



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 234 OF 2011**

**NANCY WANGITHI KARERU..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**FACTS**

1. The Appeal arises from the judgment delivered on 2<sup>nd</sup> May, 2012 by the Hon. J.K.Kiarie SPM in CMCC No.129of 2010. The appellant had been charged on eight (8) Counts ranging from making, forgery and uttering false documents. She was found guilty on all the Counts and was convicted and sentenced to one (1) year for each count.

2. The appellant being aggrieved with the decision preferred this appeal both on conviction and sentence and listed seven (7) Grounds of Appeal in her Petition of Appeal and three (3) grounds are as in her Amended Petition of Appeal listed hereunder;

**A) Petition Of Appeal – Grounds Of Appeal**

- i) That the learned senior resident magistrate erred in law and in fact in conviction the appellant for the offence charged when there was no adequate evidence to prove the charges.
- ii) That the learned senior resident magistrate erred in law and in fact in finding that the appellant had forged/obtained.
- iii) That the learned senior resident magistrate erred in law and fact by relying on evidence from the witnesses.
- iv) That the lower court erred in law and in fact in accepting and relying on evidence from witnesses which ought not to have been received and/or admitted on record.
- v) That learned senior resident magistrate erred in law and in fact by failing to appreciating that the evidence of the appellant was cogent, truthful and justified.
- vi) That the learned senior resident magistrate erred in law and in fact in not appreciating the inconsistencies in the testimony of prosecution witnesses.

vii) That sentence is punitive and malicious in nature and thought the learned magistrate purported to consider the appellant's age he erred in law and fact by imposing a mandatory 8 years period without pardon in light of the appellant's age and the magistrate was determined to convict the appellant.

### **B) Amended Grounds of Appeal**

i) That, the trial magistrate erred in law and fact while basing my conviction without considering I wasn't positively identified by any of the prosecution witnesses in any occasion of alleged forgery nor neither in production of any document to the said offence.

ii) That, the trial magistrate erred in both law and fact while further basing my conviction in reliance of the advanced evidence in the prosecution side without putting into consideration that the same was left in doubts and riddled with contradictions.

iii) That, the trial magistrate erred in Law while rejecting my Defence without observing the same was not challenged by the evidence adduced by the prosecution witnesses.

3. At the hearing hereof the appellant abandoned the grounds of appeal relating to conviction and proceeded only on Ground of Appeal No.8 relating to sentence.

4. Prosecuting Counsel for the State made oral submissions and opposed the appeal whereas the appellant relied on her written submissions.

### **ISSUES FOR DETERMINATION**

5. After hearing the parties these are the issues framed for determination;

(i) whether trial magistrate erred failed to take into consideration material factors when passing sentence;

(ii) whether the sentence imposed was punitive and malicious;

### **ANALYSIS**

6. The Appellant was found guilty and was convicted on all eight (8) counts, which included, forgery of judicial documents, uttering false documents and making documents without authority contrary to Sections 351, 353 and 357 of the Penal Code, respectively.

7. In this instance Counts 1 and 3 relate to forgery of judicial documents and these documents consist of a Grant of Letters of Administration and a Certificate of Confirmation in respect to Succession Cause No.46/2007.

8. Counts 5 and 7 relate to making documents without authority and both offences are in respect to Title No. KABARE/NYAGITHUCI/67 which title is the subject matter of the aforementioned Succession Cause.

9. Counts 2, 4, 6 and 8 relate to uttering false documents and all these documents that were made and forged were presented by the appellant on the same day to the same clerk, one Michael Mwangi at the Lands Office at Kerugoya.

10. Section 14(1) of the Criminal Procedure Code confers on a trial court the discretion to order sentences to run concurrently. The matters a court should take into consideration in deciding whether to order sentences to run concurrently are whether the offences were committed in one transaction or whether they are similar in nature.

11. The appeal on conviction was abandoned leaving only the appeal on sentence and in her Ground of

Appeal No.8 she states that **“the learned magistrate erred in law and fact by imposing a mandatory 8 year period”**. Thus she has challenged the legality of the sentence imposed on her.

12. At page 18 of the Judgment in the Record of Appeal, it is noted that the trial magistrate had sentenced the appellant to pay a fine of Kshs. 50,000/= or in default to serve a term of one (1) year imprisonment on each count.

13. The appellant has served a term of four (4) years out of the eight years and submits that the term imposed is punitive and malicious. I will take it to mean harsh and excessive.

14. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The appellate court must satisfy itself that the trial court did not take into account relevant factors or in the circumstances of the case the sentence is harsh and excessive.

15. From the facts outlined it is this court’s considered view that the offences, the subject of this appeal, may not have been all committed at the same time, particularly the making of the documents, but they relate to transactions that are similar in nature and also touch on the same Succession Cause and the same parcel of land.

16. Section 351 of the Penal Code provides a seven year sentence for the offence of forging a judicial or official document and reads as follows;

**“Any person who forges any judicial or official document is liable to imprisonment for seven years”**

17. This court is therefore satisfied that the sentence of one (1) year for each count is within the law.

18. As the record stands no mention is made by the trial court as to the manner the sentences are to run. Applying the principles to this appeal as set out in the case of **Wanjema supra** I find that the trial magistrate did not take into account material factors in that the offences were similar in nature and that they all touched on the same succession cause and the same subject property.

19. Upon perusal of the court record, one would not be faulted in assuming that the sentence imposed was for a period of eight (8) years in totality and such a sentence is indeed harsh and excessive in the circumstances of the case.

20. But I reiterate that the sentence of one (1) year for each count is within the law and I shall therefore not interfere with this part of the sentence but shall only proceed to correct the omission by the trial magistrate by including an order that the sentences imposed shall run concurrently.

## **FINDINGS**

21. For the forgoing reasons these are my findings;

- i. This court finds that the trial magistrate indeed erred in failing to take into consideration material factors when passing sentence therefore rendering the sentence harsh and excessive.

## **DETERMINATION**

22. The appeal on sentence is found to be meritorious and is hereby allowed.

23. The sentences imposed shall run concurrently from the 2<sup>nd</sup> May, 2010 when the appellant was first sentenced by the trial magistrate.

24. The appellant having served her term in full shall be set at liberty unless otherwise lawfully held.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 29TH day of October 2015.**

**A. MSHILA**

**JUDGE**

**29/10/2015**