



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 181 of 2013

JOSEPH MUREITHI KANYITA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence at the Milimani Chief Magistrate's Court at Milimani Cr. Case No. 1110 of 2010 delivered by E. Nduva (Mrs), Ag P.M. on 13th September, 2013).

JUDGMENT

BACKGROUND

The Appellant, Joseph Mureithi Kanyita was charged in the first count with committing the offence of forgery contrary to Section 350(1) of the Penal Code. The particulars were that the Appellant, with a co-accused, on 5th March 2007 at Eagle House in Nairobi within Nairobi Area jointly forged a power of attorney for land parcel Nairobi Block 94/170 Nyari purporting it to be a genuine and valid power of attorney for the said land drawn by Daniel Ndegwa Wokabi of Kimandu Gichohi & Co. Advocates.

In count 2 the Appellant was charged with uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence were that on the 5th day of March 2007 at Kencom Bus Stop Nairobi within Nairobi Area knowingly and fraudulently uttered a certain forged document namely Power of Attorney for Nairobi block 94/170 to Paul Njogu Macharia purporting it to be genuine.

In count 3 he was charged with making a document without authority contrary to Section 357(a) of the Penal Code. The particulars were that on 31st August 2007 in Nairobi the Appellant with intent to defraud and without unlawful authority or excuse made a transfer of lease purporting it to be genuine for land title No. Nairobi Block 94/170 and drawn by Loice Wairimu Kagucia & Co. Advocates.

In count 4 he was charged, with another, of obtaining registration by false pretence contrary to Section 320 of the Penal Code. The particulars were that on 13th March 2007 at Ardhi House Ministry of Lands headquarters in Nairobi province with the intent to defraud, jointly obtained registration of certificate of Lease Title no. Nairobi/Block 94/170 by false pretence.

He was arraigned in court and after a trial he was convicted on all the charges. He was sentenced as follows:

1. Count 1: Kshs. 100,000 fine or 6 months imprisonment.

2. Count 2: Kshs. 100,000 fine or 6 months imprisonment.
3. Count 3: Kshs. 100,000 fine or 6 months imprisonment.
4. Count 4: Kshs. 200,000 fine or 1 year imprisonment.

He was dissatisfied with both the conviction and sentence and he preferred this appeal. In the Memorandum of Appeal dated 25th September, 2013, he set out the following grounds of appeal;

- 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 erred in holding that the power of attorney dated 5th March 2007 was forged contrary to evidence adduced by the donor, Monica James.**
- 3. That the learned magistrate erred in not deducing that the complainant had no proprietary interest in the property(Nairobi/Block 94/170 Nyari) to enable him to institute criminal proceedings.**
- 4. That the learned magistrate wrongly held that the Appellant had deceived the land Registrar to issuing him a title contrary to the evidence adduced.**
- 5. That the learned magistrate wrongly relied on the document examiner's evidence as proving beyond reasonable doubt that the Appellant forged the power of attorney and transfer of lease while there was no evidence supporting this finding.**
- 6. That the learned magistrate erred when he cancelled the 1st Appellant's title to the property known as Nairobi/ Block 94/170 Nyari on grounds of fraudulent acquisition thus ruling on the issue of ownership of the property which was no in her purvey.**
- 7. That the learned magistrate erred in failing to hold that even though the documents were forged the prosecution had failed to show that the forgery had actually been done by the Appellants.**
- 8. That the learned magistrate wrongly held that due to the inconsistencies on the exact amount of the purchase price paid by the Appellant to Monica James the transfer of the property to the Appellant was tainted by fraud.**
- 9. That learned magistrate erred in failing to note that there was a failure to call crucial witnesses, specifically; Muraguri and Paul Njogu Macharia, who worked on the documents in question.**
- 10. That the learned magistrate erred in deeming the defense's witness as untruthful in her evidence.**
- 11. That the learned magistrate erred in finding that the complainant had proprietary interest in the property.**
- 12. That the learned magistrate erred in not finding that the prosecution's evidence was aimed at Monica James and not the Appellant.**
- 13. That the learned magistrate erred in holding that the prosecution had established a prima facie case.**
- 14. That the learned magistrate erred in disregarding the Appellant's evidence and their**

counsel's submissions and thus arrived at a wrong decision.

SUBMISSIONS

The parties; Appellant, Respondent and Interested Party, agreed to canvass the Appeal by way of written submissions. The parties filed their respective submissions with Mr. Kanjama for the Interested Party choosing to highlight the same. I wish to point out that this case is related to High Court Civil Suit No. 423 of 2009. A judgment was passed by Hon. Justice E. K. O. Ogola on 19th February, 2016 in Civil Suit 423 of 2009. Some of the issues canvassed in the submissions herein were already settled in the said judgment. I will not therefore belabor repeating them in this judgment.

The Appellant's submission was that the charge of forgery was not effectively proven to show that he did indeed carry out the alleged forgery. Further that he was a bona fide buyer and was in no way culpable in the commission of the offences alleged and that the trial magistrate had erred by relying on the evidence of the document examiner to find a conviction against him. He further submitted that the prosecution case was primarily set out against Monica James and not him and that her testimony should have effectively exonerated him. Further that the failure by the prosecution to call her as their witness meant that her evidence would be detrimental to their case. He further submitted that the evidence adduced was not sufficient to prove the charges beyond a reasonable doubt. He prayed that the Appeal be allowed, the conviction quashed and sentence set aside.

The Respondent represented by learned State Counsel, Ms. Nyauncho, opposed the appeal and even filed a notice of enhancement of sentence against the Appellant. She submitted that the charges were proven beyond reasonable doubt. Further that the Appellant could not rely on the evidence of DW3 as the magistrate had ruled that the witness was untruthful. She concluded by praying for the Appellant's sentences to be enhanced in line with this court's power under Section 354(3)(b) of the Criminal Procedure code as they were too lenient and not commensurate with the crimes committed. She urged that the appeal be dismissed.

The Interested Party argued that the charges had been proved beyond a reasonable doubt. In the count of forgery they cited **Alexander Muteti Mutinda & Another v Republic [2015] eKLR** to submit that the prosecution did not have to establish who actually made the documents if it is proved that the Appellant presented the documents with a view to inducing a given turn of events. An enhancement of the sentence was urged. The case of **Isaac Waitaha Njuguna v Republic (2006)eKLR** to posit the idea that although sentencing is at the discretion of the trial court this discretion must be exercised judicially. It was submitted that in the instant case, the sentence was too lenient making it almost look like the crimes in question had no ramifications. It was prayed that the appeal be dismissed.

EVIDENCE

The prosecution's case was that the Appellant and the co-accused forged a power of attorney supposedly donated by the appointed nominee of a plot in Nyari. The proprietor was the complainant. The power of attorney procured was used to effect a transfer of the title to the Appellant. The complainant lodged a complaint with the police and the Appellant claimed to have acquired the property legitimately from the proprietor's estranged wife, the nominee. The prosecution did not agree with this theory and their investigations revealed that the purported seller was not in Kenya when the power of attorney was donated and that further she did not have any locus standi to sell the property as she was holding it in trust for the complainant. They averred that when these factors were taken into consideration it pointed to the Appellant and his co-accused forging the documents and effecting transfer of the property in question.

PW1, CAPTAIN MOSES KARIUKI WAHOME lived in the USA. He recalled that in September 2004 he was in Nairobi looking to procure a plot on which to build a residential home. He found a half an acre plot in Nyari and purchased it from Githu Mwaniki and Milka Njeri for Kshs. 3,800,000. He produced the Agreement for Sale of the property, Nairobi block 94/170/Nyari, dated 28th September 2004. He nominated his wife, Monica, as the title holder. After he completed payments on the property he got transfer documents dated 14th February, 2005. It was a lease transfer and consequently they were issued

with a title deed in his wife's name. The title was collected by his lawyer and consequently transferred to Ann Mbugua.

On 8th March 2008 his wife was coming to Kenya for a funeral and he asked her to donate a power of attorney to their advocate, Ann Mbugua so he could get a loan to complete building on the property. The same was done and construction continued.

He recalled that in early 2009 he was called by his caretaker and cousin and they informed him that John Mburu had taken his house and that Joseph Murithi Kanyita, the Appellant, had supposedly sold it to him. He called John Mburu and informed him that he was in possession of the property's title deed. He flew to Kenya and visited John Mburu before reporting the same to the CID. Investigations were carried out and they learnt there was a second title deed in the Appellant's name who supposedly bought the property from the complainant's wife in 2007. He had an opportunity to see the title and also learnt it had been charged to I&M Bank on 26th November, 2007.

At Lands office he saw a power of attorney dated 5.3.2007 from his wife to Michael Mwangi Ngugi for the sale of the parcel of land. He noted that the passport number A476174 was on record as his wife's passport number and also that his wife's name was misspelt and her signature forged and he therefore concluded it was not genuine. He also saw a transfer of lease from his wife to the Appellant and the photo affixed purporting to be his wife was actually of the Appellant's sister, Purity. He further testified that on 5th March 2007 when the power of attorney was donated, his wife was with him in America. He concluded by testifying that he was still in possession of the property and that a court order was in effect stopping the disposal of the same.

PW2, ROSINA NDILA MULE was an Assistant Commissioner of Lands, Registration Section at the headquarters at Nairobi. Her duties were to supervise both Nairobi District land registry and Nairobi Central land registry. She recalled that on 13th September, 2007 she was at the Nairobi District registry when a transfer document was presented for registration and given a presentation book number 171. The transfer was from Monica James to Joseph Mureithi Kanyita dated 30th August, 2007 in respect to Nairobi Block 94/170. It was executed by the attorney for Monicah James and a Power of Attorney donated to Michael Mwangi Ngugi, No. 1 of March 2007. It had been presented for registration on 8th March, 2007. The power of attorney had been witnessed by Ndegwa Wokabi advocate and drawn by Kimandu Gichohi and Co. Advocates. The transfer was witnessed by L.W. Kangucia(Mrs.) Advocates.

The documents were then given a day book number and the following day they were audited to confirm whether duty and land rent had been paid. The document was then matched with the parcel file and allocated an investigating officer who checked whether it complied with registration and statutory requirements. The officer then made an entry in the document and the property register, that is, the green/white card. The document was then passed to a registrar who perused and dispatched it to the strong room. The documents that supported the transfer were rent clearance certificate, commissioner's consent to transfer, rate clearance certificate and a valuation report from the chief government valuer. She further testified that the original title from the seller was presented and she personally saw it and canceled it.

She registered the transfer and signed it on the white/green card. She further testified that on 26th November, 2007 a charge of Kshs. 18 M was registered against the title by Investment and Mortgage(I&M Bank) against the property. The property was registered to Joseph Mureithi Kanyi.

In 2009 their office received a letter from Musyimi & Co. Advocates who claimed they were in possession of the original title. They presented it and she certified it as a genuine document. She further testified that the title deed submitted by the Appellant was also genuine. Thus given the fact that one parcel of land cannot have two genuine title deeds they decided to restrict the green card in the mother file since they had no powers to cancel a genuine title document.

PW3, LOISE WAIRIMU KAGUCIA was an advocate of the High Court of Kenya practicing in the

name and style of Kagucia & Co. Advocates based in Nakuru with a branch in Nairobi. She recalled that on 23rd September, 2009 she received a letter from the firm of Kibunja & Associates Advocates inquiring whether they had prepared a transfer of lease document relating to a transfer between Monica James and Joseph Murithi Kanyita. Further whether she had attested the signature of the two transacting parties. They had attached a copy of the transfer of lease.

She perused the document and noticed that the document was never prepared by her office or herself. The documents showed they were drawn by L. W. Kagucia(Mrs.) Advocate and Commissioner of Oath of Asili Co-op House, 4th Floor, P. O. Box 4252-00100 Nairobi. She testified that her firm traded as Kagucia & Co. Advocates and did not use the initials L. W or the suffix "Mrs." She offered a sample of the company's name to evidence the same. It further showed that the firm's physical address in Nakuru was Belper House, Second Floor, Court road, P. O. Box 425-20100 Nakuru while the Nairobi office was in KEMU Towers P. O. Box 10187-00100 Nairobi. Therefore the stamp was a forgery.

She testified that she had never transacted or supervised matters relating to property numbered Nairobi Block 94/170 and that the parties involved Monica James, Joseph Murithi and Michael Ngugi were not known to her and they did not appear before her on 31st August, 2007 as alleged. She therefore never witnessed their signatures.

PW4, SARAH NJUHI MWENDA was in 2007 working at the Lands Office in charge of Nairobi registry of titles. Her duties were to register transfers of leases, discharges, powers of attorney and other documents under the registered Land Act. She recalled that on 2nd May, 2005 she registered a caution in the name of Monica James of P. O. Box 74149 Nairobi claiming purchaser's interest. Later on, a succession cause was brought for registration in the names of Milka Njeri Gitau and Joseph Mwaniki Gitau which was to be registered under title Nairobi block 94/170. There was also a transfer of lease in the names of Milka Njeri Gitau and Joseph Mwaniki Gitau as the administrators of the estate of Samson Mwaura Gitau for a consideration of Kshs. 3,800,000.

She registered the document and there was an application as proprietors by transmission from Milka Njeri Gitau and Joseph Mwaniki Gitau as personal representatives of Samson Mwaura Gitau dated 19th July, 2005. She acted on the documents and issued a title deed. After the transfer, the original title deed was cancelled and kept in the parcel file for any future reference.

PW5, EDWARD ABEGI was an advocate of the High Court of Kenya and he formerly practiced at the firm of S. G. Mbaabu & Co. Advocates until December 2011. He recalled that while working there in the year 2005 Captain Wachira, PW1, instructed the firm to purchase for him property in Nyari Estate, Nairobi with the Land reference number 94/170. The land in question was registered to Milka Njeri Gitau and Joseph Mwaniki Gitau and the advocate dealing for the vendors was Mwaniki Gitau & Co. Advocates. A sale agreement was forwarded to them from the vendor's advocate for approval. Salient issues were agreed upon between the parties and consideration was set at Kshs. 3,800,000. The sale agreement was executed and attested by the relevant parties. A transfer was made to Monica James, who was a nominee appointed by the purchaser, under special condition number 2 part 6 of the agreement. They finally got a title and it was registered on 19th July, 2005. They received the title and kept it in their office. Later, the complainant withdrew instructions from them and instructed them to give the file to Ann Mbugua of Musyimi & Co. Advocates which they did.

On 16th March, 2009 he received instructions from one of his clients in America by the name Jane Kariuki who introduced him to Monica James through an email. She told him that Monica was complaining that Captain Wachira intended to dispose of property she was the registered owner of without informing her. He wrote to the firm of Musyimi & Company Advocates seeking to understand their intention for the property pursuant to the email. They fixed a meeting at their offices on 16th April, 2009. She went to a meeting with Anne Mbugua and John Mburu. John Mburu informed him that a certain Joseph Mureithi Kanyita was selling him the property. He informed him that he did not know who Joseph Mureithi Kanyita was but showed a sale agreement prepared by T. K. Rutto & Company advocates.

He suspected something was wrong since he knew that Musyimi and Company advocates had the original title deed during the period when the property had purportedly been transferred to Joseph Kanyita. He wrote a letter to T. K. Rutto & Company advocates on 21st April, 2009 and sought clarification on the matter based on his discussion with John Mburu and Ann Mbugua. He warned T. K. Rutto advocates and copied it to Ann Mbugua and John Maina Mburu that the said client might be a fraudster since the original title had not been surrendered to the Lands Office. The letter was also copied to Ministry of Lands.

On the same day he was instructed by Jane Kariuki regarding the same property with an attachment for sale agreement between Michael Mwangi Ngugi of ID 1321385 and Joseph Mureithi. It was dated 21st March, 2007. There was also a transfer of lease from Monica James to Joseph Mureithi Kanyita. In addition, there was also a power of attorney to Michael Mwangi Ngugi donated by Monica Njeri James. Thereafter, instructions were withdrawn and he was asked to close the file which he did.

In 2009 officers from Central Police Station came to his office and interviewed him and he gave them all the pertinent details and he also recorded a statement.

PW6, POLICE SUPERINTENDENT ANTIPAS NYANZWA a forensic document examiner recalled that on 5th October, 2009 CPL Maria Musima who was attached to the CID headquarters brought to his office three sets of documents that had disputed signatures and stamp impressions. They were marked as Accused 1, Accused 2, F, F2 and E. She also submitted six other sets that contained various specimen signatures and stamp impressions. Through a police exhibit memo form she requested him to examine and compare the disputed stamp impressions in the documents with specimen signatures and stamps.

On 11th October, 2009 he examined and compared the questionable signatures that were indicated. He found the said signatures were in his opinion forgeries. He further examined the stamp impressions and found the same to be forgeries. He wrote a report on the same day in which he detailed his findings.

PW7, AKWANA MAHERO was an advocate practicing at the law firm of Musyimi & Co. Advocates. He recalled that the law firm had a client by the name of Captain Moses Wachira, the complainant herein, The firm had been handling his matters since 2005. He learnt from their file that the complainant had purchased Land Ref. Nairobi Bloc 94/170 Nyari in 2004. There was a sale agreement in the file in favour of the complainant and the title was meant to be in the name of Monica James, a nominee under the agreement.

In the year 2009 they learnt from the complainant that there was one John Mburu who had gone to the said property and attempted to evict the care taker, one Muthuri Miriti. Prior to this event the complainant was known to be the owner of the property and when he checked the file he found two notices from the City Council of Nairobi addressed to the complainant as the proprietor as per an enforcement notice dated 9th February, 2007 seeking to stop the illegal construction of a gate. He also found several quotations for various materials used for the development as their client was using their firm to procure the same.

He also found a power of attorney dated 8th March, 2008 donated by Monica James to Ann Mbugua, a colleague at the firm. The power of attorney granted her the power to deal lawfully with matters regarding the property.

He later learnt that somebody had tried to dispossess their client the property. He perused the documents and realized that the passport number in the power of attorney was different from the one supplied by their client. They had copies of an American passport no. A4263525586 and a Kenyan passport number A10713341 on record for Monica. They wrote to Kimandu Gichohi & Co. Advocates, who were indicated as the drawers of the power of attorney, seeking confirmation as to whether they had drawn the document. They received a letter back stating that they did not draw the power of attorney; that that done, Monica did not appear before them to execute the same and that Mr. Wokabi did not know her and she did not appear before him or identify herself with a passport.

He further testified that they received communication between S. G. Mbaabu and T. K. Rutto & Co. Advocates, dated 21st April, 2009 instructing them to stop the sale transaction.

He testified that they lodged a caution on the land which was filed on 26th April, 2009 setting out the fact that Captain Wachira was a beneficiary in a trust. The caution laid out what the client termed as fraudulent issues in the pending transfer of the land to John Mburu. Their client asked them to lodge a complaint with CID headquarters.

He concluded by testifying that he had met Monica James when she came to their office to sign a power of attorney on 8th March, 2008 and he met the accused persons in court in the civil and criminal proceedings.

PW 8, DANIEL NDEGWA WOKABI an advocate of the High court of Kenya practicing in the firm of Kimondo Gichohi & Co. Advocates recalled on 28th April 2009 that they received a letter from the firm of Musyimi & Co. Advocates in reference to Nairobi Block 94/170 Nyari in which they indicated they were working for Captain Moses Wachira who had beneficial interest in the property. They asked them to advice on three issues, namely; whether they drew a power of attorney, whether Monica James appeared before their Mr. Wokabi to execute the power of attorney and lastly whether the said Monica identified herself using a passport. They replied via a letter dated 29th April 2009 in which they indicated that none of the events had taken place in, and was transacted by their law firm or the witness himself.

PW9, ANNE NJERI KIMANI MBUGUA an advocate of the High Court of Kenya and a partner at Musyimi & Co. Advocates recalled that in 2005 Mr. Wachira, the complainant herein became their client. On 25th November, 2005 the firm received a title and file and they entered the same into the security book. She also took on the role of collecting debts on his behalf and she would disburse the same to Muriuki, a foreman and Nicholas who took care of the property.

She learnt from the client that he was constructing on a property in Nyari and he even took her and a colleague to the site where they found ongoing construction. He also asked her to source for quotations from various service providers to facilitate the completion of the building. Around March 2008 the client informed her that he had lost his sister and his wife Monica was coming to Kenya to attend the burial. He had received a loan facility from savings and loans for Kshs. 5,000,000 and he wanted his wife to sign a power of attorney during her visit to assist in acquiring the same.

She instructed a colleague to attend to Monica James when she arrived and draft a power of attorney. The same was dated 8th March, 2008 and was witnessed by Mr. Nadida. The loan facility was not forthcoming and the client intimated to her that he was open for a sale of the property. They received an offer from Joseph Stambolian for USD 700,000.

They learnt in 2009 that the property was sold to Mureithi, the Appellant, when Mr. Wachira called her from USA. She did her due diligence and she found John Mburu who came to her office where she showed him the title deed in her possession. He had in his possession a bundle of documents and she wrote letters to all the advocates who were implicated via this documents. She went to Kimondo Gichohi advocates and the signature was denied. She was also copied a letter from S. G. Mbaabu Advocates addressed to T.K. Rutto in which the transfer of the land was being questioned. She also wrote a letter dated 4th May, 2009 to the Lands office in which she gave the Registrar the chronology of events. Further, she forwarded all documents in their possession to the Registrar to enable the registration of a caution. She then commenced Judicial Review proceedings before Justice Ochieng for verification of the title. She testified that the title deed was always in her possession and that she was at all times acting for Moses Wachira and Monica.

PW10, CHARLES MUTURI WANGAI was a cousin to the complainant. In respect of this case he was a witness to the purchase of the property from Gitau. He testified that they had began construction around February 2005. He acted as the overall manager in the construction and his duties were to pay workers and suppliers for construction materials and also to supervise the caretaker. He produced the construction

plan of the building.

In December 2008 the house was valued at Kshs. 65,000,000. He produced the construction records for the property.

In April 2009 he received a call from Anthony Duda, who had introduced them to the property's caretaker one Nicholas Muthuri, who informed him that they had been trying to reach Nicholas to no avail. He tried calling Nicholas but his efforts were futile as well so he decided to drive to the property and when he got there he found a stranger on the property. He asked the person what he was doing there and he replied that he had been stationed there by the owner of the property, one John Mburu. This was shocking since he was not aware that his cousin had sold the property. He informed PW1 what had happened and he denied he had sold the property. He went to Nyari police station and he was informed that the police could not arrest the trespassers without a court order. He relayed this information to the complainant who sent security guards to guard the property.

He testified that the property was registered in the name of Monica Wakiero Karanja also known as Monica James who he knew from the early 1980s. He met Mburu who alleged he purchased the plot from Joseph Kanyita, the Appellant. He later came to learn that the title had changed hands to Joseph Kanyita in 2007.

PW11, CPL MARIA MUSIMA was attached to the Economic and Commercial Crime Unit. She was assigned to investigate the case on 6th May, 2009. The matter was reported by a lawyer, Akwana Mahero, on behalf of the complainant who was out of the country. She commenced her investigations on Land Ref. No. Nairobi block 94/170 Nyari.

On 25th May 2009 she wrote a letter to the Land's office Ardhi House Nairobi to attain documents relating to the property to assist in the investigations. She further wrote a letter to the Director of Immigration on 15th September, 2009 inquiring for the personal information of the passport No. A 476174 indicated in the power of attorney. She also wanted to get the particulars of the passport holder and establish when she was last in Kenya. She received a response indicating that the holder of the passport was Monica Leonis Karanja alias Monica James alias Monica Wakiero Karanja who was born on 6th February 1963. She was also informed that the passport was destroyed in a fire at her house in San Diego on 13th March, 2006 and she was consequently issued with a new passport number A1071334 on 7th September, 2006. According to them the passport was last used on 11th September, 2008. Further, that she had traveled into the country on 29th August, 2006 on an emergency certificate number 017844 issued by the consulate general in Los Angeles. The report also said that the Appellant had last been to the country on 9th March, 2008 and left the country via J.K.I.A using American passport number 426352558.

She then created an exhibit memo in which she attached all the documents plus various samples that were needed for comparison which she sent to the document examiner. She received results in April 2010. The Appellant was arrested on 4th May, 2010 by officers from Gigiri Police Station and charged accordingly.

The prosecution closed the case and the learned trial magistrate made a ruling that a prima facie case had been established and therefore put the accused persons on their defence.

The Appellant testified as **DW1**. He testified that in early 2007 he was in Nairobi, Kenya. He had been desirous of acquiring property from Monica James in 2006 when he was still in the USA. Monica had informed him that she had property in Nairobi which she wanted to sell since she was not planning on returning to Kenya. They started negotiations and Monica gave him a copy of the property's title to facilitate due diligence. He conducted a search and found that the property was registered to her. The property had registration number Nairobi Block 94/170 Nyari Estate and an official search showed that it belonged to Monica.

They continued communication via telephone and email and eventually they agreed she would come to

Kenya to appoint someone of her choice who would facilitate transfer of the property as she was still based in USA. She later called him and gave him Michael Ngugi's number who would be acting on her behalf. Monica came to Kenya in March 2007 and when they met she suggested they proceed to Ndegwa Wokabi & Co. advocates to have a power of attorney drawn. When they got to the firm, Michael and Monica went into the office and he left. He later collected them and dropped her off at the airport. He first saw the power of attorney when it was registered in August 2007.

He then effected all payments to the US using cheques that were deposited in Monica's account for the consideration of Kshs. 3,800,000 which was arrived at after deducting other debts owed in the USA. The sale agreement was between him and Monica's registered representative. He finished paying for the property in August 2007 and he was handed all the relevant documents by Michael. In September 2007 he transferred the property in his name. He said that one Muraguri took the transfer documents to Lucy Kagucia to attest but they never met her. The said Muraguri was working at Ndegwa Wokabi's law firm. He further testified that he was given vacant possession of the land.

He testified that he knew the complainant from San Diego where they interacted in various social gatherings and he did not know that he had a beneficial interest in the land until April 2009 when they were evicted from the land. They tried to 'mitigate' with Monica but the complainant had already gone to court arguing he had a beneficial interest.

DW2, MICHAEL MWANGI NGUGI was the co-accused to the Appellant. He testified that he was an accountant by profession and that in the year 2006 he was visiting friends in Naivasha and during that visit he met one Monica James at a restaurant. They started talking and during one of their conversations she informed him that one Joseph Kanyita was coming to Kenya and she wanted them to meet. He met Joseph, the Appellant, on 5th March, 2007 at Hilton Hotel when Monica was around at which meeting she informed him that she was selling some property to Joseph and she wanted his help. He told her he had no objection and on the same day she donated a power of attorney to him at Kimandu Gichohi & Co. Advocates. A form was signed and they left it there since it had to be registered before it could be used. He picked the document on 21st March, 2007. Monica had given him original title and other transfer documents. He therefore requested Joseph to draw a sale agreement to facilitate the transfer. The agreement was made by Kimandu Gichohi Advocates on 24th March 2007. Monica confirmed to him that she had been paid Kshs. 3,800,000 and he could therefore transfer the property. He traveled to Nairobi where he met Joseph and handed over the relevant documents. He later learnt that the transfer had gone through.

DW3, MONICA WAKIERO KARANJA formerly **MONICA JAMES** testified that she was married to the complainant, Captain Wachira, but that they were separated. She testified that she previously owned a plot in Nyari which had been donated to her by her ex-husband Moses Wachira after she bore a daughter. This was in 2005 and the property was registered in her name and a certificate of lease granted to her. She testified that this was not a conditional gift and she was not meant to hold the property in trust for her husband. She testified that the property was undeveloped at that juncture that her ex-husband later developed the same without her knowledge and she only found this out when she came back to transfer it. She testified that she transferred the property to sever ties with her ex-husband. She transferred it to Joseph Mureithi Kanyita, the Appellant, who she knew from the United States as they lived in the same neighbourhood. She sold it for a consideration of Kshs. 20,000,000 of which she received cash Kshs. 3,800,000 with the rest used to offset investments in their other business ventures. She testified that they begun negotiations in 2006 but execution happened in 2008.

She stated that the transaction was carried out via a power of attorney she had donated to Michael Ngugi whom she had met in Naivasha. She came to Kenya for a day with the sole purpose of executing the power of attorney. This was on 5th March, 2007. She used her Kenyan passport and they met at the Hilton hotel before proceeding to Ndegwa Wokabi & Co. Advocates so she could donate the power of attorney. They met Mr. Wokabi advocate who drew the power of attorney. She left it there as they had agreed with Michael that as soon as it was done he would pick it up and consequently represent her in the transaction.

The Appellant paid her by way of cheques making installments over a period of 6 months. She testified

that she had been to Kenya in October 2009 and again in June 2012 but not in 2008 and that further she did not know any Ann Mbugua of Musyimi & Co. Advocates and she had never donated a power of attorney to her on 8th March, 2008 as she was not in Kenya during that period. She further testified that she had never instructed the firm of Musyimi & Co. Advocates to sell this property and she did not know whether they were holding documents relating to the property.

She also testified that the complainant had initiated a similar case in the United States where the Appellant, his sisters, herself and a friend were defendants and that she presented the title deed and won. This was case No. 37-2009-109776.

She testified that she was not aware that the property was transferred to Joseph Kanyita Mureithi. She stated that this did not matter as her interest was to get rid of the property.

DETERMINATION

After due consideration of the evidence on record, I find the following main issues arising for determination.

- i. Whether the learned trial magistrate erred in cancelling the title to the subject land.
- ii. Whether the magistrate erred in deeming the evidence of DW3 as untrustworthy.
- iii. Whether the charges against the Appellant were proved beyond reasonable doubt.
- iv. Whether the sentence imposed was too lenient.

I will first deal with the issue of the cancellation of the title document by the trial magistrate at the conclusion of the trial at the insistence of the Director of Public Prosecutions. The Appellant contends that the magistrate acted ultra vires in allowing this application. In determining this issue, I am guided by the words of Lord Diplock in **Gouriet v Union of Post Office Workers [1977] 3 All ER** at page 99, that:

“Authorities about the jurisdiction of the courts to grant declaratory relief are legion. The power to grant a declaration is discretionary; it is a useful power and over the course of the last 100 years it has become more and more extensively used...”

It was further noted that;

“An enactment of Parliament defining and creating a criminal offence amounts to an injunction by Parliament restraining the commission of the acts made criminal. If the injunction in the Act is not obeyed, and in these days it frequently is not (sic), the statute normally states the maximum punishment that can be awarded on conviction.

...

In every case it will be for the court to decide whether it has jurisdiction to grant the application and whether in the exercise of its discretion it should do so.”

Flowing from the above observation, I think the learned magistrate exercised her discretionary power to cancel the title and she did not therefore act ultra vires. The action in my view was intended to prevent any further unlawful transfer of the title. Having arrived at a finding that the transfer and subsequent registration of the title was unlawful, the most prudent thing to do was to order the cancellation of the title. That way, the subject matter (the land) would be preserved and revert to the initial status quo until such a time that a court of higher jurisdiction would rule to the contrary.

That aside this being an appellate court of first instance it is mandated to reanalyze and reexamine the evidence on record and come to a conclusion while taking cognizance of the fact that it has not had the

opportunity to see the demeanor of the witnesses. See: **Okeno v Republic [1972] EA 32.**

The first issue that this court must look at involves the evidence of DW3 and the role she may or may not have played in the case. The Appellant submitted that the trial court disregarded her evidence which was truthful. She went by the names Monica Karanja James, Monica Leonis Karanja and Monica Wakiero Karanja. Her involvement in the case is that she was the nominee title holder and ex-wife of the complainant in the case. The prosecution's case was that the Appellant and others had forged the documents necessary to effect a transfer and successfully done so in 2007. However, this was countered by the Appellant who in his evidence brought DW3 as one of his witnesses and she adduced evidence to the effect that she had sold him the property. She sought to ratify the documents that the prosecution alluded to were forgeries. This was mainly the case with regards to the power of attorney. The rest, she said was carried out between the Appellant and the man to whom she donated the power of attorney.

The learned magistrate in her judgment held that the power of attorney was not given by Monica and she gave untruthful evidence in the defence. The evidence of the document examiner was clear and conclusive that the signatures and stamp impressions on the power of attorney and the transfer of the lease did not pass a comparison with the samples offered making them forgeries. The supposed makers of these signatures and stamp impressions also refused to endorse them and outrightly disowned them. PW3 testified that she was trying to get rid of said property to cut off links with her ex-husband and she was even willing to give it away and the consideration she received was a bonus. But the persons (advocates) before whom she alleged that transfer of lease and power of attorney were made and executed denied ever doing so. She therefore lied to the court and under oath.

There are also other major inconsistencies between her evidence and that of the prosecution that speaks to her standing as a witness. The investigating officer got a report from the Director of Immigration with regard to passport number A476174 which was confirmed to have belonged to her. They informed her that the passport in question was destroyed in a fire on 18th March, 2006 at her home in San Diego; a local incident report of the same was attached to evidence the loss. Further, she traveled to Kenya on 29th August, 2006 using an emergency certificate issued by the Consulate General at Los Angeles evidencing the lack of the passport at the time. She was subsequently granted a new passport, number A1071334, on 7th September, 2006. However, in a surprising turn of events the passport that was reported as lost was used on 11th September, 2006. This same passport was used to make the power of attorney in 2007. There is therefore evidence of utter lies by PW3 that her genuine passport was used in the transactions.

Again, DW3 stated she was last in Kenya in 2012 and that she had been in Kenya in 2007 but not in 2008. The letter from the Department of Immigration is clear that the witness was last in Kenya on 9th March, 2008. This date might sound familiar as it conforms to the evidence given by PW9 both in her witness statement and in her testimony in court that a power of attorney was donated to her on 8th March, 2008. This donation has been denied by the witness even though the document bore her particulars, picture and signature.

From the foregoing, I conclude that the witness was not truthful in her testimony and was only plotting the diversion of the course of justice. She appeared bent on a mission to hurt her estranged husband. It is also not clear why the police to not pursue investigations on the authenticity or otherwise on her insistence that her genuine passport was used to facilitate the transfer of the title yet the Immigration Department had contrary evidence. I accordingly hold the Appellant's ground of appeal that DW3's evidence was disregarded in his favour as unmeritorious.

I now delve into whether the prosecution proved the counts that the Appellant was charged with beyond a reasonable doubt. The first charge was that of Forgery contrary to Section 350(1) of the Penal Code. Section 350(1) provides that;

“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.”

In this particular case the forgery was that of a power of attorney. Phillimore L.J broke down the definition of forgery in **R v Dodge and Harris [1971] 2 All ER 1523** as:

“A document is false... if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it or authorize its making ... or if, though made by or on behalf of or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, ... is falsely stated therein; and in particular a document is false:- (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it.”

The Court of Appeal held in **Joseph Mukuha Kimani v Republic (Criminal Appeal No. 76 of 83) [1984] eKLR** 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.”

The Appellant contended that the prosecution never proved that he forged or was involved in the making of the power of attorney. The evidence of the defence witnesses was that the document was drawn, executed and attested in the presence of DW2, DW3, the advocate and one Muraguri. The advocate however denied taking part in the making of the said document and the document examiner found that the signatures therein were not those of DW3. Mativo J in **Caroline Wanjiku Ngugi v Republic[2015] eKLR** held that:

“Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus the elements of forgery are:-

i. False making of – The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. “Writing” includes anything handwritten, type written, computer generated or engraved.

ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filling in blanks on a form or altering the genuine contents of the document.

iii. Ability to defraud – The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.

iv. Legal efficacy – the document or writing has to have some legal significance.

v. Intent to defraud – the specific state of mind for forgery does not require intent to steal but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer.”

This definition sets out as its first element the need to prove that the person charged was indeed the one who put ink to paper and created the document deemed a forgery. This is further reaffirmed in **R v Gambling [1974] 3 All ER 479** where the court held that:

“...‘forgery is the making of a false document in order that it may be used as genuine.’ This definition involves two considerations: first, that the relevant document should be false; and secondly, that it was made in order that it might be used as genuine.

[...]

Given [...] that each application was ‘false’ was it made ‘in order that it might be used as genuine’? Indeed what do these words involve in the context of the present case? Clearly they require proof of an intent on the part of the maker of the false document that it shall in fact be used as genuine. We think that they also involve that the untrue statement in the document must be the reason or one of the reasons which results in the document being accepted as genuine when it is thereafter used by the maker. It is this concept which we think is sought to be expressed in the aphorism – as to the usefulness of which views may differ strongly – that the document must not only tell a lie, it must tell a lie about itself. [...] If this is correct, then it seems to us to follow that in cases such as the present in which the falsity of a document arises from the use of a fictitious name or signature, or both, then that document is a forgery only if, as counsel for the appellant contended, having regard to all the circumstances of the transaction, the identity of the maker of the document is a material factor. [..]

In many cases the materiality of the identity of the maker would be so obvious that evidence would be unnecessary: for example, when the document is a cheque or a bill of exchange and the purported signature of the drawer, or endorser, or the acceptor has been written by the someone other than the person whose signature it purports to be. In other cases, such as the present, evidence would be required, and the materiality or otherwise of the identity of the maker of the document must be a matter for the [court].”

This court must contend with the fact that the power of attorney was created with the sole aim of facilitating a fraudulent transfer of land. The donor of the power of attorney has stood by it but an attesting witness, the advocate Wokabi, categorically denied involvement in drawing or attesting the document. It is therefore in contention who did draw the document between the Appellant or his co-accused and the court must rule that the prosecution did not sufficiently prove the identity of the forger which was material in this matter. Respectively, the appeal with regard to this count must succeed.

The second count against the Appellant was uttering a false document contrary to Section 353 of the Penal Code which provides that;

“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.”

The particulars of this charge were that the Appellant uttered the power of attorney on 5th March, 2007 to one Paul Njogu Macharia at Kencom Bus Stop. The complainant was also not called as a witness in proof of the count. The charge was, as such, not supported by evidence. The conviction in this regard was a misdirection both in law and fact. The appeal in this count must succeed.

The third count was for the offence of making a document without authority contrary to Section 357(a)

of the Penal Code. The section provides thus:

“without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing;”

The particulars of the charge were that the Appellant on 31st August, 2007 with intent to defraud, without lawful consent or excuse made a certain document namely a transfer of Lease, purporting it to be a genuine for Land Title No. Nairobi Block 94/170 Nyari and drawn by Loice Wairimu Kagucia of Kagucia & Co. Advocates. The court has looked at the Transfer of Lease in question and it purports to have been executed by the firm of L. W. Kagucia(Mrs.) Advocates. Mrs. Kagucia did testify in court that this was false and that her firm did not trade using the name in question and further that the offices indicated were not the location of the firm's Nairobi office. She gave samples of her signature and stamp impressions to the investigating officer who passed them along to the document examiner who found the ones used in the Transfer to be forgeries. The court is satisfied that the Appellant did indeed make a false document and agrees with the trial magistrate's decision to convict.

The last conviction was for the offence of obtaining registration by false pretences contrary to Section 320 of the Penal Code. The Section reads:

“Any person who willfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.”

The evidence adduced with regards to this count was that the Appellant, in conjunction with another, on 13th September, 2007 obtained registration of a certificate of lease for Title No. Nairobi/ Block 94/170 by false pretences. This court has looked at the evidence of PW2 who set out how the transfer document was presented in respect of the property aforementioned to enable its transfer to the Appellant. The transfer was carried out as per set guidelines and she even testified that the Appellant came to her office to follow up on documents. **“He told me he was based in America and he was in a hurry but I told him the document must follow due procedure.”** There is no doubt that the title was registered. Clearly the Appellant obtained the registration under false pretence. This court must therefore in light of this fact uphold the conviction by the trial magistrate. In the end, the appeal succeeds in respect of counts I and II. The conviction in the two counts is quashed and sentences set aside. I do however find that the prosecution proved their case beyond a reasonable doubt in counts III and IV. I uphold the conviction respectively.

With regard to the sentences, the same were challenged and the Respondent filed a notice of enhancement under Section 354(3) of the Criminal Procedure code. It stated that the sentences preferred against the Appellant were too lenient. The Interested Party was also of the same opinion and made submissions to that effect. A notice of enhancement of the sentence is a cautionary requirement which informs the Appellant to make a choice of whether or not to proceed with the appeal. See **JJW v Republic [2013] eKLR** where it was held that:

“... sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effect on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced.”

Having made the above observation, it is important to set out the guidelines in sentencing. They were well enunciated by the then Court of Appeal for Eastern Africa in **Ogalo s/o Owuora v Reginam** where it was held:

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if

members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R., (1950) 18 E.A.C.A 147, "it is evident that the Judge has acted upon some wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in the circumstances of the case:

[...]

We appreciate, of course, that a trial judge is not necessarily bound by [...] precedents but we think that they afford some sort of yardstick to an Appellate Court which has to consider whether a sentence is or is not manifestly excessive in all circumstances of the case."

The emphasis as cited in the Ogalo case (ibid) is that sentencing is always in the discretion of the court and the factors for consideration in interfering with the trial court's decision in sentencing were clearly set out therein. I add that sentencing must also take into consideration the blameworthiness of the accused. In this case, the value of the property comes into play which was Ksh. 65,000,000/-. The question then is; was the sentence commensurate with the offence? I revisit the statute in answering this question. I have upheld the conviction in counts III and IV. Under the respective provisions they were charged under, they were liable to the following sentences;

Count III-----imprisonment for seven years.

Count IV----- imprisonment for one year.

In my view, notwithstanding that the Appellant was a first offender, the penalty in count III was not commensurate with offence. The trial court failed to take into account that the complainant stood to lose such a valuable property and that a stiff sentence would send a warning to the would-be offenders, thus serve as a deterrent measure. I think, in the circumstances, a custodial sentence was justified. Accordingly, I set aside the sentences imposed and substitute them with an order that the Appellant shall serve two years imprisonment in respect of count III and six months imprisonment in respect of count IV. Sentences will run concurrently. Days served prior to the payment of the fines will be taken into account in tabulating the sentence. The fines shall also be refunded to the Appellant.

DATED AND DELIVERED THIS 15TH DAY OF SEPTEMBER, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Mr. Owang for the Appellant.**
- 2. M/S Nyauncho for the Respondent.**
- 3. M/S Maloa for the Interested Party.**