



**Muli v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 10785 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E002 OF 2024
FR OLEL, J
SEPTEMBER 18, 2024**

BETWEEN

DAMARIS KATILE MULI APPELLANT

AND

REPUBLIC RESPONDENT

***(BEING AN APPEAL AGAINST CONVICTION AND SENTENCE DELIVERED
ON 7TH DECEMBER 2023 BY HON R. GITAU(SRM) AT MAVOKO
CHIEF MAGISTRATE COURT CRIMINAL CASE NO 268 OF 2019)***

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of making a document without authority contrary to section 357 (a) of the Penal Code. The particulars were that on the 24th February 2015, at unknown place within the Republic of Kenya, jointly with others not before court with intent to deceive and without lawful authority or excuse made a certificate of death number 0298066 in the names of Johnstone Mutisya Munee dated 24th February 2015 purporting it to be a genuine certificate of death issued by the department of Civil Registration, a fact she knew to be false.
2. Count two: The Appellant was charged with the offence of making a document without authority contrary to section 357(a) of the penal code. The particulars were that on the 26th February 2015, at unknown place within the republic of Kenya, jointly with others not before court with intent to deceive and without lawful authority or excuse made a certificate of death number 0298287 in the names of Agnes Mbinya Mutisya dated 26th February 2015 purporting it to be a genuine certificate of death issued by the department of Civil Registration, a fact she knew to be false



3. Count 3: The Appellant was charged with the offence of uttering a false document contrary to Section 357(b) of the penal code. The particulars were that on the 9th March 2015, at Okao & Company Advocates at town house 6th floor, Kaunda street within the Republic of Kenya, jointly with others not before court knowingly and fraudulently uttered a forged certificate of death serial number.0298066 in the name of Johnstone Mutisya Munee , deceased, purporting it to be a genuine certificate of death obtained by the department of Civil Registration, a fact she knew to be false.
4. Count 4: The Appellant was charged with the offence of uttering a false document contrary to section 357(b) of the penal code. The particulars were that on the 9th March 2015, at Okao & Company Advocates at town house, 6th floor, Kaunda street within the republic of Kenya, jointly with others not before court knowingly and fraudulently uttered a forged certificate of death number 0298287 in the names of Agnes Mbinya Mutisya purporting it to be a genuine certificate of death issued by the department of Civil Registration, a fact she knew to be false.
5. Count 5: The Appellant was charged with the offence of intermeddling with free property of the deceased person contrary to section 45(1) as read with section 45(2) of the *Law of succession Act*, CAP 160 Laws of Kenya. The particulars were that on the 5th day of October 2016 at Machakos Law Courts within Machakos County jointly with others not before Court with the intent to defraud and without lawful authority or excuse, obtained certificate of confirmation of grant in the succession case no 139 of 2015 to administer Syokimau farm limited certificate number 219 comprising of 10 shares, estate of the late Johnstone Mutisya Munee a fact she knew to be false.
6. Count 6: The Appellant was charged with the offence of forging stamps contrary to section 352(a) of the Penal Code. The particulars being that at unknown date and place within the Republic of Kenya jointly with others not before court made a false impressed stamp used for the purposes of accounting by the public service office of the Assistant chief Matungulu sub location, Matungulu location a department under the ministry of interior and coordination of national government with intent to deceive.
7. Count 7: The Appellant was charged with the offence of forgery of official document contrary to section 351 of the Penal Code. The particulars were that at unknown date and place within the Republic of Kenya jointly with others not before court made an official document i.e letter of administration from the Assistant chief Matungulu Sub location purporting it to be what it was infact not.
8. Count 8: The Appellant was charged with the offence of uttering a false document contrary to section 357(b) of the Penal Code. The particulars were that on the 10th day of march 2015, at the office of the high court of Kenya at Machakos within Machakos County jointly with others not before court uttered a forged letter of administration referenced; the rightful heirs of the deceased Johnstone Mutisya Munee Estates LR no 12715/148 , purporting it to be a genuine letter of administration obtained from the office of the Assistant chief Matungulu Sub location, a fact she knew to be false.
9. During trial the prosecution called seven witnesses who testified in support of their case. The appellant was placed on her defence. she gave sworn evidence and called one witness to support her case. The trial magistrate did consider all the evidence adduced and found the Appellant guilty on count 2 (making a document without authority) ,count 4 (uttering a false document), and count 7 (forgery of an official document). She convicted the appellant under section 215 of the criminal procedure code and Consequently, sentenced her to serve three (3) years on each convicted count and since the transactions were committed at the same time the sentence was to run concurrently.



10. The Appellant being dissatisfied by the sentence filed her petition of Appeal on 02.01.24. and raised the following grounds of Appeal, that;
 - a. The learned trial magistrate erred in law and in fact by convicting the appellant based on insufficient and inconsistent evidence tendered by the prosecution.
 - b. That the learned trial magistrate erred in law when she convicted the appellant without prosecution proving their case beyond reasonable doubt as required by law.
 - c. That the learned trial magistrate erred in law and in fact by finding that some of the counts were not proved beyond reasonable doubt but nonetheless proceeding to rely on the same evidence to convict the appellant.
 - d. The learned trial magistrate erred in law and in fact by accepting the prosecution case as proved without taking due consideration on the defence case.
 - e. The conviction was against the weight of evidence adduced.
 - f. That the sentence by the trial magistrate was harsh and excessive in the circumstance.
11. The Appellant prayed that the conviction and sentence be set aside and the same be substituted with an order acquitting her and/or in the alternative the sentence be reduced significantly.

B. Prosecution Case.

12. The prosecution called seven (7) witnesses. PW1 Felix Musau Mutisya testified that Johnstone Mutisya Munee (the deceased) was his father, who had died in the year 2002 and after burial, together with his mother, they had processed his death certificate and put together all other necessary documents to enable them following up on administration of his estate. They had also agreed that their mother be the administrator of the said estate. His mother passed on in 2011 after they had petitioned Machakos court to grant them letters of administration of their late father's estate, but the grant of letters administration in her favour had not been issued.
13. After their mother's death, he started to peruse documents within their father's house, at Mitamboni and came across a police abstract which indicated documents had been lost and that report had been made at Kamukunji Police Station. The lost documents were 3 log books, share certificates and other personal documents. He also came across an allotment letter for a property in syokimau, a letter from a lawyer informing his father to go collect a title which was ready for yet another property in Syokimau, and a letter from Syokimau Farm limited, inviting members for a meeting. He then decided to find out the status of the said parcels of land and visited at the land's office Machakos, but was not successful in unearthing the registration details.
14. He further decided to follow up on this issue and went to Mavoko Municipality planning department, where he checked the land rates, and found one of the said parcel registered under a different name, which was Damaris Katile Muli. The records at the said office indicated that, she was paying rates. At this point, he decided to go to the police-DCIO to seek assistance. Investigations commenced, they wrote their statements narrating what had happened and eventually the accused was arrested. The Syokimau parcel of land belonged to his late father and they had been in possession all along, but after making the police report, the land had been fenced with a barbed wire and a structure made of mabati constructed thereon. When they visited the said parcel of land again after two months, they found a fresh concrete perimeter wall had been built around it.



15. He, with the consent of his siblings, had restarted the succession process regarding his father's estate, by applying to substitute his mother's name with his and had seen the accused person for the first time in court. They too were not related with the accused person in any manner and he did not recognize the letter from Assistant chief Matungulu as their home was at Mitaboni -Kathiani and not at Matungulu, which was within Kangundo Sub County. The Assistant chief letter from Matungulu also had indicated one Agnes Mbinya Mutisya, Rosemary Kanini Mutisya and Damaris Katile as beneficiaries of his father's estate, but that information was false as the said persons, were not their family members/relatives and nor did his late father disclosed that he had another family. He had no grudge against the accused, but she had no authority to deal with his father's property.
16. Upon cross examination PW1 stated that he Felix Musau Mutisya (produced his identity card for inspection) and was not Felix Mutisya Munee. He was 52 years of age and was the 1st born son of the deceased. He knew, Elizabeth Ndinda Mutisya who was his sister and reaffirmed that his father, Johnstone Mutisya Munee died in 2002 and his first name was not Johnson as indicated in the death certificate marked as MFI-1. His deceased father, used to reside at Mitaboni and had one wife known as Beatrice Syokau Mutisya. He did not know one Agnes Mbinya Mutisya and also was not aware if she was his late father's wife. He never heard of her or seen the said Agnes Mbinya Mutisya before.
17. PW1 further stated that, had found documents relating to the parcels of land in Syokimau, in his father briefcase and the police abstract reporting the lost title had been issued in 1981. When he went to inquire at Mavoko planning office, he discovered that the suit parcel had been registered in the accused name, but was not aware when she started to pay land rates. He also reaffirmed that the allotment letter he found were issued by syokimau farm limited and the allottee was his father Johnstone Mutisya Munee. Amongst the documents discovered was payment receipts for share certificate and a letter written from an advocate informing his late father to go collect his title deed.
18. After discovery of the fraud perpetrated, he had reported the matter for investigations in 2019. In reexamination, PW1 confirmed that he was close to his father, who was lawfully married to Beatrice Syokau Mutisya, were blessed with seven (7) children, he had no other family and certainly was not he married to Agnes Mbinya Mutisya. During his life time the deceased had told him about the land parcel at Syokimau and the succession process relating to his estate was still ongoing. They had obtained the grant of letters of Administration, which he marked as MFI 7(a) & (b).
19. PW2, Elizabeth Ndinda Mutisya, testified that PW1 was her elder brother. Their father was Johnstone Mutisya Munee who died in 2002 and their mother was Beatrice syokau Mutisya and she passed on in the year 2011. When her father died, PW1 took charge of the family affairs and it remained so even after their mother died. Their father had misplaced certain documents relating to his parcels of land at syokimau and reported the loss at Kamkunji police station. PW1 had come across the relevant documents after the death of their father and started following up to confirm the status of the said parcels of land. He checked at Machakos lands office and Mavoko county planning office and discovered that land that rates for the said parcel of land was being paid by the accused person.
20. They visited the suit parcel of land and made a decision to follow it up legally to enable the family reclaim it. Later a person known as Noor and two ladies had come to their home to see PW1 and had purported to have in their possession, the passport of their deceased father. They also claimed to have possession of various documents related to the said parcel of land, which showed that the suit parcel belonged to the accused person. Noor wanted to purchase the said parcel of land and had asked the accused for a copy of her National identity card. He noticed that her names in the said national identity card differed from their father's name and that is what prompted him to look for the complainant's family. PW2 vehemently denied that the accused was her sister or relative and reaffirmed that her father



did not have any other family apart from their nucleus family. She further denied that her late father was ever married to one Agnes Mbinya Mutisya

21. Upon cross examination PW2 stated that she knew the land in Syokimau existed and PW1 had taken her to view it in 2019. Her father's name was Johnstone Mutisya Munee and she did not know anybody by the name Johnson Ndunda Mutisya nor did She know or get to meet the person who wanted to purchase the said parcel of land, Noor and had only talked to him on phone. Initially when their father died, they did not follow up on the land parcels at Syokimau, and had only done so after PW1 had discovered land ownership documents related thereto in their deceased father's briefcase. PW2 also reiterated that her late father did not have any other family and indeed if such a family existed, they should have attended his funeral, but that was not the case herein
22. PW3, Jimmy Munyao Mutisya, testified that that PW1 was his elder brother and their father died in 2002, while their mother died in 2011. PW2 was also his elder sister and he had got to know about this case through his elder brother PW1, who was the administrator of their father's estate. PW1 had discovered documents showing that the suit parcels of land belonged to their father, but upon inquiry at Mavoko planning office, had discovered that the same were registered in the name of the accused. When his father died, he was in form 2 and was not aware of the said parcels of land but the documents discovered by PW1 proved the deceased ownership of the same. While following up on the said parcel of land, one Noor and two other ladies had visited PW1 and proposed to purchase the said parcel of land but they did not agree to his proposal. Noor had also told him that the accused was their sister, and one Agnes Mbinya Mutisya, their step mum, but to his knowledge that was not true.
23. Upon cross examination PW3 confirmed that he visited the suit parcel in April 2019, when it was vacant, but when they subsequently visited the same parcel in July 2019, found that it had been fenced. They were born six (6) siblings and his father's name was Johnstone Mutisya Munee and not Johnson Mutisya Munee. Further his late father was not married to Agnes Mbinya Mutisya and he too did not know the accused person before court. He also confirmed that documents in possession of PW1 confirmed that the suit parcel of land belonged to their late father and the family had authorized him to follow it up and recover the same on behalf of the estate.
24. PW4 Joyce Wambui confirmed that she worked at Ministry of interior civil registration as a civil registration officer and had worked there for 20 years. She had received a letter from Mlolongo DCIO, seeking to have them verify the death certificate serial No 0298066, Entry No 261219642 attached to the said letter, was the death certificate for a deceased person named Johnson Mutisya Munee. At this point the defence counsel objected to the witness referring to the said letter on grounds that they had not been supplied with the said letter. The witness was stood down and PW1 & PW2 were recalled for cross examination as the prosecution had previously been allowed to amend the charge sheet with respect to count 1, 2 & 8 to correct the deceased name in the charge sheet from Johnson to the correct name of Johnstone. Both of them clarified that their fathers name was Johnstone Mutisya Munee as seen in MFI 3, and MFI 5. Initially he was known as Lucas Mutisya Munee and the same was indicated in the payment receipts made to Syokimau farm limited and African Brotherhood church dedication certificate of their brother Jimmy Munyao Mutisya, but at one point he had changed his name to Johnstone, though they did not have a poll deed for the said name change. Both PW1 and PW2 confirmed that Lucas and Johnstone referred to the one and the same person, who was their later father.
25. PW5 Inspector Iranda Masiko testified that on 10.06.2019 their lab received an exhibit memo under the escort of PC Henry Bosire of CID Mlolongo. The memo form was stamped and signed as acknowledgement of receipt of exhibits in their lab. The same request was processed and examined by John Munide SSP, a fellow forensic officer, who he had worked with for six (6) years and was allowed



by court to produce his report dated 18.06.2019 by virtue of section 72 as read with section 77 of the [Evidence Act](#).

26. Mr John Muinde SSP, had compared the handwritings on Exhibit Memo marked A with the known handwriting of Joseph Munyao presented on Exhibit memo marked B1-B2 and formed the opinion that they were not made by the same authors. Similarly, he subjected the stamp impression arrowed in red ink on the Exhibit marked A, with the known stamp impression arrowed in red ink on Exhibit B1-B2 and formed the opinion that the stamp impressions were not made by the same machines. The questioned letter marked Exhibit A was not authentic.
27. The methodology applied was to subject the handwriting to image enhancement and magnification procedure using an instrument called VSC6000 and I-D for inspection of minute's individual characteristic for absolute identification. He had also subjected the stamped impressions to superimposition procedure and they did not fit. He considered possibility of natural variations that can be caused by time spans the writings were made, age , factor, sickness poor sight, natural per failures, intoxication by alcohol and the writing instruments to make his conclusions. PW5 produced the document examiner report as Exhibit 11 and identified the attached Exhibit memo (MFI 8) and attachments as MFI 13(a) &(b).
28. Upon cross examination PW5 stated that he was a chief inspector of police and had 6 years' experience as a trained forensic examiner. The complainants name in the memo Exhibit memo form was Felix Mutisya Mumo and the memo stated that they did not manage to get the requested standard specimen of Joseph Munyao because by then he was deceased. He was not involved in the actual examination of the exhibits and the said Exhibit 11 had been prepared by Mr John Muinde SSP and approved by another examiner known as Chief Inspector Alex Mwangela.
29. PW6 Paminius Makari Ombara stated that he was an advocate of the high court of Kenya and that officer's from DCIO Mlolongo had called him and sent a message inquiring if they knew about documents used to prepare letter of administration of the complainant's father. The document's availed to him by the accused was the original certificate No.219 for Syokimau Farm Limited, which was used to file Machakos succession [No 139 of 2015](#). He confirmed that, the accused came to his office sometime in 2015 and had given him the original certificate of the said parcel of land, he made a copy of the original certificate, certified it and returned the original to the accused. He only came to know the accused, then as a client and she did instruct them to file the succession cause for her. Later he learnt that she had applied to self-represent in court, and as a firm, had abandoned representing her in the said succession cause.
30. PW7 Dominic Musau Musyoki stated that he was the area chief of Kyeleni location and had held the said position for the last six (6) years. He had received a letter from DCI Athi river requesting him to explain if he knew the late Joseph Ndamuki Munyao (deceased), to which he replied that he knew him as he had worked with him from 2014, but as at the time he was testifying the said Joseph Ndambuki Munyao had passed on. The DCI officer's had further showed him a letter alleged to have been written by the deceased. Since they had worked together for a long period of time, he was familiar with the deceased handwriting and signature and in his opinion the said letter (MFI 8) had not been authored by the said Joseph Ndambuki Munyao. Further PW7 also confirmed that he did not know the accused and/or the family of the late Johnstone Mutisya Mune as they were not residence of his area.
31. PW8 PC Henry Bwire testified that on 26.03.2018, PW1 Felix Mutisya accompanied by two of his siblings, had made a reported at Mlolongo Police station that plot No 49 under LR 12715/148 situated in Syokimau had been illegally transferred to the accused and the same had been fenced off and a temporary iron sheet structure built thereon. PW1 also reported that he had visited Mavoko Lands



- office and after numerous visits he had learnt that indeed transfer of the said parcel of land had been effected using documents issued from Machakos High Court. They wrote a letter to court seeking certified copies of the documents used to obtain grant, by the accused which legally allowed her to inherit the said parcel of land. They obtained the court documents to wit; introduction letter by the chief, death certificate entry no. 261217435, Serial No 0298287 in the name of Agnes Mbinya Mutisya, death certificate entry no. 261219642 Serial No 0298066 in the name of Johnson Mutisya Munee, certified copy of the certificate of confirmation of grant issued in Machakos High court on 19.10.2021 by Justice E Ogolla- confirming that the accused was the legal heir of the suit parcel of land.
32. The complainant had earlier furnished them with a certificate of death entry No 2103115 serial No 742834 in the name of Johnstone Mutisya Munee and the certificate of death for Beatrice Syokau Luke certificate No 225863 registered on 28.10.2011. Having reviewed the letter of the chief (MFI 8), they opted to also submit it for further scrutiny/forensic examination. Before forwarding the said letter, they discovered that the chief who had purportedly authored (MFI8) had died and they did request the current chief to provide them with specimen handwriting and signature of the deceased chief for comparison. The letter (MFI 8) bore an official stamp of the chief and his name was Joseph N Munyao and his official signature appended thereon. In the memo he had asked the report to show whether the handwriting and stamp on the questioned document/letter was made by the same author as compared with the known handwriting and stamp on exhibit B1 and B2, which was also a sample of the deceased chief handwritten letter, officially obtained from PW7. The document examiner in his report opined that the documents were made by different authors
33. Further they wrote to the civil registration office-Nairobi and sort verification and authenticity of the both sets of death certificates. For the complainant's parents; Johnstone Mutisya Munee and Beatrice Syokau Luka and also the death certificates filed by the appellant in the succession cause for Anges Mbinya Mutisya and Johnson Mutisya Munee. The said department vide their letter dated 16th April 2019, did respond and determined that both the death certificates of Johnson Mutisya Munee and Agnes Mbinya Mutisya were not issued from their office hence were not a true copy from their records.
34. PW8 further testified that to prove that indeed their father owned the suit parcel of land, PW1 had provided them with a police abstract dated 14th July 1981, where there father had reported loss of documents amongst them a share certificate No 219 dated 31.01.1980, 3 log books, a driving license, brief case, personal cheque books and share certificate which numbers were not particularized. PW1 furnished him with a letter of allotment in the name of Johnstone Mutisya Munee dated 3rd August 1981 issued by Syokimau Farm Limited as well as the rates receipt paid by Lucas Mutisya Munee dated 05.05.1981. PW1 had also obtained grant to the estate of Johnstone Mutisya Munee In Machakos succession cause No 321 of 2004 and also had correspondences from their advocate relating to the suit parcel of land and estate matters. They did their investigation and on 25th April 2019, arrested the accused within Nairobi CBD and had her arraigned in court on the next day. PW8 produced into evidence all prosecution document's into evidence as Exhibit P1 to P18 (except Exhibit P11, the Document examiners report earlier produced).
35. It was also his finding that the accused person was not related to the complainants and the complainant's fathers name was Johnstone Mutisya Munee and not Johnson Mutisya Munee as presented by the accused person accused. Further the search at the civil registry had revealed that the death certificate of Johnson Mutisya Munee did not originate from the said office and thus it was a forgery. In the course of investigations, PW8 stated that he did visited the suit parcel of land and found people of Somali origin in occupation but could not establish on whose authority they were on the said land. He had also made effort to get official communication from Ardhi house, but were not successful. On his last visit, to the said office, they were notified by the registrar that the parcel no LR



12715/148 was not in their records. He concluded his testimony in chief by stating that the author of the documents in issue could only be known by the accused person as she was the one who presented them to the firm of Okao and Company Advocates to enable her process the succession process she undertook.

36. Upon cross examination PW8 stated that PW1 gave him Exhibit 1. and it was indicated therein that Johnstone Mutisya Munee died on the 8th March 2002. His family had commenced administration of his estate vide, Machakos Succession cause 321 of 2004 and grant of letters of administration issued, but was unaware if the said grant had been confirmed. He admitted that he did not know of any other assets of the late Johnstone Mutisya Munee other than the land in issue and that Syokimau farm limited had since been wound up. He also had nothing to show that the police abstract was genuine and nor did the said abstract particularized the share certificate number that had been lost. Exhibit 14b was not a genuine document for it bore the name Johnson Mutisya Munee and that was the document used by the accused to obtain the grant. The complainants also never provided him with a deed poll confirming that Lucas Mutisya Munee and Johnstone Mutisya Munee were one and the same person, but based on documents presented he believed so. He had also opted to charge the accused with forgery as documents presented to Okao Advocate were not genuine.
37. In re-examination PW8 confirmed that the real beneficiaries of the deceased were the complainants and to the best of his knowledge Johnson Mutisya Munee did not exist and the death certificate used by the accused was proved by the civil registration department to be a forged document. The complainants had also explained that their deceased father was initially known as Lukas Mutisya Munee and later changed his name to Johnstone Mutisya Munee and document's in their possession proved that he owned the suit parcel.

C. Defence Case

38. The appellant was placed on her defence. She opted to give sworn evidence and called one witness in support of her case. She stated that she was born in 1984 and was the daughter to one Rosemary Munyiva Mutisya, who was daughter of Agnes Mbinya Mutisya and her father was David Muli Ndambuki. Her maternal grandmother, Agnes Mbinya Mutisya was married to Johnson Mutisya Munee. According to the appellant, her mum left the country when she was 2 years old and she has never seen her since and had been raised by her grandparents. Since her grandparents could not afford to pay her school fees, she went to look for her biological father and was able to apply for a national identity card using his name. Unfortunately, in 2007 her father also passed on and she had to do odd jobs in Nairobi to survive.
39. In 2013, Nicholas Matheka, her grandmothers brother informed her that there were documents her grandmother had left with him relating to a land in Syokimau. Together with Nicholas, they went to Syokimau Farm limited offices, where she presented the said documents and an official of the company, one Paul Masila confirmed that indeed her grandfather owned a property there. In 2015 she commenced the title processing, her uncle gave her the share certificate, receipt for payment of land, letter of allotment, Identity card in the name of Johnson and two death certificates of her grandparent's. She then instructed the firm of Okao and Company Advocates to obtain a grant of letters of administration for her and after two (2) years without the conclusion of the matter, she opted to pursue it personally. She obtained the grant in Machakos succession cause No 139 of 2015 and after obtaining the grant she went to the lands to process the title but was told the suit parcel had another title in the name of Amina Abdalla and that the said Amina Abdalla had not used original documents to obtain its title/lease. She was later arrested before she could pursue the matter further. She denied having authored the death certificate in the name of Johnson Mutisya Munee and that of



Agnes Mbinya Mutisya and that she obtained them from her grandmother's brother Nicholas Matheka together with the chief's letter.

40. Upon cross examination the appellant stated that Nicholas Matheka had died in the year 2017 and he was the one who gave her the documents in question. She procured the deed plan for the land in readiness to obtain the title as she was the only surviving beneficiary of Agnes Mbinya Mutisya and Johnson Mutisya Munee. One Mr Paul Masila could confirm her heritage as they were neighbors with her grandparents at Syokimau and after her grandmother's death she had relocated from Syokimau to Kathiani but had also sold the land at Kathiani land to cater for Nicholas medical bills. The appellant denied authoring any of the documents used to enable her obtain grant for her grandfather's estate.
41. DW2, Paul Masila, testified that he was one of the administrators of Syokimau Farm, which was wound up in 2013. He produced the Kenya gazette notice dated 08.08.2013, newspaper notification and minutes of the company's AGM meeting, where he was appointed as an administrator. It was his testimony that he knew the accused since she was young and lived with her grandfather Johnson Mutisya Munee who was a member of Syokimau Farm from 1972 until his demise. He had the original member register of Syokimau Farm and Johnson Mutisya Munee was member No 219 and was allocated plot no 49 under share certificate No 219 and owned 10 shares from No 2181-2190. Each member had also paid 1500 for surveying. In their register, they had a member called Lucas, but he had sold and transferred his shares to Johnson Mutisya Munee. DW2 referred to the prosecution documents used to prove that the suit parcel belonged to Johnstone Mutisya Munee and in his opinion, the said documents were not authentic. The late Nicholas Matheka had taken the death certificate of Johnson Mutisya Munee and certificate of confirmation of grant to their office, and later got to know that Johnson had another family at the time of his burial in Mitaboni. Later, had met the accused person after he was informed that she had been arrested and confirmed that the accused and her grandmother were residing at the Syokimau farm.
42. Upon cross examination DW2 stated that he joined Syokimau Farm in 1967 and became a member in 1984. He sold his shares, and later bought others and was member no 329. He had at some point served as the company secretary and therefore knew how the company records were kept. He reiterated that the prosecution set of documents were not genuine as they had no member known as Johnstone Mutisya Munee and/or lucas Mutisya Munee and to the contrary, it was the records he had produced that were genuine. DW2 also confirmed that his name, that of P.M Mbabu and Mackenzie Mutuku who were purported to be board members were all not in the members register. He also admitted that at page 18 of the purported original member register, the chairman's signature was not legible and the same also pertained to page 26 of the register which had part of the chairman's signature cut off. He denied knowledge of Johnson Mutisya Munee having his residence at Kathiani and/or that had a daughter by the name Rosemary Munyiva, but later saw them with a child called Katile
43. The trial magistrate did consider all the evidence adduced, the parties submissions and found the Appellant guilty on count 2(making a document without authority) count 4 (uttering a false document) and count 7 (forgery of an official document). The trial court proceeded to convicted the appellant under section 215 of the criminal procedure code and sentenced her to serve three (3) years on each convicted count. Since the transactions were committed at the same time the sentence was to run concurrently.

E. Appeal Submissions

44. The Appellant filed submissions on 26.02.2024 and summarized the issues for determination as to whether the prosecution had proved its case against the appellant to the required threshold in law on the charges that she had been found guilty and whether the sentence was too harsh in the



circumstances. The appellant urged the court to evaluate all the evidence adduced afresh and arrive at its own independent conclusion as aptly stated in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968]EA 123 .

45. It was submitted that the prosecution has the burden of proving its case and not the accused to prove her innocence and the issue at the heart of the appeal was whether the prosecution had discharged the burden to prove that the appellant had made a false document contrary to Section 357(a) of the penal code and hence the 4th count of uttering a false document contrary to section 353 of the penal code. The circumstances which resulted to the charge revolved around the appellant obtaining of death certificate and chief's letter to enable her succeed the estate of her deceased grandfather. The trial magistrate had heavily relied on the evidence produced by PW8, the investigating officer, especially Exhibit 9(a) & (b) to convict the appellant, but faulted this finding as PW4 the officer from civil registration department was stood down and never produced the said letters from their custody and being the author of the said documents, PW4 should have been recalled to produce the same. The trial magistrate should therefore not also have been placed reliance on Exhibit P 13(a) & (b) as PW5, the forensic document examiner in cross examination had testified that he could not tell how the said documents were obtained.
46. That in order for the prosecution to be successful, they first had to establish that the death certificate was made and/or executed without lawful authority of the complainant and the department of civil registration and then secondly, prove that the appellant did so with intent to deceive. It was only PW4 who would have proved if indeed the said death certificate was genuine or not and since she did not testify, that fact remained unproved and therefore an inquiry as to the makers state of mind as to establish whether she had intent to defraud was therefore rendered moot. Reliance was placed in the case of *Joseph Mureithi Kanyita v R* {2017}e KLR, where these principles had been discussed.
47. It was submitted that from the prosecution evidence on record, no witness had pointed an accusing finger on the appellant that she unlawfully made and/or procured the two death certificates but rather offered evidence trying to prove, which set of death certificate presented to court was genuine. It therefore could not be gainsaid that the conviction of the appellant, was based on weak circumstantial evidence and therefore not proved beyond reasonable doubt. Reliance was placed on *Sawe Vrs Republic* (2003) KLR 364, *Pius Arap Maina Vrs Republic* (2013) Eklr & *Elizabeth Waithiegeni Vrs Republic* (2015) eKLR.
48. To the contrary appellant did give an explanation of how she came in possession of the death certificate and the appellant defence unfortunately was not considered by the trial magistrate while arriving at her decision and this was a serious misdirection as the appellant had stated how she came into possession of the said documents.
49. With regard to the charge of uttering a false document contrary to section 357(b) of the penal code, it was incumbent on the prosecution to prove two ingredients; that the document is false and that the accused person was aware of the same. The elements were not proved according to the appellant and she ought to have been acquitted. The trial court had further erred when she relied on the evidence of PW5, PW6 and PW7 to convict the appellant on the charge of forgery. PW7 was not a handwriting expert, PW5 who examined the documents sated that the specimen handwriting of Joseph Munyao could not be obtained because he was deceased and could not tell how Exhibit 13(a) & 13(b) were obtained. The offence of forgery was therefore not established and the appellant prayed that she be acquitted of all the charges and she be set free.
50. On the sentence melted, the appellant submitted that based on the nature of the offences, the trial court should have called for the probation report before sentencing her and that the trial magistrate did not inquire into her capacity to pay fine before imposing non-custodial. The offence does not stipulate



a mandatory minimum sentence and the court thus has discretion to impose a lesser sentence or fine, especially given that no extraneous circumstances, were shown to exist. The appellant thus urged the court to take the view that the appellant deserved a lesser sentence.

51. The Appellant urged this court to allow the appeal and overturn her conviction which she was believed not to be based on any cogent evidence.

E. Analysis and Determination

52. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by The Court of Appeal case of Okeno – VS – Republic (1972) EA 32 where it was stated as follows: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.

53. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

“The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not.”

54. Having considered the lower court record, the grounds of appeal and the submissions of the parties, I find the issues for determination are ;

- a. Whether the prosecution proved its case beyond reasonable doubt.
- b. Whether the sentence should be reviewed

55. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is



possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

56. In this case the accused was charged with 8 counts of making documents without authority, uttering false document, forging stamps, forging official documents, intermeddling with the estate of a deceased person and also uttering a false document and was eventually was convicted of making document without authority contrary to section 357(a) of the Penal Code; uttering false document contrary to section 357 (b) of the Penal Code and Forgery of official document contrary to section 351 of the Penal Code.
57. The offence of making a document without authority and uttering a false document is provided for under section 357 of the Penal Code which as follows:
- “357. Any person who, with intent to defraud or to deceive –
- (a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or
 - (b) 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.”
58. That offence is committed by the making, signing or executing a document, electronic record or writing, for or in the name of another person. In addition, the making, signing or execution must be without lawful authority or excuse, and with the intent to defraud or deceive. See Joseph Muerithi Kanyita Vrs Rep (2017) eKLR
59. The appellant under county two and four was accused together with others not before court, with intent to deceive and without lawful authority or excuse, made the death certificate Number 0298287 of Agnes Mbiya Mutisya dated 26th February 2015, purporting it to be a genuine certificate of death issued by the department of civil registration, a fact she knew to be false. Further on count four, she is said to have uttered a forged death certificate Number 0298287 under the name of Agnes Mbiya Mutisya, deceased, purporting it to be genuine certificate of death obtained from the department of civil registration.
60. PW8 in his evidence in chief, confirmed that in the course of their investigations, they had submitted the death certificates of Johnson Mutisya Mune and Agnes Mbiya Mutisya to the civil registration office’s for authentication and vide their response dated 16th April 2019, the said death certificates were confirmed “ not to be a true copy of the register of death held in the office and therefore not ascertainable.” The said evidence was admitted as Exhibit 9(a) & (b). It was also proved that the appellant had submitted these documents to PW6 and he had used the said documents to file Machakos Succession cause No 139 of 2015. The prosecution had thus proved the said documents were not genuine. Further it was also proved that the appellant used these documents to file Machakos succession cause No 139 of 2015 and while at it also used a forged chief’s letter. The purpose for doing so was obviously to defraud the complainants of their father land and also to use the grant to deceive the lands office that she was the legal heir of the suit parcel. The ingredients of the offence were thus proved by the prosecution and it was on the appellant rebut this evidence
61. DW1 testified that in 2013, one Nicholas Matheka, Agnes Mbiya’s brother informed her that there were documents her grandmother had left with him relating to a land in Syokimau. Together they went



to Syokimau Farm offices where she presented the documents and an official of the company one Paul Masila confirmed that indeed her grandfather had a property there. The said Nicholas Matheka gave her a share certificate, receipt for payment of land, letter of allotment, Identity card in the name of Johnson and two death certificates to enable her process the suit parcel title deed. In 2015 she commenced the title processing and instructed the firm of Okao and Company Advocates to obtain a grant for her and after two years without the conclusion of the matter, she opted to pursue it personally. She obtained the grant in Machakos succession cause No 139 of 2015 and thereafter went to the lands office to process the suit property title, but was told that it had another title in the name of Amina Abdalla and that the said Amina Abdalla had not used original documents to obtain it. She was arrested before she could pursue the matter further. She denied having authored the death certificate in the name of Johnson Mutisya Munee and that of Agnes Mbinya Mutisya and reiterated that she had obtained them from her grandmother's brother Nicholas Matheka together with the chief's letter.

62. The appellants defense was escapist and she did not prove that Nicholas Matheka had given her the death certificate in question. It was her evidence that he had called her in 2013 and purported to have given her document's relating to the suit parcel of land and also accompanied her to Syokimau Farm limited to confirm if indeed her purported grandfather owned the suit parcel. They presented the documents to the officials of the said company and indeed it was confirmed that her grandfather owned the said parcel of land. The death certificate's in question (Exhibit P16 & P17), which were proved to be fake, were compiled from entry/return in the register of death CA 32673/C of 26/2/15 and CA.32097/C of 23/2/15 and were dated 26.02. 2015 and 24.02.2015. It is obvious that as at 2013, the said Nicholas Matheka could not have had them in his possession as the said death certificated had not been processed. The only logical conclusion to this line of defence of the appellant was that she was deliberately lying about the source the impinged death certificates and her all her evidence must therefore be taken with a pinch of salt.
63. The appellant's evidence was therefore untruthful and she failed to prove how she came into possession of the said death certificate and/or discount, the fact that they were fake document, had been made without lawful authority or excuse, and used the said documents to defraud the complainants family and/or deceive the Mavoko lands and planning department to register the suit parcel of land under her name.
64. The appellant also raised the issue that PW4, the officer from civil registration department was stood down, and did not produced Exhibit 16 & 17 into evidence. That is true, but the said documents were produce into evidence, by PW8, the investigation officer. The key evidence was the letter dated 16.04.2019, which was authored from a civil registration office, and the court could validly rely on the same, based on Section 83 of the *evidence Act*. The appellant also confirmed to have given PW6 the said documents to have him initiate the succession process further confirming that she was the one in possession of the forged documents. Having failed to satisfactorily explain herself, and after considering the prosecution evidence, I do find that the trial court was right in convicting the appellant under Count two and four as they were adequately proved.
65. Under count seven, the appellant was convicted of forgery of official documents contrary to section 351 of the penal code. She at an unknown place within the republic of Kenya, along with others not before court had made an official document i.e. letter from assistant chief, Matungulu sub location purporting it to be what infact, it was not. To determine whether forgery in terms of section 349 of the Penal Code has been proved in this case, one must answer the question whether the prosecution proved the ingredients of the said offence.



66. Phillimore L.J broke down the definition of forgery in R v Dodge and Harris [1971] 2 All ER 1523 as:

“A document is false... if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it or authorize its making ... or if, though made by or on behalf of or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, ... is falsely stated therein; and in particular a document is false:- (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it.”

67. Mativo J in Caroline Wanjiku Ngugi v Republic[2015] eKLR held that:

“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 or engraved.
- ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filling in blanks on a form or altering the genuine contents of the 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 type writer or a computer.”

68. This definition sets out as its first element the need to prove that the person charged was indeed the one who put ink to paper and created the document deemed a forgery. This is further reaffirmed in R v Gambling [1974] 3 All ER 479 where the court held that:

“...‘forgery is the making of a false document in order that it may be used as genuine.’ This definition 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. [...]

Given [...] that each application was ‘false’ was it made ‘in order that it might be used as genuine’? Indeed, what do these words involve in the context of the present case? Clearly they require proof of an intent on the part of the maker of the false document that it shall in fact be used as genuine. We think that they also involve that the untrue statement in the document must be the reason or one of the reasons which results in the document being accepted as genuine when it is thereafter used by the maker. It is this concept which we think



is sought to be expressed in the aphorism – as to the usefulness of which views may differ strongly – that the document must not only tell a lie, it must tell a lie about itself. [...] If this is correct, then it seems to us to follow that in cases such as the present in which the falsity of a document arises from the use of a fictitious name or signature, or both, then that document is a forgery only if, as counsel for the appellant contended, having regard to all the circumstances of the transaction, the identity of the maker of the document is a material factor. [...]

In many cases the materiality of the identity of the maker would be so obvious that evidence would be unnecessary: for example, when the document is a cheque or a bill of exchange and the purported signature of the drawer, or endorser, or the acceptor has been written by the someone other than the person whose signature it purports to be. In other cases, such as the present, evidence would be required, and the materiality or otherwise of the identity of the maker of the document must be a matter for the [court].”

69. PW7 Dominic Musau Musyoki the area chief Kyeleni location, testified that he had been chief of the said area for the last 6 years, and was quite conversant with the handwriting and signature of one Joseph Ndabmbuki Muyao a former assistant chief within his area and they had worked together from 2014. The DCI showed him a letter allegedly written by the said assistant chief (MFI 8), who had since passed on, and he confirmed that the said letter did not emanate from their office and was not written by the deceased chief. He was referred to a different letter MFI 13(b) and he confirmed that the same was written by the deceased assistant chief and he could identify his handwriting, signature and stamp. PW7 also confirmed that the appellant was not a resident of his area.
70. It was PW8 testimony that they submitted Exhibit 13(a) for further scrutiny because they doubted its authenticity. He got a specimen letter earlier written by the deceased assistant chief from PW7, prepared an exhibit memo and forwarded the said document examiner at DCI headquarters for examination. In the memo he had asked the report to show whether the handwriting and stamp on the questioned document was made by the same author as compared with the known handwriting and stamp on exhibit B1 and B2. The document examiner in his report opined that the documents were made by different authors. It is to be noted that the appellant had presented the fake letter of the assistant chief to secure grant under Machakos Succession cause No 139 of 2015 . This evidence was confirmed by PW5 Chief Inspector Iranda Masiko, a forensic document examiner who produced Exhibit 11, the forensic investigation report, which found that when exhibit 13(a) and 13(b) were not made by one and the same person. The prosecution therefore proved that the appellant had used a forged letter of chief to obtain the grant in the said succession cause.
71. The appellants defence was, the same that the said documents were given to her by her alleged grandmother’s brother one Nicholas Matheka, but as stated above, this evidence does not hold true, based on the untruthful nature of evidence the appellant adduced. The appellant also urged the court to find that the assistant chief had died and the specimen used to compare his handwritings were not valid. This argument does not hold water, as PW7 clearly explained how the specimen letter, exhibit 13(b) was procured. He had worked with the deceased assistant chief from 2014, and upon request gave the DCI a sample of a letter, the said assistant chief had written, under his own hand for comparison. The said sample letter came from official government records and its authenticity cannot be doubted. The offence of forgery of official documents was thus also properly proved by the prosecution and the appellant safely convicted of the said charge.
72. The final issues raised in this Appeal was that the trial magistrate did not exercise her discretion in the right manner and ought to have considered passing a lighter sentence, fine and or imposing a



non-custodial sentence. The sentence of three (3) years was excessive under the circumstances and the appellant urged the court to review the same.

73. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

74. The offence of making a document without authority under section 357(a) of the penal code, uttering a false document contrary to section 357(b) of the penal code all attract a penalty of seven year imprisonment, while the offence of forgery of official document contrary to section 351 of the penal code attracts a penalty of three year imprisonment. It has not been shown, that the trial court overlooked some mutual factors or took into account some wrong material or acted upon a wrong principle in sentencing the appellant to serve three years imprisonment and to order the said sentences to run concurrently.

E. Disposition

75. Having considered the entire appeal, submissions filed and the law and also having reevaluated, reanalyzed and reconsidered the evidence afresh, I do find that all the grounds raised in this Appeal are not merited and the same are dismissed.

76. Right of Appeal 14 days.

77. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 18TH DAY OF SEPTEMBER, 2024.

In the presence of;

Appellant present from Machakos women prison

Mr. Mangare/Ms Otulo for Respondent

Susan/Sam Court Assistant

