



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Criminal Appeal 24 of 2007**

RAEL CHEROP MARITIM ..... APPELLANT  
=VERSUS=  
REPUBLIC ..... RESPONDENT

**JUDGMENT**

**I. Procedure**

- 1). Rael Cherop Maritim (herein referred to as the Appellant) was originally charged with three Criminal offences before the Principal Magistrate's Court at Eldoret namely:

**Count I**

- A). **Forgery**

**Contrary to Section 349 of the Penal Code.**

**Particulars of offence**

On the 21<sup>st</sup> January 1992 at Simat area in  
Uasin Gishu District within Rift Valley  
Province, forged a signature in a transfer of  
Ownership of a motor vehicle (FORM C)  
purporting to have genuinely been signed by Emily Bett authorizing the transfer of a  
tractor registration No. KZQ 780 to the said  
Rael Cherop Maritim.

- B). **Count II**

- C). **Altering a false document, contrary to**

**Section 353 of the Penal Code.**

**Particulars of offence**

On the 21<sup>st</sup> January 1992 at District  
Commissioner's office in Uasin Gishu District within the Rift Valley Province  
knowingly and fraudulently altered a  
certain forged transfer of ownership of  
motor vehicle (FORM C) purporting it  
to have been signed by Emily Bett.

**Count III**

- D). **Stealing a Motor Vehicle Contrary to**

**Section 278**

**A of the Penal Code.**

**Particulars of offence**

**On the 14<sup>th</sup> day of February 1997 at Simat area in Uasin Gishu District of the Rift Valley Province stole a motor vehicle tractor Registration No. KZA 780 valued at 612,672 which was joint property of Emily Beth and herself.**

- 2). A Plea of not guilty was entered on all the three counts on 18<sup>th</sup> February, 2000 (M.L. Kangatta S.R.M.).
- 3). It appears that on Count II the offence of **Altering a False Document** Contrary to Section 353 of the Penal Code was either withdrawn or struck out.
- 4). The trial then commenced before L.W. Gitari, a Principal Magistrate as she then was for a period of five years (3<sup>rd</sup> April, 2001 to 23<sup>rd</sup> May 2006). She was transferred out of the Station. Submissions on the case were heard before F.N. Muchemi a Chief Magistrate on 18<sup>th</sup> July 2006. L.W. Gitari now a Senior Principal Magistrate then prepared an undated Judgment. It is unclear whether it was read on her behalf or not. What follows next of the proceedings is a sentence imposed on 19<sup>th</sup> March 2007 by O. Muchelule Chief Magistrate (as he then was on Count I, a fine of Kshs 30,000/= in 12 months imprisonment. Count II Presumably count III) fined 50,000/= in default 24 months imprisonment).
- 5). According to the Law, for an offence of forgery under Section 349 of the Penal Code.  
**“... unless owing to the circumstance of the forgery or the nature of the thing forged some other punishment is provided to imprisonment of 3 years”.**
- 6). This offence is a felony and a fine is not provided for.
- 7). Stealing of a motor vehicle contrary to Section 278 (A) as read with Section 49 of the Traffic Act Cap 403 or with the definition of a motor vehicle being a mechanically propelled vehicle and in this case a tractor the offence is that of a punishment of 7 years imprisonment.
- 8). The offence is also a felony and a fine is not provided for.

- 9). After a total of 7 years hearing and being duly convicted and sentence, the appeallant appealed to this High Court on both conviction and sentence.

## **II. Appeal**

- 10). The appeal was filed by M/s Chemitei & Co. Advocates. The Memo of appeal stated in summary:-
- (i) There was insufficient evidence
  - (ii) The trial magistrate failed to take into account the defence given
  - (iii) There was unsubstantiated evidence.
  - (iv) Failed to take into account the relationship of the parties.
  - (v) The sentence was excess.
- 11). The State in reply conceded to the appeal on grounds that the proceedings was conducted by prosecutors who were incompetent to have conducted the trial more so for P.W. 2 and P.W.3. The proceedings were in effect a nullity and it is therefore only on those grounds that the appeal be allowed.
- 12). From the foregoing and on the sentences, the proceedings are a nullity.

## **III. Background of Appeal**

- 13). This matter began in 1988. the Appeallant and the Complainant were best of friends. The Appeallant was a self made businesswoman who had little income. The Complainant was a teacher who assisted the Appeallant access finance for her business. In 1989 they bought a tractor jointly. It seems the appeallant did not share in her proceeds nor pay back the loan on time. It was then in the year 1997 that the Complainant filed a Civil Suit to Court being HCCC 340/97 seeking for breach of contract and ownership of the motor vehicle tractor as assessed at 50%.
- 14). It is then that she discovered that a forgery occurred. That she was no longer the joint owner of the said motor vehicle with the appeallant. Her name had been fraudulently changed and omitted from the documents. She then filed HCCC 138/2000 where the Complainant sought orders of damages for forgery. This case was filed on 12<sup>th</sup> June 2000.
- 15). The current Criminal court case was brought to the Magistrate Court and preferred against the appeallant on 18<sup>th</sup> February,2000 four months before the HCC 138/000 that was filed 12<sup>th</sup> June 2000

- 16). The advocate in the subordinate Court tried to bring out the issue that where you have a Civil matter, Criminal matters should not be preferred. This was so relied on the judicial review Court case by Kubasu J in the Case of **Vincent Kiriega Saina =vrs= Attorney General** Misc. Application 839/1999 and 1088/1999 High Court of Kenya at Nairobi.
- 17). This point was never raised as an appeal ground in the applicant's memo of appeal. The trial Magistrate stated each case should be heard separately.
- 18). An attempt to consolidate the two civil cases HCC 138/2000 and HCCC 340/97 was declined by Dulu J. the two civil cases are still pending before the High Court of Kenya at Eldoret.
- 19). What therefore is before Court is the memo of appeal on issues outlined herein. The appellants are bound by her memo of appeal. This being that her evidence was not allowed and the prosecution evidence is insufficient.

#### **IV. Findings**

- 20). The appeal is allowed on technicalities. That the prosecution who conducted the trial had no mandate to do so and that the sentence imposed by the Chief Magistrate was an illegality. The Appellant is acquitted.
- 21). The issue on whether the Civil matter may terminate this appeal was never pleaded in the Memo of Appeal and no findings in this judgment on that part would be made.
- 22). Section 34 of the Evidence Act in part may apply.
- 23). The appellants are set at liberty unless otherwise lawfully held.

**DATED THIS 6<sup>TH</sup> DAY OF MAY 2010 AT ELDORET.**

.....  
**M.A. ANG'AWA**  
**JUDGE**

#### **Advocate**

- (i) H. Chemitei Advocate instructed by the firm of M/s Chemitei & Co. Advocate for the Appellant  
(ii) V.I. Kabaka, State Counsel instructed by the office of the Attorney General for the State.

Court as before

Advocate for appellants : I pray for fine of Kshs 80,000/= be released.

Advocate for the State: I have no objection.

ORDER: Application granted. Kshs 79,590/= be refunded to the appellants vide receipt K. 336545 dated the 13<sup>/03/2007</sup> Kshs 79,590/=.

**M.A. ANG'AWA,**

**JUDGE. 6/5/2010.**

**Cell fees off.**

**M.A. ANG'AWA,**

**JUDGE.**

ORDER:

HCC 340/97 and HCC 138/2000 be returned to the Registry.

**M.A. ANG'AWA,**

**JUDGE. 6/5/2010.**