



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT EMBU  
Criminal Appeal 37 of 2007**

**ROSEMARY MICHERE MITHAMO.....APPELLANT  
VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

Rosemary Michere Mithamo Alias Gladys Wangeci Korii is the appellant herein. She was charged with 6 counts under the penal code. These charges were forgery contrary to section 349 Penal Code altering a false document contrary to Section 353 of the Penal Code; obtaining money by false pretences contrary to Section 313 of the Penal Code and personating a person named in a National Identity contrary to section 382(2) of the Penal Code. . She denied all the charges and the matter proceeded to full trial with the state calling a total of 5 witnesses in support of its case. On her part, the appellant testified on oath and gave a very brief statement of defence. She was represented by Mr. Gacheru both in the trial court and before this court. Following the trial, she was found “*not guilty*” on count 2 but was found guilty and convicted on the other 5 counts. She was sentenced to serve 8 months in jail. She was nonetheless released on bail pending appeal. She served only about 2 weeks of that sentence. Being aggrieved by the said conviction and sentence, she filed the appeal citing 8 grounds of appeal.

When the appeal came up for hearing, learned counsel for the state Mr. Omwega conceded the appeal on 2 grounds. That concession I believe was based on grounds 2 and 5 in the petition of the appeal. The grounds are hereunder:-

2. ***“The learned trial magistrate erred in law and fact in believing the evidence of PW1 while he gave no convincing evidence at all even the investigation said there was no evidence to implicate the appellant”***
5. ***The learned trial magistrate misdirected himself in believing documents produced in court were written by the appellant while the expert’s evidence did not support the case.***

Since this appeal is conceded and rightly so in my considered view, I will be very brief. In a nutshell, the appellant is said to have approached PW1 Samson Mboi Obadiah and borrowed some Ksh.300,000/= to assist her to buy rice to supply several government institutions as she had been contracted to do. She and PW1 are said to have entered into an agreement where the appellant agreed to pay back the money within a stipulated time- She gave a Title Deed in respect of plot **No.INOI/KARIKO/2029** as security to guarantee payment. The agreement was that if she failed to pay the money, then she would sell that plot to PW1. She also gave PW1 a photocopy of her national identity card. She failed to pay the money and so PW1 started the process of having the plot in question transferred to himself. It was then that it was discovered that the Title deed in question, the certificate of search and the Identity Card were all fake. The appellant was arrested and charged with the 6 counts.

Investigations were conducted, and the documents in question were submitted to the documents examiner PW5 for examination and comparison with the appellant’s signatures and thumbprint. No agreement was found. There was therefore no expert opinion to nail the

appellant or to prove that she was the one who had either forged the Title Deed, the Identity card or even signed the agreement in question. The learned trial magistrate appears to have ignored the expert opinion of PW5 in its entirety and proceeded to convict on the sole evidence of PW1. In doing so, he stated;

***“Although nobody testified to corroborate the evidence to PW1 in so far as the sale transaction was between PW1 and the accused, however, I am convinced and satisfied from Mboi’s general demeanor (PW1) that he is an honest and truthful witness. From his general demeanor he appeared reliable and honest.”***

It is noted however that when PW1 stood in the witness box, the learned trial magistrate did not record his demeanor. He seems to have had a belated recollection of the same when he was writing the Judgment. This was wrong. The demeanor of the witness where necessary must be noted and recorded as he testifies but not sneaked belatedly into the Judgment.

In the cases of forgery, the prosecution must prove that the accused person is the one who made the forged document, or altered the same. In this case, there was explicit evidence from the handwriting expert to the effect that he found no agreement in the documents submitted for examination and the appellant’s handwriting.

It was also conceded that the advocate or whoever witnessed the signing of the said agreement was not called as a witness.

Clearly, this evidence was too scanty and I am indeed surprised that the learned trial magistrate could rely on it to convict.

I find and hold that the conviction herein was against the weight of the evidence. This appeal must carry the day. The same is therefore allowed. The conviction against the appellant is hereby quashed and the sentence of 8 months imprisonment set aside.

**W. KARANJA**  
**JUDGE**

Delivered, signed and dated at Embu this 22nd day of April 2010

**In presence of:-Mr. Gacheru for appellant and Ms Matiru for state. Appellant also present.**