REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 80 OF 2018

(*An appeal from conviction and sentence in Judgment by Hon. F. Makoyo*

***Senior Resident Magistrateon 25th May 2018 in Butere Criminal Case No. 41 of 2014*)**

CHARLES ALUMASA LUGWILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Background and Brief Facts

1. This appeal stems from the decision of the learned trial magistrate aforementioned which was filed by the appellant on 5th June 2018 seeking *inter alia* that his sentence be set aside; his conviction quashed and fine if already paid, refunded to him, on the following grounds as set out in his petition of appeal *inter alia* THAT:

> ***a)*** *The learned senior resident magistrate error in law in convicting the appellant of the offence of forgery contrary to section 349 as read with section 350 of the Penal Code when such case was explicitly duplex and incurably and fatally defective.*
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> ***b)*** *The learned senior resident magistrate grossly erred in law making conclusion in his judgment that a charge of forgery under section 349 as read with section 350 of the penal code was a charge in the alternative and therefore valid as a basis for conviction of the appellant when the subject charge was grossly invalid and lumped up contrary to the relevant law*
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> ***c)*** *The conviction is not supported by the evidence on record*
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> ***d)*** *The learned senior resident magistrate erred in law in convicting the appellant of a non-existent charge, namely, forgery of alleged court order in Civil Suit No. 173 of 2013 Kakamega High Court when the evidence presented to court was in respect of Civil Suit No. 173 of 2012 Kakamega High Court*
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> ***e)*** *The charge of forgery contrary to section 349 of the penal code of which the learned magistrate convicted the appellant was not the same charge the appellant was informed of and over which he was tried*
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> ***f)*** *The learned magistrate was wrong in law in introducing or otherwise relying upon irrelevant considerations in convicting the appellant*
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> ***g)*** *The fine Kshs. 100,000/- imposed on the appellant was unlawful and too severe, harsh,vindictive, punitive and grossly out of context with the gravity of the offence and did not take into account the mitigation raised by the appellant and fact that he had no previous criminal record*
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> ***h)*** *In all circumstances of the case, the learned magistrate failed to act judiciously and or properly as a result of which the appellant has suffered an injustice.*

2. The appellant was charged with the offence of forgery contrary to *section 349 as read with section 350 of the Penal Code Cap 63 Laws of Kenya*. Particulars of the offence were that the appellant, on the 23rd day of December 2013, at Bungoma township in Bungoma South District within Bungoma County, forged a court order in *Civil Suit No. 173 of 2013* purporting to be a genuine court order issued by

Kakamega High Court.

3. The appellant was additionally charged with another count for the offence of uttering a false document contrary to section 350 of the penal code. The particulars were that the appellant on the 23rd day of December 2013, at Bungoma Township in Bungoma South District within Bungoma County, knowingly and fraudulently uttered a certain forged court order purporting to be a genuine court order vide *Civil Suit No. 173 of 2013* from Kakamega High Court.

4. At the conclusion of the trial, the learned trial magistrate found the appellant guilty of the first count and sentenced him to pay a fine of Kshs. 100,000/- and in default, he was to serve a two-year imprisonment.

5. It is the said conviction and sentence that forms the basis of the instant appeal.

6. This is the first appellate court and as such it is guided by the principles set out in the case of DAVID **NJUGUNA WAIRIMU VS. REPUBLIC [2010] eKLR** where the court of appeal stated:

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

7. In a much earlier decision, the Court of Appeal similarly held in Okeno **vs. Republic [1972] EA 32** that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

Issues for Determination

> **(a) Whether the charge was duplex and incurably and fatally defective**
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> **(b) Whether the respondent sufficiently discharged the burden of proof to the required standard of beyond reasonable doubt that the appellant forged a Court Order in Kakamega High Court Civil Case No. 173 of 2013**

Whether the charge was duplex and incurably and fatally defective

8. Mr Musiega, counsel for the appellant submitted that the appellant was charged with the offence of forgery contrary to Section 349 as read with Section 350 of the penal code, which according to counsel, created two different offences. Mr Musiega added that it was curious that the conviction was based on Section 349 of the Penal Code and that duplicity prejudiced the appellant.

9. Sections 349 and 350 of the Penal Code provide as follows:

> ***"CHAPTER XXXV – PUNISHMENT FOR FORGERY***
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> ***349. General punishment for forgery***
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> ***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.***
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> ***350. Forgery of wills, etc***
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> ***(1) Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life, and the court may in addition order that any such document as aforesaid shall be forfeited.***
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> ***(2) In this section, "document of title to land" includes any deed, map, roll, register or instrument in writing being or containing evidence of the title, or of any part of the title, to any land or to any interest in or arising out of any land, or any authenticated copy thereof.***

10. Section 135 of the *Criminal Procedure Code, CAP 75* provides as follows:

"(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information."

11. The Court of Appeal, in the case of **Dickson Muchino Mahero vs. Republic [2002] eKLR** held as follows:

"In the English case of Ministry of Agriculture Fisheries & Food v. Nunn [1978] Ltd. [1990] Crimn.L.R. 268, DC it was emphasized that the question of duplicity is one of fact and degree; and that the purpose of the rule is to enable the accused to know the case he has to meet.

Likewise, in Amos v. DPP [1988] RTR 198 DC, it was held that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain.

…….

In the appellant's case we have perused through the record of the trial court, and are satisfied that the appellant understood the charge he faced, he asked relevant questions to the charge and in no way was he prejudiced."

(Also see the Court of Appeal in **Paul Katana Njuguna v Republic [2016] eKLR**)

12. A look at Sections 349 and 350 of the Penal Code reveal that the two sections provide for two separate offences and punishments. A suspect involved in the forgery of a document not listed under Section 350 ought to be charged under Section 349. If the suspect is involved with specific forgery of documents listed under Section 350 and general forgery listed under Section 349 in the same transaction, then the suspect ought to be charged on two separate counts: One under Section 349 and the other under Section 350.

13. In the instant case, the appellant was charged with two offences in the same count and thus the charge was duplex. The question is whether this duplicity of the charge prejudiced and embarrassed the appellant in that he did not understand the charges he faced. The answer lies in the record which shows that the appellant apparently understood the charges that were read to him and to which he took plea. The record further shows that the appellant cross-examined witnesses and never raised any objection at any time that he was confused as to the nature of charges he was facing. The record further indicates that the appellant was later on represented by an advocate, Mr. Musiega, who did not raise any issue that his client, the appellant, did not understand the charges facing him. It is therefore my finding that even though the charge was duplex, the appellant was not prejudiced in any way and that there was no injustice occasioned on him for the reason of that duplicity. This ground by the appellant therefore fails.

Whether the respondent sufficiently discharged the burden of proof to the required standard of beyond reasonable doubt that the appellant forged a Court Order in Kakamega High Court Civil Case No. 173 of 2013

14. In the case of **Joseph Mureithi Kanyita vs. Republic [2016] eKLR, G.W. Ngenye-Macharia J** cited the Court of Appeal case of **Joseph Mukuha Kimani vs. Republic (Criminal Appeal No. 76 of 83) [1984] eKLR** which held that:

"The prosecution must prove that:

(a) the document was false; in the sense that, it was forged

(b) the accused knew it was forged

(c) the utterer intended to defraud.

In the case of KILEE v REPUBLIC [1967] EA 713 at p 717, it was said that, the false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: OMAR BIN SALEM v R[1950] 17 EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see SAMUELS v REPUBLIC[1968] 1."

(Also see **Mativo J** in **Caroline Wanjiku Ngugi v Republic[2015] eKLR**)

15. **PC Martin Kitunyi** testified as PW1 and produced a Forensic Document Examination report (*Pexhibit 1*) together with an exhibit memo (*Pexhibit 2*), specimen court order (*Pexhibit 3*), specimen signature of the appellant (*Pexhibit 4(a) –(f)*}, known signature of the Deputy Registrar (*Pexhibit 5*), specimen signature of the Registrar (*Pexhibit 6(c) – (f)*} and a Notice of Motion application (*Pexhibit 7(a) – (c)*}.

PW1 stated that the report was done by his colleague, one Jacob Oduor who was the document examiner and conducted the examination. In the said report, it was the opinion of Mr. Oduor that the signature in the exhibit marked "Y" (the impugned Court Order, *PExhibit 3*) was made by the appellant after comparing it with the appellant's specimen and standard signatures marked *"W-1 to W-6"* and *"X4, X2 and X5"*. Mr. Oduor further held that the signature in the document marked *"B"* and that of the specimen and standard signatures marked *"A1-A6"* were similar and that they belonged to the Deputy Registrar. Mr. Oduor noted that the signature of the impugned Court Order was not made by the Deputy Registrar going by the Deputy Registrar's standard signatures. In essence, Mr. Oduor opined that the signature in the impugned Court Order was that of the appellant and not the Deputy Registrar's.

16. **Peter Wamukoya Amakalu** testified as PW2 and stated that on 11th January 2014, he was called by a relative informing him that there were people cultivating on his land and that they had the impugned court order. PW2 stated that copies of the impugned court order were with the area assistant Chief, one Millicent and the area Chief. PW2 added that the impugned order was in respect of *Kakamega High Court case no. 173 of 2012* and that he gave instructions to his advocate Gabriel Fwaya to confirm the authenticity of the said court order. PW2 stated that his advocate wrote to the Deputy Registrar who replied and confirmed that the order was not genuine. During cross-examination, the PW2 stated that it was one Jackson Anyangu Amboka who gave him the impugned court order and not the appellant.

17. **Jackson Anyangu Amboka** testified as PW3 and stated that he was familiar with the impugned court order and that it was the appellant who gave it to him. PW3 stated that there was an ongoing case in *Kakamega High Court Case No. 173 of 2012* in respect of parcel of land *Marama/Shinamweyuli/619* pitting him against PW2. PW3 stated that the appellant, who worked in the law firm representing him advised him to file an application restraining PW2 from working on the parcel of land. PW3 added that he paid the appellant a total of Kshs. 14,000/- and was issued with receipts for the filing and that the appellant then gave him the impugned court order on 24th December 2013 at their office in Bungoma Corner house, Room 10, in the presence of one Patrick Okunda, his brother. PW3 stated that his brother Patrick called to tell him the impugned order was not genuine but on inquiring, the appellant told him that it was genuine. PW3 stated that he was later summoned by the Investigating Officer and PW3 asked the appellant to accompany him but then the appellant told him that he had gone to the police earlier on. PW3 added that the appellant linked him with an advocate called Oscar and together they went to Butere Police Station where PW3 recorded his statement. During cross-examination, PW3 stated that he knew the appellant for a long time and that they have never quarreled. PW3 added that he gave the appellant Kshs. 14,000/- over a period of time for court attendance and obtaining those orders and that the appellant personally issued the receipt of payment. PW3 stated that the appellant gave them fake orders and denied that it was him and his brother who forged the orders.

18. **Patrick Okunda Chitechi** testified as PW4 and stated that he knew the appellant having first met him on 19th December 2013. PW4 stated that someone had encroached on his wife's land and that together with PW3, they went to the appellant's office to get documents showing that the case was still ongoing and had not yet been concluded. PW4 stated that they met the appellant who gave them (PW3 and PW4) a copy of the impugned court order (*PExhibit 3*) and that the appellant told them that he was to serve the original to PW2 in that case. On cross-examination, PW4 stated that the document given to him related to related to *Kakamega High Court Case No. 173 of 2012*.

19. **Zablon Indakwa** testified as PW5 and stated that he had an agreement with PW2 where he would lease PW2's land and he paid him for it. PW5 stated that there were crops on the land and that he had to wait until the crops were harvested. PW5 further stated that on 11th January 2014, he found PW3 ploughing the land using a tractor and when PW5 told him he had an interest in the land, PW3 told him that PW2 had no claim over the land. PW5 stated that he called PW2 and asked him to come and resolve the matter and when he did come the following day, they still found PW3 and another person ploughing the land and they gave PW5 and PW2 a court order (*PExhibit 3*) which restrained PW2 from ploughing the land. PW5 then told PW2 to report to the police.

20. **Isaiah Kisongochi** testified as PW6 and stated that he was the Executive Assistant at Kakamega Law Courts. PW6 produced a letter (*PExhibit 10*) dated 14th January 2014 to Fwaya Advocates authored by **Caroline Kendagor**, the Deputy Registrar then stating that the order (*Pexhibit 3*) was not genuine.

21. **PC Kennedy Lubembe** testified as PW7 and stated that he was the Investigating Officer in the case and on 14th January 2014 he received a report from PW2 that he had been served with court order which he suspected was forged in respect of *Kakamega Civil Case No. 173 of 2012* where PW3 was the plaintiff and PW2 the defendant. PW7 stated that PW2 gave him a copy of the impugned order(*PExhibit3*), a letter from PW2's advocates to the Deputy Registrar inquiring about the court order as well as the reply from the Deputy Registrar. PW7 testified that he embarked on investigating the matter and that he wrote to the Deputy Registrar to confirm the authenticity of the order and the Deputy Registrar wrote back confirming that the order was forged. PW7 summoned PW3 who came with his brother PW4 and that PW3 confirmed that he had given instructions to his advocates Luchivya & Co. Advocates to get an injuction against PW2 from dealing in the land. PW7 added that PW3 told him that he was handled by the appellant, who was a clerk at the law firm and that PW3 paid for the services and was issued with a receipt. PW7 stated that he summoned the appellant who denied ever giving the impugned order to PW3. PW7 further stated that he took the handwriting and signature samples of the appellant and prepared a Memo for the document examiner and that was when the appellant was found culpable and he was charged as the court order was made by him. During cross-examination, PW7 stated that PW2 never mentioned the appellant as he only knew PW3 and reiterated that it was PW3 who served the order to PW2 and that it was the appellant who forged the court order.

22. During the defence hearing, the appellant testified as DW1 and stated that he used to work at Luchivya & Co. Advocates. DW1 added that PW3 went to their firm as he had a land dispute with PW2 and that they prepared pleadings and filed a case number 173 of 2012. DW1 added that PW3 came back seeking to obtain orders preventing PW2 from entering the land and that his boss, Luchivya prepared the application seeking the injunction and filed the application himself. DW1 added that Mr Luchivya then called him and told him that the orders had been issued in Kisumu as the Kakamega judge was on vacation and Mr Luchivya asked him to inform PW3 to go to Kisumu and collect the order. DW1 stated that PW3 informed him that he had collected the order and that he never followed with PW3 after that. DW1 stated that police officers came to the office but then spoke with Mr Luchivya behind closed doors and that he was arrested after he was asked to go to Butere Police Station. DW1 stated that he did not understand why Mr Luchivya was never called as a prosecution witness and why the Deputy Registrar whose signature had been forged was never called to testify. DW1 added that he did not understand why *Civil Suit No. 173 of 2012* and *Civil Suit No. 172 of 2013* were never produced in court. DW1 denied giving PW3 the court order and did not know why PW3 was framing him. During cross-examination, DW1 stated that he had not produced any pleadings in *Civil Suit No. 173 of 2012* and an order from Kisumu High Court. DW1 added that PW3 collected the court orders from a court clerk DW1 did not know. DW1 confirmed

that Kshs. 14,000/- was paid by PW3 to the Law firm and that part of the money was paid to Luchivya and the other part was paid to him. DW1 stated that he gave a sample of his signature and handwriting but denied that the handwriting in the order was his. DW1 added that he did not call Luchivya as a witness as he saw his name in the charge sheet as a prosecution witness. DW1 stated that he did not have any grudge against any of the prosecution witnesses prior to the incident and that he had only differed with PW3 over process serving prior to the incident. During re-examination, DW1 stated that his sample handwriting was taken in respect of *Civil Suit No. 173 of 2013* and not *Civil Suit No. 172 of 2012*.

23. An analysis of the evidence on record indicates that it was the appellant who gave the impugned order to PW3, which was corroborated by PW4 who stated that he was present at the time. I am also persuaded by the evidence of PW1, that is, the Forensic Document Examination report, that the impugned court order was not issued by the Deputy Registrar of Kakamega High Court but was forged by the appellant. PW7's evidence also adds to the weight against the appellant as it was consistent with what PW3 told him when PW3 made his initial statement.

24. The appellant's claim that the court order was issued in Kisumu and that it was PW3 who went to collect it from an unnamed court clerk cannot stand for want of proof. The burden shifted to the appellant the moment he alleged this version of the story and it was up to the appellant to prove that the order was issued in Kisumu and that there was court clerk who gave PW3 the court order. Without discharging this burden, the evidence of the respondent remained unshaken and uncontroverted.

25. Further, this court rejects the submission by Mr. Musiega, counsel for the appellant, that the court order in question related to *Civil Case No. 172 of 2013* and not *Civil Case No. 172 of 2012*. The evidence on record is in relation to an impugned order issued in *Civil Case No. 172 of 2012*, and any mention of *Civil Case No. 173 of 2013* in the charge or pleadings must have been a typographical error which was curable and with no effect of granting the appellant the benefit of doubt.

26. Further, this court finds that the letter of the Deputy Registrar dated 14th January 2014 and produced by PW6 as *Pexhibit 10* was properly tendered as evidence and in compliance with Section 77 of the *Evidence Act*. The said letter was rightly presumed to be genuine by the trial court and thus the personal attendance of the Deputy Registrar as witness was neither necessary nor mandatory.

Disposition

27. Having re-examined and re-analyzed the evidence and testimony from the trial court, I find that the weight of evidence is against the appellant and supports the charge. The appellant forged the impugned court order and intended to defraud and deceive PW3 that it was genuine knowing very well it was not. I find that the appellant gave the impugned court order to PW3 in the presence of PW4 and that the evidence of PW1 demonstrated that it was the appellant who forged the court order.

28. The evidence against the appellant is inculpatory and incompatible with his innocence and leaves only a remote possibility which is least probable.

29. From the record it is clear that the trial court convicted the appellant on the offence of forgery contrary to Section 349 of the Penal Code. However, the evidence on record supports the charge in Section 350 of the Penal Code being that a court order is a document of judicial record which is listed as one of the documents in the said section. As such, this court invokes it powers under Section 354 (3) (a) (ii) of the *Criminal Procedure Code, Cap 75* and finds that the appellant was guilty of forgery contrary to Section 350 of the Penal Code.

30. On the sentence, once one is found guilty of the offence under Section 350 of the *Penal Code Cap 63*, they are "liable to life imprisonment". The Court of Appeal in the case of **Daniel Kyalo Muema vs. Republic [2009] eKLR**) held that the term 'liable to' meant that a court has discretion to pass a lesser sentence depending on the circumstances of the case.

31. The learned trial magistrate sentenced the appellant to pay a fine of Kshs. 100,000/- and in default, he was to serve a two years prison sentence. The Court of Appeal, in the case of **Peter Mbugua Kabui vs. Republic [2016] eKLR** held as follows:

> "*The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now old hat. The predecessor of this Court, in the case of* ***Ogolla s/o Owuor vs Republic, [1954] EACA 270****, pronounced itself on this issue as follows: -*
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> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -***
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> ***sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***
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> *In the more recent case of* ***Kenneth Kimani Kamunyu -vs- R. (2006) eKLR,*** *this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful."*

32. From the record, it is noted that the learned trial magistrate took into account the appellant's mitigation, in line with the Supreme Court of Kenya's decision in **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR.** I also find that even though Section 350 of the Penal Code does not provide for a fine, a court is empowered by Section 26 (3) (i) of the Penal Code to add or substitute the imprisonment

with a fine. In light of the aforementioned circumstances and Section 354 (3) (a) (ii) of the *Criminal Procedure Code, Cap 75* this court finds no reason to disturb or interfere with the sentence of the trial court as the same was reasonable and judicious.

33. The upshot is that the appeal herein lacks merit and the same is dismissed.

Dated, Signed and Delivered in Open Court at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE