



REPUBLIC OF KENYA



**KENYA LAW**

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**Mctough v Republic (Criminal Appeal E012 of 2025)  
[2025] KEHC 6390 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E012 OF 2025**

**JM OMIDO, J**

**APRIL 24, 2025**

**BETWEEN**

**WILLIAM ROMAN MCTOUGH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement, conviction and sentence of Hon. K. Cheruiyot, Senior Principal Magistrate delivered on 2nd February 2025 in Kisumu MCCR No. E129 of 2021)*

**JUDGMENT**

1. This judgement is predicated on the appeal against the judgement, conviction and sentence of Hon. K. Cheruiyot, Senior Principal Magistrate delivered on 2<sup>nd</sup> February 2025 in Kisumu MCCR No. E129 of 2021, Republic v William Roman Mctough.
2. William Roman McTough, (hereinafter referred to as “the Appellant”) was in the lower court charged with six counts of the offence of forgery of document to title contrary to Section 350(1) of the [Penal Code](#), Cap 63 Laws of Kenya.
3. As is instructive from the charge sheet, in count one, the particulars of the offence were that on or about the 28<sup>th</sup> day of May, 1998 at an unknown place in Kisumu within the County of Kisumu, with intent to defraud John Robert McTough, the Appellant forged a transfer of undivided shares for land parcel no. East Kisumu/Dago/789 purporting it to be genuine and signed by the said John Robert McTough, a fact the Appellant knew to be false.
4. In the second count, the particulars were that on or about the 28<sup>th</sup> day of May, 1998 at an unknown place in Kisumu within the County of Kisumu, with intent to defraud John Robert McTough, the Appellant forged a transfer of undivided shares for land parcel no. East Kisumu/Dago/789 purporting it to be genuine and signed by one James Michael McTough, a fact the Appellant knew to be false.



5. The particulars of the offence in count 3 were that on or about the 28<sup>th</sup> day of May, 1998, at an unknown place in Kisumu within the County of Kisumu, with intent to defraud John Robert McTough, the Appellant forged a transfer of undivided shares for land parcel no. East Kisumu/Dago/931 purporting it to be genuine and signed by one James Michael McTough, a fact the Appellant knew to be false.
6. The particulars of the offence in the fourth count were that on or about the 28<sup>th</sup> day of May, 1998, at an unknown place in Kisumu within the County of Kisumu, with intent to defraud John Robert McTough, the Appellant forged a transfer of undivided shares for land parcel no. East Kisumu/Dago/932 purporting it to be genuine and signed by one James Michael McTough, a fact that the Appellant knew to be false.
7. In respect of the fifth count, the particulars of the offence were that on or about the 28<sup>th</sup> day of May, 1998, at an unknown place in Kisumu within the County of Kisumu, with intent to defraud John Robert McTough, the Appellant forged a transfer of undivided shares for land parcel no. East Kisumu/Dago/932 purporting it to be genuine and signed by one James Michael McTough, a fact that the Appellant knew to be false.
8. The particulars of the offence in the last count were that on or about the 7<sup>th</sup> day of December, 2011, at an unknown place in Kisumu within the County of Kisumu, with intent to defraud John Robert McTough, the Appellant forged a Power of Attorney in respect of land parcel no. East Kisumu/Dago/234 purporting that it was genuine and signed by the said John Robert McTough, a fact the Appellant knew to be false.
9. The Appellant pleaded not guilty on all six counts and a full trial was conducted. The prosecution case was founded on the evidence of six (6) witnesses. The defence evidence comprised the sworn testimony of the Appellant and the expert testimony of his single defence witness.
10. At the conclusion of the trial, the Appellant was found guilty and convicted of the offences in the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> counts and was ultimately sentenced to serve two years imprisonment on each of the four counts, which sentences the trial court ordered would run concurrently. The trial Court acquitted the Appellant on the 2<sup>nd</sup> and 5<sup>th</sup> counts.
11. The nine cited grounds of appeal presented by the Appellant vide the Petition of Appeal dated 13<sup>th</sup> February 2025 upon which he seeks to upset the conviction and sentence are as follows:
  - a. That the learned trial Magistrate erred in law to convict the Appellant when there was no evidence of specimen writing of the Complainant and the Appellant supplied to the Examiner for examination against the questioned writings.
  - b. The learned trial Magistrate erred in both law and fact, in relying on the Document Examiner's Report to convict the Appellant when in the said report, the Examiner erroneously compared signatures supplied in the exhibit memo against underwritings (sic) contained in the questioned documents.
  - c. That the learned trial Magistrate erred in both law and fact, in relying on the Document Examiner's Report to convict the Appellant when the examiner outrightly went beyond his mandate by concluding that the questioned writings were forged as compared to the signatures supplied for examination.
  - d. That the learned trial Magistrate erred in law and in fact, in finding and holding that the Appellant presented to the land registry the said documents without evidence.



- e. That the learned trial magistrate erred in law and in fact, that the documents were presented to the Land Registry and intended to be taken as genuine when the Appellant had sufficiently demonstrated that the Complainant and PW5 had admitted having signed the documents in favour of the Appellant.
  - f. That the learned trial Magistrate erred in law and fact by convicting the Appellant when there was no complaint filed by one James Michael McTough.
  - g. That in convicting the Appellant, the learned trial Magistrate failed to consider the Appellant's defence in his Judgement, thus arriving at a one-sided decision which has caused an injustice to the Appellant.
  - h. That the learned trial Magistrate erred in advancing theories and speculations to fill glaring loopholes in the prosecution case.
    - i. That the Learned Trial Magistrate's decision was speculative, skewed, slanted and unfair.
12. The court directed that the appeal proceeds by way of written submissions and both parties filed their respective submissions.
  13. I have perused the Petition of Appeal, the submissions by the two sides and the record in its entirety.
  14. This being a first appeal, this court has a legal duty to re-analyze, re-evaluate and re-assess the evidence adduced in the lower court so as to come up with its own conclusions while bearing in mind that it did not have the benefit of seeing or hearing the witnesses when they testified (see *Okeno v Republic* [1972] E.A, 32 at 36; *Pandya vs Republic* [1957] EA 336; *Shantilal M. Ruwala v Republic* [1957] EA 570; and *Peter v Sunday Post* [1958] EA 424).
  15. From the record of the trial court, the first prosecution witness (PW1) was John Robert Mctough, who was the complainant and a brother to the Appellant. The witness recalled that sometimes in the year 1976, he began business operations in Kisumu and subsequently established several ventures including Octopus Bottoms Up Night Club, Octopus Kenya Limited, and Octagon Private Investigation and Security Services. He involved his two brothers, and James Michael McTough (PW5) in the business enterprises.
  16. PW1 stated that the profits from these ventures were pooled and used to purchase four parcels of land namely Kisumu/Dago/234, East Kisumu/Dago/789, 931, and 932 which were all registered jointly in the names of the three brothers.
  17. PW1 further stated that differences later arose between him and the Appellant, which culminated in civil proceedings in the year 1994. The dispute was resolved by way of a consent order recorded in High Court Civil Case No. 1790 of 1994. According to the said consent, the brothers agreed to split between themselves both the business assets and the properties. PW1 was to receive the four parcels of land in Dago, in addition to offices in Nairobi, Central, and Coast regions, as well as cash in the sum of Kshs. 1.5 million while PW5 was allocated the Kisumu region businesses. The Appellant was to retain the family house in Nakuru, Octopus Night Club and the Rift Valley based business ventures.
  18. PW1 told the court that although the Dago parcels were to be transferred to him, the Appellant retained custody of the title deeds and in the year 1991 charged them to a bank. PW1 stated that when he inquired about the discharge of the titles, the Appellant claimed he lacked the finances to do so. He stated further that at some point, PW5 handed over to the Appellant the original title document to parcel Kisumu/Dago/234, which had been in PW5's possession, and also gave him Kshs. 500,000/-.



19. PW1 testified that despite the agreement, the Appellant never transferred the properties to him and eventually ceased communication with the witness. Upon further inquiry with the bank, PW1 learned that the titles to the charged properties were discharged in the year 1998. He later discovered that the Appellant had transferred parcels East Kisumu/Dago/789, 931, and 932 into his sole name and had sold parcel Kisumu/Dago/234 to Airport Housing Cooperative Society.
20. PW1 recalled meeting the Appellant at Village Market, during which the Appellant allegedly proposed that PW1 writes a letter gifting the parcel Kisumu/Dago/234 to him in order to avoid incurring tax liabilities. Acting on that request, PW1 wrote and signed a letter dated 19th October, 2010 to that effect. He however expected that the Appellant would still formally transfer to him all the parcels of land at a later date, as per the agreement that the parties had reached. He later discovered that Kisumu/Dago/234 had been sold by the Appellant.
21. PW1 subsequently reported the matter to the Directorate of Criminal Investigations (DCI), recorded a statement, and provided specimen signatures. He was later shown a Power of Attorney dated 22<sup>nd</sup> December, 2010 which he denied ever signing or donating. He acknowledged that the photograph and ID number on the said document were his, but asserted that the photograph had been given to the Appellant for an unrelated purpose.
22. PW1 also examined a land transfer form dated 28<sup>th</sup> May, 1998 purportedly signed by him in relation to parcels 789, 931, and 932. He denied signing the document, stating that the signature thereon was not his.
23. On cross-examination, PW1 confirmed the existence of a civil suit between him and the Appellant pending before the High Court in Kisumu, filed in 2012. He stated that the suit was stayed and he had not yet testified therein. He acknowledged signing the letter of 19<sup>th</sup> October, 2010 but maintained that he never signed the Power of Attorney, noting that he was abroad (in the UK) at the time it was allegedly executed. He conceded that the government was not a party to the civil proceedings.
24. PW1 reiterated that he was the founder of the businesses and brought in his brothers subsequently. He stated that although the properties were jointly acquired, the Dago parcels were awarded to him under the 1994 consent, and that the house in Nakuru was allocated to the Appellant in view of his interests in the Rift Valley. PW1 explained that he wrote the letter of 19<sup>th</sup> October, 2010 before discovering the unlawful transfers. He admitted meeting the Appellant at Village Market to discuss the land but denied granting permission for any transfers or transactions in respect thereof.
25. When recalled, PW1 submitted the previously missing second page of the power of attorney. He also stated that the brothers had since amicably resolved their property disputes and expressed no desire to pursue the matter further, though he did not retract the forgery allegation.
26. The second prosecution witness was Timon Kipkemboi Sirma (PW2) who testified and told the trial court that he was employed as a Credit Manager at Guardian Bank. His testimony focused on the status and custody of the title deed for parcel number Kisumu/Dago/234, one of the four properties central to the charges against the Appellant.
27. PW2 told the trial court that the said title deed was being held by the bank as collateral for a loan facility extended by First National Finance Bank to Octagon International Limited, a company associated with the Appellant and his family. He explained that Guardian Bank took over the operations of First National Finance Bank, effectively taking up the place as chargee of the said property. He confirmed that the title had never been discharged and remained in the bank's custody as security for the outstanding facility. The witness stated that the title was in the names of John Robert McTough, James



- Michael McTough and William Roman McTough and that there was a resolution to use the title to borrow.
28. The third prosecution witness, George Gachuhi (PW3), who testified and told the trial court that he previously served as the Land Registrar in Kisumu. His evidence was primarily in relation to the registration history and procedural integrity of land transactions involving parcels East Kisumu/Dago/789, 931, 932 and 234.
  29. PW3 told the court that he was approached by officers from the Directorate of Criminal Investigations (DCI) in relation to suspected irregularities in the transfer of the aforementioned parcels. In response, he retrieved the relevant green cards and registry files and examined the entries pertaining to ownership changes.
  30. Upon review, PW3 noted that the parcels had been registered in the name of the Appellant. However, he observed that there were no Land Control Board Consents accompanying some of the transfers, and the documents used to effect the registrations appeared to deviate from standard registry protocols.
  31. PW3 further testified that although the land registry processed the applications, he could not confirm the identity of the person who physically presented the documents for registration. He stated that the registry staff relied on the paperwork presented at the time and that the entries were made based on what appeared to be complete instruments.
  32. On cross-examination, PW3 acknowledged that he did not personally handle the original entries and transactions at the time of registration. He was therefore unable to verify the authenticity of the signatures on the transfer forms. He also confirmed that no direct complaint had been lodged with the lands office and that the alleged irregularities only came to light following the DCI's inquiry.
  33. Jacton Oduor (PW4), introduced himself as a forensic document examiner attached to the Ethics and Anti-Corruption Commission (EACC). He testified that he was requested by the Directorate of Criminal Investigations to conduct handwriting and signature analysis on several documents suspected to have been forged.
  34. PW4 informed the court that he received multiple questioned documents from the investigating officer, including E1 - E3 – Transfer forms for undivided shares; F – Power of Attorney; and G1 - G3 – Application for Land Control Board Consent concerning parcels East Kisumu/Dago/789, 931,932 and 234. He also received specimen signatures attributed to John Robert Mctough (PW1) and James Michael Mctough (PW5) for comparative purposes.
  35. According to his testimony, PW4 examined and compared the questioned signatures with the known specimens and found significant discrepancies in pen pressure, slant, and formation of strokes. Based on these differences, he concluded that the signatures on the questioned documents did not match those of PW1 and PW5, and were therefore not authored by the two.
  36. PW4 prepared and submitted a written report to that effect, which he produced as an exhibit. He emphasized that the irregularities were not attributable to natural variation, but rather indicated possible simulation or forgery.
  37. On cross-examination, PW4 acknowledged that he did not receive or examine the Appellant's specimen handwriting or signatures. He further conceded that, in certain instances, he had compared a questioned signature with a known handwriting sample, rather than strictly conducting signature-to-signature comparisons.



38. When asked about the effect of time lapse or changing physical conditions on handwriting, PW4 admitted that such factors could influence natural variation, but maintained that the degree of difference observed in this case went beyond such explanations.
39. PW4's conclusion was that the signatures appearing on the documents purporting to have been executed by PW1 and PW5 were inconsistent with their known signatures and were likely forged. He did not, however, offer any opinion on the identity of the person responsible for the alleged forgery.
40. The prosecution called James Michael McTough (PW5) as its fifth witness. The witness testified and told the trial court that he was a brother to both the Appellant and PW1 (the Complainant). He confirmed that the three of them jointly acquired several parcels of land which included East Kisumu/Dago/789, 931, 932, and Kisumu/Dago/234.
41. PW5 stated that during a call with the Appellant and PW1 when both (the Appellant and PW1) were at the Village Market, he was informed they had resolved the issue of the four parcels. He claimed to have had no interest in the land. He stated that he was unaware that the said parcels had been subsequently transferred to the Appellant's sole name until much later, and denied ever executing any transfer instruments or authorising the Appellant to act on his behalf in relation to those properties.
42. On cross examination, upon being presented with a transfer form dated 22nd October, 2010, the witness conceded that the signature appearing on that particular document resembled his and acknowledged that he may have signed it. He explained that the Appellant had presented several documents to him around that time, and he signed one believing it to be an affidavit.
43. Sylvester Mango was the sixth prosecution witness (PW6). The witness told the trial court that he was prior to his engagement at the Ethics and Anticorruption Commission a police officer and was tasked with investigating the complaint lodged by John Robert McTough (PW1) concerning alleged fraudulent dealings involving the parcels of land subject to the case before the trial court.
44. PW6 stated that acting on the complaint, he visited the Kisumu land registry and retrieved copies of green cards and documents relating to the four parcels in question namely Kisumu/Dago/234, East Kisumu/Dago/789, 931, and 932. He examined the registration history of the said parcels and noted that they had been transferred to the Appellant as sole proprietor.
45. Upon further inquiry, PW6 discovered that the transfer documents bore signatures purporting to belong to PW1 and PW5. In order to determine the authenticity of these signatures, he forwarded the questioned documents, together with specimen signatures from the complainants, to the Document Examination Section for analysis.
46. He testified that he later received a report from the forensic document examiner (PW4), which indicated that the questioned signatures did not match the known specimens of PW1 and PW5. On the strength of that report, and having considered the history of civil disputes among the brothers, he formed the opinion that the documents had been forged, and preferred charges against the Appellant.
47. On cross-examination, PW6 admitted that he did not obtain specimen handwriting or signature samples from the Appellant during the course of his investigation. He further confirmed that no witnesses were called from the land control board, the land registry personnel involved in the original processing, or any advocates who may have witnessed the transactions.
48. PW6 acknowledged that while PW1 was the principal complainant, PW5 had not made any formal complaint, though his name appeared on several of the allegedly forged documents. He stated that the inclusion of PW5 in the charges was based on inference from the documents examined and PW1's statement.



49. He also confirmed that some potential witnesses including the advocate who was said to have witnessed the signing of the Power of Attorney were not interviewed or called as witnesses. He attributed this omission to logistical limitations and an assessment that their evidence was not essential.
50. The prosecution case was closed at that stage and in its considered ruling rendered on 15<sup>th</sup> February 2024, the trial court found that the prosecution had established a prima facie case against the Appellant on all the six counts and he was placed on his defence in respect thereof.
51. The Appellant (DW1) opted to make a sworn defence and denied all the charges levelled against him. He maintained that the properties in question, East Kisumu/Dago/789, 931, 932, and Kisumu/Dago/234, were acquired jointly by himself and his two brothers, PW1 and PW5, through their collective business ventures. He asserted that the acquisition and registration of the parcels occurred in the ordinary course of their family investment and that each brother had an equitable interest.
52. DW1 told the trial court that following disputes over the management of their joint businesses, a consent order was recorded in High Court Civil Case No. 1790 of 1994, whereby the parties agreed on the distribution of assets, including land. He testified that under the terms of the consent, each brother was allocated specific properties and business interests. He maintained that his dealings with the parcels he subsequently registered in his name were pursuant to and consistent with that family agreement.
53. Regarding the letter of gift dated 19th October 2010 (MFI-2), DW1 stated that it was voluntarily executed by PW1 and reflected the arrangement between them concerning the parcels of land. He denied any fraudulent inducement or misrepresentation. He further testified that the Power of Attorney in issue was executed in the presence of their family advocate, Mr. Miruka Owuor, who duly attested to the signatures.
54. DW1 produced in evidence a witness statement by the said late advocate, confirming that all three brothers appeared before him and signed the Power of Attorney willingly. He stated that the statement was recorded prior to the advocate's passing and provided independent verification of the events surrounding the execution of the document.
55. DW1 denied ever forging or causing to be forged any land transfer or legal instrument. He questioned how he could be accused of forgery when his own specimen signature or handwriting had not been obtained for comparison. He stated that the registration of the parcels in his name followed due process and was done in good faith based on documentation that was valid at the time.
56. On cross-examination, the Appellant maintained that there was no intent to defraud and that the subsequent dealings with the parcels such as charging or selling them were undertaken as owner or transferee pursuant to the family's prior agreement and settlement in the civil case.
57. The Appellant called Daniel Gutu (DW2) a private forensic examiner and former officer with the Directorate of Criminal Investigations, as a defence witness. DW2 testified and told the trial court that he received documents for analysis, including several letters; the Power of Attorney dated 7<sup>th</sup> December, 2010; A1-A4 – copies of transfer form for Kisumu/Dago/789, 931 and 932; A5-A7 – copies of transfer form for Kisumu/Dago/931, 932 and 789; B1-B4 specimen signatures of John McTough; and C - specimen signatures of William McTough.
58. According to DW2, upon examination of the documents, the similarities in line quality, pen movement, and signature formation led him to find no substantial grounds for suspecting forgery. He opined that the signatures attributed to PW1 were likely genuine and bore characteristics consistent with natural variation rather than simulation or fabrication.



59. DW2 also addressed the methodology employed by PW4, the prosecution’s handwriting expert. He criticized PW4’s approach, particularly where handwriting was compared to signatures, stating that this practice was not forensically sound. In his view, handwriting and signatures involve different motor patterns, and comparing the two can yield unreliable or inconclusive results.
60. On cross-examination, DW2 reiterated that the Power of Attorney had been signed by PW1. He further noted that his own analysis was limited in relation to PW5 (James McTough) because he was not provided with PW5’s known specimen signatures. As a result, he was unable to reach a definitive conclusion on the questioned documents allegedly bearing PW5’s name.
61. He stated that he was engaged by the Appellant’s legal team for purposes of this matter and received compensation for his services. However, he maintained that this did not affect the integrity or independence of his expert opinion.
62. The defence closed its case at that stage.
63. I have considered the grounds of appeal, the filed submissions, the evidence adduced before the trial court and the lower court’s record in its entirety. I will revert to them as may be necessary in my analysis below.
64. From the record, the issues that I am now tasked to determine, are whether the prosecution proved the four counts of the offence of forgery against the Appellant beyond reasonable doubt and subject thereto, whether the sentences meted upon the Appellant were appropriate.
65. Inevitably, this court in determining the issues stated above must first satisfy itself that the ingredients of the offence of forgery were proved against the Appellant in respect of the four counts on which the Appellant was convicted, beyond reasonable doubt, as is the requirement in law.
66. Section 345 of the *Penal Code* defines forgery as:  
“making of a false document with intent to defraud or to deceive.”
67. Section 347 of the *Penal Code* defines making a false document as:  
347. Making a false document  
Any person makes a false document who—  
(a) makes a document purporting to be what in fact it is not; or  
(b) alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; or  
(c) introduces into a document without authority whilst it is being drawn up matter which if it had been authorized would have altered the effect of the document; or  
(d) signs a document—  
(i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing; or  
(ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing; or  
(iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person; or



- (iv) in the name 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;
- (e) fraudulently—
  - (i) makes or transmits any electronic record or part of an electronic record;
  - (ii) affixes any digital signature on any electronic record; or
  - (iii) makes any mark denoting the authenticity of a digital signature, with the intention of causing it to be believed that such record, or part of document, electronic record or digital signature was made, signed, executed, transmitted or affixed by or by the authority of a person by whom or whose authority he knows that it was not made, signed, executed or affixed;
- (f) without lawful authority or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with a digital signature either by himself or by any other person, whether such person is living or dead at the time of such alter;
- (g) fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of deception practised upon him, does not know the contents of the document or electronic record or the nature of the alteration.

68. Section 348 of the [Penal Code](#) defines intent to defraud as:

348. Intent to defraud

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

69. Section 350 of the [Penal Code](#) provides the punishment for specific types of forgery as:

350. Forgery of wills, etc

- (1) Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life, and the court may in addition order that any such document as aforesaid shall be forfeited.(2)In this section, "document of title to land" includes any deed, map, roll, register or instrument in writing being or containing evidence of the title, or of any part of the title, to any land or to any interest in or arising out of any land, or any authenticated copy thereof.

70. In the case of *Nathan v Republic* (Criminal Appeal E007 of 2020) [2022] KEHC 15531 (KLR) (4 April 2022) (Judgment) the Court with approval cited the case of *Peter Wanjohi Gitonga v Republic* [2020] eKLR) in which reliance was placed upon the Court of Appeal decision in *Joseph Mukuha*



Kimani v Republic (Criminal Appeal No 76 of 83) [1984] eKLR where it was stated, regarding the offence of forgery that:

“The prosecution must prove that: -

- a. the document was false; in the sense that, it was forged
- b. the accused knew it was forged
- c. the utterer intended to defraud.

In the case of Kilee v Republic [1967] EA 713 at p 717, it was said that, the false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: Omar Bin Salem v R [1950] 17 EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see Samuels v Republic [1968].”

71. Expanding on these essentials, Mativo J (as he then was) in Caroline Wanjiku Ngugi v Republic [2015] eKLR observed as follows:

“Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus, the elements of forgery are:-

- i. False making of - The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated, printed or engraved.
- ii. Material alteration - The person must have taken a genuine document and changed it in some significant way. It is intended to cover situations involving false signatures or improperly filling in blanks on a form or altering the genuine content of a document.
- iii. Ability to defraud - The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.
- iv. Legal efficacy - The document or writing has to have some legal significance.
- v. Intent to defraud - The specific state of mind for forgery does not require intent to steal, but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of typewriter or a computer.”

72. From the decisions above, for the the offence of forgery to be proved, the following ingredients have to be established:

- a. The document was false in the sense that it was forged
- b. That it is the accused person who forged it.
- c. The accused person intended to use the forged document to defraud.



73. Turning to the question as to whether the documents in question were false in the sense that they were forged, the contention by the prosecution in counts 1 and 6 was that the signature of John Robert McTough was forged in the transfer of undivided shares for land parcel no. East Kisumu/Dago/789 and the Power of Attorney in respect of land parcel no. East Kisumu/Dago/234.
74. The prosecution further proffered the position in counts 3 and 4 that the signature of James McTough was forged in the transfer of undivided shares for land parcels no. East Kisumu/Dago/931 & East Kisumu/Dago/932.
75. Pursuing this assertion, the prosecution advanced the testimonies of PW1 and PW5 who denied signing the respective documents above as well as the expert evidence of PW4, whose opinion in the report that he produced was to the effect that the two witnesses did not sign the impugned documents.
76. The Defence countered the evidence of PW4 through their own expert, DW2, as well as the testimony of the Appellant and the statement of the deceased advocate.
77. Bearing in mind the foregoing, I find it prudent to re-analyze the evidence presented by the contesting forensic document examiners. As a starting point, I am minded to restate the manner in which I ought to treat expert evidence. While I am not bound by the opinions of experts, such evidence is to be taken in conjunction with the other available primary factual evidence. Where conflicting expert opinions exist, the court must evaluate them against the backdrop of all other admissible evidence and provide reasons for preferring one over the other. In *AG v Republic (Criminal Appeal E008 of 2021) [2022] KEHC 11299 (KLR)*, it was held:

“Firstly, expert evidence does not ‘trump all other evidence.’ Judges are entitled to disagree with an expert witness. Expert testimony must be assessed against established facts, with primary factual evidence bearing greater significance. Secondly, expert evidence must be considered in context and not in isolation. It should not be artificially detached from the broader evidentiary record. A court’s findings are often formed through the interaction between expert and factual evidence. Thirdly, where conflicting expert opinions exist, the court must evaluate them against the backdrop of all other admissible evidence and provide reasons for preferring one over the other. Lastly, a judge must consider the entirety of the evidence, including that provided by experts, before arriving at any factual conclusions.”

78. The experts in this instance were both forensic document examiners, or handwriting experts, so to speak. Regarding the proper role of a handwriting expert, in *Samson Tela Akute v Republic [2006] eKLR* the court cited with approval the case of *Hassan Salum v Republic [1964] EA* at page 128 where it was stated:

“... 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 LJPC 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, ofcourse, 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...”

79. In the case before me, from the forensic document examination report presented by PW4, upon examination of of E1-E3 – Transfer forms for undivided shares; F – Power of Attorney; and G1-G3 –



Application for the Land Control Board consent concerning parcels East Kisumu/Dago/789, 931,932 and 234, PW4 concluded that the questioned signatures on Exhibits E1-E3 and G1-G3 exhibited different styles and formations when compared to the standard and known signatures of PW1 and PW5.

80. It was PW4's contention that the questioned signature on Exhibit F and the standard signatures as well as the known signature for James Michael McTough, displayed similarities and appeared to have been executed by the same individual. Regarding John Robert McTough, PW4 determined that the questioned signatures on Exhibits E1-E3, G1-G3, and F significantly differed in style and formation from the standard signatures on D1-D2 and B, leading to his opinion that these signatures had been forged.
81. Disputing his contemporary's findings, DW2 upon examination of the Power of Attorney dated 7<sup>th</sup> December, 2010; A1-A4 copies of transfer form For Kisumu/Dago/789,931 and 932; A5-A7 copies of transfer form for Kisumu/Dago/931,932 and 789; B1-B4 specimen signatures of John McTough; and C - specimen signatures of William McTough, the similarities in line quality, pen movement, and signature formation led him to find no substantial grounds for suspecting forgery. For DW2, the signatures attributed to PW1 were likely genuine and bore characteristics consistent with natural variation rather than simulation or fabrication.
82. DW2 also criticized PW4's methodology, particularly where handwriting was compared to signatures, stating that this practice was not forensically sound. In his view, handwriting and signatures involve different motor patterns, and comparing the two can yield unreliable or inconclusive results.
83. In the face of these contrasting positions, where does the truth lie? Forgery is about making a false document or altering it to serve some purpose other than that originally intended, or signing it in a misleading way. In the instant case, the allegation is that the signature of John Robert McTough was forged in the transfer of undivided shares for land parcel No. East Kisumu/Dago/789 and the Power of Attorney in respect of land parcel no. East Kisumu/Dago/234. It is further alleged that that the signature of James McTough was forged in the transfer of undivided shares for land parcels no. East Kisumu/Dago/931 and East Kisumu/Dago/932.
84. PW1 and Pw5 denied executing the impugned documents. The evidence of PW4 was that the person or persons who signed the questioned documents were neither PW1 nor PW5. The evidence of DW2, in contrast, was that PW1 signed the documents in question.
85. Whereas the prosecution's position was that the signatures in the impugned documents were not authored by PW1 and PW5, no evidence was presented to prove that it is the Appellant who forged the said witnesses' signatures. If anything, the Appellant's specimen signatures were not taken for purposes of comparison with the disputed signatures.
86. It has been held in the cases of *Jeremiah Induswe Onzee v Republic* [2020] eKLR and *Ngugi v R* (Criminal Appeal E087 of 2023) [2024] KEHC 9081 (KLR) (22 July 2024) (Judgment) that even where it is proved that a document is forged, a conviction will not follow unless the prosecution proves beyond reasonable doubt that it is the accused person who forged that document.
87. As we have seen above, a handwriting expert's opinion is not binding on the trial Court. In the wake of the fact that the two experts conflicted in their opinions, it was crucial for the trial Court to make its own independent evaluation and finding, rather than opt to go by the opinion of one expert while rejecting the other expert's opinion without any tenable explanation. The trial court had the duty to examine the impugned documents and the other evidence before it in order to determine whether the prosecution had proved beyond reasonable doubt that the Appellant forged the signatures.



88. There is no indication whatsoever that the learned trial Magistrate did on his own examine the signatures with the aim of arriving at such a conclusion. The findings which the trial court made, which I must in the premises fault, were as follows:

- “7. The forensic document examiner (PW4) called by the prosecution testified that upon examination of the signatures on the documents, the transfer of undivided shares, the application for Land Control Board Consent and the power of attorney were false and therefore forged.
8. On the other hand, DW2 testified that the documents were not false or forged and that the signatures on them were made by PW1, the complainant.
9. Specifically, PW4, Jacob Oduor, testified and produced his report (Pexh 11). In his report, he states that he examined the signatures of James Michael McTough against the questioned signatures in the documents in question Exh 1 to 3 and concluded that they are written in different style and formation when compared to the signatures obtained from James Michael McTough and his known signatures.
10. Similarly, PW4 testified that upon examination of questioned signatures and on comparison with the signatures obtained from John Robert McTough he found them to have been written in different style and formation, hence forged.
11. That finding supports the testimonies of PW1 and PW5 the brothers of the accused person who jointly owned the land parcel number East Kisumu/Dago/789,931, and 234, who denied signing the transfer of undivided shares, the application for Land Control Board Consent and power of attorney.
12. In other words, PW1 and PW4 denied or disowned the documents in question and ever signing or otherwise making the documents. In fact, PW2 testified that the title to East Kisumu/Dago 234 was still being held at Credit Bank over an outstanding loan.
13. Therefore, the defence witness DW2 and private forensic document examiner’s attempt to discredit PW4’S report ( P. Exh 11) cannot hold.
14. DW2’s assertion that PW4 arrived at a wrong opinion by comparing signatures and writings, that the projection machine was not operational in the DCI at the time (2012); that use of magnifying lens is unreliable and inaccurate procedure of examining document is thus a mere attempt to discredit an otherwise accurate report supported by other evidence of PW1 and PW5.
15. Further, the procedure used by PW4 was efficient and sufficient for conclusive determination by image enhancement and magnification when the methodology used by the two forensic document examiners are considered.
16. Therefore, the only conclusion and finding is that the documents being transfer of undivided shares, application for consent to transfer and power of attorney were false in the sense that they were forged.”



89. With respect, it is clear that the trial Magistrate did not reach his own independent findings on the issue by undertaking his own examination of the documents and on the basis of the whole of the evidence available but wholly relied on the prosecution's handwriting expert.
90. The prosecution appears to have relied on the presumption that the Appellant forged the documents because he "benefitted" from the forged documents by acquiring title to the properties, hence he must have made them. The law works on concrete evidence and not suppositions.
91. Nothing in the record of the lower court would lead me to reach the finding that the documents in question were forged by the Appellant. As a matter of fact, the specimen writings and signature of the Appellant were not submitted to the prosecution's document examiner for examination and there was therefore no basis of reaching the finding that the Appellant forged them. The trial Magistrate appears to have adopted the prosecution's position that the Appellant must have been the one who forged the documents because he stood to gain from the transactions that arose from the allegedly forged documents. However, this conclusion was not made on the strength of the available evidence and the learned trial Magistrate erred thus.
92. In my view, the fact that there were two differing expert opinions on whether the documents were forged or not, presented a situation in which sufficient doubt was cast on the prosecution case. The issue as to whether the impugned documents were forged or not and the subsequent issue as to whether it was the Appellant who forged the documents ought to have been determined on the cardinal principal of evidence under Section 3(4) of the Evidence Act, that a fact is not proved when it is neither proved nor disproved.
93. Forgery of the questioned documents was in the premises neither proved nor disproved, and was therefore not proved. It follows then that there was no evidence to prove beyond reasonable doubt that the Appellant forged those documents.
94. For the reasons stated in the above, I reach the conclusion that the prosecution did not adduce sufficient evidence to prove beyond reasonable doubt the offences in the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> counts. The conviction on the four counts was therefore not safe.
95. Having so found, I need not delve into the other ingredients of the offence of forgery as the same would be a superfluous exercise.
96. In the result, for the reasons stated above, I allow the appeal, quash the convictions on counts 1, 3, 4 and 6 and subsequent thereto proceed to set aside the sentences of two years imprisonment imposed on the Appellant on each of the four counts.
97. I order that the Appellant shall be set at liberty forthwith unless he is otherwise lawfully detained.

**DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 24<sup>TH</sup> DAY OF APRIL, 2025.**

**JOE M. OMIDO**

**JUDGE**

Appellant: Present (virtually).

For the Appellant: Mr. Anjichi.

For the Respondent: Ms. Jebichii.

For the Complainant: Mr. Omondi.

Court Assistants: Mr. Ngoge & Mr. Juma.

