



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Kneller JA, Chesoni & Nyarangi Ag JJA )**

**CRIMINAL APPEAL 76 OF 1983**

**BETWEEN**

**JOSEPH MUKUHA KIMANI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from the High Court at Nairobi, Todd J)**

**JUDGMENT**

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 March 5, 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 Orony 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] 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] 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 (PW 3), and Mr James Jony Opiyo (PW 2), who was the Motor Vehicle Examiner, there was insufficient evidence that it was false, and that is forged as charged. 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 uttering 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**

.....

**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**