**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 91 OF 2018**

**MARY WAMAITHA MURIU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from the whole conviction and sentence imposed on Mary Wamaitha Muriu on 12th July, 2018 by the Senior Principal Magistrate Hon D. Orimba SPM sitting at Kangundo Law Courts)

**JUDGEMENT**

1. The Appellant, **Mary Wamaitha Muriu**, was charged with several counts of forgery (Counts 5, 8 and 10) **contrary to Section 349 of the Penal Code**, uttering a false document (Count 6 and 9) **contrary to Section 353 of the Penal Code**, obtaining by false pretenses (Count 2) contrary to **Section 313 of the Penal Code,** obtaining registration by false pretense (Count 1) contrary to **Section 320 of the Penal Code,** conspiracy to effect unlawful purpose (Count 3) contrary to **Section 395F of the Penal Code,** making a document without authority (Count 4 and 7) contrary to **Section 347 of the Penal Code and** cheating (Count 11) contrary to **Section 315 of the Penal Code.**

2. The particulars of Count I were that on the 11th June, 2014 at Machakos land registrar's office in Machakos District within Machakos county willfully procured registration of the title deed **No. Donyo Sabuk/Komarock Block 1/12869** for herself using forged documents.

3. The particulars of count 2 were that on the 19th June, 2014 at Family Bank (K) Limited, Kenya Tea Development Authority Branch in Nairobi within Nairobi County, with intent to defraud obtained from the said bank KShs 1.8 million/- by falsely pretending that the title deed **No. Donyo Sabuk/Komarock Block 1/12869** in the names of Mary Wamaitha Muriu was a genuinely obtained title deed to secure the said loan.

4. The particulars of count 3 were that on 24th April, 2014 at Kasikoni, Matungulu District within Machakos County jointly with others not before court knowingly conspired to transfer the title deed **Donyo Sabuk/Komarock Block 1/12869** in the name Joel Mwaniki to her names without his consent.

5. The particulars of count 4 were that on the 24th day of April, 2014 at an unknown place within the republic of Kenya, jointly with others not before court with intent to defraud and without lawful authority or excuse made an authority letter dated 24.4.2014 purportedly written and signed by Joel Mwaniki.

6. The particulars of count 5 were that on the 24th day of April 2014 at an unknown place within the Republic of Kenya with intent to deceive, jointly with others not before court forged the signature of Joel Mwaniki an authority letter dated 24.4.2014 purporting to be a genuine signature of the said Joel Mwaniki.

7. The particulars of Count 6 were that on 24th April, 2014 at Kasikoni, Matungulu District within Machakos County knowingly and fraudulently uttered a forged authority letter dated 24.4.2014 purportedly from Joel Mwaniki to Mr. Patrick Mwangi the chairman of land control board.

8. The particulars of Count 7 were that on the 24th day of April, 2014 at an unknown place within the republic of Kenya without lawful authority or excuse jointly with others not before court made a land sale agreement between her and one Joel Mwaniki purporting to be a genuine sale agreement.

9. The particulars of Count 8 were that on the 24th day of April, 2014 at an unknown place within the republic of Kenya, jointly with others

not before court forged the signature of Joel Mwaniki on the sale agreement dated 5.3.2014 purporting to be a genuine signature of the said Joel Mwaniki.

10. The particulars of Count 9 were that on 24th April, 2014 at Kasikoni, Matungulu District within Machakos county knowingly and fraudulently uttered a forged sale agreement dated 5.3.2014 to Mr. Patrick Mwangi the chairman of the Land Control Board.

11. On count 10, the particulars were that on unknown dates at an unknown place within the republic of Kenya with intent to deceive, forged the signature of Joel Mwaniki on the transfer of land registered on 11.6.2014 purporting to be a genuine signature of the said Joel Mwaniki.

12. The particulars of Count 11 were that on the 19th June, 2014 at Family Bank (K) Limited, Kenya Tea Development Authority Branch in Nairobi within Nairobi County by means of fraudulent tricks deceived Joel Mwaniki to deliver his title deed No. Donyo Sabuk/Komarock Block 1/2869 as security for her staff loan than he would have done but for such tricks.

13. The Appellant was convicted in respect of all counts and sentenced to pay a fine of a total of Kshs 1,060,000/- and in default serve a total of 21 years imprisonment; the sentences would run consecutively. Having been dissatisfied with the decision of the trial court, she preferred the instant appeal through her advocates on 12th October, 2018. Her 29 grounds of appeal in summary are that the case was not proved beyond a reasonable doubt, that the evidence was insufficient and not credible, that the case was riddled with bias and contradictions, that the trial magistrate failed to consider her defence, and that the sentence was harsh, punitive, excessive and in contravention of Section 7 and 14 of the Criminal Procedure Code.

14. The Appellant vide submissions dated 18th February, 2019 framed 4 issues for determination. Firstly, whether the learned magistrate was fair, independent and impartial as envisaged under Article 50 of the Constitution, Secondly whether the prosecution discharged its burden of proof; Thirdly whether the ingredients of the charges were met and fourthly whether the sentence was harsh, excessive and punitive and that the learned magistrate was in disregard of the provisions of Section 7 and 14 of the Criminal Procedure Code. On the first issue, Learned Counsel cited the provisions of Article 50 of the Constitution and submitted that the trial magistrate failed to recuse himself from hearing the criminal case against the appellant on the grounds that the same court was seized with the **Civil Suit No. 169 of 2015, Joel Mwaniki v Family Bank & Mary Wamaitha Muriu** over the same subject matter. Counsel submitted that the court had no jurisdiction to order that the Title Deed No. Donyo Sabuk Komarock Block 1/12869 reverts back to Pw1 and that the same order was made on 18th July, 2018 after the court was functus officio having delivered a judgment on 12th July, 2018 and thus exhibited bias towards the appellant. Learned counsel submitted that the trial magistrate evaluated evidence only on four counts but passed sentences on all the eleven counts hence a manifestation of bias against the appellant.

15. The Appellant went on to submit on the 2nd issue that the trial magistrate relied on evidence of witnesses who were not called to give evidence and did not give reasons for his judgement. He cited the error in finding that the prosecution had established a prima facie case against the appellant yet the prosecution had not discharged their burden of proof; counsel relied on the case of Ramanlal Trambaklal Bhatt v R (1957) EA 332 at 334 and 335. He also reiterated that the burden of proof of the prosecution as being beyond reasonable doubt as per Section 110(1) of the Evidence Act and the case of R v Derrick Waswa Kuloba (2005) eKLR was cited. He faulted the trial magistrate for relying on uncorroborated evidence in convicting the appellant. Further that the trial court failed to consider the evidence that the appellant paid Kshs 1.8m/- to Pw1 hence defeating the ingredients of the offence of obtaining registration by false pretense and in convicting the appellant the trial magistrate erred in law. Learned counsel submitted that the trial court was biased in admitting exhibits marked MFI-17 contrary to Section 70 of the Evidence Act.

16. The appellant's submission on the 3rd issue was that no handwriting samples were obtained from the appellant and the same was admitted by Pw9, the investigating officer who admitted that he saw no need for the same. Counsel added that no comparison chart was presented before the court and relied on the case of Samson Tela Akute v R (2006) eKLR where the court held that an expert opinion that fails to point at the intricate handwriting similarities or dissimilarities and goes further that the maker of the document is the accused person is devoid of evidential weight. Learned counsel submitted that the error in relying on evidence that was unprocedurally obtained and in contravention of Section 70 of the Evidence Act led to reliance on uncorroborated evidence as the same was not rendered from the onset. Learned counsel submitted that counts 6 and 9 were not proven because the evidence of Pw2 as corroborated by Pw3 point towards the fact that the documentation was given to Pw2 by the advocate and not the appellant. Counsel submitted that the entire conveyancing process was done by Pw5 as per his evidence and therefore there was a failure by the trial magistrate to consider the evidence. On the count of uttering a false document, counsel submitted that payment in favour of DW1 defeats the claim of fraud.

17. It was the Appellant's submission on the 4th issue that the sentence meted on the appellant contravened provisions of Section 14(3)(4) and 7 of the Criminal Procedure Code. Counsel relied on the case of George Mwangi Chege & 2 Others v R (2004) eKLR that concurrent sentences should be awarded for offences committed in one criminal transaction unless exceptional circumstances prevail. Counsel concluded by submitting that on count one, the sentence should be quashed and judgement set aside because the appellant returned the money; that count two because no cogent evidence of forgery was presented before court, the prosecution failed to discharge its burden of proof. On the count of uttering a false document, he submitted that the prosecution failed to tender evidence that the appellant tendered to the land control board an authority letter marked MFI 10. On the counts of making a false document, forgery and uttering a false document, counsel submitted that the prosecution did not provide any corroborative evidence and on the count of cheating, counsel submitted that the facts do not disclose the offence.

18. The State conceded to the appeal and sought for an order for retrial because there may have been bias because the court handling the criminal case was the same one that handled the civil suit in respect of the same subject matter and refused to recuse itself in respect of the criminal case. Learned State Counsel, submitted that issuance of civil orders in a criminal trial is a demonstration of bias. Counsel was of the view that the same would not serve justice and added that the trial magistrate relied on uncorroborated evidence in convicting the appellant and no party was called from the bank to give evidence and he bank never reported any loss of money.

19. Vide supplementary submissions filed on 14th May, 2019, learned counsel for the appellant submitted that the court ought not to grant an

order for retrial where the evidence was insufficient to sustain the charges but only where the original trial was illegal and defective. Counsel cited the case of **Opicho v R (2009) KLR 369** and **Samuel Wahini Ngugi v R (2012) eKLR**. Counsel submitted that the prosecution case was weak and a retrial will prejudice the appellant.

20. The evidence on record was as follows. Pw1 was Joel Mwaniki who testified that he knew the appellant as a bank manager at Family Bank and who had asked him to be a guarantor for a loan and sought the title deed to the suit property and he handed over the same to the appellant. He testified that Kshs 7 million was deposited in his account but the appellant told him to return KShs 4.5 million and later he went to inquire and found that his title deed was transferred to the names of the appellant and he denied ever selling the land to the appellant or signing any sale agreement or transfer in respect of the same. On cross-examination, he testified that the appellant assisted him get the loan that he wanted and he purchased a vehicle registration number KBN and admitted signing the document PMFI-2. After a ruling wherein the trial magistrate refused to recuse himself in the hearing of the matter, Pw1 continued testifying during cross-examination. He testified that he made a loan application of Kshs 7 million to purchase a plot of Land in Kahawa but received Kshs 2.5 million. He testified that he does not know how to sign but wrote his name and thus denied the signatures on exhibits MF1 9 and 10. He also denied that there was a deposit of Kshs 1.8m/- in his account.

21. Pw2 was Patrick Githienye Mwangi who testified that he chaired the land board meeting on 24th April, 2014 and the appellant appeared together with a lawyer called Njagi appeared before the board in respect of transfer of the suit land. He testified that Pw1 did not attend but Njagi was allowed to attend on his behalf and the consent was issued. It was his testimony that Pw1 later came and complained that his land had been fraudulently transferred. Counsel for the appellant walked out of court and the appellant was not able to cross-examine the said witness (Pw2).

22. Pw3 was Rosaline Soo, the County Lands Registrar, Machakos. She testified that she heard of this matter when Pw1 came to complain. However in her view the documents passed the test for registration and hence the title was registered in the names of the appellant. She testified that the Pin and ID were stamped by the bank and not an advocate. The court refused a second application for recusal and the hearing commenced albeit before another trial magistrate.

23. Pw4 was Sheriff Sam Mwangangi Mwendwa who denied witnessing a sale agreement in respect of the suit land. He also denied the stamp on the document.

24. Pw5 was Joel Kyatha Mbaluka who testified that he is on the Panel of Family Bank and that on 29th April, 2014 he received instructions in respect of a loan facility that was advanced to the appellant and the appellant came to his office to request to take transfer documents to her ailing uncle. Pw5 conceded and gave them to the appellant and when she returned them, the conveyance was effected and he gave instructions for the money to be paid to the vendor of the land. He testified that he knew Pw1 and that he admitted receiving money but returned it and he denied ever signing documents in respect of the suit land.

25. Pw6 was CIP Geoffrey Chania who testified of examination that was conducted on disputed documents marked as B, C, D and G. He had samples of the known handwriting of the appellant and specimen handwritings and signatures of the complainant. He testified that he formed the opinion that the complainant did not sign the land documents save for CMF-5. He prepared his report and tendered the same in court. On cross-examination, he testified that sample handwritings of the appellant were not compared with the document that was disputed.

26. Pw7 was PC Samuel Kamau who testified that he received instructions to handle the complaint from Pw1 and recorded the complaint in the Occurrence book then obtained a copy of the green card from the ministry of lands. He conducted investigations at the Law Society of Kenya and was able to get hold of Pw4 but not Njagi. When recalled he presented in evidence a deposit slip in respect of money that was deposited by the complainant.

27. Pw8 was CIP Johnson Bulemi who testified that he received the complaint from Pw1 and conducted investigations at the Law Society of Kenya, KRA and Family Bank. He was able to obtain documents that were used to transfer the suit land and handed over the file to Pw7.

28. Pw9 was CIP Isaiya Muiranga who testified that he received documents in respect of the conveyance of the suit land and forwarded them to the government analyst for examination. He testified that the ID and PIN certificate were certified twice and he got suspicious and thus called the appellant and further that he amended the initial charge sheet from 3 counts to 11 counts. After the prosecution closed the case, the court ruled that the appellant had a case to answer. She was put on her defence and she called 5 witnesses.

29. Dw1 was the appellant who testified that there was a banker-customer relationship with Pw1 and that he indicated to her that he was selling his property. She then conducted a search in respect of the suit land and when satisfied, she notified the bank because she was to obtain a loan from the bank to purchase the land. She testified that after the conveyance documents were prepared she went to the land board together with Advocate Njagi who had been introduced to her by Pw1 as his advocate. She testified that when the consent was ready, she went with Pw1 to collect the same after which Kshs 1.8m/- was transferred to Pw1's account. She lamented that the investigating officer did not allow her to give her side of the story and that to date no investigation had been conducted to establish that she took money from the bank. She testified that she paid for the property and that the Advocate Njagi gave documentation to the Land Board. She testified that the property was valued at Kshs 4m/- and she paid Kshs 1.8m/- for the same. On cross-examination, she testified that the complainant quoted the figure of Kshs 2m/- for the property and denied that she took the sale agreement to be signed by the complainant because Mr. Mbaluka knew the complainant. She testified that the complainant never signed the document in her presence. The appellant had no other witness and closed her case.

30. The first issue the court would wish to address before going into the merits of the case is whether Article 50 of the constitution was violated. Article 50 (1) of the Constitution as the pillar on which this issue stands provides that, **"every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"**. Then the question flows; *had the trial Magistrate exhibited bias that is likely to compromise a fair and impartial trial?***"**

31. The Black's Law Dictionary, 8th Edition at page 171 defines the word bias as;

> **"Inclination; prejudice, …., judicial bias. A Judge's bias toward one or more of the parties to a case over which the Judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge's bias usually must be personal or based on some extra judicial reason."**

While the same dictionary at page 1303 defines recusal as;

> **"Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest."**

32. The law has been that the issue of recusal of judicial officers from matters owing to their alleged bias in a particular case has been addressed in various case law. In the case of **Jasbir Singh Rai & 3 Others -Vs- Tarlochan Singh Rai & 4 Others (2013) eKLR,** Supreme Court of Kenya Petition No. 4 of 2012 Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC) had this to say;

> **"(6) Recusal as a general principle, has been much practiced in the history of the East African Judiciaries, even though its ethical dimensions have not always been taken into account. The term, is thus defined in Black's Law Dictionary, 8th Edition (2004) (P. 1303);**
>
> 'Removal of oneself as Judge or policy maker in a particular matter, (especially) because of conflict of interest'**."**
>
> **[7]From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.**
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> **[8]It is an insightful perception in the common law tradition that the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate profile, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "constructive intuition which operates after learning and analysis are exhausted" [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.**
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> **[9]Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.**
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> **[10] In R. v. Bow Street Metropolitan Stipendiary Magistrate, ex- parte Pinochet Ugarte (No.1) [2000] 1 A.C. 6, the English House of Lords [now the Supreme Court] had just rendered a judgment when it became known that a member of the collegiate Bench involved, was an unpaid director and chairman of Amnesty International Charity Limited, an organization set up and controlled by Amnesty International; and the same member's wife was also employed by Amnesty International. In the said judgment, it had been held that General Pinochet, the Chilean Head of State, was not immune from arrest and extradition, in relation to crimes against humanity which he was alleged to have committed while in office. The House of Lords, at the commencement of the hearing, had given permission for Amnesty International to join in as intervener. A newly constituted Bench of five Judges held unanimously that the earlier judgment must be set aside, because one of the members of the Bench should have been disqualified from hearing the case; as that member had had an interest in the outcome of the proceedings.**
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> **[11] In an American case, Perry v. Schwarzenegger, 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice.**
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> **[12]Such a broad test is adopted too in *South African Defence Force and Others v. Monnig and Others* (1992) (3) SA 482 (A), p.491: "The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial."**

33. In the foregoing case, the learned judge of the Supreme Court of Kenya Ibrahim JSC observed as follows*;*

> **"The issue of the circumstances under which a judge may be required to recuse himself has been explained by the elaborate decisions of the courts made over the years which go as far back as the 19th century when the House of Lords in Dimes vs Proprietors of Grand Junction Canal, set aside Lord Chancellor Cottenham's decision in the case on the ground that he had a pecuniary interest in the matter by virtue of the fact that he had a substantial shareholding in Grand Junction Canal. The Court set aside that decision and held that Cottenham LC was disqualified.**
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> **This is supported by the commonly cited holding of Lord Hewart CJ in *R vs Sussex, ex parte McCarthy* that *"it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."***

**The Court noted that it was faced with a novel case since the disqualification was sought on grounds which did not indicate any person would get any pecuniary interest out of the decision of the Court since the matter was a criminal case. It opined:**

**"[t]he rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge is involved together with one of the parties."**

**Further, the Court explained that it is only in exceptional circumstances as in this case "should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest."**

**Lord Nolan in concurring with the decision of Lord Browne-Wilkinson and Lord Goff in *Ex parte Pinochet* stated that "in any case where the impartiality of a judge is in question**

**Similarly, Lord Hutton observed that if the nature of the interest was such that public confidence in the administration of justice required that the judge implicated disqualifies himself, it was irrelevant that there was in fact no bias on the part of the judge, and there is no question of investigating whether there was any likelihood of bias or any reasonable suspicion of bias on the fact of that particular case.**

34. These precedents clearly indicate the weight with which the principle has been held by the Courts and the extent to which the Courts will jealously guard it. Even if it results in some inconvenience on the part of the Court it would be gladly borne for justice to prevail **. In *R vs Gough***[1993] 2 All E. R 724, [1993] AC 646 **Lord Goff of Chieveley observed that:**

**"[T]he nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of the impartiality."**

35. In the English case of **Metropolitan Properties CO. (FG.C) LTD. v Lannon & Others (1969) 1 Q.B. 577**, proceeded to summarize the legal position in Kenya as follows: -

**"That being the position as I see it when the courts, in *this country are faced with such proceedings as these, [i.e.* proceedings for the disqualification of a judge] it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the *fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi -judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal."***

36. In the instant case, the ground for recusal was because there was before the same court a civil matter in respect of the same subject matter and the same parties. Administrative convenience or inconvenience is not one of the factors that the judge takes into consideration in deciding whether to recuse himself or not and in that regard applying the test whether or not there is a real possibility that a fair-minded and informed observer might think that there was a real possibility of bias, I have reached the conclusion that the answer is in the negative. Similarly, I have reached the considered conclusion that there is no legitimate reason to fear that in this particular criminal case the trial court lacked impartiality and that the trial magistrates had predispositions not permitted by facts and law to decide the case in a certain way.

37. In as much as the prosecution has conceded to the appeal, the substantial issues to be addressed are whether the court may grant an order for retrial and whether the prosecution proved its case against the appellant beyond the reasonable doubt in respect of all the counts. In addressing whether a retrial may be granted, there would have to be a finding that there was a mistrial, which defect can only be corrected by way of ordering a retrial.

38. A retrial cannot be ordered as a matter of course. As stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic (1964) E.A 481** and restated in **Fatehali Manji vs The Republic (1966) E.A. 343**:-

**"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where 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 particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."**

39. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522** held as follows;

**"…several factors have therefore to be considered. These include:**

**1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.**

2. **A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.**

3. **A retrial should not be ordered where it is likely to cause an injustice to the accused person.**

4. **A retrial should be ordered where the interest of justice so demand.**

**Each case should be decided on its own merits."**

40. In the present case, the evidence on record does not clearly point to the guilt of the Appellant. Whereas the title is in her name, she mentions a certain Njagi who appeared at the Land Board office and who had an envelope that contained the land documents and hence evidence as to who acquired the "fake consents" from the land office that enabled the bank to place the deposit of KShs 1.8m/- if any is not clearly before the court. The appellant is sure that the land belongs to her because she testified that she negotiated the fee from Kshs 2m/- to 1.8m/.

41. Be that as it may, a closer introspection into the case would be necessary to determine whether if a retrial is ordered the same would most likely result in a conviction. The main issue to grapple with is whether the offences were proved beyond reasonable doubt. The first offence was forgery which is defined under **Section 345 of the Penal Code as;**

**"….the making of a false document with intent to defraud or to deceive."**

42. The Appellant has a title deed in her names. She has letters of consent that the lands officer admits were issued by his office and this was confirmed by PW5 and PW2 who confirmed with PW3 as well as PW4 that the transfer was registered because the procedures were fulfilled as required. None of them denied issuing the consent and the title deeds respectively.

43. PW9 took all these documents to PW6, the document examiner with the specimen handwriting and signatures of the above mentioned witnesses as well as with those of both appellant. The conclusion was that the signatures on the documents did not match the specimen signatures provided by Pw. However the handwriting and signatures of the complainant were not compared and the person who would clear the air, Njagi was not called as a witness. I am alive to the fact that failure to call all persons involved in the transaction is not necessarily fatal unless the evidence adduced is barely sufficient to sustain the charge as is posited in Section 143 of the Evidence Act and the cases of **Bukenya & Others v R (1972) EA and Mwangi v R (1984) KLR 595.** However if a witness was not called by the prosecution and I rely on the case of **Bukenya v Uganda (1973) EA 549** which held that failure to call an essential witness would be adverse to the prosecution case.

44. The second offence was uttering false documents contrary to **Section 353 of the Penal Code** which defines it as;

**"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."**

45. The false document in question is the authority letter and the sale agreement. It was the evidence of the appellant that the envelope containing documentation was handed over to Njagi and the said Njagi was not presented in court. The complainant denied receiving documents from Pw5 who alleged that he gave them to her so that the vendor of the suit land may have them signed. On the face of the evidence, there is no evidence to corroborate the narrative that the complainant was responsible for writing the document because the evidence of the document examiner does not link the writing on the same with that of the appellant.

46. The third offence was obtaining by false pretenses contrary to **Section 313 of the Penal Code.** It is defined thereunder as;

**"Any person who by any false pretenses, and with intent to defraud, obtains from any other person anything capable of being stolen, or includes any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years."**

47. Taking into account the evidence of Pw2 and Pw3, the Appellant had originals, the bank that was allegedly duped has not brought evidence to that effect. The Appellant got the loan and she had documents that were clearly genuine and backed by the evidence of the land registrar who gave the documents a clean bill of health.

48. The fourth offence was making a document without authority (Count 4 and 7) contrary to **Section 347 of the Penal Code**. The *actus reus* herein is the making of the authority letter and the land sale agreement. The Appellant was able to get a title deed in her names. However the nexus between her and the authority letter as well as the sale agreement does not exist in light of my analysis in 41 above. I find that the evidence has not proved this offence.

49. The Appellant did raise the issue that her specimen signature and handwriting were not compared with the offending signatures before the document examiner could give his report, which was admitted thereby casting doubt how the appellant could be connected to the offence. It is the view of this court that the officials required to execute the documents admitted having executed the same and this leads me to come to the conclusion that count 1 equally collapses leaving the counts 3 and 11.

50. The count 11 related to cheating and from the evidence on record, the complainant seemed to be part of the deal and therefore the court is not able to see how he was cheated. In any event the complainant admitted that part of the monies from the bank were wired into his account. Count 3 seems to have been established, however the conspirators have not been presented before court. I would have expected there to be co-accused persons and the basis upon which the trial court upheld the conviction remains a mystery. The second issue is therefore resolved

in the negative

51. Taking full consideration of the evidence adduced in court as well as the conclusions reached by the trial court, it is evident that there is no evidence that the Appellant committed the offences she was accused of. A retrial would thus most likely not result in a conviction. It is clear to me that the trial court's conviction was quite unsafe. This is borne from the fact that the trial magistrate did not even consider about four counts where complainants did not turn up and proceeded to convict the appellant on all eleven counts. A retrial would not be suitable in the circumstances. In any event it has come out clearly that the parties are still pursuing a civil claim in the matter which would resolve several issues on the land ownership dispute.

52. I now consider the second factor, whether any prejudice would be occasioned to the Appellant if a retrial were ordered.

53. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of **Ahmed Ali Dharmsi Sumar vs Republic (Supra)** and restated in **Fatehali Manji v The Republic (Supra)**, in deciding whether a case is suitable for re-trial, each case depends on the particular circumstances. In the present case, the answer is in the affirmative for the reason that she has almost served sentence in respect of only one of the offences that she may have been convicted of save for the selectiveness of the prosecution in charging accused persons. Clearly, a retrial would not serve its purpose.

54. In the result, this appeal succeeds. The conviction by the trial court is hereby quashed and the sentences set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**Dated and delivered at Machakos this 8th day of July, 2019.**

**D.K KEMEI**

**JUDGE**