



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO.138 OF 2014

JOSEPH SIMIYU MWANDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(From original conviction and sentence in Criminal Case No.123 of 2013 at the
Chief Magistrate's Court Kakamega (D. Ogal RM) dated 19th September, 2014)**

JUDGMENT

1. **Joseph Simiyu Mwando**, the appellant, was charged before the Chief Magistrate's Court at Kakamega with two counts of making a false document contrary to **section 347(a)** as read with **section 349** of the Penal Code, and uttering a false document contrary to section 353 of the Penal Code. Particulars in respect to count 1 were that on the 10th day of August 2012 at Ambwere Complex Plaza Kakamega Township in Bukhungu location within Kakamega County, with intent to defraud, without lawful, authority or excuse made a land sale agreement purporting to be the land sale agreement signed by **Jafred Angaluki Muaka**, as the seller and comprised in title Butsotso/Shikoti/520.

2. Particulars in respect of count 2 stated that on the 23rd day of November, 2012, at Kakamega Land Registrar's office in Kakamega Central District within Kakamega County, knowingly and fraudulently uttered a forged land sale agreement purporting to have been and signed by **Jafred Agaluki Muaka**, as the seller and comprised in title Butsotso/Shikoti/520.

3. After a full trial in which the prosecution called a total of five witnesses and two witnesses by the defence, the trial magistrate acquitted the appellant in count 1, but convicted him in count 2. The appellant was sentenced to a fine of Kenya Shillings Forty Five thousand (Kshs.45,000/-) or 3 years imprisonment in default. The appellant felt aggrieved and lodged an appeal to this court on 8 grounds of appeal as follows:-

“1. THAT the honourable trial magistrate erred both in law and fact in convicting and sentencing the appellant on a defective charge sheet.

2. THAT the learned trial magistrate erred both in law and fact in convicting the appellant when the particulars of the charge were not proved.

3. **THAT the learned trial magistrate erred both in law and fact in convicting the appellant when there was no sufficient evidence.**

4. **THAT the learned trial magistrate erred both in law and fact in convicting the appellant when the prosecution's case was full of contradictions and incapable of sustaining the charge against the appellant.**

5. **THAT the trial magistrate erred in law in convicting the appellant when the proceedings and judgment were defective for failure to comply with the law.**

6. **THAT the learned trial magistrate shifted the burden of proof to the appellant and relied on extraneous issues which were not on record.**

7. **THAT the learned trial magistrate failed to consider the appellant's defence, and finally,**

8. **THAT the sentence imposed upon the appellant was too harsh and the learned trial magistrate did not consider the appellant's mitigation."**

4. During the hearing of the appeal Mr Onsango appeared for the appellant and Mr Oroni for the State. Mr Onsango, learned counsel for the appellant, highlighted the written submissions they had filed. Learned counsel faulted the trial magistrate for giving the appellant 14 days' right of appeal before sentence, saying that was an error because the appellant was not given a chance to mitigate, and sentence was passed after the right of appeal.

5. Learned counsel also submitted that the learned trial magistrate was wrong in convicting the appellant on count 2 after acquitting him on count 1. Counsel was of the view, that the learned trial magistrate having made a finding of fact that the prosecution had failed to prove count 1, he could not convict the appellant on count 2 which related to uttering a false document namely PEx2, Authority to sale Agreement. Counsel argued that the appellant did not know that PEx2 was a forged document but had taken it to be genuine when presenting it. He relied on a decision of this court (**Ochieng' J**) in **Criminal Appeal No.802 of 1997, Robert Obonyo Oyoo v Republic** where learned Judge had said that it was possible for one person to have varied signatures. He also cited the case of **Erick Mutema Kariuki v Republic** where the court found that the appellant had not uttered the document, to buttress his arguments.

6. Mr Onsango further submitted that the charge was defective when it referred to "**Land Sale agreement**" which was different from PEx 2 which was produced – "**Authority to sale Agreement.**" On the defective charge learned counsel referred to the decision in the case of **Fappyton Mutuku Ngui v Republic** 2012 eKLR, a decision by this court (**Ngugi, J**). Counsel further submitted that the trial magistrate wrongly relied on circumstantial evidence when there was no such evidence to support the prosecution case and for that reason the prosecution's had failed to prove its case beyond reasonable doubt. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

7. Mr Oroni, learned prosecution counsel, opposed the appeal and submitted that the appellant was convicted for uttering a false document which was purportedly signed by the complainant (PW3) a resident in USA. An exhibit memo containing known signatures of PW3, his specimen signatures and PEx2 which was purportedly signed by the complainant were sent by PW5 to the Documents Examiner, (PW4), who upon comparing the signatures on the documents forwarded to him, formed the opinion that PEx2 compared to PEx6(a-c) and the known signature of the complainant in PEx7 was not signed by the complainant.

8. Counsel submitted that the appellant presented PEx2, to the Land Registrar, purporting to have a purchaser's interest over land Parcel No. **Butsotso/Shikoti/520**. According to counsel, PW1 identified the appellant as the person who uttered the document to him and accordingly count 2 was proved beyond reasonable doubt. Regarding the submission that the charge was defective, counsel argued that the charge was proper and was supported by the evidence adduced. He therefore urged that the appeal be dismissed.

9. This being a first appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial court, and give due allowance for that (see **Okeno v Republic [1972] EA 32**). This duty was aptly stated in the case of **Isaac Ng'ang'a Kahiga v Republic [2006] eKLR** where the Court of Appeal said:-

“A court hearing a first appeal (i.e. a first appellate court), also has to carefully examine and analyse a fresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour so the first appellate court would give allowance of the same.”

That duty was again restated in the case of **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** where again the Court of Appeal said:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court.”

10. PW1, **John MMasi**, a Land Registrar stationed at Kakamega whose duties include registration of land documents, issuance of title deeds, searches among others, told the court that on 23rd November, 2012, a caution, executed by the appellant, was presented to him for assessment of fees. On it was attached Authority to sale agreement which was to support a contractual interest on parcel of land known as **Butotso/Shikoti/520**. The witness told the court that the document was paid for and duly registered. According to the witness, the supporting document indicated that the purchase price was Kshs.12 million and Joseph Simiyu was supposed to get 10% commission. He further told the court, that the owner of the land later visited their offices with an intention to transact on the land but discovered that a caution had been registered against the title. On being shown the document, he denied knowledge of the agreement and reported the matter to the police. The witness produced the caution as PEx1, the authority to sale agreement PEx2, search certificate PEx3a, and receipt for payment PEx3b. The document showed there was an agreement between Simiyu and Mauka.

11. PW2, **Simon Mauka**, told the court that on 10th August, 2012 he and the complainant met the appellant who was in the company of 2 other people. Together they went and met an employee of Kenya Power and Lighting Company Sacco Ltd which was willing to purchase the complainant's parcel of land which was approximately 8 acres. Later the appellant told them that the Sacco was willing to purchase the land at Kshs.1.700,000 per acre and it would pay his commission. The witness told the court that no agreement was entered into on that day. A meeting was later held in Nairobi on 28th September, 2012 when price of Kshs.1.5 million per acre was agreed and terms of an agreement reached. In October 2012, he was informed that a caution had been lodged against the title. He went to the land's office and established that indeed there was a caution lodged by the appellant against the titler indicating a purchaser's interest.

12. He told the court that he informed the complainant of the new developments who went to the land office and confirmed the position to be true. Efforts to resolve the matter failed and later the appellant demanded payment of commission for selling the land. In cross examination the witness told the court that it was him who introduced the complainant to the appellant and the first meeting was on 10th August, 2012.

13. PW3, **Angaluki Mwaka**, the complainant testified that in 2011 he had requested the appellant to look for a buyer for his parcel of land **Butotso/Shikoti/520**, but withdrew instructions in the same year. The appellant contacted him in August 2012, with news that Stima Sacco wanted to buy the land. The witness told the court that he went to the appellant's office on 10th August, 2012 and was shown a letter of offer the appellant had written to Stima Sacco and also introduced him to a member of the Sacco. He was informed by the member of the Sacco that after the letter of offer, the Sacco would have the property valued after which a meeting would be held to agree on the purchase price.

14. On realising that the process would take time, he donated a power of authority to PW2 (his brother) to enable him deal with the transaction and left. The witness further testified that he returned to Kenya on 17th December, 2012 and was informed by PW2 that a caution had been registered against the property. He went to the Lands office on 19th December, 2012 and confirmed that the appellant had lodged a caution against his property claiming a purchaser's interest. He was given a copy of the agreement in (PEX2) which showed that the appellant had allegedly been appointed an agent by him to sell his land at a commission which was not true. The witness denied signing PEX2, and reported the matter to CID who investigated the case and charged the appellant in court. In cross examination, the witness told the court that he had given the appellant instructions but revoked them later on. He denied ever instructing the appellant to write the letter of offer to Stima Sacco.

15. PW4, No.231671, Chief Inspector of Police **Alex Mungesa**, and a document examiner, testified that he received documents from the investigating officer which included PEX2, PEX6(a-c) and PEX7. After carrying out examination he concluded that the complainant did not sign PEX2. He prepared a report which produced in court as PEX9. In cross examination, the witness told the court that he was not given the appellant's hand writing specimen for examination.

16. The last prosecution witness PW5 No.89218 PC **Shadrack Amachi** and the investigating officer in this case, told the court that complainant reported that his signature had been forged by the appellant who prepared an agreement purporting it to have been signed by the complainant. He collected specimen signatures from the complainant together with the agreement, prepared an exhibit memo and forwarded them to PW4, the Document Examiner. An examination thereof revealed that the complainant did not sign PEX2. The appellant was arrested and charged in court. In cross examination the witness told the court that the Documents Examiner formed an opinion that the questioned document (PEX2) was forged, but did not say by who.

17. When put on his defence, the appellant gave a sworn statement and called 2 defence witnesses. The appellant, (DW1), told the court that he is a Real Estate Agent operating under the name of **Joesim Enterprises**. He told the court that he knew the complainant on 5th May 2011 when the complainant gave him instructions to sell his land Parcel No. **Butotso/Shikoti/520** at a price of Kshs.1.7 million per acre. The appellant told the court that they got a buyer, namely **Stima Sacco**, and gave them a letter of offer dated 10th August, 2012 (DEX4). Eventually a price of Kshs.1.5 million per acre was agreed. According to the appellant, they entered into an agreement with the complainant (PEX2) which was done in the appellant's office and signed by the complainant. Following the letter of offer, a meeting was held in Nairobi to formalise the transaction where the appellant was represented by Ronald Mukki (DW3). The appellant further told the court that he went to demand payment of the commission and when he was told that it was not payable, he lodged a caution against the property (PEX3) claiming contractual interest and not purchaser's interest.

18. The appellant further told the court that he did not see PW3 sign PEX2, but that it was signed in the presence of Ronald Mukki (DW2). The appellant told the court that he lodged the caution to protect his interest and blamed the complainant for bringing the charges against him to escape from paying his commission. He admitted in cross examination, that he is the one who lodged the caution and presented PEX2 to the Land Registrar (PW1). He also maintained that PW3 signed PEX2.

19. DW2, **Ronald Mukki Busena**, told the court that they wrote a letter of offer (DEX4) to **Stima Sacco**, after the complainant had told them that he had land to sell. The complainant had asked them to get a buyer and he agreed to pay them 10% commission and signed PEX2 in their office in his presence on 10th August, 2012. On 28th October, 2012 a meeting was held in Nairobi to agree on the price and conclusion of the transaction and that he represented their office during negotiations in Nairobi. In cross examination, the witness told the court that he was present together with the appellant when the complainant signed PEX2. He said that was not the first time they were meeting the complainant. He told the court that on the day of the meeting in Nairobi, no document was signed. He also said the figure of 12 million had been agreed verbally at Kakamega and that they would get 1.2 million being 10% commission.

20. DW3, **Zamzam Injera** on her part, testified that she knew the accused as a property agent when they were looking property to buy on behalf of a women's group and the appellant told them that Parcel No. **Butsotso/Shikoti/520** was available for sale. She went to the appellant's office and was shown a copy of the title for the property whose registered property was Jafred Ambaruki, a person known to her after being introduced to her by the appellant. She was shown the land which was about 8 acres and offered to buy it at Kshs.9.6 million. According to this witness the owner wanted Kshs.1.7 million per acre and therefore but rejected her offer as low because the agent was to be paid 10% commission.

21. Based on that evidence, the learned trial magistrate acquitted the appellant in count 1, that of making a false document, but convicted him for the offence of uttering a false document, provoking this appeal. In his first ground of appeal, the appellant faulted the trial magistrate for convicting the appellant on a defective charge. The charge for which the appellant was convicted and sentenced was drafted as follows:-

“UTTERING A FALSE DOCUMENT CONTRARY TO SECTION 353 OF THE PENAL CODE.

JOSEPH SIMIYU MWANDO

On the 23rd day of November, 2012 at Kakamega Land Registrar's office at Kakamega Central District within Kakamega County, knowingly and fraudulently uttered a forged land sale agreement purporting to have been and signed by Jafred Anguki Muaka, as the seller and comprised in title Butsotso/Shikoti/520.”

22. The appellant was charged with uttering a false document which was referred to in the particulars of the charge as Land Sale Agreement. Counsel for the appellant submitted that what was produced as PEx2 during the hearing was not a land sale agreement but Authority to sale Agreement. It is on that basis that learned counsel argued that the charge was defective. **Section 134** of the Criminal procedure Code provides as follows on charges:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

23. The requirements of section 134 of the Criminal Procedure Code are that the charge should be clear enough to enable an accused to understand it and prepare to mount a defence against it. In the charge, there was a specific offence, specific provision of the law and such other particulars as would make it possible to be understood. The charge contains clear and sufficient information regarding the offence. In my view, the charge was unequivocal and the appellant understood what he was facing before the trial court. That is why he mounted vigorous cross examination and offered his own defence. Counsel for the appellant did not raise any issue with the charge, which either, means the charge was clear to them, thus did not cause prejudice or a miscarriage of justice to the appellant. On this, I find support in the Court of Appeal decision in the case of **Fappyton Mutuku Ngui v Republic** [2014] eKLR where that court addressing the issue of a defective charge stated:-

“The appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence.”

That is the position I find in this case and for that reason, this ground of appeal lacks merit and is dismissed.

24. The appellant's grounds 2 and 3 can be dealt with together. In ground 2, the appellant faulted the trial magistrate for convicting him when particulars of the offence were not proved, while in ground 3, he complained that he was convicted without sufficient evidence. Counsel for the appellant submitted that

the learned trial magistrate having acquitted the appellant on count 1, was in error to convict him on count 2 for uttering a false document. **Section 353** of the Penal Code under which the appellant was charged provides as follows:-

“S353 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”. (emphasis)

The word “**utter**” is defined under **section 4** of the same Code as follows:-

“Utter means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal, or act upon the thing in question.”

25. According to the section and the definition above, it is an offence if one **knowingly** and with intent to **defraud** utters a false document, that is, uses, deals with, or attempts to use or deal with, or attempts to induce some other person to use, deal with or act upon the document or thing uttered to him. That is, the person to whom the document is uttered, is made to take action or steps which save for the thing uttered to him, he would have not taken.

26. The appellant had been charged in count 1 with making a false document and upon trial, the learned magistrate found as a fact that there was no evidence that he made the document complained of, namely, the Authority to Sale Agreement, PEx2. The learned magistrate acquitted him on that count, and quite rightly in my view, holding that the charge of making a false document had not been proved. The prosecution was required to lead evidence to show that the appellant had signed that document. **Section 70** of the Evidence Act (Cap 80 laws of Kenya), is clear that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting alleged to be in that person’s hand writing must be proved to be in his hand writing. There was no evidence that the appellant signed PEx2 and it was on that basis that he was acquitted in count 1.

27. Did the acquittal of the appellant on count 1 entitle him to be acquitted on count 2? The answer to that question would depend on the evidence before the trial court. In my respectful view, it is not a must that once a person is acquitted of the charge of making a false document, he must also be acquitted of the charge of uttering a false document. If there is evidence to support the charge of uttering a false document, then the court could rightly convict him for that.

28. The document on which count 2 was founded was an “Authority to sale Agreement” (PEx2) allegedly signed by the owner of the land. That document is dated 10th August, 2012. The complainant is said to have given irrevocable authority to the appellant’s firm to sell his land **Butsotso/Shikoti/520** at a price of Kshs.12 million and the appellant’s firm was to be paid a 10% commission being Kshs.1.2 million. That document further authorised the appellant’s firm to receive 10% of the purchase price deposited with them as stake holders, and in the event of change of mind or cancellation of the transaction by either party, the complainant was to be held liable to pay that firm for deployment (sic) or damages.

There is evidence that the PW3 met the appellant on 10th August, 2012 and an understanding was reached that the appellant could get a buyer to purchase his land in question. The evidence on record is that, the complainant wanted Kshs.1.7 million per acre which would translate to Kshs.13,600,000/-. There is also credible evidence that the price of Kshs.1.5 million per acre translating to Kshs.12 million shillings was agreed upon on a different date and month in Nairobi and not 10th August, 2012, as the document purports to show.

29. In this appeal, the complainant testified that he did not sign PEx2. His evidence was supported by that of PW4, the document examiner who examined the complainant’s specimen signatures **vis a vis** the signature on PEx2 alleged to have been made by him, and concluded that it was not by the complainant. PW2 also told the court that on 10th August, 2012 no agreement was signed. There is therefore credible evidence that the complainant (PW3) did not sign the document that was uttered to PW1, the Land Registrar.

30. Secondly, the prosecution was required to prove that the appellant **knew** that the document was false and he intended to **defraud**. The appellant in his defence told the court that he is the one who lodged the caution to which PEx2 was attached and presented it for registration. The question of uttering is therefore undisputed since the evidence of both PW1 and the appellant supports it. The question is whether the appellant knew that the document was false and uttered it with intent to defraud.

The Court of Appeal addressed its mind on the question of uttering a false document in the case of **Kepha Moses Mogoi v Republic** [2014], eKLR where it said:-

“The offence of uttering a false document under section 353 of the Penal code is proved if a person knowingly and fraudulently utters the document.” (emphasis)

31. In his defence, the appellant told the court that he did not see the complainant sign PEx2, but that he signed in their office in the presence of DW2, Ronald Mukki, an employee of his firm. DW2, Ronald Mukki however had this to say during cross examination:-

“The Authority to sell was signed on the 10th August 2012 in our office. I was there, Joseph Simiyu (appellant) and Mr Wycliffe Amoko was also present and Mr Anguliki.”

The defence witnesses seem to contradict themselves. The appellant says he did not see the complainant sign the document while his own witness and employee of his firm (DW2) says he was present. The irresistible inference that can be drawn from this in my view, is that the witnesses were not telling the truth to the court. This reinforces the prosecution’s case that the complainant did not sign PEx2. It also means the appellant knew that PEx2 was false when he uttered it.

32. Regarding whether the appellant uttered the document with intent to defraud, the answer is yes as can be seen from the following decisions. In the case of **Samuel v Republic** [19968] EA 1, the Court of Appeal for Eastern Africa held that **where a person utters a false document intending to deceive a public officer and by that deceit to cause the public officer to take action which he would not otherwise have taken or to refrain from taking action which he would otherwise have taken, that intent was fraudulent.** (underlining mine) The above principle was applied by the successor to that court, the Court of Appeal for Kenya, in the case of **Karingo v Republic** [1982] KLR 213 where the appellant had produced forged receipts to explain his possession of some stolen goods. The court held:-

“A person shall be deemed to have uttered a false document with intent to deceive contrary to section 353 of the Penal Code, where the public officer has upon that document taken action which he would not otherwise have taken or would have refrained from taking had he known the document was false.”

That is precisely the position in this case. By uttering the false document, the appellant caused PW1, the Land Registrar to register a caution against Parcel No. Butso/520 belong to the complainant, an action he would possibly have not taken had he known that the document, namely PEx2 was a false document. I therefore find that there was sufficient evidence before the trial court to convict the appellant on the charge of uttering a false document.

33. Mr Onsango again submitted that the trial magistrate was in error when he convicted the appellant and immediately gave him 14 days to appeal before mitigation and sentence. With great respect to learned counsel, I do not see what prejudice this caused to the appellant. It is not an error that lead to a miscarriage of justice and I say no more. I have also not found any contradictions in the prosecution’s case which would invalidate the findings of the trial magistrate. On the complainant that the learned trial magistrate failed to consider the defence evidence, I do not find merit in this. I have perused the learned trial magistrate’s judgment and found that he fully considered the defence but did not believe it. Regarding sentence, the appellant was fined Kenya Shillings Fifty Five thousand or three (3) years imprisonment in default. The sentence is lawful and within the discretion of the trial magistrate and I see no impropriety on the same, to warrant interference.

34. Having carefully perused the record of the trial court, reviewed the evidence before that court and evaluated it myself, and considered submission by counsel on both sides, I find that the appeal is devoid of merit and the same is dismissed.

Dated and delivered at Kakamega this 5th day of May, 2016.

E.C. MWITA

JUDGE