



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO.274 OF 2013**

**SAMUEL MUONZI MUNYAKA .....1<sup>ST</sup> APPELLANT**

**PHILIP MULI MUNYAKA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the judgment of Principal Magistrate's Court at Kangundo delivered by Honourable I. M KAHUYA , (Senior Resident Magistrate) on 27<sup>th</sup> September, 2013 in **KANGUNDO P.M.CR CASE NO. 26 of 2012**)*

**(Consolidated with criminal case no. 275 of 2013)**

**JUDGMENT OF THE COURT**

1. This appeal arises from the conviction and sentence of Hon I. M. Kahuya Senior Resident Magistrate in Kangundo S.P.M.CR. 26 of 2012. The two Appellants had been charged with the offence of forgery contrary to Section 349 of the Penal Code as it was alleged that on the 30<sup>th</sup> day of November, 2010 at Nguluni Market, Nguluni location in Matungulu District within Machakos County, jointly with intent to defraud forged MUKA – MUKUU share certificate No. 1610 purporting to be share Certificate of **KITELE MUNYAKA**. The Appellants also faced a second charge of stealing contrary to Section 275 of the Penal code as it was alleged that on 30<sup>th</sup> day of November, 2010 at Nguluni Market, Nguluni Location in Matungulu District within Machakos County, stole Identification Card, Driving Licence, Share Certificate and other documents the property of **KITELE MUNYAKA**. The Appellants were acquitted for the offence of Stealing but convicted and fined a sum of Kshs.100,000/= in default to serve 12 months imprisonment for the offence of forgery.

2. The Appellants were aggrieved by the conviction and sentence and have lodged a Memorandum of Appeal dated 23/10/2016 raising the following grounds of Appeal:

- 1. The judgment of the learned Magistrate is not supported by the evidence on record.***
- 2. The Learned Senior Resident Magistrate erred in law and in fact in convicting the Appellants of forgery when the evidence did not establish the same.***
- 3. The learned Senior Resident Magistrate erred in law and in fact in failing to have regard to the fact that the offence of forgery was not proven.***
- 4. The Learned Senior Resident Magistrate erred in law and in fact in convicting the Appellants***

*of forgery despite having found that the alleged forged documents had otherwise been authenticated.*

*5. That the learned Senior Resident Magistrate erred in law and in fact in relying on isolated facts from the alleged forged share Certificate and failing to have regard to the substantial portions to the same which clearly exonerate the Appellants.*

*6. The learned Senior Magistrate erred in dismissing the defence by the Appellants.*

*7. The Learned Senior Resident Magistrates erred in law and fact in failing to consider adequately the fact that there was insufficient evidence for the charge of forgery to stand.*

*8. The Learned Senior Resident Magistrates erred in law and fact and failed to warn herself of numerous contradictions in the Prosecution's case which created doubts in the whole.*

*9. The Learned Senior Resident Magistrates erred in law and fact in failing to take into consideration evidence adduced by the defence witnesses.*

*10. The sentence is manifestly excessive.*

3. The appellants now want the conviction quashed and sentence to be set aside.

4. This being a first appeal, this court is obligated to re-evaluate the evidence presented before the trial court and come to an independent conclusion bearing in mind that it had no opportunity of seeing or hearing the witnesses testify ( see **OKENO =VS= REPUBLIC [1972] EA 32**).

5. PW.1 **Kitele Munyaka** testified and stated that he is a younger bother to both accused persons as he is the last born. He stated that he came to learn on 22/01/2010 that the accused persons had forged a **Share Certificate No.1610** that had been issued to him by Muka Mukuu Co-operative Society. He further stated that he had bought the land from the Co-operative Society in 1970 for Kshs.1,000/= but he had lost the receipt. He confirms receiving letters from the Society and the DC's office over a dispute lodged by the accused and other family members over the said share in Muka Mukuu Society.

6. PW.2 **Benard Matunga** testified that he was present at the D.O's office on 9/9/2010 during the deliberations on the dispute between Complainant and his brothers and had not witnessed Complainant buying the said land.

7. PW.3 **IP. Daniel Ngutu** testified that he was a document examiner and he confirmed that the signatures on the share Certificate had been made by both Appellants herein. He further stated that he got the sample signatures from Muka Mukuu Management with which to compare.

8. PW.4 **Peter Muoki Kyungu** testified that he was the administrator at Muka Mukuu Farmers Co-operative and that the share number 1610 had been in the names of the Complainant. He further stated that initially share certificates were green in colour but later changed to yellow cards following problems brought about by former officials on political related issues. He stated that he realized an anomaly in that the new Share Certificate appeared erased and new names of Appellants indicated yet it initially contained Complainant's names. He confirmed that there were disputes over the property. He further confirmed that one of the Society officials Mr. Kitavi had signed the yellow card.

9. PW.5 John Thomas Musembi testified that he had been a former manager of the Muka Mukuu Sacco having been employed as from 12/09/2007 – 21/02/2011. He confirmed arbitrating on dispute between Appellants and Complainant over family land. He confirmed that the share Certificate had not been forged as it was duly signed by Sacco Officials and sealed with the Sacco seal.

10. PW.6 PC. Kipsang stated that he received the complaint from the Complainant and launched investigations and recovered the Share Certificate in dispute from the home of 1<sup>st</sup> Appellant herein and

later charged them.

11. The trial court found both Appellants had a case to answer and placed them on their defence in compliance with the Provisions of Section 211 (1) of the Criminal Procedures Code. They all tendered sworn testimonies. The first Appellant stated that on the alleged date of stealing and forgery, he and the other family members were attending a meeting at Muka Mukuu Sacco Offices and that the Complainant was also present and the dispute was to do with their parents farm. He stated that the family's farm had been delegated to the Complainant to manage on their behalf but he was to leave the land to the other family members as he had his in Nguluni. He further stated that the family held several meetings in which it was resolved that the Complainant's name be erased but he had refused and he and the others went ahead and requested the Sacco to register in the names of the Appellants to hold on behalf of all family members and a fee of Kshs. 600/= was paid for change of name. He maintained that **Share 1610** belongs to all family members and not Complainant alone.

12. The second Appellant stated that they did not forge documents but that the share Certificate was changed into their names. He stated that the Complainant had been frustrating the family's efforts to have the shares registered in Appellants names on behalf of the family as complainant wanted to own everything himself.

13. **DW.3 Mbuvi Munyaka** testified that the family land had been entrusted to complainant to hold in trust for them but when he turned around to claim it for himself, the other family members resolved to have change in names which was deliberated upon and sanctioned by the DC but that Complainant stayed away.

14. **DW.4 Teresia Wambura Mutie** stated that initially all documents were in the names of Complainant but later family members resolved that the names in the Share Certificate be changed and the Appellants to hold the property in trust for the family members as they had started losing faith and trust in the Complainant.

15. With the leave of the court, parties filed written submissions. It was submitted for the Appellants that the evidence presented before the trial court did not meet the threshold of proof beyond any reasonable doubt. It was the Appellant's counsel's contention that the Appellants had presented credible defence evidence worthy of belief and which should have led the trial court to find in their favour and rule that there had been no forgery as alleged since the share certificate in issue had been lawfully issued by the officials of Muka Mukuu Farmers Co-Operative Society. It was submitted for the Respondent that the case before the trial court had been proved beyond reasonable doubt in that the Complainant's names had been removed from the document and replaced with those of the Appellants in circumstances that raised forgeries and which were confirmed by the Document Examiner.

16. **Determination:**

I have considered the evidence presented before the trial court as well as the submissions by learned counsels for the parties herein. I find the issue for determination is whether the Prosecution had proved its case in the lower court beyond any reasonable doubt.

The Appellants had been charged with the offence of forgery contrary to Section 349 of the Penal Code. The definition of the word forgery is described in Section 345 of the Penal Code as:-

***“Forgery is the making of a false document with intent to defraud or to deceive.”***

17. As the Appellants had denied the charges before the trial court, the burden of proving their guilt lay squarely upon the shoulders of the Prosecution to discharge. The key prosecution witnesses appear to have been the Complainant, (PW.1) the document examiner (PW.3) and the two officials of Muka Mukuu Farmers Co-operative Society (PW.4 & PW.5). The Complainant maintained that the share Certificate was forged by the Appellants. The document examiner stated that upon scrutiny of the share certificate he was able to establish that the two Appellants were the ones who had signed the document. The

Appellants in their defence evidence tendered on oath had stated that they had lodged a complaint against the Complainant to agree to have the property shared among all family members. The Appellants request had been made to Muka Mukuu Farmers Co-Operative Society and the Provincial Administration where the Complainant and the Appellants and other family members had been summoned to appear before the Sacco and the D.C. After the Complainant failed to turn up, the Appellants and other family members resolved that the share Certificate be rectified and issued in the names of the Appellants to hold it in trust for themselves and the other family members including the complainant. In fact the area D.C okayed the same. The Appellants therefore presented themselves before the Sacco officials and were advised to pay transfer fees of Kshs.600/= and the rectification was effected. The new share Certificate contains the names of the Appellants and signatures as well as those of the Sacco officials. The Share certificate was and still is the property of the said Sacco and was confirmed by the two officials (PW.4 and PW.5). In fact PW.4 admitted on cross-examination that one of their officials by the name Kitavi had signed it. Again PW.5 confirmed that the signatures of the Sacco Chairman, Treasurer and issuing officer were genuine and that it was his belief that the document had not been forged. Further the Sacco officials confirmed that there had been a dispute involving the Complainant and the Appellants over the subject property. If the Appellants duly paid the transfer fees to the Sacco and signed the relevant part of the document while the Sacco officials also countersigned the document it follows that the document became legitimate. If the Complainant had been aggrieved over the same, then the proper course of action was to seek an order of cancellation of the certificate in the appropriate manner. This is so because none of the Sacco officials were roped into these proceedings as having participated in the alleged forgery and made as accomplices. It was improper to single out the Appellants for Prosecution yet the Sacco officials had also signed the document. As the trial court had rightly found that the charge of stealing had not been properly proved, it follows that the charge of forgery could not stand in view of the above observations. Hence I find the Appellants had given some credible testimonies in their defence which had the effect of shaking that of the prosecution. There was clearly some doubt as to the Appellant's guilt. A perusal of the share certificate indicates that the Appellants duly signed the relevant portion and likewise the transfer document and both counter-signed by the Sacco officials. There is no signature belonging to the Complainant and there is none that he positively identified before court so as to justify his claim that he had been registered as holder of the said share certificate. The benefit of such doubt ought to have been resolved in favour of the Appellants. Consequently, I find the Prosecution's case had not been proved beyond any reasonable doubt.

18. In the result, I find the Appellant's appeal has merit. The conviction arrived at by the trial court is hereby quashed and sentence set aside. The Appellants are ordered set at liberty forthwith unless otherwise lawfully held. If any fines had been paid, the same is ordered to be refunded to the depositors forthwith.

It is so ordered.

Dated, signed and delivered in court at Machakos this 16<sup>TH</sup> day of MAY 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Langalanga for Mwinzi for Appellants....

Machogu for Respondent

C/A: Kituva .....