



**Were v Republic (Criminal Appeal E034 of 2022)
[2023] KEHC 22483 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E034 OF 2022
JRA WANANDA, J
SEPTEMBER 22, 2023**

BETWEEN

STEPHEN SHISIA WERE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged in Butere Senior Principal Magistrate's Court Criminal Case No 307 of 2020 with three counts. In Count I, he was charged with the offence of forgery contrary to Section 345 as read with 349 of the *Penal Code*, in Count II he was charged with the offence of uttering of a false document contrary to Section 353 of the *Penal Code* and in Count III, he was charged with the offence of obtaining registration by false pretences contrary to Section 320 of the *Penal Code*.
2. The particulars of the offence in Count I were that the Appellant, on September 1, 2009 at an unknown place in Kakamega County, with intent to defraud forged a land transfer form purporting it to be a genuine land transfer form for the parcel of land number Marama/Shinamwenyul/2109 commissioned by M/s JJ Masiga & Co Advocates.
3. The particulars of Count II were that on the same day at the Land Registrar's office Kakamega, the Appellant knowingly and fraudulently uttered a forged land transfer form for the said parcel of land to the land registrar purporting it to be a genuine document endorsed by one Jacob Shieunda Misaka.
4. The particulars of Count III were that on September 15, 2009 at the Land Registrar's office Kakamega, the Appellant wilfully procured for himself a registration of the same parcel of land bearing the names of the said Jacob Shieunda Misaka by falsely pretending that he acquired the same as a gift.
5. The Appellant was represented was Mr. Nandwa Advocate. He pleaded not guilty and the matter then proceeded to full hearing. The prosecution called 10 witnesses and the defence called 4 witnesses, including the Appellant.



Prosecution Evidence

6. PW1 was one Ruth Otula Nabawa. She testified that her sister was ailing and her late father, the said Jacob Shieunda Misaka (deceased) was unable to raise funds for her treatment, he approached the Appellant who agreed to bail him out by giving him some money in exchange for the deceased allowing the Appellant to utilize the parcel of land as a lease. She further testified that in the year 2018 after the demise of both her parents, the Appellant confirmed that he had in his custody the title deed for the parcel and that he was ready to return it, that he however later declined to return it, for this reason the area Chief declined to issue the family of the deceased with a burial permit since the Appellant was laying claim of ownership over the land. According to PW1, the Appellant claimed that he had purchased the parcel of land from the deceased and demanded that the family of the deceased pay him Kshs 3,000,000/= as a condition for him to transfer back the land to them. She testified further that the demands by the Appellant prompted the family to escalate the issue with the chief. She further stated that prior to his death, the deceased had sold portions of the land to a number of people. In cross-examination, PW1 stated that the amount of money given by the Appellant to the deceased was Kshs 60,000/- and that she later learnt that the parcel of land had become registered in the name of the Appellant
7. PW2 was one Florence Owiso, PW1's sister. She testified that during her mother's burial in March 2018 the Appellant made remarks that, "if someone is in possession of your property, it is prudent to return the same", that the deceased died shortly after the demise of their mother in 2018 after which the Chief summoned the family of the deceased and informed them that the Appellant was laying claim to the parcel of land, at a later meeting before the Chief the Appellant demanded Kshs 3,000,000/- in exchange for return of the land to the family. She further testified that the Appellant had given the deceased money to assist the deceased clear hospital bills and in turn the deceased allowed the Appellant to till the land in order to recover the money advanced, that she got this information from the deceased, that the Appellant is currently living on the land, PW1 was living on the parcel but the Appellant chased her away, there are other 3 people living on the parcel to whom the deceased had sold portions thereof, there is also a school and a church to whom the deceased had transferred portions of the land and that they are neighbours with the Appellant. In cross-examination, she stated that she was never involved in any of the land transfer processes.
8. PW3 was one Jennifer Matechi, a sister to PW1 and PW2. She testified that after the death of the deceased, they discovered that his said parcel of land had become registered in the Appellant's name, she approached the Appellant to inquire how the land was transferred to his name, the Appellant told her that he had purchased the same from the deceased. She too stated that the Appellant had bailed out the deceased when the deceased was financially constrained and had no money to cater for their sister's medical expenses, her late father had allowed the Appellant to utilize a portion of the land in exchange for the money that the Appellant had advanced to him, the Appellant gave the deceased Kshs 40,000/- and the deceased topped up Kshs 20,000/-. She stated that upon discovering that the land was registered in the Appellant's name, they informed the area Chief who summoned them together with the Appellant who demanded that they pay him Kshs 3,000,000/- if they were interested in getting back the land, 4 people had purchased portions of the land from the deceased and who had also transferred some portions to a school and a church. PW3 too conceded that she was not present during the transactions.
9. PW4 was one Francis Ingosi, He testified that he is a Court process server, that he was arrested in connection with the alleged forgery of the land transfer forms the subject of this matter. According to him, he told the police that he was not aware of the transaction, the transfer forms indicated that the



transfer took place at the office of J.J. Masiga & Co. Advocates as indicated by the rubber stamp, he did not know why he was arrested and the reason was only disclosed to him later. In cross-examination, he stated that he worked in the said law firm between 2008 and 2010, that the rubber stamp indicates the name “Masicca” and not “Masiga”, that his duties never involved stamping of documents and that he is not a “masquerader”

10. PW5 was one Nelson Joel Maramba. He testified that he purchased a portion of the said parcel of land in August 1999 from the deceased and that he purchased 1 acre and paid the deceased Kshs 50,000/-.
11. PW6 was one Stephen Kachisa Mboka. He testified that in August 1999 he was a witness to a land sale agreement between the deceased and PW5.
12. PW7 was one PC Benson HinzaNo He testified that he is attached to the DCI office in Butere and he is the investigating officer in this matter. He stated that in January 2020 the complainants (PW1, PW2 and PW3) reported that their land parcel had exchanged hands and been registered in the name of the Appellant. He then recounted the narrative earlier given by the said witnesses in respect to how the Appellant had given deceased money to settle medical bills for their sister and in exchange the deceased allowed the Appellant to utilize the land. He stated that he summoned the complainants and the Appellant and advised them to explore a settlement but that 7 months later the complainants returned with the report that no settlement had been reached, he then visited the parcel and recorded statements, he obtained the green card and the transfer form from the lands registrar, the green card indicated that the land was transferred to the Appellant as a gift, the transfer form bore the stamp for J.K. Masiga Advocates, he located the said Advocate and summoned him, the Advocate noted that although the description depicted his firm, the address used was different and also that the correct name of his firm is J.J. Masiga & Advocates. PW7 then stated that he summoned the Appellant who did not show up but instead sent a letter from an Advocate, PW7 later arrested the Appellant, he also located PW4 Mr. Masiga Advocate’s clerk who denied knowing the Appellant, PW7 forwarded the transfer form and the agreement to the document examiner, he later received a report from the document examiner indicating that the deceased’s signature in the documents were dissimilar, he later received confirmation from the Law Society of Kenya confirming that there was no Advocate in practice by the name of J.J. Masisa and Co. In cross-examination PW7 stated that it is the Appellant who told him that the deceased gave him the title deed to keep in safe custody.
13. PW8 was one George Obondo. He testified that he is the County land registrar Kakamega and produced the land transfer form referred to above. He also referred to the green card and stated that the title deed was issued on 14/9/2009, the consideration was not indicated, there was a restriction lodged by the complainants PW1, PW2 and PW3 claiming beneficial interest and which barred any dealings with the land. He also referred to minutes of the land control board meeting which indicated that the transfer to the Appellant was by way of a gift and that he could not tell who presented the documents to the land registrar.
14. PW9 was one PC Audrey OtieNo She testified that she is a document examiner of 3 years standing attached at the DCI. She stated that she received an exhibit memo form at their regional offices with an exhibit A and another marked B, she examined the question signature in exhibit A in comparison with the signature in exhibit B and it was her opinion that the signatures were made by different authors, her findings were based on the dissimilarities on the pen movement, pen lift, base line alignment slant of signature, the initial and terminal strokes. She stated that she subjected the signatures to image enhancement and magnification procedures using a video spectral comparator for better visibility and inspection of individual characteristics and absolute identification, she did a side by side comparison of the questioned and known signatures, she considered the possibilities of natural variations resulting from the time span the signatures were made, the writing instruments and also the changing writing



habits and compiled her report which she then produced as exhibit. In cross-examination, she conceded that illness can affect a person's signature

15. PW 10 was one Mutula Mutic. He testified that he is the Assistant County Commissioner Butere sub-county and came to testify in respect to the said parcel land for which the deceased was given consent to transfer it the Appellant. He stated he was not in that office by August 2009 when the land control board held its meeting and only relied on minutes of the meetings which show that both the deceased and the Appellant appeared before the board during the meeting held on August 13, 2009.

Defence Evidence

16. At the close of the prosecution case, the Appellant was found to have a case to answer and was placed on his defence.
17. DW1 was the Appellant. He testified that the deceased was his friend and that they had an ancestral relationship, the deceased summoned him to his home and informed him that his daughter was admitted in hospital and he needed financial assistance, the Appellant assisted the deceased with money, the daughter later died, in the year 2007 the deceased called for a meeting at his home with the village elder and the area chief and told them that he was indebted to the Appellant but he was unable to repay him, the deceased then made an announcement that he was offering his parcel of land to the Appellant since he was unable to repay the debt. He stated that he accompanied the deceased to Mumias where they sought services of a surveyor and at a later date they appeared before the Land Control Board where they obtained consent for the transfer, subsequently, the deceased furnished the Appellant with the title deed for the land parcel and informed him that portions thereof belonged to Musera Primary School and Musera Baptist Church who would process titles for their shares and that the entire parcel is 1.47 Ha. He further stated that in the year 2018, the head-teacher Emusere Primary School approached the Appellant with a view to processing a title deed for the school's portion but that at the Land Control Board the daughter of the deceased opposed the application for transfer.
18. The Appellant added that he personally looked after the deceased and his wife and catered for their basic and material needs, he footed the funeral expenses for the wife of the deceased when she died in March 2018 and also for the deceased when he too subsequently died in June 2018, no one complained about the title being in his name, the daughters only started complaining when the Appellant initiated transfer of the school's portion. He denied that the deceased was of unsound mind and stated that in fact, the deceased was a pastor and could read his bible coherently and that the charge against him was instigated because of pure malice.
19. In cross-examination the Appellant stated that he gave the deceased a sum of Kshs 60,000/- when he sought financial assistance from the Appellant in 2005, in 2006 he added the deceased Kshs 50,000/-, the children of the deceased later came to know of the financial assistance, when the deceased asked for the meeting with the area Chief, Ruth a daughter of the deceased was present, the other people who were in the meeting are dead, the meeting was held at Emusere Primary School, the said Ruth was with them when he accompanied the deceased to go to Mumias to process the land documents, the wife of the deceased footed the surveyor's fees, the deceased transferred the entire parcel to the Appellant but portions thereof were to be transferred to the school and the church, the deceased summoned all his daughters and the Appellant at his house and confirmed that he had gifted the land to the Appellant, the deceased was a pastor and the Appellant was one of his congregants
20. DW2 was one Rashid Makanyaya Indakwa. He testified that he is a village elder and that sometime in the years 2006 or 2007 or thereabouts the deceased called a meeting and announced that he had sold part of his land and that he had gifted part of it to the said school and church, that he was only blessed



with daughters and that the Appellant was more or less his son since the Appellant had stood by him, that he had gifted his said land to the Appellant who would share it with the daughters of the deceased. He stated further that the deceased was a pastor and that he was not suffering from any mental illness. In cross-examination, he stated that at the said meeting one of the daughters of the daughters was present but the wife was not.

21. DW3 was one Silas Ouma Sheifa. He testified that he is a pastor and a mortician, that Emusere Baptist Church stands on the land parcel, the land where the church was built was donated by the deceased, the church set up Emusere Primary School, the deceased was the pastor in that church, in 2017 they wanted to procure the title deed for the church and when he approached the deceased to facilitate the process, the deceased told him that the school owned him money and promised to show him the individual that would help them procure the title deed but only if the school paid him, he then liaised with the school's headteacher and they paid the remaining balance to the deceased in instalments, the first was Kshs 10,000/-. In cross-examination, DW3 stated that while they paid Kshs 10,000/- to the deceased as aforesaid, they paid the balance of Kshs 20,000/- to the Appellant on the recommendation of the deceased who was by then sick.
22. DW4 was one Trutea Bosihili. She testified that she is a teacher at Emusere Primary School where she transferred to in January 2018, while there she learnt that the school did not have a title deed and was situate on parcel of land owned by the deceased, she was informed by the committee that there was a pending balance, the deceased alongside his wife informed her that the deceased had gifted the entire parcel to the Appellant and that the Appellant would assist the school to procure the title deed for its portion, they went to the land control board. In cross-examination, she stated that she learnt that the deceased had donated the land to the school but that he had later demanded Kshs.100,000/- and subsequently demanded Kshs.30,000/-, DW3 paid the amount in instalments of Kshs 3,000/-, that she paid Kshs 10,000/- to the deceased and his wife and the remaining balance of Kshs 20,000/- was paid to the Appellant.

Judgment of the trial Court

23. Upon considering the testimony of the witnesses and the evidence on record, the trial Magistrate delivered his Judgment on April 13, 2022 whereof he found the Appellant guilty of all the 3 Counts. Accordingly, the Appellant was convicted and sentenced to serve imprisonment for 2 years in Count I, 2 years in Count II and 1 year in Count III. The sentences were to run concurrently.

Appeal

24. Being dissatisfied with the decision, the Appellant filed this Appeal on April 22, 2022, raising 11 grounds which were cited as follows:
 - i. That the learned trial Magistrate erred both in law and fact in convicting the Appellant when there was no evidence linking the Appellant to the offence.
 - ii. That the learned trial Magistrate erred both in law and fact in convicting the Appellant when the elements of the offence were not proved.
 - iii. That the learned trial Magistrate erred both in law and fact in convicting the Appellant when the charge sheet and the particulars of the offence were fatally defective.
 - iv. That the learned trial Magistrate erred both in law and fact in shifting the burden of proof thereby resulting in a miscarriage of justice.
 - v. That the decision of the learned trial Magistrate was against the weight of the evidence.



- vi. That the learned trial Magistrate erred both in law and fact in failing to consider and properly analyze the Appellant's evidence in defense.
- vii. That the entire proceedings and judgement by the learned trial Magistrate were fatally defective and unlawful.
- viii. That the sentence handed to the Appellant was too harsh and unlawful and had led to a miscarriage of justice.
- ix. That the learned trial Magistrate erred both in law and fact in convicting the Appellant when prosecution failed to establish that indeed the complainant was incapable of carrying out the land transactions that led to the registration of the Appellant as the proprietor of land parcel number Marama/Shinamwenyuli/2109.
- x. That the learned trial Magistrate erred in law in entertaining what was otherwise a civil matter.
- xi. That the learned trial Magistrate erred both in law and fact in passing sentence based on biased sympathetic and illegal opinion from extraneous influence.

Hearing of the appeal

- 25. Both parties filed their written Submissions on January 17, 2023. The Appellant's was filed by Messrs E.K. Owinyi & Co. Advocates while the Respondent's was filed by Prosecution Counsel N.K. Chala.

Appellant's Submissions

- 26. Counsel for the Appellant submitted that the prosecution bears the burden of proving its case beyond reasonable doubt but that in this case, it did not discharge this burden and that it is not for the accused to prove his innocence. He cited the case of *Miller v Minister of Pensions* (1947) 2 All ER 372 and [Pius Arap Maina v Republic](#) [2013] eKLR and Counsel added that this is a civil matter disguised as a criminal case, the Appellant was arrested way after the alleged forgeries had happened and after the deceased – the initial owner of the land - had died, the deceased did not raise any alarm during his lifetime that documents to his title had been forged, the complainants have since filed a civil matter on fraud at Butere Law Courts against the Appellant which is still ongoing and yet to heard.
- 27. On Count I in respect of the charge of forgery, Counsel argued that the prosecution did not call one Mr. Masiga Advocate, the person whose stamp and signature appear on the transfer form to deny the document, his stamp and signature despite the fact he was a very crucial witness, forgery was not proved as a transfer form is not a false document within the meaning of Section 347 of the [Penal Code](#), the form is what it purported to be - a transfer form - the land registrar also admitted that the document is genuine and from their office, the deceased was not present to deny that the signature was not his and the evidence of the document examiner cannot be taken as the gospel truth. He cited the case of *Peter Ngugi v Republic Nairobi CACRA No50 of 1996*.
- 28. On Count II, in respect of the charge of uttering a false document, Counsel relied on the case of [Njoroge v Republic](#) [2021] eKLR and added that no evidence was adduced to prove that the land transfer was forged and therefore false, no evidence was adduced to prove that the Appellant knew that the document was false and intended to use it to defraud, no evidence was adduced to show that the Appellant is the one who placed the alleged forged transfer form before the land registrar, the land registrar stated that he could only tell the person who presented the documents for registration if he saw the application for registration form.



29. On Count III in respect of the charge of obtaining by false pretences, Counsel submitted that the same was equally not proved, land acquisition procedures are well recognized and the systematic steps towards the same are to guard fraudulent dealings, going by the definition of the offence in Section 320 of the *Penal Code* the prosecution did not prove that it is the Appellant who procured registration by false pretence, land officials are professionals in registration of title and the consent to transfer land is applied by the vendor, in this case the deceased, the consent and minutes of the land control board were produced in Court and it is clear that the board gave the deceased consent to transfer the land to the Appellant by way of gift, it is not the Appellant who sought the registration of land parcel in his name, the deceased had no problem with the registration he did and was living in the same land until his demise, his house is still on the same land, the Appellant is an immediate neighbour and a close relative who had no intentions to defraud as alleged. Counsel further submitted that whereas the trial Magistrate appreciated that the deceased could have intended to transfer the land to the Appellant as he did, it was a wrong presumption for her to conclude that the deceased could not transfer the whole land.
30. Regarding sentence, Counsel argued that 3 years imprisonment excessive and too harsh in the circumstances.

Respondent's Submissions

31. Counsel for the State submitted that in her Judgment, the trial Magistrate only addressed two counts, the offence of forgery and offence of obtaining registration by false pretences, the Magistrate did not address herself to the offence of uttering a false document yet the Appellant was convicted for this offence as well, in fact the issue of whether it was the accused who uttered the false documents did not form part of the issues to be looked into by the trial Court, every judgment should have reasons as to why a person has been convicted of a particular offence, the failure by the Magistrate to give reasons why the Appellant was convicted for the offence of uttering a false document renders such conviction a nullity.
32. Counsel submitted further that the evidence of PW8 - the land registrar - exonerates the Appellant, by his own admission the Registrar stated that he could not tell who presented/uttered the documents for registration, the registrar also admitted that the documentation that would have shown who presented the documents for registration was not available, as such the offence of uttering was not proved and consequently if it was not proved that the Appellant uttered the registration documents then it was consequently not proved that he is the one who obtained the registration by false pretences.
33. On Count I, Counsel submitted that the documents that were subject to forensic examination were two, the transfer document and the sale agreement dated 28/9/1999 which were done 10 years apart, PW6 was called to confirm that he witnessed the execution of the Sale Agreement that was signed in 1999, it is this document that was used for comparison of the signature of the deceased on the transfer, PW6 admitted that the signature was now slightly different from the way he used to sign in 1999.
34. As for the transfer, Counsel submitted that the same was executed by an Advocate but who was never called to confirm whether or not the document was signed in his presence and whether the alleged persons who signed the transfer were the true persons noted in the documents and that the Advocate was a necessary witness whom the prosecution should have called. He cited the case of *Serpepi Sanja Siromo V Republic* [2020] eKLR.
35. Counsel submitted further that the evidence shows that the property had been sub-divided into various portions, the original number of the land was 2050 as seen on the green card, the same was then sub-divided and gave rise to the Appellant's portion registered as 2109, the evidence shows that the



Appellant was entitled to a portion of the land as per the wishes of the deceased, as such the prosecution ought to have led evidence to demonstrate that the size of the land that was registered in the name of the Appellant was not consistent with the size of the land that the deceased had allowed him to occupy, it was crucial for the prosecution to have obtained a survey report showing who were in occupation of the land and what portions they occupy and if the said portions are consistent with what was recorded on the separate deeds, in the absence of such evidence it cannot be said that the Appellant obtained the land through forgery.

Analysis and Determination

36. This being a first appeal the duty of the court is to review the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See *Okeno –V- Republic* (1972) EA 32 and *Kiilu & Another v Republic* (2005) 1 KLR 174.

37. Although the State conceded to the appeal herein, it does not follow that this Court must therefore automatically allow the appeal. Despite the concession by the State, the Court still has the duty to scrutinize the evidence afresh and arrive at its own determination. In *Odbiambo v Republic* (2008) KLR 565, it was stated as follows:

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”

38. Regarding the issues for determination, I note that although in the Memorandum of Appeal, there is reference to the Charge Sheet being defective, such ground was not advanced, revisited nor argued in the Submissions. I therefore presume that the ground was abandoned.

39. In my view therefore, the issues that arise for determination in this appeal are the following;

- i. Whether the prosecution proved the offences of forgery, uttering a false document and obtaining registration by false pretence.
- ii. Whether the sentence imposed was justified.

40. I now proceed to analyze the said Issues.

41. In Count I, the Appellant was charged with the offence of forgery. The offence is created under Section 345 of the [Penal Code](#) in which the same is defined as follows:

“Forgery is the making of a false document with intent to defraud or to deceive.”

42. Punishment for the offence is then provided under Section 349 of the Penal Code as follows:

“Any person who forges any document 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.”



43. From the above definition, the offence of “forgery” consists of making a false document. The ingredients include the intent to defraud or deceive. In the case of *Caroline Wanjiku Ngugi –V- Republic* (2015) eKLR, Hon. Justice Mativo J. 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.”

44. In *Elizabeth Achieng Nyanya –V- Republic* (2018) eKLR, Hon. Lady Justice Aburili referred to the Nigerian case of *Alake –v- The State* where the Court listed the ingredients of the offence of forgery as follows: -

- i. That there is a document in writing;
- ii. That the document or writing is forged;
- iii. That the forgery is by the accused person;
- iv. That the accused person knows that the document or writing is false;
- v. That he intends the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine.

45. It is trite law that the prosecution bears the burden of proving its case beyond reasonable doubt. It is evident that the offences herein were alleged to have been committed in the year 2009 and the Appellant was arrested in September 2020 after the deceased - initial owner of the land - had died in the year 2018. Considering that the deceased therefore died almost 10 years after the offences were allegedly committed, it is curious that the deceased is not reported to have himself raised any complaint during his lifetime. He is not reported to have at any time complained that documents of title to his land had been forged or that the land had been unlawfully transferred to the Appellant. It is curious that it is the daughters of the deceased who now raise a complaint after their father had already died.

46. On Count I in respect of the charge of forgery, I am surprised that the prosecution did not call the said Mr. Masiga whose alleged Advocate stamp and signature appear on the transfer form. It was not alleged that the person was not available or that there was any difficulty in locating or bringing him to Court to testify. In fact, PW7, the Investigating Officer confirmed that while investigating and compiling



evidence, he located and interviewed the said person. In the absence of Mr. Masiga's testimony stating that indeed his stamp and signature were forged, I disagree with the trial Magistrate that there was sufficient material before her to arrive at her finding that the Advocate's stamp and signature were forged. Since the deceased is not alive to give his side of the story and since there was no evidence before the Court suggesting that during his lifetime the deceased raised any complaint about transfer of the land, I agree with Counsel that the said Advocate was a very crucial witness and the failure to call him seriously weakened the prosecution's case.

47. For the reasons stated, I am of the opinion the trial Magistrate erred in basing her Judgment majorly on the document examiner's evidence. This is not to say that I have found that the document examiner's conclusions were incorrect or that I disbelieve her. Far from it. On the contrary, the examiner's conclusions may well be very correct. What I am saying is that the veracity of the examiner's findings has been heavily put into doubt by the other evidence and circumstances on record thus rendering it unsafe to be the basis for forming the foundation for a conviction in the absence of other convincing corroborative evidence.
48. In any event, it is also trite law that the evidence of an expert is still subject to the ordinary rules of interrogation of evidence and is never to be automatically accepted as the gospel truth without question. Where there is no sufficient evidence to corroborate an expert's opinion or where such evidence is controverted by other evidence or circumstances, the Court remains at liberty to disregard it.
49. Further, Counsel observed that the documents that were subject to forensic examination, the transfer document dated September 1, 2009 and the sale agreement dated 28/9/1999 were done 10 years apart, that PW6 was called to confirm that he witnessed the execution of the Sale Agreement that was signed in 1999 and that it is this document that was then used for comparison of the signature of the deceased on the transfer. Since it was not explained why a more recent signature could not be obtained and used as a sample for comparing the signature of the deceased, I agree with Counsel that the document examiner's report is also substantially weakened by the 10 years duration between the documents.
50. Count II was in relation to uttering a false document contrary to Section 353 of the Penal Code which provides as follows:

“Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.”
51. The word “utter” is then defined under Section 4 of the *Code* as follows:

“Utter means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal, or act upon the thing in question.”
52. According to the above definitions therefore, the offence is only established if the false uttering is made “knowingly” and “with intent to defraud”. The person who utters must therefore do so with the knowledge that the document is false and must have, in the cause of uttering, the intention to defraud. This therefore means that the person to whom the document is uttered is made to take action or steps or fail to take steps or action which save for the thing uttered to him, he would not have taken or vice versa (see the Court of Appeal case of *Kepha Moses Mogoji v Republic* [2014], eKLR.
53. Considering the above, I agree with Counsel that no evidence was placed before the trial Court to demonstrate that the Appellant is the person who presented the alleged forged transfer form before the Land Registrar. The Registrar's evidence was that he could only identify the person who presented the



documents for registration by perusing the application for registration form. This was never produced in evidence. The first hurdle for the prosecution was to prove the identity of the “utterer”. How then can the Appellant be presumed guilty when the identity of the individual who presented the document was not even established in the first place? In failing to even establish the identity of the “utterer”, the charge therefore collapsed long before it even reached the stage of determining “knowledge” or “intent to defraud”.

54. Count III was obtaining land registration by false pretence contrary to Section 320 of the Penal Code. The section provides as follows:

“ Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.”

55. “False pretence” is then defined in Section 312 of the *Penal Code* as follows: -

“ Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.”

56. In addition to my earlier findings on Count I and II above, I also note that the consent and minutes of the land control board produced in Court demonstrates that the board gave the deceased consent to transfer the land to the Appellant. In any case, as already aforesaid, there is no allegation that the deceased at any time during his lifetime raised any complaint in respect to the change of ownership of the land. As correctly submitted by Counsel, the evidence shows that the deceased was still living in the same land until his demise, his house is still on the same land and the Appellant is an immediate neighbour. If the deceased had a problem with the transfer, nothing would have been easier than for him to complain or take steps to recover the same during his lifetime. I also agree with Counsel that the trial Court had no basis to make the finding that even if the deceased intended to transfer or did transfer the land to the Appellant, he could not have transferred the whole land and disinherited his own family. I find the Magistrate’s said conclusion to have been speculative assumption not based on any evidence before her.

57. I also take cognisance of the testimony of DW4, the teacher at Emusere Primary School who stated that the deceased and his wife personally informed DW4 that the deceased had gifted the entire parcel to the Appellant and that the Appellant would assist the school to procure the title deed for its portion. This piece of testimony was not seriously challenged.

58. It should however be clear that nowhere have I declared the Appellant to be innocent of the offences alleged against him. All I am saying is that the burden or standard of proof in a criminal case is that of “beyond reasonable doubt” and in my view, the prosecution failed to sufficiently discharge this burden. My assessment of the trial Magistrate’s Judgment is that she appears to have overlooked the fact that the case before her was a criminal matter whose standard of proof was “beyond reasonable doubt”. She then appears to have treated the matter as if it were a civil case thus lowering the threshold by applying what seemed like the standard of proof “on a balance of probabilities”.

59. I say because the Magistrate appears to have based her Judgment majorly on circumstantial evidence and suspicion. In doing so, she misdirected herself since it is trite law that circumstantial evidence, however strong, cannot per se sustain a conviction (see the Court of Appeal decision in the case of *Sawe v Republic*, 2003 KLR 354)



60. In my opinion, the dispute herein was more of a civil matter in nature and which should not have been presented as a criminal case. I note that indeed, the Appellant's Counsel, in his Submissions, hinted that the complainants have since filed a civil case at the Butere Law Courts seeking to recover the land from the Appellant and which case is still ongoing. My view is that such civil case is where the complainants ought to direct their energy. As aforesaid, my findings in this case should not be deemed as automatically prejudicing that civil case. I say so because the standards of proof are different in the two jurisdictions.
- ii. Whether the sentence was imposed was harsh or excessive
61. Having found that the conviction of the Appellant was unsupported, determination on the issue of the appropriateness of sentence imposed is now overtaken by events and can only be for academic purposes. In the circumstances, I do not find it necessary to dwell on this issue.

Final Orders

62. The upshot of my findings above is as follows:
- i. This Appeal is allowed, the conviction of the Appellant is quashed and the sentence imposed is set aside.
- ii. Consequently, the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023

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WANANDA J. R. ANURO

JUDGE

