REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E025 OF 2021

LILIAN WANYAGA NJAGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of M.N. Gicheru, CM sitting at Embu Law Courts

in Criminal Case Number 1305 0f 2015 and delivered on the 3rd March, 2021)

JUDGMENT

1. The appellant herein, Lilian Wanyaga was charged with three counts as follows: -

Count I

Forgery contrary to Section 349 of the Penal code; the particulars being that on diverse dates between November and December, 1999 at unknown place within the Republic of Kenya forged a certain document namely Kenya Certificate of Secondary Education Serial No. KSCE 1370225 from Magundu Secondary School purporting to be a genuine certificate issued by the Kenya National Examination Council.

Count II

Making a document without authority contrary to Section 357(a) of the Penal Code; the particulars being that on diverse dates between November and December 1999 at unknown place within the Republic of Kenya with intent to deceive, without lawful authority or excuse made a Certificate of Secondary Examination Serial No. KSCE 1370225 from Magundu Secondary School purporting to have been issued by the Kenya National Examination Council.

Count III

Uttering a document with intent to deceive contrary to Section 357(b) of the Penal Code, the particulars being that; on the 8th day of February, 2013 at Embu University College, Embu District within Eastern Region with intent to deceive knowingly uttered a certain document namely Kenya Certificate of Secondary Examination Serial No. 1370225 from Magundu Secondary School which had been made without lawful authority.

2. The appellant pleaded not guilty to all the counts. The prosecution called eleven (11) witnesses in support of their case and at the close of prosecution's case the appellant was put on her defence.

3. The appellant gave a sworn statement but did not call any witnesses and in his judgment delivered on the 3rd day of March, 2021, the learned magistrate convicted her in counts I and II and sentenced her to pay a fine of Kshs. 50,000/= in each count and in default to serve 12 months imprisonment. She was, however, acquitted in Count III.

4. The appellant moved this court by way of a petition of appeal dated 28th day of July, 2021on grounds as enumerated on the face of the petition seeking to quash the conviction on the two counts and also the sentence, which she alleges was manifestly excessive.

5. When the appeal came up for hearing, the court gave directions on filing of submissions which both counsels complied with, and which submissions this court has duly considered together with the evidence on record.

6. In the submissions filed on her behalf by the counsel on record, the appellant submitted that the prosecution did not adduce any evidence at all that the alleged forged certificate was ever in possession of the appellant. She further submitted that no sufficient evidence was presented to support the charge and particulars that she indeed forged the KCSE certificate No. 1370225 and that no prosecution witness was present or saw her do the act of forging the certificate. Further that the original of that certificate was never traced or recovered in the possession of the appellant. That the learned magistrate erred by concluding that the alleged document was forged by the appellant and that she made it.

7. It was submitted that there was no specific complainant in respect of counts I and II and that the learned magistrate erred in finding that a copy of the forged certificate was found in two undisputed locations being Meru University of Science and Technology in the appellant's list of documents submitted for interview held on the 27th February, 2012 and also in the appellant's file at Karatina University yet, the two institutions had never raised an issue with those "forged" copies of certificates. She therefore argued that the said documents were sourced with the sole aim of framing her in counts I and II.

8. Further, it was submitted that though the learned magistrate found that there was no sufficient evidence to prove that the appellant uttered or presented a copy of the forged certificate to the interviewing panel at Embu University, and rightly acquitted her on count III, the court erred by finding that since the appellant is the one who stood to benefit from the forged certificate to secure a vacancy, she could not deny and ran away from it. That this amounted to shifting of the burden of proof to the appellant to prove her disassociation with the forged certificate.

9. The appellant further submitted that, while the learned magistrate found as a fact that the appellant was never found in actual and physical possession of the alleged forged certificate, the court erred by finding that she was in constructive possession of the same, before it was filed in Karatina University, yet, the appellant denied being the source of the copies of the said certificate in both Karatina and Meru universities.

10. The appellant also faulted the learned magistrate for invoking the provisions of Section 20(1) of the Penal Code yet, the appellant was neither charged under that section nor was she charged with forgery with any other person(s) not before the court. She argued that the court made a presumption that the appellant counselled and/or procured some other person(s) to forge or make the certificate on her behalf. That, it was therefore misguided and presumptive to apply the provisions of Section 20(1) to the facts and the circumstances of the case that was before the trial court.

11. Further that the learned magistrate disregarded the defence and the defence submissions which pointed at obvious gaps and insufficiency of the prosecution evidence and which should have been resolved in favour of the appellant.

12. On sentence, it was submitted that the same was manifestly excessive considering the mitigation that the appellant gave to the court.

13. On the part of the respondent, it was submitted that from the evidence on record, it is clear that there was a document which was falsely made by the appellant being the Kenya Certificate of Secondary Education. That the evidence showed that the document and its contents were altered to show that the appellant sat for KCSE in the year 1999 under Index Number 308104/043 and scored a mean grade of C+ which was not true.

14. Relying on Section 357(a) of the Penal Code and citing the case of **Dennis Binyenga Vs Republic [2018] eKLR**, the respondent laid down the essential elements of the offence of making a false document. The respondent also cited the case of **Joseph Mureithi Kanyita Vs Republic [2017] eKLR** in which the court of appeal stated that in addition to the making or signing of the document, execution must be without lawful authority or excuse, and with intent to defraud or deceive.

15. Further, the respondent relied on Section 348 of the Penal Code and submitted that the appellant processed a document that did not reflect her true grade, without any authority whatsoever. That her intention was to defraud her employers into giving her a position that she did not qualify for, and therefore the trial court was right in convicting the appellant for the offence.

16. On the issue of constructive possession, it was submitted that under Section 4(a) of the Penal Code, possession need not be direct or physical but it is wide enough to include constructive possession. That, the appellant having been formerly an employee of both Meru and Karatina Universities had presented the KCSE certificate with a mean grade of C+ and therefore, the trial court was right in finding that the appellant was the source of the certificate and therefore the owner of the document.

17. On sentence, it was submitted that the same was neither harsh nor excessive as the provisions under which she was charged and convicted provides for more severe sentences. The respondent urged the court to dismiss the appeal.

18. This being the first appellate court, its mandate includes subjecting the entire evidence to a fresh analysis and evaluation and drawing own conclusions. The court is guided by the case of **Okeno Vs Republic [1972] EA 32.** (See also the case of **David Njuguna Wairimu Vs Republic [2010] eKLR** and that of **Kamau Njoroge Vs Republic [1987] eKLR).**

19. The court has considered the petition of appeal, the submissions of both counsels for the appellant and the respondent. I have also subjected the entire evidence to a fresh analysis and evaluation and have drawn my own conclusions over the matter.

20. The appellant was charged and convicted in counts 1 and 2 for forgery and for making a document without authority. She was, however, acquitted on the 3rd count of uttering a document with intent to deceive.

21. Forgery is defined in Section 345 of the Penal Code as the making of a false document with intent to defraud or deceive.

22. Section 349 of the Penal Code provides;

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

23. The ingredients for the offence of forgery were set out in the Indian case of **Sukanti Chaudhry Vs State of Orise CLR Rev. No. 1408 of 2008** which are that;

> ***a) There must be a document or writing.***
>
> ***b) It must be forged by the accused, and;***
>
> ***c) The accused must have used it with the intention that the forged documents will be acted upon to the prejudice of the victim.***

Also in the case of **Caroline Wanjiku Ngugi Vs Republic [2015] eKLR** relied on by the respondent which case cited the Nigeria case of **Alake Vs the State**.

24. From the evidence on record, it is not in dispute that the KCSE certificate in issue was not genuine and that it was forged as it was materially different from the one issued by Kenya National Examinations Council. PW10, a document examiner examined the document and prepared a report that confirmed that the document was a forgery. The evidence shows that the document and its contents were altered to show that the appellant sat for her KCSE in the year 1999 under Index No. 308104/043 and scored a mean grade of C+ which is not true. Further, the evidence on record shows that the genuine KCSE certificate was officially registered under the name of Perpetual Njagi Karimi and not in the name of the appellant.

25. It is also not disputed that copies of the alleged certificate were found in Meru and Karatina Universities in the appellant's list of documents submitted for interviews. The appellant had previously worked for these two institutions. This fact was not denied by the appellant.

26. Though the appellant contends that the two universities are not complainants in the case before the court, the court refuses to be convinced that they were sourced by the investigating officer with the sole aim of framing the appellant. The prosecution was able to adduce sufficient evidence to connect the appellant with the forged certificate which had her name on it, yet, it was not her genuine certificate.

27. It is also worth noting that when she was put on her defence, she did not explain how her name came to be on the forged certificate yet, she was in the same school where the genuine certificate was allegedly issued. She did not also deny that the forged certificate was found in her list of documents submitted for interviews both at Meru and Karatina Universities. Though it is true that the appellant was not found in the actual and physical possession of the forged certificate, I concur with the learned magistrate that she was in constructive possession of the same.

28. Under the short title in the Penal Code, possession is defined as hereunder;

> ***"Possession" –***
>
> ***(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.***

29. Further, the learned magistrate was right in invoking the provisions of Section 20(1) of the Penal Code which provides;

> ***(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—***
>
> > ***(a) every person who actually does the act or makes the omission which constitutes the offence;***
> >
> > ***(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***
> >
> > ***(c) every person who aids or abets another person in committing the offence;***
> >
> > ***(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.***

30. On Count II, the offence of making a document without authority is set out in Section 357(a).

31. From its definition, the offence constitutes the following ingredients;

i. Proof of the making, signing or execution of a document.

ii. The same (making, signing or execution of a document) was done by the accused.

iii. The same (making, signing or execution of a document) was without lawful authority or excuse, and;

iv. The same (making signing or execution of a document) was with the intention to defraud or deceive.

(See the case of ***Dennis Binyenya Vs Republic [2018] eKLR*** and that of **Joseph Mureithi Kanyita Vs Republic [2017] eKLR)** on the ingredients of the offence of making a documents without authority.

32. Section 348 of the Penal Code establishes the intent to defraud. It reads;

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

33. As earlier stated, PW10 testified as having examined the certificate in issue and confirmed that it was a forgery.

34. PW7, the Deputy Registrar of Meru University testified that the appellant had presented the KCSE certificate to the university. PW9 who is the Registrar of Karatina University provided the investigating officer with the same certificate which was in their records and which she submitted to them. The said certificate bears the name of the appellant which is not the correct position.

35. Considering the above rendition, it is my considered view that the prosecution was able to tender sufficient evidence to prove the elements of the offences in counts I and II the appellant faced before the trial court. I agree with the trial court's finding.

36. On the 3rd count of uttering a document with intent to deceive, I agree with the learned magistrate that the same was not proved beyond reasonable doubt.

37. As to whether the sentence was excessive and unreasonable, it is trite that an appellate court cannot interfere with the exercise of the trial court's discretion in sentencing unless the sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor or took into account some wrong material or acted on the wrong principle. Even if the appellate court feels that the sentence is heavy and that it might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist (see **Bernard Kimani Gacheru Vs Republic [2002] eKLR**).

38. I have considered the sentences imposed upon the appellant and in my view, the same are not excessive and were within the law. The appellant did not prove that the trial court overlooked some material factor, or took into account some wrong material or acted on the wrong principle.

39. The appellant has submitted that the prosecution confirmed that the appellant was a first offender, that she was expectant and that she had 3 young children at the time and that she was remorseful. The court has perused the judgment of the trial court and noted that the learned magistrate considered that the appellant is a first offender and also the mitigation that she put forth.

40. In the circumstances aforgoing, I find that the appeal is devoid of merit and hereby dismiss the same.

41. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....FOR THE APPELLANT

.....FOR THE RESPONDENT