



**Shipiti v Republic (Criminal Appeal E073 of 2021)  
[2023] KEHC 17693 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17693 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E073 OF 2021  
JRA WANANDA, J  
MAY 18, 2023**

**BETWEEN**

**DAVID AMIKOLAS SHIPITI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged in Eldoret Chief Magistrate's Criminal Case No. 694 of 2015 with the offence of forgery contrary to Section 350(1) as read with Section 349 of the Penal Code.
2. The particulars of the offence are that on or before 24/01/2014, the Appellant, at an unknown place within the Republic of Kenya, with the intent to defraud, forged the signature of Herman Shipiti, in a land transfer document (Eldoret Municipality/Block 21(King'ong'o) 511), purporting it to be genuine.
3. The Appellant pleaded not guilty and the matter proceeded to full trial. Both the prosecution and the defence called 5 witnesses each.

**Prosecution Evidence**

4. PW1, Paul Kimisik arap Sugut testified that he is a resident of Lesero, on 19/05/1980 he transferred 35 acres of his property in Laikipia to Mary Chemaiyo in exchange for ½ of an acre at Huruma, the property in Laikipia was plot No. E3 at that time, the property in Huruma was plot no. 10492, he referred to an agreement dated 19/05/1980, he did not effect the transfer of the property in Huruma in his name but left it property to one Angu Makau to manage it as a trustee, he could not remember what happened in 2013, he remembers that on 29/04/2016 he was called by the land registrar, he was supposed to attend with the Appellant, he had lodged a caution on the property at Huruma in 2014, the property was known as Eldoret Municipality/Block 21 (Kingongo), new numbers had been granted, the property was in the name of Mary Chemaiyo, he knows Herman Shipiti who had the original title of the whole of Huruma, he then referred to the certificate of search dated 18/08/2014, it



was in the name of Herman Shipiti, next he referred to an Agreement dated 20/06/2000, the seller in the agreement is Ezekiel Rono and the purchaser is Austine Juma, PW1 conducted his inquiries and learnt that the sale agreement was fake.

5. He added that on 29/4/2015 they were called with the Appellant by the land registrar but the Appellant did not attend, the registrar told him to leave and wait until such a time that she would notify him, PW1 then went to Australia in May 2016, he came back to Kenya in July 2016, he went to ministry of lands, he learnt that a title had been issued to David Shipiti (Appellant), Herman had passed on in 2015, he did not sell any part of the property to anybody, upon realizing what had transpired, he lodged another caution, he then reported the matter at Eldoret Police Station.
6. In cross-examination, he testified that they swapped properties with his mother-in-law, he however did not have documentation to prove that the plot No. 10492 had belonged to his mother-in-law, regarding a green card showed to him, he stated that it shows that Eldoret/Municipality Block 21C (Kingongo)/54 was produced from subdivision No. 2, he knew that Kingongo has several subdivisions, he did not carry out a search to ascertain that plot No. 10942 originated from which numbers, he was not shown certificate of Mary Chemweno, she did not give him a map, in 2013 the property was not used, it lay utilized, plot No. 10492 produced Eldoret Municipality/Block 21 (Kingongo) 511, the original title was in the name of Haman Sipiti, he did not have a document to show how the original Huruma plot produced the other plot number on subdivision, regarding a letter dated 14/05/2014 showed to him, he stated that it reminded him that if failed to go to the lands office the caution would be removed, he went and paid Kshs 200/-, he was in Australia in 20/11/2015 and came back in August 2015, the caution was removed on 25/05/2015, at the time that he went to Australia the caution was in place. He added that he placed the second caution on 8/08/2016, the green card shows that the title was issued in 1995, he was informed that the Appellant was a labourer of Herman Shipiti who passed on in 2015, he knew that Herman had since passed on, a caution is not supposed to be lodged on a deceased person's property, if the property is in one name he has a right to transfer it to another party. In Re-examination, he reiterated that he went to Australia in 2015, the caution was removed on 2/05/2015, he was in Australia at the time of the removal of the caution, it was removed mysteriously, he attended a meeting before the land registrar but the Appellant did not attend, he could not remember whether Herman Shipiti died while PW1 was in Kenya or in Australia.
7. PW2, Augustine Mwasu Makau, testified that he is a pastor and runs a primary school, the Appellant approached him and told him that the owner of the property next to his might have passed on and he was desirous of selling the same to PW2 and that he had all the necessary documents necessary to effect a transfer, PW2 declined the offer, PW2 told him that he was a Christian and could not do so, later one Wechuli came to PW2's office with an agreement, he asked Wechuli whether he knew Ezekiel Rono, Wechuli said that he had paid Herman some money for the purpose of buying property,
8. He stated further that PW2 later came to know that the owner of the property that the Appellant had told him had passed on was still alive, he came to know that the owner was one police officer Sugut who told PW2 to take care of the property as a trustee, the property had bushes, PW2 fenced the property, he later learnt that the Appellant was the registered owner of the property, the Appellant obtained the title fraudulently, PW2 knew the Appellant's father who passed on in the year 2014, PW2 attended the funeral. In cross examination, PW2 testified that he put a fence to close the path to stop people from trespassing to his property, what he has stated was told to him by Mr. Wechuli, PW1 gave PW2 authority to fence the plot later, the agreement was given to him by Mr Wechuli, the agreement provided that the first registered owner was Herman Shipiti who was issued with the title in 1995, the document refers to Kapkoros B. IT plot No. 2 that produced Eldoret Municipality/Block 22(Kingongo)/51, he agreed that he did not have evidence to show that the property in issue was



- Kapkoros B, Herman Shipiti was a trustee, according to the title deed Herman is the registered owner of the property, Mr. Nyachiro has never told PW2 that the Appellant and Herman appeared before Mr. Nyachiro, he doubted whether David Shipiti is a pastor, if he PW2 was a fraudulent person, he would have bought the property, he agreed that he did not have any document to show that he was holding the property as trustee for Mr. Sugut.
9. PW3, Chief Inspector Daniel Ruto testified that he is a document examiner based at Nairobi CID headquarters, he has a degree in forensic examination, on 2/12/2015 he received a document from DCI Eldoret West, it was accompanied with exhibit memo forms, the document was a transfer form for LR Eldoret Municipality Block 21/Kingongo/511, there were documents marked B1 to B4 with known signatures of Herman Shipiti, they were called upon to establish whether the signatories in CI and CII were made by the same person in B1 and B4, in his examination he found that the signatures were not made by the same person, he prepared his report and signed it on the same 2/12/2015, he then produced the report and other related documents in evidence.
  10. In cross examination, PW3 agreed that he did not know the place where the property was located, he also did not know Herman Shipiti, the signature samples of Herman Shipiti were brought, he agreed that he could not confirm that indeed the signatures that were received were those of Herman Shipiti, he enlarged the signatures to enable him distinguish them, the signature of a person can be different but they have the same characteristics, in CI and CII the person grouped characters but in BI and B2 the characters are written separately and there is spacing, the originals are not in Court as they were produced in another Court.
  11. PW4, Laureen Ngasia Isiaho testified that she is an Advocate, she executed an agreement between the parties, the agreement was prepared by the parties, her work was to execute the same, all the parties were not present, she had handled many matters on behalf of the Shipiti family, one of the parties was not present, the second page of the agreement is dated. In cross examination, she confirmed that in the year 2000 she was still in law school, she did not see consideration exchanging hands, she disputed that she did not execute the first page, she executed the 2<sup>nd</sup> page, Shipiti is not the vendor, the property was held by Shipiti on behalf of others. In re-examination, she stated that when she executes an agreement, she does it on every page, the first page was not executed by her.
  12. PW5, David Wanjama stated that he is a police officer, he was initially at the Eldoret East sub-county in the office of the Divisional Criminal Investigations Office (DCIO) as an investigator, on 18/11/2015 they received a report from PW1 that his land Eldoret Municipality Block 221/Kingongo Parcel No. 511 had been transferred to the Appellant. on 20/11/2015, he recorded the statements of PW1 and PW2, he received an exhibit from PW1 being a transfer document that transferred the land from Herman Shipiti to the Appellant, the transfer was undated, he was also supplied with a caution dated 18/11/2014, he also referred to a sale of land agreement for Ezekiel Rono and Austine Juma Wechuli dated 20/06/2000, he was also given a copy of the green card, a sale agreement dated 19/05/1980 and a certificate of official search, he established that Ezekiel Rono does not exist and Austine Juma Wechuli was not aware of the agreement, he found out that he was a boda boda rider. He stated further that he inquired from the Advocate who executed the agreement and she confirmed that the parties did not appear before her at the time of execution, PW5, Mr. Makau suspected that there was fraud and took it upon himself to confirm the owner, he found the sample signature of the known Herman Shipiti, he wanted the document examiner to compare the signatures on the land transfer with the known signatures of Haman Shipiti, the report indicated that the signature on the transfer form was made by a different person and not Herman Shipiti, on 21/12/2015 the police arrested the Appellant, PW5 was also shown another agreement date 17/01/1997 between Mary Chemaiyo and Ezekiel Rono who established that he was not the purchaser.



13. In cross examination, he stated that the documents that he was given were copies, he was not given a copy of the title, the documents were given to him by PW1, the registered owner according to the title deed was Herman Shipiti, according to PExhibit 1 the property was LR No. 1092 and the size was ½ acres, according to Exhibit DMFI 1 (green card) the size was 0.132 Hectare, the other acre has no dispute, the property that had a dispute was the ½ an acre, the land was fenced, PW1 took occupation of the property, PW5 did not see beacons on the land, he did not see a trust document, the property was 35 acres and was held in trust for Huruma Dairy Farmers' Cooperative Society, he did not establish whether Mary Chemaiyo was a shareholder or a member of the co-operative, he also did not see any mutations, he did not find a member of Huruma Co-operative Society, a caution was placed but the same was removed, he did not do the document trail, all the original documents were in possession of the registrar, Exhibit No. 8 (the transfer form) is undated, he did not know when Herman passed on, he did not confirm from the DC whether Herman did not appear before the DC with the Appellant, he did not establish from Mr. Nyachiro whether the Appellant and the father never appeared before Mr. Nyachiro, the document is not certified as a true copy, the question document he sent to the examiner was not certified, he did not call the land register to authenticate the documents, he did not record the statement of Austin Juma Wechulo (PW4), he was told that it was one of the family members who dropped Exhibit No. 10 (agreement between Mary Chemaiyo and Ezekiel Rono) for execution, she could not confirm that it was the Appellant who dropped it, none of the family members of Shipiti complained against the Appellant, PW1 is not the registered owner of the property complained of.
14. In re-examination, PW5 stated that there were two cautions that were placed in the property, the last one was placed on 27/08/2015, PW1 exchanged the property with Mary Chamiyo, PW5 was not in a position to obtain the trust documents as they were in possession of the Appellant's father, he got a copy of the transfer from PW1, he went to the land register and confirmed the consent of the same, he looked for the identity number of Ezekiel Rono but it did not exist, Paul Kimisik (PW1 – complainant) exists, the land belonged to Mary Chemaiyo initially but he did not have a title deed

### **Defence case**

15. At the close of the prosecution case, the parties were invited to make submissions on whether there was a case to answer. While the Advocate for the Appellant made such submissions, the prosecution did not. Thereafter, the Court found that the Appellant had a case to answer and placed him on his defence.
16. DW1, the Appellant, testified that he was a pastor, he was the owner of the land known as Eldoret Municipality Block 21(Kingongo 511) he was given the property by his father, he has a search for the property, it is dated 22/07/2015, he also had a copy of the green card, the property was owned by his father who is deceased, his name is Herman Shipiti, he applied for transfer, he had the transfer form, it had a copy of his KRA PIN and was executed by M/S Nyachiro Advocate, there is a copy of his identity card, Mr. Nyachiro was not called as a witness, the transfer was done in the presence of his brother and father, the transfer was lodged on 24/04/2014 and the caution was on 2/06/2015, the amount was given on the same date, his father passed on on 15/06/2014, at the time of his father's death the transfer had been signed, the consent was thereafter given. The Appellant then produced the Death Certificate as an exhibit. He stated further that he went to pick a title deed and found a caution having been lodged, it was lodged on 19/09/2014 by PW1, it was removed on 25/05/2015, the Appellant was consequently issued with a title deed on 25/05/2015, on 27/08/2015 PW1 placed another caution, the Appellant was arrested on 17/7/2015, he was produced in Court on 22/12/2015, he was arrested when his title was issued to him, he has a green card, it shows that his father acquired the land, he had 30 acres LR No. Kingongo Block 21/1092.



17. He further stated that he went to look for the original register, the same was opened on 9/11/1992, the property was called Kin'gon'go farm, the signatory was Andira Kibet and the chief was Philip Barno, the first person on the list was Jairo Kiptanui with 762 acres, the second one was Haman Shipiti with 30 acres, the original list is with the area chief, he has not seen Mary in the register of members as well as PW1, the members register was opened on 9/11/1992, the agreement is dated 19/05/1980, the 30 acres was subdivided, Mary Kimaiyo does not appear in the list of purchasers, the property he is claiming is for Kapkoros B., PW1 did not produce a mutation form, PW1 only came to the property when the Appellant's father passed on, the property in dispute is more than ½ acres, PW1 did not produce any ownership documents nor any share certificate, there was no evidence to show that his father was holding land in trust for other members, the Appellant was not mentioned by M/s Isiaho Advocate as the person who did an agreement before their office, he did not know Nicholas or Ezekiel Rono, he was not asked questions with regard to the transfer, the forensic document examiner referred to the transfer forms, his sample signatures were not taken, the documents provided were photographs, the signatures were in the transfer form, he did not know where PW1 got the documents from, Mr. Omboto Advocate was not called as a witness, the Lands Registrar was also not called as a witness, the Appellant's mother passed on, he has brothers, none of them had complained about the land, the property was being used as a children's playground, he fenced the property, no provincial administration officer was called, he did not forge his father's signature, it is possible for a person to have more than one signature.
18. In cross-examination, the Appellant (DW1) agreed that according to the report, the signature in the question document and the sample document do not resemble, there are other purchasers on the ground, his father bought the land from some person, he agreed that he had not produced any sale agreement in Court, he is not aware that Kingongo used to be called Kapkoros B, PExhibit 2 states that Mary Chrono used to stay on the land, he did not see Mary Chemaiyo, he does not know Austine nor the document showing the name, the Appellant did the transfer on 24/04/2014, it is not true that PW1 had gone to Australia and the Appellant caused the transfer at that time, he agreed that in PExhibit 10 (agreement between Mary Chemaiyo and Ezekiel Rono), the vendor is Mary Chemaiyo. In re-examination, he reiterated his agreement that according to the report, the signatures do not resemble, PExhibit 8 (the transfer) was given on 24/04/2014, the green card shows that he is the registered owner of the property, the initial sale agreement remained at the registry, he does not know or recognize Austine, it is not possible that the same land could be sold to Ezekiel Rono and Paul Kimusik (PW1 - complainant) at different, the sale agreement stamp is faded, there is no document showing the transfer from Kipkoros to Kingongo.
19. DW2, Philemon Biret testified that he has been the chief at Kabiret location, Turbo sub-county since 2004, some documents were handed to him, regarding Kingongo Block 21, he did not know whether the sub-chief Huruma had custody of the register, Phillip Barno was the chief then, when the chief retired in 2007, the register was handed over to him DW2. He then requested to produce the register in evidence but the prosecution objected arguing that the same ought to be produced by the maker and even then, it is the original which should be produced. The trial Court agreed and directed that the original document, rather than a copy, be produced and such production be done by the maker.
20. DW4, Sarah Chelimo Maina testified that she is a County Lands Officer in Uasin Gishu, that she received the green card for Eldoret Municipality Block 21 (Kingongo) Parcel No. 511 registered on 6/6/1995 over 10 times, Haman Shipiti was the registered person, the subdivisions were from parcel No. 2, entry 2 was on 19/9/2014 - a caution by Paul Sugut who claimed purchaser's interest under section 73 of the Lands Registration Act, a notice was sent to the Cautioners inviting them to object to or accept removal of the Caution, they failed to attend, the entry no. 4 of 12/06/2015 was a transfer



done to David and Nicholas Shipiti, entry No. 5 was the issuance of the title deed, it was on the same day 12/06/2015, on 27/8/2015 there was entry 6 being a caution by Paul Shipiti. She then produced a copy of the green card as exhibit.

21. DW4, Philip Kipsang Barno, testified that he was the retired chief of Kibyemet location, it used to be called Kapsyo, it was subdivided in 1996, he retired in 2001, the document (register and member's list) he was shown is in the name of Kingongo Block 21 No. 12492, it was a big shamba, they had put members together, the shamba was to be divided, there were 39 members, the document has names, acres and names of the chairman, clerk and treasurer, they (including DW5) signed. Herman is No. 2 and has 30 acres, he knows Herman including his children - Vincent and Paul Suguti, he cannot see his name, the signature is his (DW5), he signed on 15/11/1992. He then produced copies of the register and list of members in evidence.
22. DW5, James Nyachiro, testified that he is an Advocate, he was in Court by virtue of Summons to attend, he was in Court in respect of transfer of land parcel No. Eldoret Municipality Block 21/5116, the land was being transferred by Identity Card No. 3260601 - Hama Shipiti to David Amikoleo Shipiti, the passport photos and KRA PIN were attached, the signatures are his (DW5's), he did not date it because some people take long to take to lands, both parties were before him, nobody has come to his office to record a statement, the transfer, if dated and submitted late, will be charged penalty and can also lapse. In cross-examination, he stated that the transfer bore Herman Shipiti's signature in form of name, people sign using their names, anyone can write a name as a signature, the person transferring wrote the names as signature, he witnessed the signatures, the transfer is dated at the time of lodging it. In re-examination, he reiterated that Herman Shipiti and David appeared before him, one cannot know how many signatures a person has.

### **Judgment of the trial Court**

23. In a brief 2-page Judgment delivered on 16/08/2021, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt and accordingly, convicted the Appellant. On 5/10/2021, the Appellant was sentenced to serve 2 years imprisonment.

### **Grounds of Appeal**

24. Being aggrieved with the trial Court's decision, the Appellant instituted this appeal vide the Petition of Appeal filed on 10/11/2021. 20 grounds of Appeal were cited as follows:
  - i. That the Trial Magistrate erred in Law and fact in convicting and sentencing the Appellant to two years imprisonment.
  - ii. That the Learned Trial Magistrate erred in law by failing to independently analyse and/or evaluate-the evidence before drawing conclusion as by law required.
  - iii. That the learned trial magistrate erred in law and in fact by failing to analyse the evidence of the prosecution and that of the defence and giving reasons for her decision to convict.
  - iv. That the learned trial magistrate erred in law and in fact by writing and delivering a judgement that is defective and offends the principals of the law as it contains no ratio decidendi.
  - v. That the learned Trial magistrate erred in law and in fact by failing to consider the contradictory evidence of the prosecution witnesses called.
  - vi. That the learned trial magistrate erred in law and in fact by trashing the fact that the complainant (PW1) did not have any locus.



- vii. That the trial magistrate erred in law and in fact by failing to consider that the complainant did not demonstrate or prove any ownership over the subject land parcel.
- viii. That the learned trial magistrate erred in law and in fact by not considering the fact that the prosecution failed to call crucial witnesses to wit the advocate who attested to the questioned Transfer document and the land registrar who conducted the transfer process and the advocate who attested to the agreement used as the known signature of the deceased.
- ix. That the learned trial magistrate erred in law and in fact failing to consider that the document examiner relied on uncertified photocopies of both the questioned transfer document and the known signatures of the deceased.
- x. That the learned trial magistrate erred in law and in fact by failing to appreciate and address the challenge of the document examiner's report criteria of examination to wit pen lift and ink as examined documents were photocopies.
- xi. That the learned trial magistrate erred in law and in fact by failing to consider or give weight to the defence challenge to the document examiner evidence in court on the characters, terminal strokes and spacing on both the known signatures of the deceased and questioned documents.
- xii. That the learned trial magistrate erred in law and in fact by failing to consider and address the defence issues on the fact that the documents admitted in evidence to wit the questioned Transfer document and the known signatures were unlawfully and unprocedurally obtained and produced.
- xiii. That the trial magistrate erred in law and in fact by failing to take note and give weight to the defence evidence of the advocate who attested to the questioned Transfer document more so to the effect that the deceased Appeared before him and signed the same.
- xiv. That the learned trial magistrate erred in law and in fact by failing to note that the defence evidence provided and produced by the land registrar (Copy of Green card) under the summons of the court was not challenged by the prosecution.
- xv. That the trial magistrate erred in law and in fact by failing to give weight, consider and analyse the defence case and Appellant's submissions in her judgement or even give any reasons hereto.
- xvi. That the Learned Trial Magistrate erred in law and fact by failing to give any weight consideration, mention or analysis of the defence exhibits provided by the Appellant and his witnesses.
- xvii. That the Learned Trial Magistrate erred in law in fact by relying on and convicting the Appellant on the doubtful and inconclusive evidence of the prosecution witnesses.
- xviii. That the Learned trial Magistrate erred in law and fact by imposing a very harsh and improper sentence in the circumstances.
- xix. That the Learned Trial Magistrate erred in law and fact by convicting and sentencing the Appellant on flawed procedures.
- xx. That the Learned Trial Magistrate erred in law and fact by failing to find that the prosecution had not proved its case beyond reasonable doubt.



## Hearing of the Appeal

25. The Appeal was then canvassed via written submissions. The Appellant filed his submissions on 8/03/2023 through Messrs Mwaka & Co. Advocates while the State-Respondent filed its Submissions on 17/01/2023 through Prosecution Counsel Patricia Kirui.

## Appellant's Submissions

26. Counsel for the Appellant submitted that the Judgement delivered by the trial Court does not contain any analysis of the evidence given by both the prosecution and defence witnesses and does not give any reason why the Court concluded that the Appellant was guilty of the offence, the law and practice is that any judicial officer who is called upon to make a decision must lay the basis for their decision and set out the reasons why he has taken a particular path or opinion or view and which is missing the Judgment delivered.
27. It was Counsel's further submission that the prosecution evidence contained contradictions, that the complainant in her evidence alleges to have purchased the land parcel from one Mary Chemaiyo and that then it was plot E3 but then proceeds to contradict the evidence by saying that the same was plot No. 10492, indeed, PW4 produced an agreement demonstrating that the property was owned by another party, PW1 produced an agreement dated 19/05/1980 but the agreement did not contain the plot number stated in the charge sheet – Eldoret Municipality Block 21 (Kingongo)/511 but rather plot E3 being part of LR 10492 known as Kapkoros B, further, PW4 an Advocate produced an Agreement dated 20/06/2000 showing the land was sold and purchased by unknown people who claimed ownership, PW1 (complainant) was tasked to provide any mutations linking the alleged plot purchased from plot No. E3, LR 10492 Kapkoros B to the one in the charge sheet and owned by the Appellant, he failed to produce any, the investigating officer also confirmed that he did not obtain the same, in his defence, the Appellant called the Lands registrar as DW4 who produced the Green card as DEx1 and which clearly demonstrated that the same was owned by the Appellant and was transferred from his father, it was further claimed by PW1 that he left the property in the care of PW2 and that the same was fenced but still there was no evidence at all given even of the plot that he claimed to have exchanged with the one in question, further, the complainant and PW2 stated that the Appellant's father Herman Shipiti was a trustee and that the parcel was registered in his name as such but they failed to prove that by way of any document of evidence, the assertion that PW1 or the said Mary Chemaiyo ever owned land in the said area was challenged and put down by DW5 (former chief of the area) who produced the original register of the members of the larger King'ong'o Block 21 LR No. 10492 who demonstrated that the Appellant's father was an original member and owned 30 acres on the land, there was no locus for the complainant to bring forth the complaint resulting to the charges as he could not prove any ownership or connection to the subject land parcel.
28. Counsel submitted further that the document examiner told the Court that he received the questioned document - the Transfer of land form - and the known signature of Herman Shipiti who was deceased and was required to determine whether the signatures were made by the same person, in his report, he concluded that they were made by different persons, in cross-examination, he was at pains to explain how ink and pen lift would be applicable in his methodology based on the fact that the documents he used were copies and not originals, his criteria was therefore flawed, the witness admitted that the documents he used were copies, this was buttressed by the evidence of PW5 (investigating officer), it was crucial for the investigating officer to have specimen signatures of the Appellant taken and compared to the questioned document, they failed to do that but still attributed the signature in question to the Appellant, in cross-examination, PW4 stated that the questioned document alleged to bear known signatures of the deceased were obtained from an agreement whose maker was an Advocate



who was not called to testify and neither did he certify the documents as authentic to enable the same to be used as evidence or for the purpose of document examination

29. Counsel added that the prosecution failed to call crucial witnesses and have documentary evidence properly tendered, by PW5's (investigating officer) admission, the transfer forms were allegedly obtained from the lands registry, the transfer had already been undertaken but the same was not certified and neither was the lands registrar called to produce the original or a certified copy, the prosecution failed to call Mr. Omboto Advocate on the matter of the copy of the questioned document used by the document examiner as it was a copy that was uncertified and he was the maker, the prosecution failed the call the maker of the transfer form - Mr. Nyachiro - but instead he came in as a defence witness, he clearly told the Court that the said form was signed in his presence by the deceased person who was known to him, it was an obvious contradiction that the document examiner in his report and evidence used undesirable evidence and wrong criteria and/or methodology, the Advocate who attested the document attributed the signature to the deceased, the Court ignored the defence evidence, it is clear from the evidence of the Appellant that the land belonged to his deceased father - Herman Shipiti and that it was a gift, the Appellant relied on the green card to demonstrate the history of the parcel and disassociate the same from the complainant, this was ignored.
30. DW2 testified that the land belonged to the Appellant and was a gift from their father when he was alive and that the family has not raised any complaint, this evidence was ignored, evidence of DW3 and DW4 - the chiefs and custodians of the original register of the larger parcel before it was subdivided was also ignored, the trial Court further ignored the fact that the Appellant produced a copy of his father's death certificate to prove that at the time the transfer was signed his father was alive, the magistrate trashed the defence evidence, especially that of DW5 (Mr. Nyachiro Advocate) which if taken into consideration would have given the Appellant the benefit of doubt.

### **Respondent's Submissions**

31. The State Counsel submitted that the prosecution proved its case to the required standard, there was proof of ownership by the complainant as he testified that on 19/05/1980, he exchanged his 35 acres of land situated on plot No. E3 in the farm of Lembus Kongosis Ranching Company near Nyahururu with his mother-in-law, Mary Chemaiyo and in return, he was given ½ acre of land situated on LR No. 10492, near Eldoret known as Kapkoros B, he also stated that in 2013, he discovered that there was a sale agreement for the said parcel of land between one Ezekiel Rono and one Austine Juma Wechuli, on 19/09/2014, he placed a caution on the land and a hearing before the Land Registrar was scheduled for 29/04/2015, the Appellant never appeared, an agreement dated 19/5/1980 was produced as PExhibit 1, an application to place the caution produced as Exhibit 2 was later registered, the same was duly registered in the green card (DMF1), PW1 testified that he informed PW2 to take care of the property as a trustee, though the title was not in the name of the complainant, it is clear that he was in occupation, proof of ownership is not an ingredient to proof of forgery, it is evident that the complainant had a purchaser's interest, PW2 (Augustine Mwasu Makau) testified that in the year 2004, he started a school and beside the school was an empty plot, the Appellant came and told him that the owner of the property who is a police officer might have passed on and told him that he was desirous to sell the property since he had all the necessary documents to effect transfer, PW1 informed him that he could not do so as he was a Christian, he also testified that one Paul Kimisik Sugut (PW1) was alive and gave him full authority to use the land until further notice and that in 2013, it came to his attention that the Appellant wanted to sell the land.
32. Counsel further submitted that the prosecution called the relevant witnesses - the complainant, document examiner and the Investigating officer who were the key witnesses required to prove



forgery, on the issue of uncertified copies relied upon by the document examiner, Counsel submitted that original documents subject to his examination were produced in another court case, CR No. 6944/2015 and the same originals could not be produced in the current case, in the exhibits produced, the document examiner clearly indicated (in red) on the documents, that he had seen the originals of the documents, the document produced in Cr 6944/2015 were now public documents pursuant to section 68(l)(e) of the Evidence Act, the document examiner testified that he examined signatures on land transfer document which is/are the questioned samples C1 and C2 (PExhibit 6) against the known signatures of the deceased (B1) in an Agreement for Sale with Boniface Simani, B1-B4 were made by the same person as the pen stroke is the same, the signatures of a person can be different but they have the same characteristics, in his conclusion the document examiner opined that the characteristics of B1 to B4 differ with C1 and C2, the agreement for sale used by the document examiner for comparison with an alleged Transfer in dispute was an agreement signed by PW2 with Herman Shipiti (deceased) and handed over to PW5, the source of the document and the its authenticity was therefore not in doubt.

33. Counsel further submitted that both the prosecution's case and the evidence adduced by the defence was considered by the trial Court in making its determination, regarding sentence, Counsel argued that the same was fair in the circumstances since Section 349 of the Penal Code Cap 63 provides for up to 3 years imprisonment yet only 2 years was given in this case. Counsel added that that all the ingredients required in a charge of forgery were satisfied by the prosecution. He cited the case of Elizabeth Achieng Nyanya -V- Republic (2018) eKLR and added that the document that was subject to the case at the trial Court purported to have been signed by Herman Shipiti is a transfer document, prosecution witnesses proved that the signature alleged to be that of Herman Shipiti on the said document was forged, the forensic document examination report indicated that the signatures were made by different authors, DW5 cannot confirm whether the purported signature on the alleged transfer document is a genuine signature of Herman Shipiti as he is not a document examiner, the Court should therefore disregard the evidence of DW5, evidence of PW2 that the Appellant had tried to fraudulently sell to him the property but he declined is a clear indication that the Appellant had always planned to defraud the complainant, from the evidence adduced by the prosecution witnesses, the Appellant was the one who presented the alleged transfer documents to the lands registry to procure the registration, which documents have been found to be forgeries.
34. Counsel further submitted that the defence theory was that the Appellant, together with his brother and their deceased father went to the Advocate and signed a transfer document and that the signature on the transfer was a genuine signature of their deceased father. Counsel then argued that the Appellant's father died in the year 2014, the only evidence by the defence that the Appellant's deceased father gave the Appellant land was the brother to the Appellant who at the time of arrest was at large but later arrested and jointly with others are currently facing criminal charges in Case No. 940/19 pending before the Chief Magistrates Court in Eldoret, they face charges of conspiracy to defraud, making a false document and 3 counts of forgery, if the two brothers ever went to the Advocate's chambers, then they must have presented an imposter and claimed to be their father, both the Appellant and DW2 were not truthful.

### **Analysis & Determination**

35. This being a first appellate Court, its duty as set out in *Okeno V. Republic* [1972] EA 32, is as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala -V- R* (1975) EA 57). It is not the function of a 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 draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

36. Although the Appellant has preferred up to 20 grounds of appeal, it is evident that most are repetitions and/or duplications which ought to be considered collectively and not independently. Upon considering the memorandum of appeal, record of appeal and the respective submissions presented by the parties therefore, I find the following to be the 3 broad issues that arise for determination:

- i. Whether the trial magistrate failed to analyse and evaluate the evidence and give reasons for her decision
- ii. Whether the prosecution proved its case beyond reasonable doubt
- iii. Whether the sentence was harsh/excessive

37. I now proceed to analyse and answer the issues.

#### **Whether the trial magistrate failed to analyse and evaluate the evidence and give reasons for her decision**

38. It is trite that a judgement must at least contain the analysis and the reasons for arriving at a decision. This gives the parties an opportunity to understand that the matter was heard and all the evidence analysed before reaching a decision. A casual perusal of the impugned judgement immediately reveals that it does not contain any analysis of the evidence at all. This Court, and also the parties, are therefore deprived of the benefit of understanding what informed the final decision. The Appellant is therefore right in arguing that there was no analysis of the evidence in reaching the decision.

39. However, to dismiss a judgement on this ground alone would be unjust as the trial Court stated that it had considered the evidence. Fortunately, the law imposes a duty on this appellate Court to re-evaluate the evidence and the testimonies of the witnesses and independently interrogate whether the trial magistrate had before her a proper basis for reaching the finding that the Appellant was guilty of the offence of forgery. I therefore find that although the Judgment fails to meet the acceptable standards, that alone is not sufficient to nullify it. I will therefore proceed to examine and analyze the next issue.

#### **Whether the prosecution proved its case beyond reasonable doubt**

40. The issue before the trial Court was simply whether the Appellant forged the signature of his father, Herman Shipiti (now deceased) in the impugned land transfer document (PExhibit 6) relating to Eldoret Municipality/Block 21 (Kingongo)/511. Although the parties dwelt much on secondary issues, the alleged forgery was the only issue before the trial Court. This appellate Court will therefore not dwell on matters such as who the rightful owner of the property ought to be or whether the Appellant acquired it lawfully. Those are questions to be determined by the Environment & Lands Court.

41. The relevance of the matter is that presumably it is the said transfer document that was used by the officers at the Ministry of Lands to effect a transfer of the property from the said Herman Shipiti to the Appellant and as result whereof the Appellant was issued with a title deed in his name. From the green card produced in evidence (DExhibit 1), the title deed was issued to the Appellant on 12/06/2015. The land transfer is however not dated and no evidence was tendered on whether indeed it is the same one that was lodged at the lands office and which gave rise to issuance of the title deed.



42. First, I note that the Appellant contends that the complainant (PW1) had no locus to report the complaint that resulted in the charge. Locus standi refers to the place of standing of a party in a matter. In the case of *Alfred Njau v City Council of Nairobi* (1983) KLR 625 where the Court of Appeal held as follows:

“..... locus standi literally means a place of standing and refers to the right to appear or heard in court or proceedings and to say that a person has no locus standi means that he/she has no right to appear or be heard in such and such proceedings”

43. In criminal matters, the issue of locus standi is treated differently as compared to civil matters. Whereas in civil matters the reliefs sought are advanced by one party against another, in criminal matters, once a complaint is lodged and investigations conducted, whether the complainant is directly affected or not does not invalidate the proceedings. Therefore, once it is established that a suspect has committed an offence, it is the state that takes over and prosecutes the suspect regardless of the source of the complaint.

44. I note that, on the face of it, the complainant established a purchaser’s interest in the property in question. This is because the complainant testified that he exchanged his land situate near Nyahururu with his mother-in-law and in return, the mother-in-law gave him ½ acre of the land known as LR No. 10492 allegedly also known as Kapkoros B, which apparently later gave rise to Eldoret Municipality/Block 21 (Kin’gon’go)/511. This latter parcel of land is the subject of the complaint in this case. Further, from the green card and other documents produced in evidence, it is apparent that the complainant lodged cautions on the property on two different occasions and his claim was entered as “purchaser’s interest”. Therefore, if we were to apply the doctrine of locus standi as it is applied in civil matters, he can be considered to have had locus thereby negating the Appellant’s ground of appeal.

45. I agree that the only indicator that the said property is the same as Eldoret Municipality/Block 21/ Kingongo/511 was a statutory declaration made by the complainant in support of his application to lodge a caution and which was produced as PExhibit 2. Although this declaration alone, being a mere allegation, cannot by itself establish sufficient link, that notwithstanding, in my view, there is no requirement for a complainant in a criminal case to establish locus standi before his report can be acted upon, I therefore find that this ground of appeal lacks merit.

46. The Appellant was charged with the offence of forgery contrary to section 350(1) as read with section 349 of the *Penal Code*. Section 349 provides as follows:

“Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.”

47. Section 350(1) then provides as follows:

(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.”

48. Regarding the ingredients of the offence of forgery, in the case of *Joseph Mureithi Kanyita vs. Republic* [2016] eKLR, G.W. Ngenye-Macharia J (as she then was) cited the Court of Appeal case of *Joseph*



*Mukuba Kimani vs. Republic* (Criminal Appeal No. 76 of 83) [1984] eKLR in which it was held as follows:

“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.

49. In *Caroline Wanjiku Ngugi v Republic* [2015] eKLR, Mativo J (as he then was), held 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 filing 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 type writer or a computer.”

50. Before delving into the evaluation of the evidence adduced, the challenge to the criteria used by the document examiner to determine whether the signatures were forged needs to be addressed. This is a crucial element in determining whether the offence was committed and the Appellant raised it in his grounds of appeal.

51. In his report dated 2/12/2015, the document examiner stated that he “subjected the signatures to image juxtaposition and magnification procedures using Video Spectral Comparator (VSC) for better visibility and inspection of individual characteristics for absolute identification”. He further stated that his opinion was based on peculiar characteristics in the writing that provided him with forensic evidence of different authorships, including, signatures initialization and their terminal strokes, signatures construction and their arrangements, natural pen lifts, pen pressure and ink flow, signatures spacing and baseline alignment.

52. According to the Appellant, given that the documents used were copies, the said methodology was wrong. However, the prosecution submitted that these documents were the subject of another criminal matter being CR No. 6944/2015 which contained the originals. On this issue, section 79 of the *Evidence Act* provides as follows:



- (1) The following documents are public documents —
  - (a) documents forming the acts or records of the acts —
    - (i) of the sovereign authority; or
    - (ii) of official bodies and tribunals; or
    - (iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
  - (b) public records kept in Kenya of private documents.
53. On the other hand, section 68(1)(e) of the [Evidence Act](#) states as follows;
  1. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:
    - (e) when the original is a public document within the meaning of section 79 of this Act;
54. [In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased](#) [2016] eKLR, again, Mativo J (as he then was), in interpreting the admissibility of secondary evidence, held as follows;

“My interpretation the above provisions of the [Evidence Act](#) is that secondary evidence as a general rule is admissible only in the absence of primary evidence and when a proper explanation of its absence is given. Such secondary evidence cannot be admitted without the non-production of the original being first accounted for in a permissible manner and only after satisfying the conditions provided for under Section 68 of the Act.”
55. I note that in his said report, the document examiner expressly stated that the exhibits he used to determine the authenticity of the signature were produced at Criminal Case No. 6944 of 2015 in Court 1. For this reason, production of copies thereof was acceptable. However, in my view, such copies ought to have been certified by an authorized officer who would have then been the most suitable person to come to Court, lay a basis for production of such copies and then produce the same in evidence. This is the most logical way to avoid the risk of strangers purporting to get hold of alleged official documents stored in public offices and bringing them to Court to be produced as exhibits.
56. Be that as it may, the record does not show that this issue of the whereabouts of the originals was raised in cross-examination of the document examiner. Similarly, production of the copies was also never objected to. The trial magistrate was satisfied with the witness’ explanation. In my view therefore, the document examiner convincingly explained the whereabouts of the original documents, his explanation that the originals were the subject of another criminal matter and had therefore been produced in that other case was not challenged. In the circumstances, the criteria used in examining the the documents cannot be faulted.
57. The story however does not end there. From the death certificate on record, the deceased (Herman Shipiti) died in the year 2014. The document examination report was prepared in the year 2015 after the death of the deceased. In cross-examination, the document examiner (PW3) admitted that he had no way of confirming that the sample signatures on the Agreement for Sale dated 5/12/2013 which he used as a comparison (PExhibit 7) were actually the deceased’s. It follows therefore that could not also confirm the authenticity of the copy of the agreement. He was simply given the Agreements by the investigating officer (PW5) and told that they contained the deceased’s “known signatures”. The allegation that the transfer contained the deceased’s “known signatures” was therefore



simply a rebuttable presumption. This means that if by any chance it was somebody else, and not the deceased, who had actually signed the 2013 Agreement used as comparison and purported to sign as or impersonate the deceased, then the entire forensic report would collapse. The mere fact that this possibility exists entitles the Appellant to the benefit of doubt. In conceding that he had no way of confirming or authenticating that the signatures on the sample document were in fact affixed by the deceased, the document examiner left the door wide open for many possibilities and probabilities. This is why I find that the Appellant is entitled to the benefit of doubt.

58. It was also not demonstrated that the alleged “forged” transfer was the actually the same one that was used to transfer ownership of the land to the Appellant. The “intent to defraud” as an ingredient of the offence of forgery was not therefore also established.
59. I am also disturbed by the evidence of PW5 (investigating officer) that the transfer document was given to him by PW1 (complainant). From the evidence of PW5, it appears that the document was first obtained by PW2 (as PW1’s trustee) who then handed it over to PW1 who in turn passed it to PW5 and who then handed it to PW3 (document examiner). However, in their evidence, neither PW1 nor PW2 said anything about their being the source of the document as alleged by PW5 nor did they give any indication on how or where they obtained the document from. It is therefore also true that the source of the copy of the agreement that was relied upon by the document examiner as the signature comparison document was unknown to the trial Court as it was not disclosed. For this further reason, again the Appellant becomes entitled to the benefit of doubt.
60. It is true and obvious that to the naked eye, the signatures on the Agreement used as a sample and the signatures on the transfer document the subject of this matter are markedly different and dissimilar. However, that observation alone cannot be conclusive confirmation that they were not signed by the same person. I take judicial notice that depending on their mood, state of health and even deliberately, people can have different looking signatures. Further evidence was therefore needed to be tendered before a conclusion that the signatures were made by different persons could be reached. This is where the document examiner and the forensic Report came in. Unfortunately, the source and/or authenticity of the document that he used for comparison was not conclusively established. Perhaps the examiner should have for further comparison, demanded for additional documents bearing the signatures of the deceased. Had he done so, he would have had a wider pool of documents and signatures to compare with and this would have minimized the possibility of error. For this reason, again, the Appellant becomes entitled to the benefit of doubt.
61. On this issue of benefit of doubt in criminal cases, I quote the statements made by G.V. Odunga J (as he then was) in the case of *Maurice Okello Kaburu & another v Republic* [2022] eKLR in which he stated the following:

“

“56. In criminal cases, it is old hat that the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J in *Elizabeth Waithiegeni Gatimu vs. Republic* [2015] eKLR expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty ... Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not



persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

57. Lord Denning in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say:

“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 proved beyond reasonable doubt, but nothing short of that will suffice.”

62. In this instant matter, according to the document examiner, the distinguishing features were that the “known signatures” had characters that were grouped whereas the signatures in the impugned form did not. While this may well be the correct position, the fact is that if the so-called “known signatures” in the document used as a comparison were themselves not authenticated, then any analysis of the subsequent impugned document is of no value.

63. The Appellant also pointed out that the prosecution failed to call crucial witnesses whose testimony could have given the Appellant the benefit of doubt. The Court is well aware of the pronouncement in *Bukenya v Uganda* [1972] EA 549 that failure to call a crucial witness by the prosecution entitles the Court to make an adverse conclusion against the prosecution’s case. However, the same cannot be considered in isolation, it must be understood within the context of section 143 of the *Evidence Act*, Cap. 80 which states as follows;

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

64. In *Julius Kalewa Mutunga v Republic* [2006] eKLR, the Court of Appeal held that:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see *Oloro s/o Daitayi & others v R.* (1950) 23 EACA 493.”

65. The first potential witnesses mentioned by the Appellant as having been omitted was one Mr. Omboto, the Advocate who allegedly drafted the 2013 Sale Agreement (Exhibit 7) that was used by the document examiner as a comparison for signatures. I agree with the Appellant’s Counsel that Mr. Omboto could have greatly assisted the Court in establishing the authenticity of the agreement and the signatures thereon and whether the deceased indeed signed before him. Had this been done and the



signatures on the agreement authenticated by Mr. Omboto, then a safe basis would have been laid for the document examiner to then proceed to the next stage of comparing them with the signatures on the transfer document. It was not alleged that Mr. Omboto was unavailable nor was any explanation offered on why Mr. Omboto could not be called as a witness. I therefore agree with the Appellant's Counsel that Mr. Omboto was a crucial witness and the absence of his testimony left gaping holes in the prosecution evidence.

66. The other witness mentioned by the Appellant as having been omitted was the land Registrar. I however note that a county lands officer did attend Court and gave evidence as DW4 courtesy of witness summons successfully applied for by the Appellant. The Appellant exercised this liberty and cannot then fault the prosecution for exercising its discretion on its own witnesses. It has not therefore been demonstrated that the prosecution's decision not to call the land registrar was in any way detrimental to the outcome of the case as the county lands officer still testified and provided evidence.
67. There is however also the evidence of Mr. Nyachiro Advocate (DW 5) who was emphatic that both the parties to the transfer document the subject of this matter – the Appellant and his father (Herman Shipiti) – both appeared before him and appended their signatures in his presence. The Advocate maintained this position even under intense cross-examination. Although he was not asked how he identified the parties, the presumption is that they were known to him or if not, then he employed due diligence by examining their identity cards. When asked why he did not date the transfer, he responded that the forms were undated to prevent the imposition of penalties at the lands office or expiring of validity of the document in the event of delays in lodging it at the Lands office. I find this a plausible explanation. In the absence of any contradictory evidence and in the absence of any allegation that the Advocate was perhaps compromised to lie to the Court, I have no reason not to believe that the Advocate was truthful. I also take note that PW5 (investigating officer) admitted that he never made any attempt to find out from Mr. Nyachiro whether indeed the transfer document was executed in his presence.
68. Considering, as per *Joseph Mureithi Kanyita vs. Republic* (supra), that the main ingredients of the offence of forgery are that; the document was false in the sense that it was forged, the accused knew it was forged and that the utterer intended to defraud, in view of my finding that the so-called "known signatures" were themselves not authenticated before they were used as comparisons, I find that the evidence before the Court was insufficient to cross the first hurdle that "the document was false in the sense that it was forged".
69. Accordingly, I find that the prosecution failed to prove its case beyond reasonable doubt and that the Appellant's conviction was unsafe and cannot therefore stand. In the circumstances, I hereby quash and/or set aside the conviction.

#### **Whether the sentence was harsh/excessive**

70. Having found that the Appellant's conviction was unsafe, I need not consider this further issue in respect of the sentence imposed. However, for the sake of jurisprudence, I would only mention that as already set out above, a conviction under section 349 of the *Penal Code* attracts a prison sentence of up to 3 years while a conviction under section 350(1) of the *Penal code* attracts life imprisonment.
71. In light of the foregoing, I would not have interfered with the 2 years prison sentence had the Appellant's conviction been upheld. This is because, inter alia, although section 350(1) of the *Penal Code* provides for a sentence of life imprisonment and section 349 provides for a prison sentence of up to 3 years, the Appellant was sentenced to 2 years' imprisonment which is way below the maximum.



The sentence cannot therefore be described as harsh or excessive. However, since the conviction has been set aside, this finding has no bearing in the end.

**Final orders**

72. The upshot of the foregoing is that I make the following orders:

- i. This Appeal is allowed.
- i. The conviction of the Appellant by the trial Court in Eldoret Chief Magistrate’s Court Criminal Case No. 6941 of 2015 is hereby quashed and the sentence imposed therein set aside.
- ii. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 18<sup>TH</sup> DAY OF MAY 2023**

.....

**WANANDA J. R. ANURO**

**JUDGE**

