Maina & another v Republic (Criminal Appeal E039 & E040 of 2021 (Consolidated)) [2023] KEHC 20505 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20505 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E039 & E040 OF 2021 (CONSOLIDATED)

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

JOSEPH KAMWEA MAINA ..... 1ST APPELLANT

RUTH NYAMBURA KIAMA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The 1st and 2nd appellants herein were jointly charged before the trial court with a total of six (6) counts after the amendment of the charge sheet which was amended vide the orders of 10.012019. In count 1 the appellants were charged with the offence of conspiracy to defraud contrary to section 317 of the *Penal Code*. In counts 2 to count 6, the appellants were charged with the offence of forgery contrary to section 345 as read together with 349 of the *Penal Code*. The said counts were in relation to a transaction involving land parcel No. Nyeri/ Waraza/1245 and the victims of the offence being Phillip Mwangi Gakenya and Margaret Wairimu Ngure.

2. The matter proceeded for hearing and the trial court convicted the appellants in counts 2-6 and acquitted them in count 1. The court proceeded to sentence each of the appellants to serve two years imprisonment in count 2 and one year imprisonment in counts 3, 4, 5 and 6. The sentences were ordered to run consecutively.

3. The appellants appealed against the said sentence vide respective petitions of appeal filed on November 11, 2021 and wherein they challenged the conviction and the sentence by the trial court.

4. The two appeals were consolidated vide the orders of December 7, 2021 and Appeal No. E040 of 2021 made the lead file. Directions were given that the appeals be canvassed by way of written submissions.

5. The appellants filed amended petition of appeal together with their written submissions and wherein they raised grounds to the effect that the trial court erred in law and in fact in convicting them when the prosecution had not proved its case to the required standards; in breaching *the constitution*, statutory law and the rules of procedure and thus compromising their right to a fair trial; in convicting them in count 4 based on suspicion yet no document and evidence was tendered; in convicting them based on a defective charge sheet under counts 2 and 6 when the two charges referred to the same document (charge); in ignoring their defenses and evidence thus compromising fair trial; and in convicting them based on evidence marred by inconsistencies, doubts and contradictions (see grounds 1 -6 of the amended petition of appeal). Under grounds 7, 8 and 9, they challenged the sentence on the grounds that the same was harsh and excessive and that the court overlooked the mitigating circumstances; that the court erred in imposing consecutive sentences yet the offences were committed in the same transactions; and that the trial court erred in not imposing a fine and thus abusing its discretion as provided under the sentencing policy guidelines.

6. The appellants filed submissions in support of the said grounds. Despite each of the appellants having filed individual submissions, they were copies of each other. I will thus summarize them together. The appellants basically submitted that the prosecution didn't prove the elements of the offence facing them as the Investigating Officer testified that their specimen signatures and handwriting for comparison with the questioned documents were not taken for examination. Further that the prosecution had a burden to proof that fraud was committed against the complainant Phillip Mwangi Gakenga and that he suffered loss in relation to his land but in this case it was the bank which suffered loss and not PW1. The appellants basically submitted that failure to subject their signatures to examination was an omission going to the root of the case.

7. The appellants submitted further that the prosecution did not produce the application for consent and thus count 4 was never proved. Further that the charge sheet was defective in that counts 2 and count 6 referred to the same document said to have been forged on August 7, 2014 jointly by the appellants. That, however, since the said offence occurred on the same day and allegedly committed by the same persons and thus arising out of the same transaction, the same ought to have been contained in one count and not two counts. Further that there was no evidence to prove that PW6's stamp was forged as no specimen sample of the said stamp was adduced during the trial. The appellants further submitted that the trial court did not consider their defense to the effect that PW1 appeared before the Land Control Board to acquire letter of consent and thus ignoring DW3's evidence. Further that the sentence meted out was harsh and excessive and was passed without the court considering their mitigation which they had offered and that the said sentences ought to have been ordered to run concurrently and not consecutively as they were committed in the same transaction.

8. The respondent submitted that section 211 of *Criminal Procedure Code* was never complied with in relation to 2nd appellant, as thus, there was a mistrial and the retrial ought to be ordered as against her. Reliance was placed on the case of *Ahmed Sumar -Vs- R* (1964) eKLR. It was submitted that, however, the prosecution's evidence was sufficient to prove the offence as against the 1st appellant beyond any reasonable doubts. On sentence, it was submitted that the same was not excessive as section 349 of the *Penal Code* provides a maximum sentence of 3 years. Further that since the offences were different, committed at different times and thus not in the same transactions, the sentence ought not to run concurrently but consecutively. Finally it was submitted that the court was right in not imposing a fine as it was within its discretion.

9. The appellants filed supplementary submissions in response to the respondent's submissions and wherein they submitted that since the respondent conceded that the trial at the subordinate court was defective, then the Honourable court should find that there was no sufficient evidence to sustain a

conviction and that the conviction should be quashed and the appellants set free. They reiterated that the sentence was harsh as the trial court did not impose an option of a fine.

10. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in Okeno v Republic [1972] E.A. 32 and re-stated in Kiilu and another v R [2005] 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See Gunga Baya & another v Republic [2015] eKLR).

11. PW1 testified that he was advanced a loan of Kshs. 30,000/- and a further Kshs. 40,000/= by the 1st accused person and wherein he used his father's title deed to LR No. 1247 as security and the money was to pay hospital bill for his wife. That PW1 later replaced the title deed with his sister's (Jane Wanjiku). That the accused used the said title to borrow money (Kshs.300,000/=) but the accused defaulted and PW1 had to get his own title [1245] and which he gave to the accused and the sister's title was freed. That they later agreed to sell one acre to the accused at a price of Kshs. 400,000/- and which was witnessed by their respective wives. That the accused requested him to sign a document proving that he was married to his wife and he signed without any objection together with his wife. That he received payments from the accused and after sometimes he requested the accused that they complete the transaction but the accused said that he was not interested in buying the land. That he left for Mpeketoni to look for money to refund the accused and after sometimes, his sister called him and informed him that her land was being sold as the accused had failed to pay the bank. That he decided to sell a portion of his land so as to settle the issue and he got a buyer but when an official search was conducted, it was discovered that the land had a charge of Kshs.3,500,000/- and the loan was from Kenya Women Finance Trust and upon enquiry from the land's office, she was referred to the police and he reported the matter to them. His evidence was that he did not sell the land to the accused. That when he went to the bank, he was informed that the bank had been told that he was insane. In cross examination, he testified that he did not permit the accused do take a loan using his title and that his wife only signed a document showing that she was his wife and in relation to the sale of one acre to the accused. He testified that the signature on the affidavit was not his. He denied having transferred the land to the accused or agreeing that the land should be charged to recover the money that he owed the appellants.

12. The witness was recalled for further cross examination and he testified that he had borrowed money from the 1st appellant and he initially gave the 1st appellant title deed for 1244 as security and when 1st appellant failed to repay the loan earlier given to him using the said 1244, he gave his own title for 1245 and they signed the sale agreement for sale of one acre out of land parcel 1245. That he had borrowed Kshs. 40,000/- but he did not refund the same. He testified that he did not appear before the land board for consent and that he did not sign the application for consent for the land board. That his wife signed an affidavit to show that she was his wife and that she was given an already prepared document which she signed. In further re-examination, he testified that he did not charge the land or take any loan from the bank and that he was not informed when the land was being charged.

13. PW2 testified that she is the wife to PW1 and that she signed the agreement between the accused and PW1 for the sale of one acre out of land parcel 1245. That they later discovered that the accused had taken a loan using the title deed. She denied having consented to the same and basically denied having signed any document in that respect and stated that the signatures were fraudulently obtained. Her

evidence was consistent in cross examination and re-examination to the effect that she did not sign the documents save for the agreement for sale of one acre.

14. PW3- testified that she gave her title deed for LR No. Nyeri/ Waraza/1244 to the first appellant to secure Kshs. 30,000/- for hospital bill that had been incurred by PW2 and later the accused requested that he use the said title deed to secure a loan for Kshs. 300.000/- and she agreed and the accused took a loan which he did not repay. That she later got a notification that her land was being sold by the bank and PW1 offered to sell part of his land 1245 so as to settle the loan but when they went to conduct a search, they discovered that the land had been charged for Kshs.3,500,000/- and they reported the issue to the police. That the loan had been taken by Ruth Nyambura Kiama and whom the accused identified as his wife.

15. PW4- Bessy Bona testified that she was in-charge of debt recovery with KWFT and her evidence was basically that they issued a letter to PW1 after Ruth Nyambura (2nd appellant) had defaulted in repaying the loan in which PW1 was the guarantor. That the charge was for a loan borrowed by 2nd appellant and PW1 was the guarantor. Her evidence was that there was a charged for Kshs. 2,000,000/- and another one for Kshs. 3,500,000/- and wherein PW1 was the guarantor. Her evidence in cross examination was that, normally the chargee is supposed to avail himself to an advocate appointed by the bank but that she couldn't know whether the chargee signed the charge.

16. PW5- PC Geoffrey Chani, a forensic documents examiner testified that pages of a questionable document and signatures on a charge dated 7/8/2014, specimen signature and known signature for PW1 and PW2 were forwarded to him to ascertain whether the signatures on the questionable document were made by the same author when compared with the specimen signatures and his evidence was that he found out that the signatures were made by different authors and that PW1 did not sign the said document (PMFI-6 later admitted as PExbt-6) and that PW2 (Margaret Wanjiku) did not sign the said document. He produced his report as PExbt-15. It was his further evidence that PW7 did not sign the charge, the two affidavits PW7 is alleged to have signed and the spousal consent. He produced the report and the exhibit memo.

17. PW6- Susan Mueni Mwanzao, the Land Registrar Nyeri testified that the green card for LR Nyeri/ Waraza/1245 belonging to PW1 had an entry made on 18.09.2013 being charge registered to the interest of KWFT to secure an interest of Kshs. 2,000,000/- and the borrower was Ruth Nyambura (2nd appellant). Her evidence was that for a charge to be registered, it must be accompanied by the consent to charge from the spouse and that the same was given. That there was another entry made on 19.08.2014 being a discharge of the said charge and a third entry made on 20.08.2014 being another charge that was registered in favour of KWFT for a sum of Kshs. 3,500,000/- and wherein PW1 was the chargee and the borrower being the 2nd appellant. She produced a copy of the green card as PExbt-16. In cross examination she testified that for the 2nd charge they did not require land control board's consent.

18. PW7- David Muchangi Ireri testified that he is a judicial officer having joined the judiciary on 1.07.2009. His evidence was that he did not sign the charge document dated 7.08.2014 (PMFI 6) and that the chargee and the borrower (PW1 and 2nd appellant) did not appear before him on the 7.08.2014 and that the affidavit was never sworn before him and neither was the spousal consent by Margaret Wairimu. In cross examination he testified that whatever signature was appearing on the said documents was not his signature and that the rubber stamp on the documents was not his own.

19. PW9 Snr. Sgnt Zablon Wambani testified that he was the Investigating Officer in the case. That he conducted investigations and sent the documents and specimen signatures for examination and which he submitted alongside the documents appearing on the charge and also the signature sample from David Muchangi who had witnessed the charge. The witness produced the exhibits earlier marked

by witnesses. His evidence was consistent and corroborated the evidence of PW1 and PW2 on the circumstances under which the transactions were conducted.

20. After the prosecution closed its case the appellants herein were both placed on their defenses and they gave sworn evidence.

21. 1st appellant testified as DW1 and his evidence (relevant to the appeal) was that PW1's sister Jane had earlier given her title deed for 1244 so as to secure funds for her sister to be released from hospital (Kshs.30,000/-) and later PW1 replaced the title deed with his own title being 1245 and that PW1 continued to borrow more money between 2011 and 2014 totalling to Kshs.355,000/-. That they agreed that PW1 would sell one acre of his land to him for Kshs.400,000/- and that sometimes later his petrol station go burned and when PW1 borrowed kshs. 50,000/- he told him that he could not afford the same and that is when they agreed that he could use the title deed to get a loan and since his wife had an active account with KWFT, she was brought into the agreement and when she enquired about the said loan, she was told to provide security. That is when PW1 and (2nd appellant) went to the bank and he was explained as to the requirements for the loan and he was given application forms to take to Land Board in Narumoru and later appeared before the board on 10.7.2014 and a consent was given and as such there was no forgery of the application for land board as it was PW1 who applied. That he had nothing to do with the charge as his name was not on the charge and neither did he witness the same. As for the affidavit of spousal consent, he testified that he did not sign the same and all the documents in the charge document and that himself and his wife only went to the bank and applied for the loan. He denied any involvement in the signing of the documents. His evidence was consistent in cross examination to the effect that he was not involved in the charge. In re-examination, he testified that PW1 was the one who took the title to the bank after 2nd appellant had been requested to go with a guarantor but the title was in his custody.

22. The other defense witness was Okaka Etyang, who stated that he was the DCC Kieni East Sub-county and the Chair- Kieni East Land Control Board. His evidence was that the consent was issued by their office and it was duly signed. That the minutes indicated that on 10.07.2013, PW1 appeared before the said board to charge 1245 to KWFT. That the applicant had to appear in person for the Consent to be issued unless under special circumstances when a person could write to the chair indicating why he will not appear, in which case he could appear through a proxy but in the instant case, he appeared in person. He produced the minutes and the consent as defense Exbt3A and 3B. In cross examination, he testified that approval as per the minutes proves that the actual owner appeared.

23. The 2nd defense witness was Geoffrey Gathara Mahinda and his evidence was basically that they received instructions from KWFT to prepare the charge in issue but since the borrower was from Meru, they sent the documents to Maua for execution. That they expected all the parties to be present at the Maua branch. That the documents were to be signed by an advocate but they did not direct them to any advocate. That the documents then went back to them and they registered the charge. His evidence was basically that he only prepared the documents.

24. The defense proceeded to close its case after which the court analysed the evidence and in its judgement found the same sufficient to warrant a conviction as against the two accused persons in counts 2-6 and an acquittal in count 1.

25. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in Okeno -vs- Republic (supra) and re-stated in Kiilu and another -vs- R (supra), the grounds of appeal as raised on the petition of appeal and the rival written submissions and, it is my view that the issues this court ought to determine are whether the prosecution tendered sufficient evidence to prove its case to the required

standards, whether there was a mistrial in relation to the 2nd appellant and finally, whether the sentence meted on the appellant was excessive.

Whether the prosecution tendered sufficient evidence to prove its case to the required standards

26. As I have already stated, the appellants herein were charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code in count one and offence of forgery contrary to section 345 as read together with section 349 of the Penal Code in counts 2-6.

27. Section 345 defines forgery as making of a false document with intent to defraud or to deceive.

28. The ingredients of the offence of forgery as can be see from the above provision were discussed by the Court of Appeal in Joseph Mukuha Kimani Vs Republic (Criminal Appeal No. 76 of 83) [1984] eKLR where the court held:

> " The prosecution must prove that:
>
> a. the document was false; in the sense that, it was forged
>
> b. the accused knew it was forged
>
> c. the utterer intended to defraud.
>
> In the case of Kilee v Republic [1967] EA 713 at p 717, it was said that, the false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: Omar Bin Salem v R[1950] 17 EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see Samuels v Republic[1968] 1."

29. In Daniel Shihemi Shisiah v Republic [2005] eKLR, and which is persuasive to me, the court in discussing the elements of the offence of forgery held as thus;-

> " Under this definitional section of forgery, the elements are: making a document; which document must be false, in the sense that it was forged, or of telling a lie about itself; and the false document must have been made with the intention to defraud or deceive. Those elements were exhaustively dealt with in KIMANI V. REPUBLIC, C.A. No. 76 of 1983 [1984] K.L.R. 670..."

30. Mativo J (as he then was) in Caroline Wanjiku NgugiRepublic [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 filing 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."

1. In the instant case, the prosecution's case before the trial court was that the appellants herein forged a charge purporting to have been signed by Phillip Mwangi Gakenya (count 2) ; affidavit of spouse purporting to have been made and signed by Margaret Wairimu Ngure (count 3); application for consent of the land control board purporting to have been made and signed by Phillip Mwangi Gakenya (count 4); spousal consent purporting to have been made and signed by Margaret Wairimu Ngure (count 5); and charge purporting to have been signed and stamped by David Muchangi Ireri (count 6).

2. PW1 testified that he had given his original title deed to land parcel No. LR. Nyeri/ Waraza/1245 to the 1st appellant as a security for money advanced to him and that they later entered into a contract for sale of one acre out of the said land. That when the 1st appellant refused to complete the sale, he looked for another buyer and it was when they went to search at the land's registry that they discovered that the same had been charged. He denied having allowed the appellants to charge the said land and they reported to the police.

3. PW5- PC Geoffrey Chani testified that he was sent the pages on the charge, specimen signatures and known signatures with instructions to ascertain whether the signatures on the questioned documents were made by the same author and upon analysis, he discovered that PW1 and PW2 did not sign the document. The examination or analysis was basically limited to the signatures of PW1 and PW2 on the charge. The witness being an expert and who gave expert evidence, opined that the signatures on the charge were forged. He also stated that David Muchangi did not append his signature on the documents. This evidence was never controverted by the defence.

4. What is important to note is that the documents examiner did not testify as having received the application for land control board's consent for examination. The record does not indicate as to whether the same was even produced in evidence. However, in my view and I so find, the expert evidence though not binding to the courts was necessary to prove that the application for land control board's consent was forged. There was no evidence in that respect. The first element in relation to count 4 was thus not proved to the required standards and the trial court erred in convicting the two appellants herein for the said count. The conviction as such ought to be quashed and the sentence (one year imprisonment) in relation to count 4 set aside. I thus find ground 4 on the amended petition of appeal merited.

5. As for counts 2, 3, 5 and 6 the expert evidence was sufficient to prove that the signatures on the said documents were not signed by the persons who purportedly signed them. The evidence was sufficient to prove that indeed the said documents were forged. The defense did not tender evidence to the contrary. The first element of the offence was thus sufficiently proved.

6. The next element of the offence is whether the accused persons (appellants herein) knew that the same was forged. Looking at the evidence before the trial court, it is clear that the

1st appellant was left with the original title deed upon advancing some money to PW1 but after sometimes, the said title was discovered to have been charged with KWFT. That upon reporting to the police, the police conducted investigations and the Investigating Officer took the documents to the documents' examiner and who confirmed that the documents had forged signatures. What I note is that the 1st appellant was never mentioned anywhere in the evidence. The signatures which were taken for examination in relation to the incidence were for the complainant and his wife (PW1 and PW2). There was nowhere that the 1st appellant signed any document. In his defense, he testified that he was not mentioned in the charge documents and neither did his name appear on the said documents. However, he testified that, PW1 did not write a demand letter demanding his title back and further that "we benefitted from the bank but due process was followed. All corners were navigated."

7. Could this be evidence that he was involved in forging the documents? In my view, for the reason that 1st appellant does not feature anywhere on the documents, it cannot be said that he indeed participated in the forgeries. The fact that he was the one who had the title deed does not mean that he participated in the fraud. In my view, convicting him with such evidence would be convicting on mere suspicion. I say so noting that the offence they were facing was not obtaining money by false pretence or offence related to the said title but just forgery of the charge and the accompanying documents. It could be that he was the one who gave the 2nd appellant the original title to take to the bank but in my view, the offences he was facing were only limited to one date and one act of forgery but no more.

8. It therefore means that the second element not having been proved to the required standards as against the 1st appellant, the other element (intention to defraud) ought not to be considered.

9. Considering the above, I find that the charges as against the 1st appellant in counts 2, 3, 5 and 6 were never proved. The 1st appellant's conviction in that respect ought to be quashed and the sentences set aside. Having found that count 4 was never proved, it therefore means that the 1st appellant's conviction in counts 2, 3, 4, 5 and 6 was improper and based on an error on facts and law and the same ought to be quashed and the sentence set aside. As such the appeal as against the 1st appellant succeeds.

Whether there was a mistrial in relation to the 2nd appellant

40. On the part of the 2nd appellant, I note that she has challenged the trial court's conviction and sentence on the grounds that there was breach of *the constitution*, statutory provisions and the rules of procedures and thus compromising the appellant's right to a fair trial. The 2nd appellant in her submissions submitted that the trial court erred in failing to appreciate that the 2nd appellant was condemned unheard in failing to take her evidence in defense and further that the trial court did not explain to the said 2nd appellant the provisions of section 211 of the Criminal Procedure Code as directions under the said section were taken in her absence. The respondent conceded to this ground and prayed for a retrial as against the 2nd appellant. The respondent submitted that on 8.07.2021, section 211 was complied with while the 2nd appellant was absent and the court having been informed that she was sick.

41. I have perused the record and the proceedings and I note that on 28.06.2021 the matter was scheduled for hearing but the 2nd appellant herein was absent. The matter was fixed for defense hearing on 8.07.2021. On the said date (though the typed proceedings indicate 8.07.2020) Mr. Kiget appeared for the two accused persons and he notified the court that 2nd accused (2nd appellant) was unwell. The court ordered the matter to proceed in respect of 1st accused. The records further indicate that section

211 was complied with and Mr. Kiget indicated that the accused would give sworn evidence and call two witnesses. 1st appellant testified on the said date. The matter was adjourned and fixed for further defense hearing on 29.07.2019. On that date, both appellants were present in court Mr. Kiget appeared for them. The matter proceeded and the defense case was closed.

42. From the analysis above, it is clear that section 211 was not explained to the 2nd appellant herein. The defense case was further closed without the 2nd appellant testifying. The court did not indicate as to whether the defense case as against the 2nd appellant was closed.

43. The court having not complied with the said provision of the law, it therefore means that her rights to a fair hearing was compromised. Though the 2nd appellant was represented by an advocate, it appears like the said advocate only concentrated on the 1st appellant's case and forgot the 2nd appellants case and proceeded to close the defense case without her evidence and if at all he had instructions to the effect that the 2nd appellant was not to give evidence, he ought to have indicated the same to the court so that the court puts it on record.

44. In Evans Tai Nyaoma v Republic [2013] eKLR, the Court having considered the failure to comply with section 211 of the Criminal Procedure Code held as thus;-

> " Be that as it may, the ultimate result is that non-compliance with Section 211 of the Criminal Procedure Code means that it denied the appellant his right to be heard or at least make an informed decision on how he wished to defend himself. The upshot was that the court ended up writing a judgment without the benefit of evaluating evidence which the accused may have offered. The conviction was not safe and I quash it, and set the sentence aside."

45. In my view and I so hold, for the reasons that the trial court did not comply with the mandatory provisions of the law as against the 2nd appellant, the conviction was not safe and the same ought to be quashed and the sentence set aside. I thus quash the said conviction as against the 2nd appellant as was entered by the court and set aside the sentence meted against her.

46. Having done so, the next question which should be answered is as to what orders this court ought to make? Should the court order a retrial or an acquittal?

47. The principles upon which a court may order a re-trial are well settled. A re-trial should only be ordered where the interests of justice require and would not occasion prejudice to the appellant. In the case of Fatehali Manji v Republic [1966] EA 343 the East Africa Court of Appeal when dealing with the issue held that:-

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."

(See also Opicho v Republic [2009] KLR, 369

48. I note that the prosecution tendered its evidence and which in my view was water tight. In my view and I so find, an acquittal will not be in the interests of justice. Without pre-empting the success of the case before the trial court, I find that a retrial will be proper and the interest of justice requires it. The prosecution's evidence was clear that she was the one to whom the loan was advanced and she was

guaranteed by PW1 and all the documents and the signatures therein were found to be forgeries. In my view, there are no gaps which can be said that will be filled by the prosecution's witnesses if a retrial was ordered. The evidence by PW1, PW2, PW5, PW8 and PW9 was sufficient and that the interests of justice is in favour of a retrial as opposed to an acquittal and so as to give the 2nd appellant a chance to be heard.

49. In the persuasive decision in Stephen Riungu Njeru & 2 Others v Republic [2010] eKLR the appellate court upon analyzing the evidence against the appellant therein and in ordering a retrial held as thus;-

> "In the premises therefore, we hold that there is overwhelming evidence against the Appellants and had it not been for the trial court's failure to comply with the requirements of Section 211 of the Criminal Procedure Code, the Appellants would have been properly convicted and sentenced. On account of that failure, great prejudice was caused to the appellants. The conviction is therefore quashed, the sentence set aside...."

50. I find that in the circumstances of the case herein, a retrial would be appropriate.

51. Considering all the above, it is my considered view that the appeal herein partially succeeds and I make the following orders;-

    i. That the conviction as against the 1st appellant in all the counts be and is hereby quashed and the sentences set aside.

    ii. That the conviction as against 2nd appellant in relation to counts 2, 3, 5 and 6 be and is hereby quashed and the sentences therefrom set aside for the reasons that there was a mistrial.

    iii. That the 2nd appellant shall be retried before another magistrate.

52. It is so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the State