



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 20 OF 2018**

**ANN WAMBUI GITONGA a.k.a.**

**ANN WAMBUI MAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against the conviction and sentence of Hon. I. Kahuya (SRM) in**

**Machakos Chief Magistrate's Court Criminal Case No. 149 of 2016**

**delivered on 15<sup>th</sup> February, 2018)**

**JUDGEMENT**

1. The appellant was charged with three counts. First was the offence of forgery contrary to section 345 as read with section 349 of the Penal Code. The particulars for the first count was that the appellant on diverse dates between 28<sup>th</sup> March, 2013 and 2<sup>nd</sup> April, 2013 at unknown time and place within the Republic of Kenya, jointly with other not before court with intent to defraud, made a document namely log book serial number R0579024A, for motor vehicle registration number KBJ 874D, purporting to be a genuine log book issued by the registrar of motor vehicles.
2. The second count was that of uttering false document contrary to section 353 of the Penal Code. Particulars being that the appellant on 2<sup>nd</sup> April, 2013 at Tala town, Matungulu Sub County within Machakos County, knowingly and fraudulently uttered a forged log book serial number, R0579024A for motor vehicle registration number KBJ 874D to Benson Mbuvi Munyao purporting to be genuinely registered under Yuasa Motors Limited, Mombasa a fact she knew to be false or untrue.
3. The third count was that of obtaining money by false pretense contrary to section 313 of the Penal Code. The particulars were that the appellant on 2<sup>nd</sup> April, 2013 in Tala Town Matungulu Sub County within Machakos County obtained KShs. 520,000/- from Benson Mbuvi Munyao by falsely pretending that she was in a position to sell him a motor vehicle registration number KBJ 874D make Toyota Corolla silver in colour ('*suit motor vehicle*'), a fact she knew to be false or untrue.
4. The evidence on record was as follows. Dr. David Okeyo (PW1) entered into an agreement to buy motor vehicle with Yuasya International Company Limited based at Mombasa. The vehicle agreed to be bought was the suit motor vehicle at a consideration of KShs. 850,000/=. PW1 paid a deposit of KShs. 400,000/= and the balance was to be paid by monthly instalments. He cleared the balance in March, 2013 and took possession of the vehicle. He traded in the vehicle on 15<sup>th</sup> March, 2013 for another vehicle registration number KBS 798V Toyota Fielder and topped up the difference.
5. Shahid Al Sultan (PW2) trading as Halef International stated that PW1 went to him on 13<sup>th</sup> February, 2013 with the suit vehicle to trade in with KBS 798V after paying the difference. On 20<sup>th</sup> February, 2013, Milka went to the show room and showed interest in the suit vehicle. PW2 agreed to sell it to her at KShs. 600,000/- she took possession of the vehicle after making payment. On 11<sup>th</sup> December, 2013, Crime Investigation Department Officers from Machakos visited him inquiring about the suit vehicle and PW2 informed them that he had sold it.
6. Benson Mbuvi (PW3) saw an advertisement for sale of the suit vehicle on 28<sup>th</sup> March, 2013. He contacted the number on the advertisement thus 0723715230 and asked that the vehicle be taken to his premises since he was interested in buying it. He was brought for the vehicle by the appellant who did not have the vehicle's original documents. For that reason, the two agreed to conduct the transaction on 2<sup>nd</sup> April, 2013 once the appellant had the original documents. On 2<sup>nd</sup> April, 2013, the appellant went to PW3 and was paid KShs. 520,000/-

which was the consideration agreed on. The two proceeded to Priscillah Kioko Advocates for purposes of drawing an agreement and was afterwards left with the ownership documents. PW3 later took the vehicle for repair which cost him KShs. 100,000/-. Two (2) months later, he was approached by two men who indicated that they had lost their vehicle which vehicle they spotted him with. He recommended that they go to the police for assistance. They were interrogated by the Officer Commanding Station and asked to take original ownership documents. PW3 stated that the appellant indicated to him that she owned the vehicle but that it was still in the name of Yuasa International Ltd. It later occurred to him that he had been conned.

7. On cross examination, he stated that he communicated with the appellant through the number 0738715996. That she was expectant at the time. He carried out a search on the vehicle on 28<sup>th</sup> March, 2013 but did not have the copy of records. He withdrew KShs. 520,000/- from Equity Bank and paid the appellant in cash but the appellant did not sign any acknowledgement receipt. He stated that the appellant did not give him a copy of the agreement between her and Yuasa International Ltd to confirm ownership. He was later asked to surrender to vehicle by the OCS Tala and ownership documents to the DCIO. On re-examination, he stated that the appellant indicated that she had a bank overdraft and did not want the money to be deposited in her bank account.

8. Milcah Wanjira Muicho (PW4) stated that she owned the suit vehicle having bought it from PW2 at KShs. 600,000/-. She used it for taxi business and plied Tom Mboya street in Nairobi. She later got overwhelmed with the taxi business and opted for car hire business. She was introduced to a potential hirer by the name Chege. They entered into a written contract and gave him the vehicle for 14 days at a consideration of KShs. 30,000/-. The vehicle was however not returned on the 15<sup>th</sup> day. He called Chege but was unavailable. He tried locating him all over town to no avail. He fell sick and got hospitalized. When he got well he reported the matter to the CID office in Nairobi. She engaged one Rosina and Monica who after a while told him they had located the vehicle at Tala and that the original documents were required by the police at Tala Police Station. He was hesitant to give out the documents but was after some time called by officers from Kangundo over the issue. He rushed to Kangundo and met the purported owner (PW3). PW4 produced the logbook (P. Exhibit 12).

9. Police Constable Ivy Akinyi (PW5) was called to produce CP Kyalo's report. She produced the document examination report as P. Exhibit 8. She indicated that the specimen signature in Exhibit A B and C were found to be by the same author.

10. Police Constable Kamau (PW6) took photographs of the suit vehicle which he produced as P. Exhibit 2 and the certificate thereof as P. Exhibit 2b.

11. Inspector of Police Abdi Mohamed (PW7) was on 15<sup>th</sup> January, 2016 requested to conduct an identification parade. He stated that PW3 picked out the appellant from the parade of 8 female adults. The appellant was between the 3<sup>rd</sup> and 5<sup>th</sup> persons in the parade. The appellant stated that she had never seen PW3 before PW7 signed the identification parade report (P. Exhibit 8). On cross examination, PW7 stated that he looked for females with physical features similar to those of the appellant. That the appellant was expectant at the time and he placed other expectant women in the parade.

12. Priscillah Muthui Kioko (PW 8) testified that PW3 and the appellant visited his office to make a sale agreement for the suit vehicle. The purchase price was said to be KShs. 520,000/- which was paid to the appellant and PW3 took possession of the vehicle. She stated that the vehicle had been registered in the name of Yuasa International Limited and she relied on that information to draft the agreement.

13. Corporal Chepkonga (PW9) testified that he had been sent to Kangundo Police station for official duty. There he discovered that there was a case of obtaining money by false pretense and the was being looked for. He joined efforts by obtaining the suspect's phone number from the registrar of persons. He traced her at Nanyuki. He stated that the phone was being switched on and off. That in November, 2015, the suspect's number was emitting signals from Ruiru thus phone number 0721842985. He reported to the area chief of Kithugua sub location, explained to him what he wanted but did not manage to arrest the suspect. Later, on 15<sup>th</sup> January, 2016, he returned to the village and managed to arrest the appellant who was expectant. She was escorted to Machakos where her statement was recorded and she was interrogated. She was released on bail pending plea taking since she was expectant.

14. Recalled, PW9 stated that according to the logbook recovered, the owner of the suit vehicle was PW4. On 24<sup>th</sup> November, 2016, he did a letter to NTSA to confirm whether or not the logbook serial number K9293346 was genuine. He produced the letter to NTSA dated 24<sup>th</sup> November, 2016 as P. Exhibit 24, Search of suit motor vehicle revealing PW4 as the owner as P. Exhibit 25 and logbook as P. Exhibit 26.

15. Police Constable Wanjohi (PW10) was asked to investigate the case reported at Tala Police Post vide OB No. 17/23/6/13. He stated that the dispute was of ownership of the suit vehicle between PW3 and people from Equitorial Car Hire. The people from the car hire company explained that they had hired out the vehicle but the hirer failed to pay up two months premiums. PW3 on the other hand indicated to him that he had bought the vehicle on 2<sup>nd</sup> April, 2013 having identified it on a newspaper advertisement. That PW3 called the seller on phone number 0723715230. That PW3 insisted that the appellant brings with her original ownership documents before any transaction could be conducted. He recorded PW3's statement and PW3 showed him a logbook in respect of the vehicle, a certificate of incorporation, sale agreement and payment slip from Equity Bank. PW10 then contacted the registrar of motor vehicles by a letter dated 2<sup>nd</sup> June, 2013 seeking to know whether the logbook by PW3 was genuine. By a letter dated 2<sup>nd</sup> July, 2013, a response was received confirming that the logbook Serial No. 20579024A was not genuine. PW10 by a letter dated 2<sup>nd</sup> July, 2013 requested the registrar of companies to investigate the registration details of Yuasa International Ltd and received a response by a letter dated 13<sup>th</sup> August, 2013 confirming that it was registered as a private company. He also sought to know whether the appellant's identification number is registered in a PIN certificate and if Equitorial Car Hire is a genuine business. He investigated the phone number on the sale agreement (P. Exhibit 6). He swore affidavits to enable him get information in respect with phone numbers 0722518024, 0726589999 and 0723715230 from 1<sup>st</sup> September, 2013 to 30<sup>th</sup> April, 2013. He was however informed by Safaricom Limited that the information was obsolete as days had lapsed. He was however given subscriber details in respect to the numbers thus 0722518026 – Joseph Muhia (ID No. 13545196), 0723715230 – Samwel Kamau (ID No. 24295088). He stated that he did not have details for 0726589999. He swore another affidavit dated 23<sup>rd</sup> July, 2013 before the Senior Principal Magistrate in Kangundo to enable him get details from Airtel Limited in respect to phone number 0738715996 which was the cellphone number captured in the sale agreement. He served Airtel Limited and received a response supplying him with the call data between seller and buyer. He also got subscriber details registered on ID No. 24567751 in the name of Salome Sialewo; date of birth 23<sup>rd</sup> June, 1983; place of birth Meru

North; City Maua.

16. He stated that having established that Yuasa International Limited was registered he wrote them a letter seeking to confirm if they ever owned the suit vehicle. The said company was said to have sent PW 10 a car sale agreement between them and PW1. The company further confirmed the authenticity of the sale agreement. He tried to contact PW4 to no avail. He sought information of P. O. Box 1532 Thika from the post master on 24<sup>th</sup> March, 2014 and on 14<sup>th</sup> April, 2017 received a reply showing that the owner was Samuel Peter K. Ngaruiya. He further established that ID No. 3281134 belonged to PW2. He carried the circular to all police stations in Kenya in respect of the registration number of the suit vehicle to find out whether there were reports on its theft or parallel investigations but received no signal.

17. The matter was later on taken over by PC Maina who handed it over to flying squad Kyumbi, particularly to PW9. On or about November, 2015, PW4 availed herself at Kangundo Police Station and her statement was recorded. PW4 was said to have presented ownership documents. The said were produced as:

- |   |                           |
|---|---------------------------|
| a) Sale agreement dated 15.2.15   | P. Exhibit 1              |
| b) Sale agreement dated 20.2.13   | P. Exhibit (a) and (b)    |
| c) Copy of newspaper extract dated 2.4.13   | P. Exhibit 5 (a)          |
| d) Copy of Equity Bank slip dated 2.4.13  | P. Exhibit 5(b)           |
| e) Copy of certificate of incorporation for Yuasa International Limited, Copy of PIN Card, transfer of ownership and copy of log book | P. Exhibit 8, 9, 10 & 11. |
| f) Log book No. 20151110118   | P. Exhibit 12             |
| g) Copy of ID for PW4   | P. Exhibit 13             |
| h) Copy of sale agreement   | P. Exhibit 14             |
| i) Bundle of correspondences (KRA)  | P. Exhibit 15             |
| j) Bundle of correspondence (Registrar of companies)  | P. Exhibit 16             |
| k) Bundle of correspondence (Registrar of persons)  | P. Exhibit 17             |
| l) Bundle of correspondence (Registrar of companies)  | P. Exhibit 18             |
| m) Bundle of correspondence (mobile phones)   | P. Exhibit 19             |
| n) Bundle of correspondence (Equity Bank)   | P. Exhibit 20             |
| o) Bundle of correspondence (Post master)   | P. Exhibit 21             |
| p) Bundle of correspondence (Registrar of persons)  | P. Exhibit 22             |
| q) Signal correspondence  | P. Exhibit 23             |

18. On cross examination, PW10 stated that he did not pursue further information with the registrar of persons with regard to Samuel Kembu and that the appellant's ID No. 23264866 is in the name of Ann Wambui Maina. That the ID of Ann Wambui Gitonga was issued on 15<sup>th</sup> July, 2002. That he did not prove the people from Equitorial Car Hire were genuinely registered with the registrar of companies.

19. Josephine Watetu (DW1) stated that she was informed of the appellant's arrest. She went to the police station in company of one Alice. They were asked to wait until an identification parade was conducted. They participated in the said parade and she stated that the appellant was the only one who was expectant among those who were in the parade.

20. The appellant (DW2) denied committing the offences and stated that she was arrested on 15<sup>th</sup> January, 2016 while she was at home. That the documents subject of the suit were found in her home. She stated that the police showed her a copy of an identity card which bore the names Anne Wambui Gitonga which resembles her old identity card. That her current identity card bears the names Ann Wambui Maina the latter being her husband. She stated that Gitonga is her sir name. That the alleged execution of sale agreement was a forgery because the signature is not hers. She stated that she had a document examined by her witness to prove that fact. That by the time the sale agreement was executed, she had already changed her identity card thus two (2) years earlier. That PW3 stated that the seller was an expectant woman yet she was not expectant at the time. She contended that she has maintained one number, 0721842985 for more than ten (10) years which number was not captured in the prosecution evidence. She stated further that PW8 stated that money exchanged hands in her officer while PW3 stated that payment was done outside Equity Bank. That the contradiction is proof that the case was fabricated against her. The appellant denied ever meeting PW3. On cross examination, she stated that she had never met PW3 and that PW8 mistook her for someone else. She stated that she changed her names in the year 2011 after she got married. She produced a bundle of documents as D. Exhibit 1.

21. Joseph Maina Mwaniki (DW3) recounted that the appellant was arrested by Flying Squad Officers on allegation that she was involved in car sale and forgery. That he was informed that complainant alleged that the seller was expectant and denied that it could not have been the appellant since their son was born in October, 2012. He denied that the signature in the sale agreement was not the appellant's and further that the cell phone numbers linked to the case was not the appellant's. on cross examination, he stated that he was with the appellant on the day the alleged execution of the agreement was done.

22. Martin Isakwa Papa (DW4) who is a document examiner stated that he was provided with signatures B1-B3, copy of identity card number 23264866, marriage certificate No. 140558, and specimen signatures C1-C3. He examined the signature (A) on the sale agreement between Ann Wambui Gitonga and PW3. Compared signature (A) and specimen signature C1-C3. He stated that the two signatures A and C1-C3 did not share any resemblance or characteristics. He formed an opinion that signature (A) when compared with standard signature B1-B3 and specimen signature C1-C3 were not made by the same hand. That the appellant was not the one who signed the sale agreement.

23. Aggrieved by the conviction and sentence, the appellant filed this appeal on grounds that:

*a) The prosecution case was not credible;*

*b) She was not properly identified;*

*c) She was convicted on doubtful evidence thereby the case was not proved beyond reasonable doubt.*

24. This being the appellant's first appeal, this court is under duty to re-evaluate the evidence afresh with a view of arriving at its own independent conclusion. While so doing, the court is minded that it did not have the benefit of hearing and seeing the witnesses' demeanor.

25. It was submitted for the appellant that plea was never taken. That the proceedings do not show whether the appellant entered a plea of guilty or not guilty contrary to Section 207 of the Criminal Procedure Act. I have taken the liberty of perusing the original court proceeding and it emerges that plea was taken before Hon. I. Kahuya on 1<sup>st</sup> March, 2016 and a plea of not guilty was entered for the three (3) counts. That argument cannot therefore stand.

26. On the issue of identification, the appellant took issue that the prosecution failed to call the registrar of persons to clarify whether or not the appellant surrendered her previous identity card at the time she was issued with a fresh one. She stated that the Kenya Revenue letter shows that the real PIN number for Ann Wambui Gitonga was A004235493Z and not A003283902U as alleged. That the trial magistrate contradicted herself when she noted that the PIN certificate used to commit the offence was not registered with KRA hence not genuine but goes ahead to conclude that the PIN certificate used belonged to the appellant. That the question which stands unanswered is why would the appellant use an old identity card without changes in the serial number or identity number and purport to falsify her KRA pin. It was contended that while it was alleged that the appellant participated in the identification parade and was between the third and fifth person, the listing of the suspects in the parade does not bear the appellant's name. That PW1 and PW8 relied on dock identification which was unsafe for a conviction. That in fact the trial court observed that the identification parade was poorly done since there was no special feature. In that regard the appellant cited **John Nduati Ngure v. Republic Criminal Appeal No. 121 of 2014** and **Jackson Ngui v. Republic [2007] eKLR**.

27. On that point the respondent argued that the court ought to consider whether or not the identification of the appellant was free from error and cited **Wamunga v. Republic [1989] eKLR**. It was submitted that according to PW3's evidence, he on 23<sup>rd</sup> March, 2013 met the driver who had been sent to deliver the vehicle and that the person was called Ann Wambui Gitonga. That PW3 did not offer any further explanation on how he knew the name of the driver and at what stage or time he came to know the driver was Ann Wambui Gitonga. That he further stated that when he met the appellant, she was in goggles and that she was expectant and does not explain how big the pregnancy was. That when addressing the issue the appellant in her defence testified that she was not pregnant at the material time and that her evidence was corroborated by DW3.

28. That the other issue on this limb is the question of fake KRA PIN No. A003283902U which was alleged to belong to the appellant under the name Ann Wambui Gitonga. That the letter from KRA Exhibit 15 shows that the real KRA PIN for Ann Wambui Gitonga is A004235493Z. The prosecution too was of the opinion that the trial magistrate contradicted herself by stating that the KRA pin used during the sale belonged to the appellant and at another point stated that the PIN used was not registered with KRA. It was submitted that with the contradictions and loopholes in the prosecution case the trial magistrate would have arrived at a different verdict and acquitted the appellant. It was submitted that DW4 examined the signatures and established that the signature on the agreement was not the appellant's unlike what the prosecution examiner stated. The appellant cited vast authorities on how to prove a forgery among the cases was **Baoz Owiti Okoth & Another v. Republic [2014] e KLR**. It was submitted that DW4's evidence was more authentic since he used various specimen unlike the prosecution's examiner who used a set of originals. The case of **Samson Tela Akute v. Republic Criminal Appeal No. 844 of 2004** was cited in reliance.

29. I have given due consideration to the case herein. It is clear to me that the numbers taken to Safaricom and Airtel Limited were not found to be registered in the appellant's name. Secondly, Ann Wambui Gitonga's PIN No. was confirmed to be A004235493Z and not A003283902U by KRA which was used in the sale agreement. The corresponding identity card number to A004235493Z was 23264866 that is the appellant's identity card number which is the same number in Ann Wambui Gitonga's identity card. The PIN No. used in the transaction was thereby not that of the appellant. Further, a birth certificate serial number 097634 was produced showing that the appellant delivered her child Geoffrey Gitonga on 4<sup>th</sup> October, 2012. Up to this point, the evidence produced by the prosecution could not link the appellant to the offence.

30. On the examination of signatures, I note that the examiners arrived at different opinion. I note that DW4 merely stated that he examined the signatures without expounding what method he used unlike PW5 who expounded that the methodology used in the analysis was enhancement using infrared spectrum for better visibility. That all possibilities of natural variations were put under consideration and the

pecuniary characteristics of the signature led the examiner to conclude that the authorship was by one and the same person. The examiner whose report PW5 produced was in my view thoroughly and professionally done compared to that of DW4 and is more convincing. I must also note that PW5 was fit to produce evidence on behalf of the examiner under section 77 of the Evidence Act having worked with the said examiner and that the examiner could not be availed. The appellant's signature having been found to have appended in the agreement, I find that she was linked to the offence.

31. Even if I am to be found wrong in the above disposition, a keen analysis of the appellant's own evidence reveal that she acknowledged that the documents in relation to the vehicle were found at her home. No explanation was tendered by her on how and why despite denying being involved in the crime ended up in her home. The doubts case on the KRA PIN number, her name not being found to be attached to the numbers interrogated and whether or not she was expectant at the time were cleared by the presence of the documents at her home. I must also note that the authenticity of the birth certificate is in doubt having not been certified as a true copy of the original. I find the prosecution had proved its case against the Appellant beyond any reasonable doubt.

32. As regards the sentence, it is noted that the trial court sentenced the Appellant to serve six month imprisonment on each count which were to run consecutively. Indeed the charges were all in one count and preferred against the Appellant the same day and further the offences appear to have been committed at the same time. In the premises the sentences ought to run concurrently. The Appellant's mitigation had been taken into account before sentencing.

33. In the result the appeal on sentence partly succeeds. The sentence of the trial court is hereby substituted with an order that the Appellant serves six months imprisonment on each count to run concurrently from 1/3/2018.

Orders accordingly.

**Dated and delivered at Machakos this 17<sup>th</sup> day of May, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Mutinda Kimeu for Thuku - for the Appellant

Machogu- for the Respondent

Kituva - Court Assistant