



REPUBLIC OF KENYA



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**Wamukoya v Republic (Criminal Appeal E051 of 2023)  
[2025] KEHC 10550 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10550 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E051 OF 2023  
SC CHIRCHIR, J  
JULY 17, 2025**

**BETWEEN**

**BERNARD WAFUBWA WAMUKOYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. JR Ndururi (SPM) delivered on  
4th October 2023 at the Kakamega CM's Court criminal case No. 602 of 2019)*

**JUDGMENT**

1. Bernard Wafula Wamukoya ( The Appellant) was charged in the lower court ,alongside 4 others, of various offences, involving conspiring to commit a felony, forgery, uttering a false document and obtaining money by false pretenses.
2. One of the accused persons died in the course of trial , while the other two alleged accomplices were discharged under Section 210 of the Criminal Procedure Code. The appellant herein was put on his defence and at the conclusion of trial, was convicted, on the 1<sup>st</sup> count ( on conspiracy to Commit a Felony Contrary to Section 393 of the Penal Code), 2<sup>nd</sup> Count ( on Forgery Contrary to Section 350 (1) of the Penal Code), 5<sup>th</sup> count (uttering a False Document with Intent to Defraud Contrary to Section 357 of the Penal Code ) and Count 7 (Obtaining Money by False Pretenses Contrary to Section 313 of the Penal Code.)
3. Aggrieved by the trial Court's decision he proffered the present appeal.

**Petition of Appeal**

4. The grounds are as follows:



1. The learned trial magistrate grievously erred in law and fact by failing to note that the appellant was not properly identified by the prosecution witnesses despite the prosecution case being based on identity.
  2. The learned trial magistrate fell into error on law and fact by failing to note that the offence of conspiracy to commit a felony contrary to section 393 of the penal code was not proved as there was no other accused person linked to an agreement to commit the alleged offence.
  3. The learned trial magistrate failed to properly direct his mind to ingredients of the offence of forgery where there was no empirical evidence from a handwriting expert to confirm that the signature in a certificate of title is not genuine.
  4. That the learned trial magistrate failed to properly direct his mind and analyze the scanty evidence tendered by the prosecution in relation to an offence of uttering a document with intent to defraud, when it was not proved that the alleged certificate of title for L. P. Butso/ Shibeye/4XX4 was forged hence caused a serious miscarriage of justice to the appellant.
  5. The learned magistrate fell into error in law and fact by failing to note the alleged single certificate for. P. Butso/ Shibeye/4XX4 land would not be uttered by the four accused persons and no reason or evidence was adduced linking the appellant as the person who uttered the alleged document.
  6. The learned magistrate failed to note, analyze, and direct his mind properly that the offence of obtaining money by false pretense was not proved as there was no evidence tendered that indeed the appellant received the money from the complainant.
  7. The learned trial magistrate failed to infer a bad motive on the investigations after the investigations officer failed to attend court to testify and prove the basis of the charges before the court, therefore a miscarriage of justice caused to the appellant.
  8. The learned trial magistrate fell into law and fact by failing to note that the weight of evidence presented by prosecution that was far below the legal threshold for convictions of the offences alleged.
  9. The learned trial magistrate erred in law and fact by failing to note that the weight of evidence was below the legal threshold for the offences preferred and meted excessive sentence to the appellant.
  10. That the learned trial magistrate fell into law and fact by being carried away emotionally and believing the evidence of PW6 who was the complainant and convicted the appellant on the words of the said PW6 as a way to fight the fake titles.
  11. That the trial magistrate emotionally convicted and sentenced the appellant contrary to the laid down procedure on sentencing as if the trial magistrate was pleasing PW6 for the mistakes of fraud if any committed at the lands office, hence caused a miscarriage of justice
5. The appeal was canvassed by way of written submissions

### **Appellant's Submissions.**

6. It is the appellant's submission that, he was not properly identified yet for count 1, 2,5 and 7 the identity of a perpetrator is a central; That there was no evidence showing that the appellant was the one who conspired and uttered the alleged document and that there was no identification parade to rule out any possible error on identification. As for the photographic evidence produced ,it is submitted



that it did not meet the threshold of admission as there no certificate accompanying the photographs. The appellants further submit the evidence presented did not establish conspiracy as there was no evidence that the appellant and any other person agreed to carry out unlawful act. It is stated that to the extent that the court acquitted the appellant's co-accused under section 210 of the criminal procedure code(CPC), raises the question of who then conspired with the appellant to defraud the complainant. It is further submitted that the offence forgery was not proved as there was not handwriting expert report linking the forgery to the appellant. There was no evidence that the appellant uttered the alleged Title document for Parcel number Butsotso/Shibeye 4XX4 and that there was no evidence that the appellant received any money from the complainant.

7. It is finally submitted that the trial court ought to have inferred an adverse conclusion from the investigations officer's failure to testify and defend his reasons for his decision to prefer charges.
8. On sentencing, it is submitted that the trial magistrate was being driven by emotional and irrelevant factors when meting out the sentence.
9. The respondent did not file any submissions

### **Summary of the Evidence.**

10. The complainant ( PW1) told the court that after he was referred to Mr. Gilbert Angatia he talked to him on his cellphone No. 07456XX61X about his wish to buy land. Angatia referred him to his farm- hand by the name Patrick. He visited the farm. He did a search at Land Registry for parcel No. Butsotso/Shibeye 4XX4. The search confirmed that the land belonged to the said Gilbert Angatia. He again went to meet the Angatia on site. Angatia was with his wife. From there they went to Advocate Mango's office. They signed the agreement and he paid Kshs. 400,000/= he was given Angatia's passport size photo .
11. After 3 days he went to fence the land. He went with the surveyor but found that the land on the ground and the map were different. They called a neighbour. The neighbour told them that the land was theirs ,and it was not for sale. He called Angatia but he did not respond. The surveyor also established that the title deed was fake. He arranged an operation, in which he arranged to meet the appellant at Golf Hotel. He met the Gilbert and another person. They took them to Kakamega Police Station. The complainant was a police officer at Kakamega police station
12. On cross- examination, he stated that the Patrick referred him to Albert. That the 1<sup>st</sup> accused (appellant) received his Kshs. 400,000/= .on re-examination he stated that it is Patrick who gave him a phone number 07456XX61X and it is this number the he used in all his subsequent conversation with Albert. That the appellant was the only person he transacted with. He clarified that the first name of Ngatia is Albert not Gilbert.
13. PW2 was the surveyor whse services had been sought for by the complainant. He received a copy of the National Identity card for Albert Angatia, and a Title deed for Butsotso/Shibeye/4XX4 from PW1 on 20.2.2019. He went to the Land's Registry to investigate and the registrar informed him that the title deed was fake.
14. PW3 was Derek Mango Advocate. He told the court that he prepared the agreement dated 21.2.21 between Albert Angatia and PW1 upon the instructions from the two. The property was Title number Butsotso/Shibeye/4XX4. The agreement was signed. He asked the seller to come with his wife to give consent. One Caroline Jerotich Chesum came and signed the consent. He witnessed the agreement. All the payment was made in cash.



15. On cross examination he could not recall on whether the accused was one of those who appeared in his office.
16. PW4 was the complainant's wife .On 21.2.2019, she accompanied the complainant to the alleged piece of land. On reaching there they found Albert Angatia with a lady who described herself as Albert's wife and her name was Caroline Chesum. She identified the Appellant as Albert Angatia. Angatia said he knew an Advocate who could draw the agreement. Angatia took them to Mango Advocate. While they sat in the reception area, Angatia went to the inner office. Accused 2 also came in and entered the advocate office then came out again and left. They were called into the Advocate's office. In the office was herself, the complainant the appellant and his wife. Her husband paid Kshs. 400,000/= Albert Ngatia gave them the title deed. As the money was being handed over to Ngatia , the advocate took photographs. In the photo was the complainant. she identified the title deed given out by the appellant, and the agreement which she counter signed. One Jackson Khwendo also signed it.
17. On cross -examination she stated that she came to know "Albert" as Bernard at the time of his arrest . They found the appellant when they went to the land. That she was not there when the Appellant was arrested. On re-examination she stated that the person they found on the land was accused 1 (the appellant) and he introduced himself as Albert Angatia, and the owner ,and the seller. Of the land.
18. The 5<sup>th</sup> Prosecution witness was Albert Angatia. He stated that he did not know accused 1, 2 or 3. He stated that he was the owner of the Land parcel as per the tile deed bearing serial No. 11XXX16. He stated that he had sold a portion of his land but not to the complainant in this case. He did not know the Appellant and he never gave his title deed to either the complainant or the Appellant.
19. The last prosecution witness was the Deputy Land Registrar at Kakamega Land's Registry. He had the Title Deed for Butsotso/Shibeye/4XX4,(Serial No. 17XXX87.) The property was registered in the name of Albert Angatia. When shown title deed for the same property under serial number 11XXX16 he stated that such a title did not exists in their records; that it was not genuine. (He produced the two title deeds as PExbs 3 and 4). On cross- examination he stated that they use the green card to register to verify the title deeds.

#### **Defence case.**

20. When put on his defence the appellant denied all the charges. He told the court that he did not know the complaint or the real Albert Angatia. He denied knowing Advocate Mango's office or going to his office. He denied that any photograph was taken in that office he could not tell how and when the photograph was taken. He stated he was arrested at the Golf Hotel.

#### **Determination.**

21. It is the duty to this court as the first appellate court to review the evidence tendered during trial, evaluate it and arrive at its own conclusion, while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses first hand. (Ref Gitobo Imanyara & 2 Others -vrs- A. G ( 2016) KECA 557 (KLR)
22. I have considered the evidence, the grounds of appeal and submissions by the appellant. The following issues arise for determination
  1. Whether there was a positive identification of the appellant
  2. Whether the offence of conspiracy to defraud was proved
  3. Whether the offence of forgery was proved



4. Whether the offence of uttering a false document was proved
5. Whether the offence of obtaining money by false pretenses was proved.  
whether the offence of conspiracy to commit a felony was proved.
23. Section 393 of the penal code defines the offence of conspiracy to commit a felony as follows: “Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”
24. It is the appellants case that the offence was not proved as there was no other person linked to the offence. That the moment his co -accused’s were acquitted , then it raises the question of who is co- conspirators were. In the case of James Mulama – Vrs- Republic (1975) KEHC 1 ( KLR) it was held: If on a charge of conspiracy all the accused but one are acquitted that one has to be acquitted also unless it is charged and proved that someone else not named in the charge has been part of the conspiracy.”
25. In finding the appellant guilty, the trial court stated that the appellant conspired with one Patrick who was represented by the appellant as his farm – hand. From the charge sheet it is evident that the said farm – hand, whose name was given by the complainant as Patrick, was not charged along side the others. The complainant told the court it is the purported owner of the property who sent him to the farm -boy called Patrick on phone number 07597XX14X. He is the one who gave him the cell phone number 07456XX61X as belonging to the appellant.
26. I have looked at the complainant’s evidence in regard to the role played by Patrick , and noted that this piece of evidence was not contested at cross-examination. For instance the complainant provided telephone numbers which he used to communicate with the Appellate which Number was given to him by Patrick. The ownership of the phone number was not questioned at cross- examination. Thus even though the other co-accused were not found to be part of the conspiracy, the conspiracy of the Appellant with one Patrick his alleged farm- hand, was proved . The acquittal of his co-accused could not earn the appellant an automatic acquittal as it was established that he conspired with someone else who was not in court. I am therefore satisfied that the offence of conspiracy was proved.

**whether the appellant was positively identified.**

27. The identification in this case was by two people, the complainant and his (PW1)and his wife,( PW4). According to PW4 the journey to the alleged owner’s land was in the morning hours . Thus, the conditions for positive identification was conducive. I have also noted that there is consistency in the testimonies of the complainant and PW4 on this aspect. The complainant told the court that he met the appellant and a woman. PW4 confirmed this and further stated that the woman identified herself as Caroline Chesum, the Appellant’s wife. The Caroline Chesum was also named by the Advocate who drew the agreement ( PW3) as the person who accompanied the appellant during the signing of the agreement.
28. While I agree with trial magistrate that the investigation’s officer could have done better, the evidence presented by PW1,4 and the PW3 was sufficient to prove that the person who was posing as Albert was actually the appellant herein. Identification was therefore positive.



### **whether the offence of forgery was proved.**

29. In the case of *Caroline Wanjiku Ngugi Vs Republic* [2015] KEHC (854) KLR Justice Mativo defined Forgery 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.”
30. The Deputy County Land Registrar ( PW 6) testified on the two title deed for Land parcel number Butso/ Shibeye/4XX4. He told the court that Title deed with serial number 17XXX87 ( PEXB3) did exist in their records but the one with serial number 11XXX16 is nonexistent, that it was not genuine.
31. I take the judicial notice of the fact that County Land Registrar is the custodian of the all Land records in a county. He affirmed the title deed with serial No. 17XXX87 as a valid document which exists in their records while the other one does not . He stated that the one with serial No. 11XXX16 is not a genuine document. The later is the document presented by the Appellant to the complainant . The Appellant has argued that there was no evidence that he forged the title deed as there was no evidence of a hand- writing Expert.
32. However , the testimony of a hand- writing expert was not necessary in this case as the evidence of the Land’s Registrar sufficed. The Land Registrar as the custodian of all the land records as aforesaid disowned the Title deed presented by the Appellant. He stated that it was a non- existing document in their records. If a purported document does not exist in the Government official records, then it means it is not an official record, that it is fake. It did not need a hand- writing expert to sanitize it.
33. Section 345 of the *Penal Code* defines forgery as “ the making of a false document with intent to defraud or to deceive.” It was evident that the title presented by the accused was not genuine document in the land parcel. It was a false document created to mimic the title deed under serial No. 17XXX87. In the case of *Mutemi & 2 others Vs Republic* (2024) KECA 85 (KLR), The Court of Appeal held “The definition of the offence of forgery thus involves two considerations: first, that the relevant document should be false and secondly, that it was made in order that it might be used as genuine. The material in the false document should therefore, be capable of deceiving an individual to act upon it in place of the original or genuine document.” In the present case the document presented to the complainant did indeed mislead him to believe that it was a genuine title deed for land parcel No. Busotso/ shibeye/4XX4.
34. The Appellant has further submitted that it was not proved that he was the one who forged the document. In establishing forgery there is no necessity for proving that the Accused is the Author of the document. It simply suffices to prove that the accused presented the documents. In this regard , am duly guided by the court of Appeal decision in the case of *Alexander Muteti Mutinda & another v Republic* [2015] KEHC 7709 (KLR) where the court held: “As regard the evidence of the document examiner, this court holds that that evidence did indeed establish that the two documents were forgeries. it was not necessary for the prosecution to establish who actually made the documents if it managed to establish that the Appellants presented the said documents. The appellants were beneficiaries of the said forgeries.”
35. Am satisfied that the offence of forgery was proved

### **Uttering False Document with Intent to Defraud.**

36. Section 357 (b) of the *Penal Code* provides as follows: “Any person who, with intent to defraud or to deceive knowingly utters any document or electronic record or writing so made, signed or executed by



another person, is guilty of a felony and is liable to imprisonment for seven years.” On this count, I have no reason to interfere with the findings of the trial court. The Appellant is the one who handed to the complainant the fake title deed for Land Parcel Number Butsotso/Shibeye/4XX4. It was intended to deceive the complainant that it was a genuine title deed for the said land parcel, and indeed having passed off as such, managed to convince the complainant. He uttered the Title deed with serial No. 11XXX16.

37. It was the evidence of complainant and PW4 that Kshs. 400,000/= was handed over to the appellant in exchange for the title deed. I have considered the testimonies to these witnesses at cross-examination. There was hardly any interrogation on whether indeed money exchanged hands between the complainant and the Appellant herein. It has already been established that the appellant had no land to sell as whatever title deed he had to the property was not genuine. He therefore received the Kshs. 400,000 by falsely pretending to sell land which land he did not have in the first place. The appellant has argued that there was no evidence like a bank deposit slip to prove that some money was paid. However, PW1’s and PW4’s evidence was that the money was paid in cash and their testimonies were not contested as aforesaid.
38. In view of the foregoing, I am satisfied the prosecution proved their cases in respect of the 1<sup>st</sup>, 2<sup>nd</sup> 5<sup>th</sup> and 7<sup>th</sup> counts and I have no reason to fault the findings of the trial court.

#### **Sentence.**

39. The appellant has faulted the trial Magistrate for considering irrelevant factors and “being emotional” when meting out the sentence. However in his submissions, the appellant’s Counsel seem to have mixed up issues of conviction and sentence. Factors to be considered in sentencing, may come from outside the evidence tendered. That is why in sentencing, the court may take into account social inquiry reports, Prepared by Probation Officers and views of the victims.
40. The propensity of crime is also a valid consideration as one of the purposes of punishment is deterrence. The reference that the money was borrowed came out from the evidence- in- chief of the complainant. Thus, the appellant rhetorical question that “how did the magistrate know the money was borrowed” is misconceived as the Magistrate had a basis for making such an observation. In sentencing the circumstances of the offence is a factor for consideration and therefore the circumstances under which the complainant got money which was eventually defrauded from him was a valid factor in determining the appropriate sentence. The appellant’s complain therefore the trial court took into consideration irrelevant factors has not merit.
41. On whether the sentence was excessive, the Appellant was sentenced to a fine of Kshs. 1,000,000/= on each count or 4 years in default for each count. The sentences were to run consecutively. Count 1 attract a maximum of 7 years imprisonment, Count 2 attracts a life imprisonment,. Count 5 also attract 7 years imprisonment and count 7 attract a maximum of 3 years.
42. On count 7 the maximum sentence is 3 years. The sentence of 4 years was therefore illegal. The same is hereby set aside and substituted with 3 years. Count 1 and 5 attract a maximum of 7 years and therefore, I consider the 4 years in default reasonable. Count 2 attracts life imprisonment and the 4 years was therefore quite lenient and I have no reason to fault it.
43. On the fines, I find the fine of 1,000,000/= to be excessive and I find it necessary to interfere as hereafter.
44. Consequently, the appeal on sentence partially succeed. The same are reviewed as follows:
  - a). Count 1 the Appellant is sentenced to a fine of Kshs. 300,000/= or 4 years in default.



- b). On count 2 the sentence as passed by the trial court is upheld.
- c). On count 5, to a fine of Kshs. 300,000/= or 4 years imprisonment in default.
- d). On count 7 a fine of Kshs. 50,000/= or 2 years in default.
- e). The sentences will run consecutively, and are deemed to have taken effect from the date of the judgment at the trial court.

**DATED, SIGNED AND DETERMINED VIRTUALLY AT ISIOLO THIS 17<sup>TH</sup> DAY OF JULY, 2025.**

**S. CHIRCHIR**

**JUDGE .**

In the presence of:

Godwin Luyundi- Court Assistant

Bernard Wafubwa- The Appellant

Ms. Kagia – For the Respondent

