



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL 76 OF 83

JOSEPH MUKUHA KIMANI APPELLANT

AND

REPUBLICRESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Nairobi (Todd, J) dated 3rd March 1983,
in Criminal Appeal No. 1112 of 1982)**

JUDGMENT OF THE COURT

Joseph Mukuha Kimani (the appellant) was convicted on three counts, that is, two of forgery and one of uttering a false document, contrary to Sections 349 and 353 of the Penal Code, respectively. At his first appeal, the High Court acquitted him of the two counts of forgery but upheld the conviction on the count of uttering a false document. What was put against Joseph on that count, was that on the 5th day of March 1981, at Kahawa Garrison, within Nairobi Area, he knowingly and fraudulently uttered a certain forged Trade Test Certificate No. 65092 to Joseph Zimi, purporting it to be a genuine Trade Test Certificate, signed by James Ornyu Opiyo.

On this second appeal, four grounds were put forward but Mr. Gatimu for the appellant, argued only ground 3, that the learned Judge erred in not appreciating that, the elements of the offence were not proved. Indeed, ground four was not maintainable, in view of Section 361(1) (a) of the Criminal Procedure Code. Section 353 provides as follows:

“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 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] E A 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] E A 1. The prosecution showed that, the uttered document was made to

be used as genuine for the promotion of the appellant. However, though the document (certificate) was said not to have been signed by the Assistant Director of Industrial Training in the Ministry of Labour Mr Pravin Kumar Kapur (P W 3) and MR James Jony Opiyo (P W 2), who was the Motor Vehicle Examiner there was sufficient evidence that it was false, and that is forged as changed. Mr Opiyo said that, the record showed that, he examined the appellant who failed, but the appellant said, in his unsworn statement, that he passed the test. He also said that, he collected a certificate from the Ministry's office. He surely must have been informed that he could collect it, and at that time, it appears, there was no objection to his collecting it, on the ground that he had earlier passed the examination. It was not proved that the appellant, therefore, knew the document was forged.

We do not think all the essential ingredients of the offence of forging a false document were established, nor was the document, the subject matter of the charge proved to be false. For these reasons, the conviction cannot be sustained. The appeal is allowed, conviction quashed and the sentence put aside. We order immediate release of the appellant unless he is otherwise, lawfully withheld.

Dated and delivered at Nairobi, this 3rd day of May, 1984.

A A KNELLER

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JUDGE OF APPEAL

Z R CHESONI

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AG JUDGE OF APPEAL

J O NYARANGI

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AG JUDGE OF APPEAL

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

DEPUTY REGISTRAR