REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO. E121 OF 2024

REUBEN OSEKO ANYONA……

APPELLANT

VERSUS

REPUBLIC……

……RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. W. Kugwa, Resident Magistrate in Kisii CMCRC No. E386 of 2022 delivered on 30.9.2024.

2. The Appellant was charged with forgery contrary to Section 345 as read with 349 of the Penal Code. The particulars of the offence were that on 23.6.2013, at unknown place within the Republic of Kenya, the Appellant jointly with others not before court with intent to defraud Stephen Anyone Morebu a parcel of land title deed number Nyaribari Masaba/Boguche/1596, forged a signature of Stephen Anyona Morebu on the application for consent of the land control board form

purporting it to be the genuine signature of Stephen Anyone Morebu.

3. The Appellant was charged on count II with the offence of making a document without authority contrary to section 357(a) of the Penal Code. The particulars were that the Appellant jointly with others not before court with intent to defraud Stephen Anyona Morebu a parcel of land title deed number Nyaribari Masaba/Boguche/1596, without authority made a document namely the Application for Consent of land control board for transfer of the said land purporting it to be the genuine application for consent of the land control board issued by the Chairman of the Land Control Board Masimba.

4. On count III, the Appellant was charged with fraudulent procurement of land title deed contrary to section 103(1) of the Land Registration Act 2012. The particulars of the offence were that on 23.6.2013, the Appellant at a Land Registry within Kisii County fraudulently procured for himself the registration of land title number Nyaribari Masaba/Boguche/1596, by falsely pretending that Stephen Anyona Morebu had transferred the said land to his ownership.

5. The trial court heard the matter and subsequently delivered its judgment. It found the Appellant guilty and convicted him on Count I and Count III. However, the Court discharged the

Appellant under section 35(1) of the Penal Code and issued him with a stern warning.

6. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal dated 19.11.2024 contained 10 grounds. Only one substantive ground of appeal was raised, but it was repeated nine additional times using different wording. This approach is undesirable and serves only to waste valuable judicial time. The sole ground of appeal is that the learned trial magistrate erred in convicting the Appellant on Counts I and III despite the prosecution having failed to prove its case beyond reasonable doubt. The remaining grounds are prolixious, winding, and unseemly.

Evidence

7. The Respondent called three witnesses. PW1 was the complainant, Stephen Anyona, who is the Appellant's father. His evidence was that the Appellant transferred the suit land to himself in circumstances that were not clear. PW2, Eloya Nyalandi Anyona, the Appellant's brother, testified that the Appellant had obtained court orders restraining PW1 from carving out an access path to the land. He further stated that PW1 had previously sold a portion of the land to raise school fees for the Appellant

8. PW3 was No. 2850 PC Martin Munene of Kisii Police Station. According to him, PW1 reported the case and upon

investigations, the Appellant was suspected and arrested and charged with the offences.

9. The Appellant testified as DW1 and called two additional witnesses. His case was that prior to obtaining the Land Control Board consent, the land had already been subdivided and PW1 had paid for three beneficiaries, including the Appellant. He therefore maintained that he did not forge the title deed, as it was issued through the proper procedures. He further stated that the land had initially been intended for transfer to his mother, but she advised that it be transferred directly to him instead.

10. DW2 was George Humphrey Omboga. According to him PW1 sold land to him and transfer was effected. PW1, per DW2, had subdivided the land into 3 portions. PW1 signed the transfer in 3 different portions including the land in question.

11. DW3 was the Appellant's mother. According to her, PW1 had transferred land into 3 portions, one of which was meant for herself. She however preferred that instead of her portion being transferred to her son, the Appellant.

Submissions

12. The Appellant filed written submissions dated 15th October 2025. It was submitted that the evidence on record relating to

the alleged forgery was highly contradictory. Reliance was placed on *Mctough v Republic* (Criminal Appeal E012 of 2025) [2025] KEHC 6390 (KLR) (24 April 2025) (Judgment), where the court stated:

> "The prosecution appears to have relied on the presumption that the Appellant forged the documents because he 'benefitted' from the forged documents by acquiring title to the properties, hence he must have made them. The law works on concrete evidence and not suppositions. Nothing in the record of the lower court would lead me to reach the finding that the documents in question were forged by the Appellant. As a matter of fact, the specimen writings and signature of the Appellant were not submitted to the prosecution's document examiner for examination and there was therefore no basis of reaching the finding that the Appellant forged them. The trial Magistrate appears to have adopted the prosecution's position that the Appellant must have been the one who forged the documents because he stood to gain from the transactions that arose from the allegedly forged documents. However, this conclusion was not made on the strength of the available evidence and the learned trial Magistrate erred thus."

13. It was further submitted on behalf of the Appellant that the charges were not supported by evidence and were not proved beyond reasonable doubt. Reliance was placed on **Onyancha v Republic** (Criminal Appeal E019 of 2023) [2024] KEHC 7671 (KLR) (28 June 2024)(Judgment) where the court stated as follows:

> “The other weakness in the prosecution case was the failure to have the lands registry on its side, by way of calling officers from the lands registry as witnesses, to bespeak the land registration documents that PW8 produced. Title deeds are issued by the lands registry. They are procured from that registry. Registered proprietors do not issue title deeds to themselves. One cannot begin to talk about issuance of a title deed being fraudulent, without involving the lands registry, which is the custodians of land registration documents, and the entity responsible for issuance of title deeds. It is the lands registry that ought to denounce or renounce a registration process, or the issuance of a title deed. It is that lands registry that declares that a certain title deed did not emanate from the said registry, or, if it did emanate from the said registry, that it was not procured properly. It would be foolhardy, to try to impeach a registration of land, or a title deed issued, by a land registry, without calling any witness from that registry, to bespeak the process, and address the issue of the validity of the process leading up to the issuance of the title document. I am surprised that PW8 did not consider the land registrar as an important witness, for the purpose of proving that the title deed issued to the appellant was not proper.

13. The Respondent conceded to the appeal faulting the trial court on the ground that there was no evidence from the Land Registrar to support the charge of forgery. That the evidence did not support the charge of forgery or at all. The

Respondent in this regard filed a Notice of Concession dated 10.9.2025.

Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge**

or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

15. In the case of **Okeno v Republic [1972] EA 32** at 36 the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."**

16. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision by Viscount Sankey L.C in the case of **H.L. (E)**

Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

17. In the case of **R vs. Lifchus {1997}3 SCR 320** the Supreme court of Canada explained the standard of proof as doth:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty... the term beyond a reasonable doubt has been**

used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

18. The legal burden refers to the burden of proof which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. According

to ***Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:**

> "The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

19. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of *In re Winship* 397 U.S. 358 (1970), at pages 361–364, where he stated that:

> "**The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction…Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical**

> **that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

20. This court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted a fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated as follows:-

> 1.**An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
> 2.**It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

21. The issue for this court's determination is whether the prosecution proved the offence of forgery and fraudulent procurement of land title deed as against the Appellant beyond reasonable doubt.

22. In order to determine whether forgery in terms of Section 349 of the Penal Code has been proved, one must answer the issue whether the prosecution proved the ingredients of the said offence. In the case of **R v Dodge and Harris [1971] 2 All ER 1523** Phillimore L.J broke down the definition of forgery 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."*

23. The Respondent had the duty to prove that the alleged forged title deed was false and that the Appellant, knowing it to be forged, uttered it with the intention to defraud PW1. The Court of Appeal has consistently held that in offences of forgery and uttering, the prosecution must establish both the falsity of the document and the accused's knowledge and intent, failing which a conviction cannot stand. In the case of **Joseph Mukuha Kimani v Republic** [1984] KECA 36 (KLR) the said court [Kneller JA, Chesoni & Nyarangi Ag JJA] held as follows:

> 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.

24. All the witnesses who testified did not connect the Appellant to any forgery. It became clear from the testimony that the case involved a family dispute in which PW1 had already divided his land into 3 portions including the impugned title deed. This is the common thread that ran through the evidence of PW1 and PW2 and which was also supported by DW3. Therefore, there was no evidence of forgery and the court erred in finding forgery and fraudulent procurement of land title deed without evidence. 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 filing 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 it is 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."

25. Therefore, there was need to prove that the person charged was indeed the one who put ink to paper and created the document deemed a forgery. This was not done and as conceded by the Respondent, the Land Registrar was not called in evidence to confirm that the title deed was fraudulent. 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].”

26. Failure to call the Land Registrar was fatal to the Respondent’s case. This is because the omission to call a material witness may result in an incomplete account of the events, thereby undermining the prosecution’s case and affecting the Court’s overall assessment of evidence. In **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** the Court stated:

> **“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound**

> **to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."**

27. This is not a case of not calling crucial witness or that the forgery could be proved by other witness. Section 143 of the Evidence Act (cap 80 laws of Kenya) provides as follows:-

> *"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."*

28. The court of appeal [S.E.O. BOSIRE, P.N. WAKI and J.W. ONYANGO OTIENO JJ.A**]** addressed the aspect of plurality of witnesses in the case of **Donald Majiwa Achilwa & 2 others v Republic** [2009] KECA 163 (KLR) as follows:

> The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however,

> the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549).

29. This was buttressed in **Keter v Republic [2007] 1 EA 135** where the court held *inter alia* that:

> *"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."*

30. Now therefore, there was no evidence that the title deed was not signed by the parties who were indicated as signed. The forgery is based on the acts of the Land Registrar. He was not called to deny that he did not sign where he purported to have signed. In the absence of evidence to that effect, there was no prima facie case in court. It is sad that the ODPP who is supposed to make the decision to charge has abdicated that role and makes the decision to charge willy-nilly. There was no scintilla of evidence to prove the charge. They have rightfully conceded to the appeal.

31. The court has said enough to show that the case against the appellant was not proved beyond reasonable doubt that the Appellant committed the offence of forgery. Indeed, there was no evidence that an offence was committed.

32. Whereas he was set free, the court erred in finding the Appellant guilty of the offences which he did not commit. Therefore, I set aside the conviction.

Determination

33. I make the following final orders:

a) This appeal on conviction is allowed and the judgment of the trial court in Kisii CMCCRC No. E386 of 2022 is set aside.

b) The sentence is set aside and the appellant is set free forthwith, unless otherwise lawfully held.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **13th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Nyambane for the Appellant

Mr. Njeru for the State/Respondent

Court Assistant – Michael