



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 968 of 2003

PETER KURIA WAITITUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 105 of 2000 of the Chief Magistrate's Court at Nairobi (Mrs. R. A. Mutoka – PM)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 988 OF 2003

ROBERT WAIRIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 105 of 2000 of the Chief Magistrate's Court at Nairobi (Mrs. R. A. Mutoka – PM)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1053 OF 2003

PETER WAIRIRI CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 105 of 2000 of the Chief Magistrate's Court at Nairobi (Mrs. R. A. Mutoka – PM)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1096 OF 2003

CHARLES NDUNG'U GITHUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 105 of 2000 of the Chief Magistrate's Court at Nairobi (Mrs. R. A. Mutoka – PM)

J U D G M E N T

The Appellants **PETER KURIA WAITITU** hereinafter referred to as the 1st Appellant **ROBERT WAIRIRI**, 2nd Appellant, **PETER WAIRIRI CHEGE**, 3rd Appellant and **CHARLES NDUNGU GITHUKA** 4th Appellant were the 1st, 2nd, 3rd and 4th accused persons in the trial before the lower court. They were charged as follows:

In count 1 the 1st, 2nd and 3rd Appellants faced a charge of **MAKING A FALSE DOCUMENT** to wit a **TRANSFER FOR LAND** contrary to **Section 357 (a) of Penal Code**. In count 2 the 1st, 2nd and 3rd Appellants faced a second count of **MAKING A FALSE DOCUMENT** to wit a **GENERAL POWER OF ATTORNEY** contrary to **Section 357 (a) of Penal Code**.

In counts 3 the 1st, 2nd, 3rd and 4th Appellants and in count 5, 1st, 2nd and 3rd Appellants faced charges of **FORGERY** contrary to **Section 349 of the Penal Code** to wit of a transfer of **LAND AND POWER OF ATTORNEY** respectively. In count 4 all the four Appellants and in count 6, the 1st, 2nd and 3rd Appellants faced charges of **UTTERING FALSE DOCUMENTS** to wit **TRANSFER OF LAND AND POWER OF ATTORNEY** respectively contrary to **Section 353 of the Penal Code**.

After a full trial the learned trial magistrate convicted all four Appellants of count 1, convicted 1st, 2nd and 3rd Appellants in count 2, convicted only the 4th Appellant in count 3 and only the 1st Appellant in count 4. They were acquitted for the rest of the charges.

In regard to the sentence the 1st Appellant was sentenced in counts 1, 2 and 3 to a fine of 100,000/= in default 12 months imprisonment, 1 year imprisonment and 8 months imprisonment respectively. The learned trial magistrate sentenced the 1st Appellant in count 3 even though he had not been convicted in that count and omitted to sentence the 1st Appellant in count 4 even though he was convicted of that count. The 2nd Appellant was sentenced to a fine of 100,000/= in default 2 years imprisonment while the 3rd Appellant was fined 100,000/= in default 12 months imprisonment in count 1. In count 2 both were sentenced to serve 2 years imprisonment.

The 4th Appellant was sentenced to a fine of 100,000/= in default 1 year's imprisonment in Counts 1 and 3. The 4th Appellant was sentenced in count 1 even though he had not been convicted for that count.

I noted that the default sentence ordered in respect of the 2nd Appellant in count I was illegal as it far exceeded the maximum default sentence provided under **Section 28 (b) of the Penal Code** of 1 year's imprisonment.

The Appellants were all aggrieved by their convictions and the sentences and therefore lodged their separate appeals which I have consolidated since they arise out of the same trial.

The case arises out of a transfer form exhibit 3 and general Power of Attorney exhibit 2. It is the prosecution's case that **Sheila Thomson** PW2 and **Anthony John Thomson** PW1 lost their mother in England when she died on 18th August 1993. The deceased **Mary Hanna Thomson** was the sole proprietor of a land LR. No. 1012/47/2 situate in Roysambu, Kasarani. Upon her death, **Sheila** took out Letters of Administration Intestate declaring herself the sole beneficiary of the deceased. The half brother, **Anthony**, learnt of it and went to court causing the revocation of the Grant of Letters of

Administration issued to **Sheila** and an order declaring him, Anthony and Sheila the Joint Administrators of the deceased estate. The issue before the criminal court in the instant case is whether the General Power of Attorney, exhibit 2, allowing the execution of the transfer by the person named in it, Sheila, was or was not signed by her. The other issue is whether the Transfer, in which the deceased person's property LR 1012/47/2 was transferred from the deceased's name to that of the 1st, 2nd and 3rd Appellants in this case, in the presence of the 4th Appellant, was signed by **Sheila**.

The 1st and 2nd Appellants **Peter Kuria Waititu** and **Robert Wairiri**, respectively were represented in this appeal by **Mr. Nyachoti**, while the 3rd Appellant **Peter Wairiri Chege** was represented by Mr. G. K. Meenye. The 4th Appellant, Charles Ndungu Githuka, himself an Advocate of the High Court of Kenya represented by Mr. Mbugua. The Respondent was represented by Ms. Jacinta Nyamosi, learned State Counsel. The State Counsel does not support the convictions entered against all four Appellants.

Mr. Nyachoti argued two grounds of appeal, one that the learned trial magistrate relied on the accomplice evidence of PW2, Sheila, a witness found by the same court to have lied, to convict his clients, without corroboration. The second ground argued was that it was not clear from the evidence of PW3 whether the two Appellants uttered the transfer form to her and that if they did, that they knew the documents to have been false and that they had formed the intention to deceive.

Mr. Meenye adopted Mr. Nyachoti's submission and argued other grounds of appeal. Mr. Meenye challenged the conviction of his client for the offences charged arguing that Sheila, PW2, had admitted signing the sale agreement and the transfer form and the said transfer form was what it was purported to be and therefore the conviction could not stand. The second ground argued by **Mr. Meenye** was that the 3rd Appellant ought not to have been convicted for the uttering charge as the documents were uttered to PW 3 by the 1st Appellant.

Mr. Mbugua for the 4th appellant argued five grounds, one that the learned trial magistrate made a ruling read out to the Appellants just before the judgment was delivered which demonstrates that the learned trial magistrate was biased and prejudiced against the Appellants for complaining against her on two grounds:

- (i) delay in delivery of judgment and
- (ii) impropriety.

On this point, after perusing the judgment of the learned trial magistrate, I do not find any basis upon which to find that she was biased against the Appellants. The judgment was sound and was based on a consideration of facts before the Court and the law applicable. I agree it was ill advised for the trial magistrate to write that ruling but that is about it.

The second ground argued was that the charges in count 1, 3, 5 and 2 were duplex in that an accused person cannot be charged with making a false document contrary to **Section 357 (a) of Penal Code** and at the same time of forging the same document contrary to **Section 349 of Penal Code**.

The third ground argued is that the transfer form drawn under section 58 of the **Registrar of Titles Act** should only have been admitted in evidence through the person who attested it and who in this case was the 4th Appellant.

The fourth ground argued was that the learned trial magistrate did not examine the document examiners report as required in accordance to the guideline in the case of **ASIRA vs. REPUBLIC (1980) KLR 227**.

The last ground argued was that the 4th Appellant's defence was not given due consideration.

Mr. Nyachoti has submitted that PW2, the key witness in the case was an accomplice and that her evidence needed corroboration. That view was shared by **Mr. Meenye**. Their argument is that **Sheila** admitted signing the sale agreement exhibit 11, and the transfer form exhibit 3. In any event, **Mr. Meenye** submitted, no conviction could lie on the forgery and or making false documents charges since the two documents were what they were purported to be. **Miss Nyamosi**, Learned State Counsel submitted that **Sheila** was not a credible witness because she made a false statement in the **Probate and Administration Case No. 663/95** by stating that she was the sole beneficiary of her mother. That in the circumstances **Sheila's** evidence in court that she did not sign the documents, which PW 9 the document examiner confirmed, should not have been believed.

The learned trial magistrate made very specific findings concerning the evidence generally and shows clearly why she believed PW2 was a 'believable' witness to use her words. Most of the conclusions are quite correct in my view and the reasoning quite sound by and large.

The issue before the court as I started by stating was the documents, a general power of attorney exhibit 2 and a transfer document whose certified copy obtained by the Investigating Officer in this case, PW 8 **Sergeant Kuria**, from the Registrar of Titles, PW3 **Rossinah**, was exhibit 3. The original copy of transfer was never found but it is clear from the evidence that the 1st, 2nd and 3rd Appellants had it at one point in time. PW8 **Sergeant Kuria** served Appellant1, Appellant 2 and Appellant 3 with a notice to produce it and other documents without success. There are other documents which also feature prominently but are not the subject of the charges now before the court. The learned trial magistrate at page J16 of her judgment observed:

"I further observed and the prosecution did bring this out, that whereas the grant of letters of administration issued on 20th January 1995 and amended on 25th March 1996, the power of attorney dated 11.2.95 (correct date is actually 11.1.95) and assent dated the same date were already in existence. Indeed, the two documents were in existence even before Sheila filed for letters of administration alone. I note however that there is no charge relating to the deed of assent and this is an unfortunate oversight on the part of the prosecution."

As correctly observed by the learned trial magistrate, the deed of assent exhibit 12 was also another important document whose execution was in issue in this case and in respect of which charges should have been preferred. There are many other documents including the affidavit whose computer print out obtained from Appellant 4 was produced as exhibit 22, sale agreement exhibit 11 and others.

Turning now to the case before the court, the Appellants 1, 2 and 3 are charged with ***making false documents*** to wit the ***transfer of land without the authority of registered owners Sheila Thomson and Anthony John Thomson*** and the ***General Power of Attorney*** without the authority of ***Anthony John Thomson***. In counts 3 and 5, the four Appellants face a forgery charge of ***forging a transfer of land with intent to defraud purporting it to be a genuine transfer signed by Sheila Thomson*** and that on behalf of ***Anthony John Thompson***. The fourth Appellant alone was convicted in this charge.

The 1st Appellant alone was convicted of Count IV which was of ***uttering a transfer of land to Rossinah*** purporting it to be genuine transfer valid to transfer the suit land. The transfer of land document, exhibit 3 transferred the suit land LR 1012/47/2 from **Anthony** and **Sheila** to 1st, 2nd and 3rd Appellants on paper. The document exhibit 3 was lodged with the Registrar of Titles on 6th May 1997 and according to PW 3, the Registrar, it was lodged by the 1st Appellant. That document was lodged by the 1st Appellant together with various other documents. These included the Deed of Assent exhibit 12, an affidavit exhibit 22, power of attorney exhibit 2, Gazette Notice No. 2457 exhibit 23, a registration of proprietorship exhibit 20 and a transfer and discharge of charge from Barclays Bank of Kenya exhibit 21.

Concerning the lodging of the transfer form and other documents the 1st Appellant in his evidence admits taking them to the Registrar in company of others whom he does not expressly name. The 2nd and 3rd Appellants did not refer to the incident of lodging the document, that is the transfer with the Registrar even though from their evidence in defence they were aware that this clearly happened.

Concerning the transfer form the evidence of the prosecution was that **Sheila** did not sign it. **Sheila** and **Anthony** as well as the Advocate purported to have drawn the Power of Attorney and PW7 all denied signing the said document exhibit 2.

The evidence by the defence in this case shows that there were some involvement between **Sheila**, PW2 and all four Appellants at some point or other. **Sheila's** evidence was that she met the 1st and 2nd Appellants through her mother's friend, one **Mrs. Betty Machanja**. From **Sheila's** evidence, the two Appellants (1st and 2nd) informed her that they could assist her obtain Letters of Administration in her sole name and that they advised her to get the land registered in her own name and not to disclose that she had a surviving brother. **Sheila** said that she did get the Letters of Administration in her name but before she acted on them, her brother **Anthony** (PW 1) got to learn of it and through **Satish Gautama Advocate**, DW7, had the grant cancelled. DW7 confirmed that much in his evidence.

Sheila denied that she signed the original of the transfer exhibit 3. That evidence was controverted in evidence by her own Advocate in a suit **HCCC No. 1706/98**. The Advocate was **Stephen Wandaka**, DW 6 who said that in the suit he acted *inter alia* for **Sheila** who was 1st Defendant, the 3rd, 4th and 5th Defendants were the 1st, 2nd and 3rd Appellants in the case. The Plaintiff was **Anthony** PW1. In that suit, **Mr. Wandaka** disclosed before he produced **Sheila's** defence, that **Sheila** pleaded that she signed the transfer after the 1st, 2nd and 3rd Appellants misled her and as a result the three had defrauded her.

Sheila's evidence in the instant case that she did not sign the transfer was contradicted by DW6 in his evidence and the statement of defence filed in the High Court suit. I did note however that the original transfer was never surrendered to the police by the Appellants despite notice to do so. I also noted that a witness called by the 3rd Appellant, **Makenzie Mweu** had a copy of the original transfer. However, the witness was withdrawn due to some technicality. **Sheila** denied filing a defence in which she admitted signing the transfer document. That defence was not put to **Sheila** to confirm or deny having it filed on her behalf.

The 4th Appellant **Mr. Githuka's** evidence was to the effect he prepared several documents which **Sheila** signed in his office and in his presence. This included the transfer in question whose copy is exhibit 3.

Putting the evidence in perspective, we have **Sheila's** evidence denying signing the transfer, supported by PW9 the Document Examiner. On the other hand we have all the four Appellants who said she signed it and the Defence witness No. 6 **Wandaka Advocate** saying **Sheila** admitted in a filed defence that she signed it.

I must state that **Githuka advocate**, the 4th Appellant in this case was not an Advocate of the High Court at the time of signing the transfer in 1997, 4th March. He had not taken out a practicing certificate that year or the years which followed until 2000. According to a witness from the Advocate's office situated at Nairobi Law Courts, **Nancy Kamau** PW5, the 4th Appellant took out a practicing certificate in 2000 and requested that it be backdated to 1997. The 4th Appellant was therefore dishonest that he was an Advocate and personated one at the time the transfer was signed. That makes his signature a forgery in terms of **Section 347 (d) (iv)** of the **Penal Code** which provides thus:

“347 Any person makes a false document who

(a); or

(b); or

(c); or

(d) Signs a document –

(i); or

(ii); or

(iii); or

(vi) *In the names of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be”*

It has been submitted by the Appellants’ Advocates that the transfer was not a false document because it was what it was meant to be. In the case of **MBANDE vs. REPUBLIC 1971 EA 553** Treveyan J. considered the definition of forgery and false document at length quoting from several previous decisions on the issue. At page 556 and 557 he makes the following observations:

“That forgery within section 345 was committed, I do not doubt. The fallacy in the appellant’s argument if I may so put it, is in the matter of the lack of authority. I am quite satisfied, as will appear, that in Kenya unless a document tells a lie about itself there can be no forgery but I apprehend a document to be false if it is made out by a person without, or in excess of, authority. Accordingly if a man fills up an incomplete document in a way which is unauthorized that document purports in its completed form to have been made by or with the required authority and so it purports to be what it is not. If the authority extends to £200 and £500 is inserted in a document it is by that insertion that the person inserting it makes the document appear to be what it is not.

This is supported by the four cases which follow.

There is, I believe, no doubt that external facts are relevant to the question of falsity. The editor of the twelfth edition of RUSSELL ON CRIME, at P. 1228 says:

“The cases of R. V. Dunn and R. V. Martin also illustrate the point that in assessing the falsity of a writing it is necessary to know such external matters as establish the purpose for which the writing is ostensibly made. A mere reading of the writing may not be enough ...”

Commenting on Section 347 of the Penal Code, Trevelyn J. observed;

“But is it the legislature’s clear meaning that each paragraph is separate and distinct from each of the others? I do not think so. I appreciate that East says that the making of a false insertion, alteration, or erasure etc. “are just as much forgeries as if the whole instrument had been fabricated” but each is a “making”. I have no desire to do violence to the language of the Statute and I shall not do so. It may be that when the draftsman was preparing paragraph (a) he had in mind the fabrication of an entire instrument and there is some justification for believing this to be so if one says that paragraph (b) was meant to deal with a document already written out, paragraph (c) was intended to govern a situation where a document is being prepared under someone’s authority and the maker inserts unauthorized matter in it, whilst paragraph (d) covered various cases of signing. But Paragraph (a) speaks of the making of a document which purports to be what in fact it is not, and must be interpreted accordingly. That being so, on the facts of this appeal though the money order forms were in part already prepared, the appellant not only inserted unauthorized matter in them but made documents purporting to be what in fact they were not and so committed forgery within both paragraphs (a) and (c). In relation to the latter paragraph, however, counsel for the appellant urged that the words “without authority” mean “without the authority of the person on whose behalf the document purports to be made” and that the expression “would have altered the effect of the document” means “would have altered the purport or drift or tenor of the document” while counsel for the respondent disdained to consider the possibility of the paragraph standing alone and said nothing about it. The words “without authority” very likely meant what is suggested but it does not help the appellant in this case: As for the meaning of altering the effect of the document, I do not accept the suggestion that the whole character of the document must be altered before it can attract the attention

of the paragraph and I prefer to believe that the word “effect”, if it needs a synonym, could do no better than to choose “gist”.

This is a persuasive authority to this court. I find the reasoning of my brother Judge and the conclusions reached quite fitting to this case and therefore I am persuaded by it. The 4th Appellant forged the transfer form exhibit 3 in that at the time of signing it, in 1997, and continuously upto 2000, the 4th Appellant had no practicing certificate authorizing him to practice as an Advocate. By signing the transfer in his capacity as an Advocate, he was purporting to be what he was not, and his signature on the document personated what he was not that is an advocate which it was not. To that extent the transfer was a forgery. Causing the practicing certificate he took out in 2000, backdated to 1997 did not cure the forgery of the transfer document herein. It is my view that whether or not **Sheila** signed the transfer document does not change the position and conclusion that the transfer form was a forgery on account of the signature of the 4th Appellant.

Mr. Mbugua suggested that the transfer document was inadmissible since the one who attested it was the only person in law who could have produced it in court as an exhibit and by that one he meant the 4th Appellant. I do not agree with the counsel. In any event that is a point that should have been taken earlier before the trial court. The document exhibit 3 was properly admitted in court as part of the documents in issue in the case and which the court had to consider to make a determination. It was properly adduced in evidence and properly admitted by the learned trial magistrate.

The learned trial magistrate found, in regard to the general power of attorney exhibit 2, that the document just like the Deed of Assent exhibit 12 was in existence long before Sheila filed the grant of Letters of Administration. It is dated 11.1.95 while the grant of Letters of Administration to Sheila was dated 20th January 1995. That would mean that Sheila was in the process of transferring the property to the 1st, 2nd and 3rd Appellants long before she had obtained the grant of Letters of Administration giving her power to enter into such a transaction. I will revert to this latter. Be that as it may I have noted that **Anand Advocate** PW7, who was purported to have drawn the document and executed by him, was not in practice as from 1991. Therefore at the time the document was purported to have been signed by him, he was not in active practice. **Nancy**, PW5, also adduced evidence to confirm that **Anand Advocate** last took out a practicing certificate in 1990.

Anand has denied signing the power of attorney exhibit 3. His evidence was confirmed in the evidence of PW9, the document examiner. The learned trial magistrate found that the general power of attorney exhibit 3, was forged because it purported to have been signed by **Anand Advocate** which was untrue and also purported that Sheila and Anthony signed it in the presence of **Anand** which was also untrue. **Anand** in his evidence said he did not know Sheila and he had never drawn the power of attorney. **Anand** stated that the Advocate’s stamp impression on the document was also not from his firm. PW9 also confirmed that bit of evidence.

Contrary to the submissions by both the Appellants and the Respondents Counsels, the falsity of the general power of attorney did not wholly depend on the evidence of PW2 and the credibility or other wise of her testimony and or the conclusions reached by the documents examiner PW9. In addition to the evidence of PW 2 and PW 9, there was the evidence of **Anand Advocate** and Anthony PW1 all affecting the purport of the document in question. I am fully aware of the holding by **Madan, Wambuzi** and **Law JJA** in **WAINAINA vs. REPUBLIC 1979 KLR 11** at pg 12:

“In our opinion there is no rule which requires corroboration of the opinion of a handwriting expert whose evidence is like the evidence of the class of other experts which it is open to the court to accept or reject. In Onyango V The Republic [1969] E.A. 362, which was a criminal appeal heard and determined by Mwendwa CJ and Farrel J, the headnote reads that the magistrate was entitled to accept or reject the opinion of the (handwriting) expert.

We would agree that the proper role of a handwriting expert is correctly set out in the following passage taken from the judgment of Spry J in Hussan Salum [1964] E a at page 128, i.e.:

... in saying that he [the expert] had no doubt that the forged signature had been written by the appellant, he was going far beyond the proper limits. I think the true answer was given by the expert in Bishop of Lincoln Case, (1921) 90 L J P C 174 that 'it is not possible to say definitely that anybody wrote a particular thing'. I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person. On the positive side, however, the most he could ever say is that two writings are so similar as to be indistinguishable and he could, of course, comment on unusual features which make similarity the more remarkable. But that falls far short of saying that they were written by the same hand".

I am also fully aware of the holding of **Nyarangi, Platt and Gachuhi JJA** in **ASIRA vs REPUBLIC 1986 KLR 227** at pg 228 much I reproduce here for ease of reference thus:

"6. The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by a particular person or that the writings are so similar as to be undistinguishable.

7. It is the duty of a court to make an examination and satisfy itself whether the handwriting expert's opinion can be accepted and the court cannot blindly accept such an opinion".

In light of holding 7 above the document examiner at page 84 of the record of proceedings in cross-examination by **Mr. Meenye** Advocate demonstrated to the court how he came to conclude that the signature on the transfer exhibit 3 was not made by Sheila. Nowhere did the document examiner demonstrate to the court why he concluded that the signatures on the power of attorney were not made by **Anthony** and **Anand Advocate**.

I have perused the learned trial magistrate's judgment and especially the analysis of PW9's evidence at Page J8 and J9 her conclusions at page J15 and J16 touching on the power of attorney and the signatures by **Anand** and stamp impressions from his firm. The learned trial magistrate clearly did not examine the signatures in question to form her own conclusion of whether or not from such informed examination to adapt or reject the document examiner's evidence. I have on my part examined the signatures purported to be those of **Anand** and Anthony against their specimen signatures and known signatures marked exhibits 33 (**Anand's**) exhibit 7, 8 and 9 (**Anthony's**). Concerning **Anthony's** signatures there is no similarity at all between his known and specimen signatures in exhibit 7, 8 and 9 with those purported to be his on the power of attorney exhibit 2. As regards **Anand** PW7's signature on the power of attorney, I have compared the signature purported to be his against that on his specimen signatures exhibit 33. There is no similarity whatsoever between these two sets of signatures.

I find, after examining the specimen, known and questioned signatures of **Anand** and **Anthony**, aforesaid, that the document examiner's evidence and report that the two did not sign the power of attorney exhibit 2, as purported, was acceptable. The learned trial magistrate's conclusion that these two witnesses did not sign the power of attorney and to that extent, it was a false document in terms of **Section 357** of the **Penal Code** cannot be faulted.

Mr. Nyachoti and **Mr. Meenye** suggested that since the writings of the 1st, 2nd and 3rd Appellants were not examined by the document examiner, and consequently the lack of any conclusion that they made the documents in question i.e. the transfer form and the Power of Attorney, the Appellants could not be convicted for the offence. In any event, **Mr. Mbugua** submitted, the charges were duplex in that the Appellants were charged with both forgery and making false documents of the same documents.

Concerning the issue of specimen writings from the Appellants I do not wish to go into so much detail on this issue as I believe the findings in **Mbande case**, supra, dealt exhaustively on that issue. The definition of forgery under **Sections 345** of **Penal Code** states thus:-

"Forgery is the making of a false document with intent to defraud or deceive."

Under **Section 347** of **Penal Code** the **making of a false document** is defined under **sub-sections (a)**,

(b) and (c) and illustrated under **sub-section (d) (i) to (iv)**. There is no doubt that the Power of Attorney and transfer are forgeries. However there must be evidence that the 1st, 2nd and 3rd Appellants made the Power of Attorney exhibit 2 and the transfer exhibit 3 before they can be found guilty for the offences. This evidence was lacking in their regard.

As for whether there was duplicity of the charges preferred, **Mr. Mbugua** relied on the case of **PETER OCHIENG VS. REPUBLIC [1982-88] 1 KAR 832**. With due respect to the learned Advocate, the cited case was considering the circumstances under which the evidence adduced and the particulars of the various charges of **forgery** contrary to **Section 349 of Penal Code** and **fraudulent false accounting** resulted in confusion in the presentation of the prosecution case and the framing of the charges. Apart from the parallel drawn, the cited case has no application to the instant case. In view of my finding on when a charge of making a false document and that of forgery can be made and in view of the conclusions I will make in this case I see no need to delve into that issue as at the end of the day the Appellants will suffer no prejudice.

Concerning the Appellants' appeals against conviction I conclude as follows:-

For the charges of **making a false document** contrary to **Section 357 (a)** that is the count 1 and 2 the conviction was unsafe and could not stand for lack of evidence that the 1st, 2nd and 3rd Appellants made the transfer exhibit 3 and the power of attorney exhibit 2. The convictions entered against the 1st, 2nd and 3rd Appellants in the two counts and the sentences imposed are quashed and set aside respectively. The learned trial magistrate convicted the 4th Appellant for the 1st count even though he was not charged with that charge. That was an error on the face of the record. Accordingly the convictions against 4th Appellant in count 1 are quashed and the sentence set aside.

As for the conviction entered against the 1st Appellant in count 4, there is overwhelming evidence both in the defence evidence of the 1st Appellant himself and the evidence of **Rossinah**, PW3, that the 1st Appellant uttered the transfer from to **Rossinah** PW3. Issue is whether the 1st Appellant knew that the transfer form was not genuine and whether he presented it fraudulently.

As evidenced in this judgment the transfer form was not genuine for the fact that the signature of the 4th Appellant was a forgery as he was not licenced as an Advocate yet he personated an Advocate at the time he signed it.

The issue of **Sheila's** signature on the transfer form was debatable as she denied signing it. Yet there was a defence filed in a High Court matter in which she was a 1st Defendant in which she admits signing it albeit she says she was misled to do so. In my own evaluation of the evidence before the court, Sheila and Appellants No. 1, 2 and 3 were involved in a conspiracy to have the land transferred from her deceased mother to herself without informing her brother **Anthony**. I do find her visit to various Advocates, **Adere** and **Wandaka** being some of them, accompanied by the 1st, 2nd and 3rd Appellants, as proof of the conspiracy. I do find however that the three Appellants hijacked the process, convinced **Sheila** that they could only help her evict persons squatting or trespassing on the land if she transferred the land to them. Thus she may have signed the transfer. However, it is clear from all the evidence presented in court in the instant case that **Sheila** received neither monies from the Appellants nor any consideration for the land. In that light therefore the **uttering** of the transfer by the 1st Appellant to PW3 was clearly done for purposes of fraudulently having the suit land transferred to the names of the 1st, 2nd and 3rd Appellants.

Sheila was not shown the said defence statement referred to above. However it is clear she did not admit knowing who came up with the Power of Attorney. **Sheila** may have been an accomplice in this matter. However the transfer form, at the time it was uttered by the 1st Appellant to PW3 was false, intended to fraudulently transfer the suit land into the names of the 1st, 2nd and 3rd Appellants, therefore effectively denying Anthony the half share of his inheritance. I do find that the 1st Appellant knew that

the transfer was false and also knew that by uttering it to PW3, it could effect a fraudulent transfer of the suit land. Further the 1st Appellant lodged many documents with PW3 including the Affidavit exhibit 22, deed of assent, exhibit 12, Gazette Notice Exhibit 23 and Memo of Charge exhibit 21. The memo of charge exhibit 21 and the affidavit exhibit 22 contained false information as did the G.N. exhibit 23. It said the original title to the land was lost yet **Ondima Advocate** had both the original title in the deceased's name and a charge over the property with BBK both exhibited in the court. The conviction entered against the 1st Appellant was in that light safe as the case against him was proved to the required standard. The conviction is therefore upheld.

As for the 4th appellant and the conviction in Count 3, I have shown at length why the charge against the 4th Appellant was proved and therefore why he was guilty of forging the transfer document exhibit. I need not repeat it here. The conviction was safe and is therefore upheld.

The 1st Appellant was sentenced in count 3 and not in Count 4 for which he had been convicted. In exercise of powers under **Section 354 of Criminal Procedure Code**, I set aside the sentence of 1 year's imprisonment imposed in count 3. In exercise of same powers, I now sentence the 1st Appellant to a fine of 100,000/= in default 12 months imprisonment in count 4.

As for the 4th Appellant he had been sentenced to 100,000/= in default 12 months imprisonment. That sentence is quite fair in my view, in all the circumstances of the case. I decline to interfere with it. The sentence imposed on the 4th Appellant in count 1 was illegal and therefore an error on the face of the record. I set aside the sentence against the 4th Appellant in count 1 accordingly.

Subject to the findings herein the appeals by the 2nd and 3rd Appellants succeed in full and those by the 1st and 4th Appellants fail to the extent shown in this judgment.

I further order that if any money was paid by the Appellants for offences they have successfully appealed against, the same should be refunded to them.

Dated at Nairobi this 10th day of May 2007.

LESIIT. J.

JUDGE

Read, signed and delivered in the presence of

Appellants present

Mr. Nyachoti Advocate for the 1st and 2nd Appellants

Mr. G. K. Meenye Advocate for the 3rd Appellant

Mr. Mbugua Advocate for the 4th Appellant

Ms. Jacinta Nyamosi State Counsel for the Respondent

LESIIT, J.

JUDGE

FURTHER ORDER

The 4th Appellant paid Kshs.200.000/- fine in the lower court. Kshs.100,000/- of it be utilized as fine in this appeal.

LESIT, J.

JUDGE