



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT MOMBASA
CRIMINAL APPEAL NO.96 OF 1996**

MARY MANGA MESHACK APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at
Mombasa (Lady Justice Ang'awa and Mr. Justice Waki)
dated 8th December, 1996

in

H.C.CR.A. NO. 264 OF

JUDGMENT OF THE COURT

The appellant MARY MANGA MESHACK MWASI (the appellant), was charged, tried, convicted and sentenced to an imprisonment term, for the offence of forgery contrary to section 349 of the Penal Code. Her first appeal to the superior court was dismissed. She now comes to us on second appeal.

The prosecution case before the trial court was that the appellant made a document purporting it to be a sale agreement made and signed by one SALIM AWADH SULEIMAN, agreeing to sell his house at Chaani, Mombasa, to her at a price of Kshs.25,000/=. The said SALIM AWADH SULEIMAN, since deceased, (under, the deceased) neither made nor executed the agreement. The appellant used the agreement to lay claim to the ownership of the house and in doing so she was acting fraudulently. On the other hand the appellant's case was that the said agreement was indeed made on the instructions and direction of the deceased who then signed it. He received Kshs.25,000/= from her as consideration for the transfer to her of the house. She denied making the sale agreement or even affixing a signature on it purporting it to be that of the deceased.

"Forgery" is defined under section 345 of the Penal Code thus:

"Forgery is the making of a false document with intent to defraud or to deceive."

The prosecution called evidence to show that a handwritten document which was exhibited may have been forged.

A copy of the document was in the possession of the appellant. The signature on it was in fact not matching with the usual known signature of the deceased and that the appellant may not have made the document. In our view, the only evidence which, in effect, connected her to the commission of the alleged

offence and on the basis of which she was charged, is merely her possession of the document. No clear evidence was adduced to show that she either made the document or was party to its making. In absence of such evidence it cannot be said that every element of the charge of forgery was established to the standard required in a criminal case. It is therefore our view that Mr. Gacivih, Senior Principal State Counsel, properly did not support the appellant's conviction on the charge of forgery contrary to Section 349 of the Penal Code. The appellant having not been charged with any related count we are of the view that no finding in that regard is called for. We wish to observe here that the manner the charge was preferred was a departure from the usual practice of including an alternative count of uttering a false document.

In the circumstances we allow the appellant's appeal, quash her conviction on the charge of forgery contrary to Section 349 of the Penal Code, and set aside the sentence of two years' imprisonment which had been imposed on her. She must be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 21st day of July, 1997.

A.M. COCKAR

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CHIEF JUSTICE

R.O. KWACH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR