



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 33 OF 2017

REPUBLIC.....APPELLANT

VERSUS

RASHID MATHOBE MAALIM.....RESPONDENT

(Being an appeal from the Judgment of Hon. D. K. Mtai (RM) in the Senior Principal Magistrate's Court at Mandera Criminal Case No.123 of 2016, delivered on 6th June, 2017)

JUDGEMENT

1. The respondent was charged on **Count I** with offence of forgery contrary to section 349 of the Penal Code. Particulars being that at unknown dates with the Republic of Kenya, with intent to deceive forced a letter with a title RE: LAND DISPUTE/SOLUTION purporting to have been written by the Assistant Chief Shaf Shafey Sub-Location one Mohamed Abdullahi Alale.

2. On **Count II** he was charged with making a document without authority contrary to section 357(a) of the Penal Code. Particulars being that at unknown date within the Republic of Kenya, with intent to deceive, without lawful authority or excuse made a letter entitled RE: LAND DISPUTE/SOLUTION purporting to have been written by the Assistant Chief Shaf Shafe Sub-Location one **Mohamed Abdullahi Alale**.

3. On **Count III** respondent was charged with uttering a false document contrary to section 353 of the Penal Code. Particulars are that on the 3rd day of March, 2016 at Mandera Police Station in Mandera East Sub-County within Mandera County, knowingly and fraudulently uttered to **No. 93009 PC Innocent Manzi** forged letter titled RE: LAND DISPUTE/SOLUTION purporting to a letter written by the Assistant Chief Shaf Shafe Sub-Location one **Mohamed Abdullahi Alale**.

4. He pleaded not guilty and matter was fully heard. The appellant was found not guilty and was acquitted in all the counts. Thus the State appealed against the aforesaid acquittal and set out 6 grounds of appeal namely:-

(1) The learned trial court erred in law by contradicting itself materially in as far believing that prosecution had more than established a prima facie case, only to depart from such material finding of fact and acquit the respondent against the weight of evidence.

(2) The learned trial court erred in law and fact by acquitting the respondent on Count 2 based on the already flawed reasoning used to acquit on Count 1 without giving distinct reasons thereto contrary to section 169 of the Criminal Procedure Code.

(3) The learned trial magistrate erred in law and fact by conjuring its own interpretation of the words "making of a document", effectively offending the provisions of section 349, 357(a) of the Penal Code and section 3(1) of the Interpretation and General Provisions Act.

(4) The learned trial magistrate erred in law and fact by failing to consider the weight of the evidence led by the State visa vis the admissions made by the respondent in his defence.

(5) The trial magistrate erred in law by failing to put into context the evidence of the prosecution witnesses and the conduct of the respondent in the circumstances.

(6) The learned trial court erred in law by failing to appreciate the totality of the prosecution's evidence and the place of circumstantial evidence in criminal trials.

5. The directions were given that appeal be canvassed by way of submission of which parties filed and exchanged.

APPELLANT'S SUBMISSIONS:

6. As far as Count I is concerned, the issue of forgery, relates to the aforementioned letter. The purport of the letter was that the Shaf Shafey Sub-Location Land Committee under the chairmanship of PW1, had deliberated on a land dispute in respect to Plot No. 766 between one Hussein Abdullahi Abdirahman and Rashid Mathobe Maalim, the respondent herein and resolved that the said plot belonged to the respondent. The said deliberations were interested by PW1 and PW3.

7. From the record the witnesses disowned the signatures appended on the said letter. PW1 denied to have been the author of the said letter.

8. Relevant specimen signatures were forwarded to the Government Forensic Document Examiner for analysis. The analyses were done and a report made. The findings by the Government Forensic Document Examiner were that the signatures in the subject letter were not similar to the specimen signatures supplied by the investigator. This evidence went hand in hand and corroborated the evidence of PW1 and PW3 that their signatures were forged in the letters.

9. The trial court appreciated the evidence and states thus:

“On the basis of the foregoing evidence I find the answer to the question as to whether the letter was forged is a definite yes.”

10. In the premises, the trial magistrate was behooved to convict the respondent on that count. The trial court failed to do that.

11. The second issue relating to Count 2 is whether the respondent was the forger.

12. From the trial proceedings, it is barefaced that the issue of ownership over the plot subject of forgery case revolved around a preexisting dispute between PW2 and the respondent. The argument was that the plot belonged to PW2 but the respondent had deliberately forged the letter to deceive the officers at the Lands Office that he was the *bonafide* owner of the said plot.

13. The finding by the trial court from the prosecution's evidence aptly captures our argument in support of Count 2. In the judgment the court states:

“The accused person having resolved to sale Plot No. 766, which he eventually did could not have initiated the sale transaction without first being registered at the Lands Office as the owner of the said plot. He therefore had the motivation to forge the letter which would have consequently enabled him to be registered as the owner of Plot No. 766 and by extension complete the sale transaction thereof.”

14. The trial magistrate went ahead to state that it was highly likely that the accused person/respondent was the forger of the letter. In any event, he was the beneficiary of the said document/letter.

15. In acquitting the respondent in the issue of forgery, the magistrate stated that there was no expert evidence from the forensic document examiner to link the accused/respondent to the same.

16. The State's argument is that goes against the better judgment because he used the said letter to transact the sale of the plot.

17. Whether he authored the letter personally or he engaged the services of a third party, as far as his criminal intention is concerned, the difference is just as long as it is short. He was criminally capable. The trial court should have convicted on that count too.

18. The trial court erred in finding that without proof that the letter was made by the accused person/respondent, intention to defraud or deceive or the motivation to do so are all irrelevant.

RESPONDENT'S SUBMISSIONS:

19. It is the respondent's submission that in regard to the 1st Count of forgery the issue to be determined by the High Court is not whether the contended letter RE: LAND DISPUTE SOLUTION is forged but whether the respondent committed the offence of forgery contrary to section 349 of the Penal Code.

20. The offence of forgery is defined under section 345 of the Penal Code as the making of false document with intent to defraud or to deceive. It is very clear from the evidence on record by PW4 Cpl Lucas Juma and PW5 PC Innocent Manzi who were both the investigating officers failed to take specimen of respondent's handwriting in comparison with the letter titled RE: LAND DISPUTE RESOLUTION to the Document Examiner for analysis to the contrary they took specimen handwriting from their witnesses.

21. In the circumstances the prosecution failed to produce any handwriting expert report indicating the respondent committed the offence of forgery contrary to section 349 of the Penal Code during trial. Therefore the learned trial magistrate was not convinced beyond reasonable doubt that the respondent committed the offence of forgery.

22. That in regard to the offence of making a document without authority contrary to section 357(a) of the Penal Code. The respondent wish to draw to the attention of the court that during trial the proceedings were being translated to him in Somali language. The trial magistrate in his judgment noted that respondent was not conversant with English language and therefore was not able to make the said document in any way. He was also not found to be in possession of the alleged document.

23. It therefore follows that the offence of making a document without authority was not also proved beyond reasonable doubt before the learned trial magistrate.

24. That the entire evidence adduced by the prosecution was inconsistent, contradictory, unbelievable and hence inadmissible to warrant a conviction.

25. That the parties to this case on question of fact as of law are entitled to demand a decision of the High Court and the High Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences bearing in mind that it has neither seen nor heard the witnesses.

26. That the gross misdirection by the Office of the Director of Public Prosecution to urge the High Court to set aside the judgment of the trial magistrate if allowed by the High Court will make the respondent suffer incurable miscarriage of justice.

27. That the burden of proof to convince the trial magistrate beyond reasonable doubt that respondent committed the offences lies upon the prosecution which they totally failed.

EVIDENCE ADDUCED

Prosecution's Case:

28. Mohamed Abdullahi Alale testified as PW1. He told the court that he previously served as the Assistant Chief for Shafshafey Sub-Location in Mandera County from the year 1994 upto 2015 when he retired.

29. That sometime in 2012 he presided over an arbitration in respect to a dispute over land parcel known as Shafshafey Plot No. 766 between Rashid Mathobe the accused person herein and one Mzee Hussein who is the father to Kaltuna (PW2).

30. Upon deliberating on the dispute the accused person undertook in writing that he had relinquished his claim over the plot. He testified that sometime in February 2016 he was called by people from the Mandera County Government who informed him that the accused person had lodged a letter purportedly written by him which indicated that elders had met and resolved that the accused person was the bonafide owner of the plot and that he had used the said letter to register the plot in his name and subsequently sold the same to another person. He identified the letter dated 7th January 2001 in court and stated that same had his official rubber stamp affixed thereon but that he never wrote the letter or appended his signature on it.

31. Further that the people who purportedly signed the letter as witnesses in their capacity as members of Shafshafey Lands Committee were neither members of the said committee nor residents of Shafshafey Location. PW1 told the court that upon confirming that the said letter had not been written by his office, he proceeded to the CID Office in Mandera and reported the matter. Subsequently he recorded his statement at the CID Office where he was also informed that a complaint similar to his had been lodged at the said office. Lastly he identified the accused person as the person who wrote the letter and stated that he previously knew him as his neighbour.

32. On being cross examined by the accused person, PW1 stated that the plot was previously part of a parcel of land jointly owned by one Hussein and the accused person's father which was later subdivided into 8 plots and thereafter the plot belonged to Kaltuna and not the accused person. He reiterated that he never authorised the letter and further stated though the letter made reference to Plot No. 766, plot numbers were not in existence as at year 2001.

33. Kaltuna Hussein Abdullahi the complainant herein testified as PW2. She told the court that she was the owner of Plot No. 766 situated at Shafshafey Location in Mandera County having inherited the same from her father one Hussein Abdullahi sometime in 2009. Consequently she had been paying the land rates thereof to both the County Council of Mandera and its subsequent successor, the County Government of Mandera. However sometime in 2016 she was informed by officers at the Mandera County Lands Office where she had gone to pay the rates for the year, that her plot had since been registered in the name of Rashid Mathobe who had lodged a letter which indicated that she had participated in a meeting convened by some elders together with the area Chief of Shafshafey Location and Rashid Mathobe and unanimously resolved that Rashid Mathobe was the owner of Plot No. 766.

34. PW2 testified that Rashid Mathobe and his father had been disputing over the ownership of Plot No. 766 hence the import of the letter was that his father had agreed to end the dispute and undertook to desist from interfering with ownership of the said plot. She stated that upon confirming that her plot had been transferred to Rashid Mathobe she made a report at the CID Office Mandera who later produced and showed her the letter which the accused person had used to effect the transfer of Plot No. 766 to his name. PW2 identified the said letter in court (exhibit 1) and denied ever appending her thumbprint on the said letter. She further stated that a sample of her thumbprint was taken by the officers from the CID Mandera after she informed them that the thumbprint on the letter was not hers. Last PW2 identified Rashid Mathobe as the accused person in court.

35. On being cross examined by the accused person, PW2 stated that she neither appended her thumbprint on the letter nor participated in any meeting as alleged in the said letter.

36. Kuso Abdullahi Abdirahman testified as PW3. He told the court that he was informed by Kaltuna (PW2) that his name and signature appeared on a letter at the Lands Office purportedly as a witness to a land transaction in respect to her plot which was transferred to Rashid Mathobe. That he was subsequently shown the letter at the Mandera CID Office and confirmed that he had not signed the said letter. He further stated that he had never been a member of the Shafshafey Lands Committee and was not aware of the contents of the letter which he identified in court (exhibit 1).

37. On being cross examined by the accused person PW3 acknowledged that the names and ID number appearing on the letter were his but denied that he had provided his ID details or signed the said letter at the chief's office or at all. He further stated that the accused person had previously worked at the chief's office and therefore may have obtained details of his ID card from the said office.

38. Corporal Lucas Juma a police officer attached to the CID Office Mandera testified as PW4. He told the court that the complainant herein made a report at Mandera Police Station on the 13th February 2016 vide OB No. 30/13/2016 whereinafter he was instructed to carry out investigations alongside his colleague PC Manzii. He stated that the complainant informed them that the accused person had fraudulently caused the transfer of ownership of her plot known as Plot No. 766 situated within Shafshafey Location to his name. That they later established from the Mandera Sub-County Lands Office that the accused person had lodged a letter dated 7th June 2001 allegedly signed by the Assistant Chief Shafshafey Location one Mohamed Alale which indicated that the complainant had agreed to cede ownership of Plot No. 766 to the accused person in a resolution that was passed in a meeting attended by the Assistant Chief, the accused person and the complainant. PW4 stated that the complainant however disputed the letter and denied that she had appended her thumbprint on the letter.

39. He further stated that they obtained confirmation from the Lands Administrator Mandera East vide his letter reference No. LH/LA/CID/03/2016 that Plot No. 766 had been registered in the name of Rashid Mathobe Maalim and subsequently sold. PW4 testified that the people named in the letter who included Assistant Chief Mohamed Alale, Guso Abdullahi Abdirahman, Salat Ahmed Adan and Adan Mohamed Guhad all appeared before them and disowned the signatures appearing on the said letter.

40. Consequently samples of their handwritings and signatures together with the specimen impression of the Assistant Chief official stamp were taken and forwarded to the document examiner for analysis vide an exhibit memo dated 14th March 2016. The document examiner one Michira Ndege thereafter wrote to the DCIO Mandera vide a letter reference ID/ORG/8/3/1/295/2016LH/PP/4A/CID/2016 dated 19th April 2016 and indicated that the sample signatures and handwritings supplied varied from the ones on the letter dated 7th June 2001 hence concluded that the letter dated 7th June 2001 (exhibit 1), letter reference No. LH/PP/LA/CID/2003/2019 (exhibit 2), known handwriting of Chief Mohamed Alale in letters dated 3rd December 2001 and 3rd December 2001 addressed to OCS Mandera Police Station (exhibit 3 & 4 respectively), specimen signature for Chief Mohamed Alale (exhibit 5), specimen stamp impression for Assistant Chief Shafshafey Location (exhibit 6), specimen signature for Guso Abdullahi Abdirahman (exhibit 7), specimen signature for Adan Mohamed Gihad (exhibit 8) and exhibit memo reference No. 295/2016 dated 14th March 2016 (exhibit 9). Lastly PW4 identified the accused person in court and stated that he had previously met him at their office hence knew him.

41. On being cross examined by the accused person, PW4 stated that he was not aware of any complaint lodged by the accused person and that he had only subjected the letter dated 7th June 2001 to analysis by the document examiner after alleged author of the letter disowned the same.

42. Police Constable Innocent Manzi of Director of Criminal Investigations Mandera testified as PW5. He told the court that he carried out investigations herein alongside Cpl Lucas Juma after the complainant reported that the accused person had fraudulently transferred ownership of her Plot No. 766 situated within Shafshafey Location. That he established from his investigations that the accused person had prepared transfer documents vide letter dated 7th June 2001 which purported that a meeting had been held by the complainant, the Assistant Chief Abdullahi Alale and location committee members comprising of Kussow Abdullahi, Abdirahman Adan and Mohamed Guhad. That the said persons however disowned the claim that such a meeting had been held hence he suspected that the accused person may have prepared the said transfer on his own.

43. Consequently sample of handwritings and signatures of the said persons together with the letter dated 7th June 2001 were forwarded to the document examiner at CID Headquarters Nairobi vide memo reference No. CR 521/35/2016. Thereafter the document examiner one Inspector Michira Ndege submitted a report thereof reference No. 8/3/1/295/2016 dated 19th April 2016 whose findings were that the handwriting on the letter dated 7th June 2001 as compared with the sample letters of Chief Mohamed Alale handwriting marked B and C had been made by different authors.

44. Further that the signature of Mohamed Alale and Adan Guhad which appeared on the letter dated 7th June 2001 were compared with their specimen signatures and found to have been made by different authors. The stamp impression of the Assistant Chief was however found to have been made by the same instrument. PW5 produced the document examiner's report as exhibit 10 and stated that the accused person was later summoned to Mandera Police Station where he was then arrested. Lastly he identified the accused person in court and stated that he was previously known to him.

45. On being cross examined by the accused person, PW5 stated that the accused person previously served as a secretary at the Assistant Chief's Office hence suspected that he may have sneaked out the stamp. He further stated that they relied on the evidence of the complainant, Chief Alale, Kussow and Abdullahi who were crucial witnesses and that they had obtained the letter used to transfer the plot at the Lands Office but did not take any action against the said office since they thought that the transfer had been effected by the parties.

Defence Case:

46. The accused person gave a sworn testimony in defence and called 1 witness. He told the court that sometime in 2001 he found one Kussow Abdullahi Abdirahman and Hussein Abdullahi clearing the disputed plot herein which belonged to his father. He immediately informed his late father and accompanied him to the plot where a scuffle ensued between them, Kussow Abdullahi Abdirahman and Hussein Abdullahi. Chief Mohamed Abdullahi Alale thereafter convened a meeting and promised to write a letter. The accused stated that his father subsequently gave him the letter which is herein alleged to have been forged. He thereafter produced the said letter to people who were collecting land rates, paid his rates and obtained a receipt thereof. That Chief Alale later told him to produce the letter to which he wrote a number on the same and kept it. The accused person stated that after he sold the plot Chief Alale called him and demanded a sum of KShs.50,000/= which he declined. Chief Alale then told him that he had powers and that he was "going to see".

47. The accused person testified that 3 days later he went to the Lands Office where he met Chief Alale together with the elders who had previously disagreed with his father. That he was however informed at the Lands Office that he was the lawful owner of the plot and that his name had been recorded in the computer. 2 days later he received a telephone call from PC Manzi of CID Mandera who informed him that a complaint had been made against him.

48. Consequently he proceeded to Mandera Police Station where he met PC Manzi and informed him that he had been given the disputed plot by this father hence he was the lawful owner. He further stated that the letter which he had lodged at the Lands Office had already been forwarded to the CID Office and was thereof informed by PC Manzi that the same would be sent to Nairobi for analysis. After 1 month he was summoned by PC Manzi who then arrested and arraigned him in court.

49. On being cross examined by Mr. Mulama learned counsel for the prosecution, the accused person stated that there was a pre-existing dispute between Hussein Abdullahi and his family in respect to the plot but that he had lawfully sold the plot. He testified that Chief Alale adduced false evidence in court since he had witnessed him writing the letter and that in any event he did not know how to write. Further that Chief Alale was similarly the one who had lodged the letter at the Lands Office. The accused person informed the court that he had a dispute with Hussein Abdullahi and not Kaltuna, the complainant herein who he only met at the police station.

50. Hodan Ibrahim Adawa testified as DW1. She stated that there had been a dispute between Rashid and another person over the plot and therefore Chief Abdullahi Mohamed Alale wrote a letter to confirm that Rashid had been given the plot by his father. That Rashid later sold the plot and thereafter she learnt that a woman was claiming ownership of the same. Later a report was made at the police station and the matter was referred to court.

51. On being cross examined by Mr. Mulama learned counsel for the prosecution, DW1 stated that the accused person was her husband and that she had known about the plot dispute since 2001. She further stated that she was present when the chief wrote the letter and attended the Lands Office where the same was presented by the Chief. However that the Chief later disowned the letter at the Lands Office hence the matter was reported at the police station. She asserted that the chief had demanded for Kshs.50,000/= and only disowned the letter after they declined to pay him.

ANALYSIS AND DETERMINATION:

52. The issues for determination therefore are:

(1) Whether the ingredients of offences of forgery, making a document without authority and uttering false documents were established beyond reasonable doubt under cited provisions of the law?

(2) Whether the prosecution proved its case beyond reasonable doubt?

53. In the case of *Caroline Wanjiku Ngugi vs Republic [2015] eKLR* relying on the case of High Court of India in the case of *Sukanti Choudhury vs State of Orisa* held that the following ingredients are necessary for an offence of forgery to be proved.

(i) The document must be forged.

(ii) Accused used the document as genuine.

(iii) Accused knew or had reason to believe that it was a forged document, and

(iv) Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.

54. Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus, the elements of forgery are:

i. False making of- The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated, printed or engraved.

ii. Material alteration- The person must have taken a genuine document and changed it in some significant way. It is intended to cover situations involving false signatures or improperly filling in blanks on a form or altering the genuine content of a document.

iii. Ability to defraud- The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.

iv. Legal efficacy- The document or writing has to have some legal significance.

v. Intent to defraud- The specific state of mind for forgery does not require intent to steal, but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer.

55. In the Nigerian Case of *Alake vs The State* [also relied on *Carolyne Case (Supra)* the court listed the following as the ingredients of the offence of forgery:

i. That there is a document or writing;

ii. That the document or writing is forged;

iii. That the forgery is by the accused person;

iv. That the accused person knows that the document or writing is false;

v. That he intends the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine.

56. Also a useful guidance was sought in the Nigerian case of *Nelson Moore vs Federal Republic of Nigeria* where it was held that in offences of these nature, the prosecution must prove the following ingredients, namely; that the accused person knowingly and fraudulently uttered a false document, or writing or counterfeit seal. Thus, the elements of uttering a forged document are:

i. Uttering and publishing as true a false, forged, or altered instrument;

ii. knowing the instrument to be false, altered, forged, or counterfeited;

and

iii. intending to injure or defraud.

57. The letter is purported to have been authored by Chief Mohamed Abdullahi Alale (PW1) on the 7th June 2001 and witnessed by Kusow Abdullahi Abdirahman (PW3), Salat Ahmed Adan, Adan Mohamed Guhad and Kaltuna Hussein Abdullahi (PW2). Chief Mohamed Abdullahi Alale (PW1), Kusow Abdullahi Abdirahman (PW3) and Kaltuna Hussein Abdullahi (PW2) all appeared before this court, identified the letter and dismissed the same as forgery.

58. They all asserted that no such resolution declaring the accused person as the owner of Plot No. 766 was ever made and that signatures appearing on the letter against their respective names were not theirs. According to Kaltuna Hussein Abdullahi (PW2) she was the bonifade owner of Plot No. 766 having inherited the same from his father one Hussein Abdullahi. She had no prior knowledge of the existence of the letter until sometime in the month of February 2016 when the same was brought to her attention by officers of the Mandera County Lands Office.

59. By that time the accused person had already registered Plot NO. 766 in his name and sold it to a third party who was subsequently registered at the Lands Office as the owner.

60. Chief Alale (PW1) was subsequently alerted of the existence of the letter which prompted him to visit the Lands Office where he confirmed that Plot No. 766 had indeed been registered in the accused person's name and transferred to another person on the basis of a letter purportedly authored by him. He therefore proceeded to the CID Office Mandera and lodged a complaint.

61. Cpl. Lucas Juma CID Mandera commenced investigations and obtained the letter together with the known handwriting and specimen signatures of Chief Mohamed Abdullahi Alale (PW1) exhibit 3, 4, & 5 respectively, specimen signature of Guso Abdullahi Abdirahman (PW3) exhibit 7 and specimen signature for Adan Mohamed Gihad (exhibit 8) which he forwarded to the Government Forensic document examiner for analysis.

62. CI Michira Ndege a Government Forensic Document Examiner at the Directorate of Criminal Investigations Nairobi carried out an analysis of the letter (exhibit 1) and the specimen signatures of PW1, PW3 and Adan Mohamed Gihad and returned a finding vide his report reference No. CID/ORG/8/3/1/295 which was produced in court as exhibit 10 by PC Innocent Manzi (PW5).

63. That the handwriting and signatures in the letter (exhibit 1) and the known handwriting and specimen signatures provided by Chief Mohamed Abdullahi Alale (PW1) (exhibit 3, 4 & 5 respectively), Guso Abdullahi Abdirahman (PW3) exhibit 7 and Adan Mohamed Gihad had been made by different authors.

64. The import of the findings by the Government Forensic Document Examiner was essentially that the signatures in the letter were not similar to the specimen signatures supplied by the prosecution witnesses. This evidence corroborated the evidence of PW1 and PW3 that their signatures were forged on the letter.

65. The accused person together with his witness, Hodan Ibrahim Adawa (DW1) however asserted in their evidence in defence that the letter had infact been authored and signed by Chief Alale who thereafter lodged the same at the Mandera Lands Office.

66. They however did not challenge the findings of the Government Forensic Document Examiner which in my view was overwhelming to the proposition that the signatures of PW1, PW3 and Adan Mohamed Gihad as appearing on the letter were mere forgeries. On basis of the forgoing evidence the trial court finding that the answer to the question as to whether the letter was forged in affirmative was justified.

67. The above finding sired the issue as to whether the accused person was the forger. From the evidence on record, the issue of ownership over Plot No. 766 revolved around a pre-existing dispute between Kaltuna Hussein Abdullahi (PW2) and the accused person. The dispute was previously between the accused person's father and PW2's father.

68. Upon the demise of the accused person's father, the accused person picked up from where his father had left and thereafter upon the demise of PW2's father, she was sucked into the dispute as against the accused person. PW1, PW2 and PW3 all claimed in their evidence that Plot No. 766 belonged to PW2. Therefore alluded that the accused person had deliberately forged the letter and deceived the officers at the Lands Office that he was the bonafide owner of the said plot.

69. The existence of the land dispute between the accused person and PW2's father and by extension PW2 was acknowledged by the accused person and DW1 in their evidence. The accused person and DW1 who are husband and wife however dismissed PW2's claim over the ownership of Plot No. 766 and asserted that the plot rightly belonged to the accused person.

70. PW1, PW2, PW3, the accused person and DW1 were all consistent in their testimony that the dispute over Plot No. 766 between the accused person and PW2 arose prior to the year 2001 and to date had not been resolved. To assert that the letter was authored by Chief Alale (PW1) as was suggested by the accused person and DW1 in their evidence in defence in the trial court view amounted to claiming that the issue of ownership of Plot No. 766 had been determined in his favour of the accused person.

71. This suggestion however contradicted what the accused person and DW1 told court which was that the dispute over Plot No. 766 had not been resolved.

72. Trial court took judicial notice that, that all land records in Mandera were destroyed in an Al Shabaab attack sometime in the year 2014 and therefore the County Government Lands Department have been engaging in an exercise of reconstructing their records by registering afresh all land owners in Mandera.

73. Further the trial court judicial notice that one of the documents required for effecting registration of land was a letter from the chief of the area where the land sought to be registered is situated. The accused person having resolved to sell Plot No. 766, which he eventually did, could not have initiated the sale transaction without first being registered at the Lands Office as the owner of the said plot.

74. He therefore had the motivation to forge the letter which would have consequently enabled him to be registered as the owner of Plot No. 766 and by extension complete the sale transaction thereof. Any evidence of an existing ownership dispute over Plot No. 766 would have obviously frustrated the accused person's endeavour to sale the plot as his application for registration at the Lands Office would have been declined.

75. To that extent the court opined that, it was highly likely that the accused person was indeed the forger of the letter. He not only had the motive and opportunity to commit the forgery but was also the ultimate beneficiary of the entire forgery.

76. However the fact that no expert evidence from the forensic document examiner was tendered in court to prove that the accused person personally forged the letter or signatures in the document in issue. Therefore the situation raises doubts in court's mind that he was the forger or creator of the document.

77. It is clear from the evidence on record that the accused person's handwriting were never taken or examined by the forensic document examiner. Merely proving that the signatures and handwritings on the letter did not belong to PW1, PW3 and Adan Mohamed Gihad does not in any way mean that the same were made by the accused person.

78. The fact that the letter referred to the accused person coupled with the overwhelming evidence which shows that he had the motive and opportunity to forge the same similarly does not prove beyond any reasonable doubt that he was the one who personally committed the forgery.

79. The nexus between the forged signatures in the letter, which in effect renders the entire letter a forgery, and the accused person can only be drawn upon analysis of his handwriting.

80. In other words evidence must be adduced to prove beyond any reasonable doubt that the accused person took paper and ink and created the forged letter for scratch.

81. The trial court noted that, that the proceedings herein were translated to the accused in Somali language after he informed the court that he was only conversant with the said language. Throughout the proceedings he never uttered any English word which makes me suspect that he may have been truthful when he told the court that he did not understand the English language.

82. His inability to write in English was alluded to by PW3 who stated in his evidence during cross examination that the accused person's wife was a clerk and knew how to write hence suggesting that she may have assisted the accused person to make the false letter. It is therefore doubtful that the accused person had the ability to personally make the letter dated 7th June 2001.

83. No evidence having been tendered by the prosecution to prove beyond any reasonable doubt that the accused person personally partook in the making of the forged letter dated 7th June 2001.

84. Thus trial court was justified in holding that the charge in Count 1 for the offence of forgery contrary to section 349 of the Penal Code was not proved beyond any reasonable doubt.

85. On Count 2, the accused person was charged with the offence of making a document without authority contrary to section 357(a) of the Penal Code. The substance of the charge being that the accused person with intent to deceive and without lawful authority or excuse made a letter titled RE: LAND DISPUTES/SOLUTION purporting it to have been written by the Assistant Chief Shafshafey Sub-Location one Mohamed Abdullahi Alale.

86. Similarly the prosecution failed to prove beyond any reasonable doubt that the accused person personally partook in the making of the forged letter dated 7th June 2001 which is the one referred to in the particulars of the offence as titled RE: LAND DISPUTES/SOLUTION. Consequently without proof that the letter was made by the accused person, intention to defraud or deceive or the motivation to do so are all irrelevant.

87. In sum there was no sufficient evidence to support conviction on the offences charged thus the court makes the orders;

(i) The appeal has no merit and is hereby dismissed.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF OCTOBER, 2019.

.....

C. KARIUKI

JUDGE