



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIVASHA**  
**CORAM: R MWONGO, J**  
**CRIMINAL APPEAL NO. 12 OF 2018**

*(Being an Appeal from the Original Conviction and Sentence in  
Criminal Case No. 1467 of 2013 in the Chief Magistrate's Court,  
at Naivasha, E. Kimilu, PM)*

MICHAEL NJOROGE KAMAU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

**JUDGMENT**

**Background**

1. The appellant/accused was charged jointly with others not before the court and convicted with several counts of the offence of making a false document contrary to **Section 347 (a)** of the **Penal Code**. Counts 1 –V were concerned with making a false document contrary to **Section 347 (a)** and Count VI concerned uttering a false document contrary to **Section 353** of the **Penal Code**. Three other counts related to one Joseph Ndungu Hamisi alias Joseph Ndungu Wambugu who absconded and was therefore not tried in those proceedings.
2. The appellant was sentenced to serve three (3) years imprisonment on each of Counts 1 to VI, the sentences running concurrently. The particulars were that the Accused (appellant) on an unknown date and time in Naivasha jointly with others not before the court, with intent to defraud and without lawful authority or excuse made and uttered certain documents namely.
3. The documents allegedly made were Title deed Numbers Gilgil/Gilgil Block 1/4435 and 1/4436 (Count 1); certificate of Death Serial Number C560259 for entry number 036101668 in the names of Beatrice Elizabeth Wambugu purporting it to be a genuine certificate of death; (Count II), Confirmation of Grant in the name of Elizabeth Beatrice Wambugu in Succession Cause Number HC 2801 of 2011 issued to Joseph Ndungu Wambugu; (Count III) Confirmation letter purportedly written by Assistant Chief of Wamwangi Sub-Location Mr. Kangethe (Court IV); a Personal Identification Number Certificate (PIN) No. A000121451H in the names of Wambugu Joseph Ndungu (Count V).
4. In Count VI all the above documents were also allegedly falsely uttered contrary to **Section 353** of the **Penal Code**.
5. Dissatisfied by the lower court's decision the appellant/accused filed a petition of appeal on 8<sup>th</sup> August 2018 on the following grounds:
  1. *That the learned trial magistrate erred in finding the appellant guilty when the evidence adduced in court did not support the holding.*
  2. *That the learned magistrate wrongly relied on evidence of making a document without authority when no document examiner's report was produced by the prosecution.*
  3. *That the learned trial magistrate erred in failing to hold that even though the documents were forged, the prosecution had failed to show the forgery had actually been done by the appellant.*

*4. That the learned magistrate erred in not finding that the prosecution's evidence was heavily pointing the second accused who absconded and not the appellant.*

*5. That the learned magistrate erred in law and fact by failing to observe the provisions of section 124, of the Evidence Act.*

*6. That the learned trial magistrate erred in law and fact by failing to make a finding that the case was not proved beyond reasonable doubt.*

*7. That the learned trial magistrate erred in law and fact by making assumptions on the evidence adduced by asserting that a common criminal intent to commit the offences had been prove when it was not proved beyond reasonable doubt.*

*8. That convicting the appellant based on insufficient evidence flouting the provisions of section 329 of the criminal procedure code.*

6. The parties filed written submissions as directed by the court.

### **Appellants' submissions**

7. The appellant combined Grounds 1,2,3 and 4. He states that the magistrate held that he had common intention to defraud the potential buyer but the 5 counts of making a false document were not proved beyond reasonable doubt against him because: there was no evidence to prove he unlawfully made or aided and abetted the making of the documents, neither was he arrested in possession nor was his name and image on the documents; and that there was no evidence to show that appellant presented the documents as genuine documents or uttered a false document and further, no evidence to show that the appellant knew that the uttered documents were false.

8. On Grounds 5, 6 and 7, the Appellant submits that the evidence on record was contradictory, uncorroborated and therefore insufficient to support any conviction. For example he argued, PW2 testified that he did not do any transaction with the appellant; the investigating officer (PW4) did shoddy investigations as he testified that two accused persons submitted documents to the land registrar, namely, two title deeds, pin certificate and letter from sub chief but it is not clear who between 1<sup>st</sup> and 2<sup>nd</sup> accused actually presented them; PW4 was not present when the documents were being presented to the registrar, and the registrar was not called as a witness to corroborate the evidence of PW4. Further, that although PW4 testified during cross-examination that the appellant had booked a search in the name of Mwaura, no evidence was adduced to show who had in fact applied for the search; that the documents were recovered from the Land Registrar and not from him; and that PW4's testimony that documents were recovered from him contradicts PW2's testimony that all the questioned documents were in possession of the 2<sup>nd</sup> accused. In his further submissions he adds that PW4 did not mention which documents were found in his possession.

9. On Ground 8, the Appellant submits that the arrest and conviction were occasioned through suspicion which cannot form a proper basis for a conviction; that he was truthful when he stated that the 2<sup>nd</sup> accused had defaulted in paying some money borrowed from Quick Care Self-help Group. Thus, that it was decided by the Group's committee that the appellant should accompany the 2<sup>nd</sup> accused to dispose his property and therefore recover the Group's money. The appellant further submits that the prosecution did not bring forth evidence to rebut this assertion.

10. The Respondent opposed the appeal. In their submissions the Respondent urges that the prosecution proved all the elements of each of the counts the appellant was charged with; that the conviction and sentence was proper; and therefore seeks that the appeal be dismissed for lack of merit.

### **Issues**

11. Only two issues arise for determination which I will handle together:

1. Whether the appellant was linked to the charges through common intention
2. Whether the charges were proved beyond reasonable doubt against the appellant

### **Analysis and determination.**

12. Nowhere in the proceedings is it disputed that the documents asserted to be fraudulent including: title deeds, death certificate, confirmation of grant, pin certificate, letter from chief and identity card were all forged. Most of the documents were in the 2<sup>nd</sup> accused's names. The exception is the alleged death certificate which was in his mother's name.

13. The fact of forged/falsified documents is clearly demonstrated in the evidence of PW1 District Lands Registrar, Thika, PW3 Civil Registration Officer, Thika, and exhibits of letters confirming that the various documents were forged.

14. It is also not contested that none of the documents in issue bore the appellant's name. the question that arises then, is whether in the absence of the appellant's name in any of the falsified documents, it can be properly said that he was connected to the offences under which he was charged.

15. From the evidence availed, the appellant is linked to the offence by his presence in the subject transaction. For example, PW2 testified that the appellant was in the company of the 2<sup>nd</sup> accused and a supposed shylock on the first date of transaction. On that day, the 2<sup>nd</sup> accused

told PW2 that he owed the shylock money and that the shylock was holding the title.

16. The appellant, on his part, alleges that his presence in the whole transaction was solely aimed to recover money from the 2<sup>nd</sup> accused (Joseph Ndungu) who allegedly owed 70,000/= to Quick Care Self Help Group of which he, the appellant, was the chairman. He argues that there is nowhere in the evidence on record that the appellant introduced himself and the role he was playing in the transaction as he alleges.

17. However, the evidence of PW2, was that there were in fact three people who approached him to sell land to him. They were the 1<sup>st</sup> Accused, the 2<sup>nd</sup> Accused and a third person who was not brought to court. The shylock, who is not a party in the case, said he was a shylock and had a debt of 350,000/= and they were holding his title. PW2 was cross examined by both 1<sup>st</sup> and 2<sup>nd</sup> accused.

18. On the first day when they met PW2, it was impossible to complete the transaction due to the late hour. Thus, PW2 pushed the transaction to the following day and ended up paying accommodation and food for the accused persons. The following day, PW2 proceeded to the Lands Registry in Naivasha to conduct a search. He was in the company of the appellant and 2<sup>nd</sup> accused who were then arrested after one officer questioned PW2 on his relations with the 2 plots. He was informed that the titles were forged. Even though PW2 admits in cross-examination that he did not transact with the appellant, it is not disputed that the appellant was present on both dates, and involved in the transaction.

19. The key argument of the appellant is that he was not alleged to have personally made any alterations or forgeries and none of the impugned documents were in his name. However, the judgment of the lower court held, inter alia, that:

***“Accused persons had a common intention when making the false title deeds...”***

20. This common intention was executed in a bid to defraud the potential buyer. The appellant did not challenge the evidence on record in the lower court and knew about the sale. It is not explicit, however, that from the evidence that he was aware that the documents they intended to use for the sale were fraudulent.

21. The statutory underpinning for the law on common intention is found in **Section 21** of the **Penal Code** which **provides:**

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*** (underlining added).

22. Authorities on common intention have also settled the law. The Court of Appeal in **Njoroge v Republic [1983] KLR 197** stated:

***“If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavour to effect the common object of the assembly.”***

23. More recently in **Dickson Mwangi Munene & Another v Republic Criminal Appeal No. 314 of 2011** the Court of Appeal while borrowing from **R v Tabulayenka s/o Kirya (1943) EACA 51** stated that common intention may be inferred from the accused’s presence, their actions and the omissions of either of them to disassociate himself from the assault. In essence the court was stating that where a person is in association with another in an act or omission an inference may be drawn from his presence, actions and omissions, if he does not dissociate himself from the act or omission in question.

24. From the evidence on record the appellant was present on both dates with PW2 to whom the land was to be sold. He was in the discussions with PW2, even though he did not make any offer in the transaction. Further, the appellant did not give proof of the alleged money owed to the self-help group by the 2<sup>nd</sup> accused neither did he give any information of that nature to PW2 during the discussions on the sale transaction. In addition, the Appellant testified that he had known the 2<sup>nd</sup> accused for a long time as a member of the Self-help Group though no documentation of membership to the group was provided.

25. The said shylock who was never arrested was the person alleged to be owed money. I am unable to understand the position of the shylock in relation to the Shs 70,000/= which the appellant said was owed to the Self-help group, given that it was not mentioned at all by PW2.

26. Looked at holistically, these facts placed the appellant in a position of knowledge of the ongoing transactions. It added to the ingredients of presence and common intention. The appellant’s untested story that he was pursuing a loan defaulter through the sale sought to be transacted is less than credible or probable.

27. In light of all the foregoing, I am persuaded that the trial court properly found that the appellant was aware of all that had been transpiring, and properly convicted him. Thus, I am unable to accept the appellant’s appeal which is hereby dismissed. The trial court’s conviction and the sentence are hereby upheld.

28. Orders accordingly.

**Dated and Delivered at Naivasha this 11<sup>th</sup> Day of November, 2019**

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**RICHARD MWONGO**

**JUDGE**

**Delivered in the presence of:-**

- 1. Ms Kinyanjui holding brief for Ms Kuria for the Appellant**
- 2. Maingi for the State**
- 3. Appellant - Michael Njoroge Kamau - present**
- 4. Court Clerk - Quinter Ogutu**