REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CRIMINAL APPEAL NO. E028 OF 2025

GABRIEL KIMANI KUNG'U.....
.....APPELLANT

VERSUS

REBUPLIC.....
RESPONDENT

(Being an Appeal against the conviction and sentence in the Senior Principal Magistrate Court in Gatundu by Honourable W. Ngumi (SPM), in Criminal Case No. E428 of 2023 on 22nd October 2024).

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Principal Magistrate Gatundu where he was charged and convicted of four counts of forgery contrary to Section 352(b) and 345 as read with Section 349 of the Penal Code, one count of uttering a false document contrary to Section 353 of the Penal Code and one count of stealing contrary to Section 268 as read with Section 275 of the Penal Code. He was convicted of the six charges and sentenced to serve 18 months imprisonment in each of Count I – IV whereas sentences

were to run concurrently. In Count V he was sentenced to one (1) year imprisonment and in Count VI, to six (6) months imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 13 grounds which can be summarised as follows:-

   a) The learned trial magistrate erred in law and in fact in finding that the prosecution proved the offences of forgery, uttering a false document and stealing beyond reasonable doubt.

   b) The learned trial magistrate erred both in law and in fact by issuing a harsh sentence without considering that the appellant was not legally represented during the trial.

   c) The learned trial magistrate erred in law and in fact by finding that the land parcel F144 belonged to the complainant and further that she was a shareholder of Kandara Investment.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant relies on the case of **Republic vs Wafula (Criminal Case E010 of 2023) [2025] KEHC 272 (24 January 2025) (Ruling)** and submits that he did not have any legal representation during the trial and

therefore he did not challenge the forensic report. The forensic analysis report for stamp impression belonging to Karuga Wandai could not have resulted to accurate result warranting a conviction as advocates stamp instruments are subject to wear and tear which call for replacement after sometime for use. The appellant submits that he is said to have committed the said offence on 11th December 2018 and the specimen impression of the stamp belonging to Karuga Wandai was taken in the year 2023, which is approximately 6 years down the line, a period which in practice calls for replacement of stamp instrument. Further, the trial magistrate failed to take into consideration that it was not disputed that the accused actually went into the office of the advocate, Karuga Wandai, which is the same name and style that the stamp in the affidavit and power of attorney that the said advocate operates and conducts business on. Thus, the appellant argues that he could not have been convicted on the allegation of an action which took place in the very place that is not disputed. If there was indeed any offence committed, then the firm of Karuga Wandai and the advocate himself or his office aided the commission of the same. The affidavit, stamp, signature and power of attorney were all obtained from advocate Karuga Wandai's office. Further the appellant argues that the defunct rubber stamp he purportedly used was not presented as evidence during the trial nor was it retrieved from him so as to be presented as evidence during trial to prove the

allegation of forgery of a rubber stamp purported to have been used by him.

5. The appellant argues that although he did not challenge the signature of S.K. Wandai, the trial magistrate erred as she ought to have been cognizant that human handwriting or signatures change gradually over time. The said signature which was subjected to forensic analysis was taken from the advocate in the year 2023 and compared to his signature on the alleged forged document dated 11th December 2018, which is approximately five years down the line. Thus the appellant argues that such analysis could not have given any accurate match warranting a conviction as the S.K Wandai signature could have gone through gradual change over time.

6. The appellant submits that the two signature specimens for the complainant are different from each other yet they are claimed to be from the same person. Thus, the conclusion arrived on after comparing the specimen with the signature in the exhibit provided in the forensic report could not have given any accurate result warranting a conviction. To support his contentions, the appellant relies on the case of **Cheboi & Another vs Republic (Criminal Appeal E037 & E035 of 2024) [2025] KEHC 668(KLR) (30 January 2025)**.

7. The appellant submits that he set his finger print impression after he was directed to do so by an official of Kandara Investment, to ascertain that he was the one

selling the suit land and thus the same did not amount to forgery as it was not aimed to resemble that of the complainant.

8. The appellant argues that he was prejudiced by not having legal representation while cross examining S.K. Wandai, the advocate and thus the trial magistrate ought to have recognised that he was acting in good faith and from the instruction of the complainant

   who had instructed the firm of S.K. Wandai to issue him with the said affidavit.

9. The appellant submits that the learned magistrate relied on hearsay evidence in convicting him with the offence of stealing as PW1, Felistas Wachera claimed that their mother had told her that he had stolen the document from her house. However, their mother, who was not deceased at the time and who had recorded a statement with the investigating officer ought to have been the complainant and the key witness for the prosecution case who could have given direct evidence, but was not called to testify to that effect. On the other hand PW4, Ann Muthoni Njoroge confirmed that he was the manager of their father's properties. Thus the appellant argues that he could not have stolen the document of their father while at the same time being the manager and custodian of their father's property.

10. The appellant submits that the investigations carried out were not impartial as he was forced to confess to the offences that he was later charged, convicted and sentenced on. The appellant submits that he reported his complaint to IPOA on 15th March 2023 and after the investigating officer got to know that he had been reported, he fast tracked his bias investigation and registered the case against him in two months at ODPP Gatundu and Gatundu Law Courts on 25th May 2025. The appellant submits that by the time IPOA were giving back their feedback to him on 12th September 2023, after six months, his case was already s*ubjudice*. Thus, the trial magistrate ought to

have ordered a trial within a trial to ascertain his complaint as well as the credibility of the evidence obtained by the investigating officer as IPOA had already recused themselves after knowing that the matter was active in court.

11. The appellant submits that the learned magistrate disregarded his submissions on issues concerning company law in relation to shareholding, share certificate, allotment receipt and pre-emption right of a company. The learned magistrate erred by arriving to a conclusion that Felistas Wachera was a shareholder of Kandara Investment disregarding that the plot was held in trust by

Felistas for him as she could not have freely owned a plot without being a shareholder.

12. The appellant argues that the trial magistrate wrongfully concluded as to who were the complainants in the case as their mother was the direct victim of the purported offence and she is the one who ought to have reported the same instead of PW4. Furthermore, S.K. Wandai never reported any case to the police and hence he was not a complainant in the matter and any allegations of forgery ought to have been made to the police or the Advocates Tribunal. To support his contentions, the appellant relies on the cases of **Republic vs Ouku (Criminal Case E012 of 2023) (2024) KEHC 6991 (KLR)** and **DPP vs Kupalo (Criminal Revision E235 of 2023) (2023) KEHC 20308 (KLR)**.

13. The appellant further argues that the learned magistrate erred in law by disregarding his submission and went on admitting the evidence of PW2, Lucy Njeri Muragu a clerk disregarding Section 147 of the Evidence Act as she was not a director of Kandara Investment hence incompetent to give evidence on behalf of the company.

14. The appellant argues that his parcel of land Juja/Kalimomi Block 3/137 was illegally and fraudulently transferred to Felistas Wachera and Ann Muthoni Njoroge although he reported the same to the police. The appellant argues that they maliciously prosecuted him for the same wrongs they

committed against him thus they do not deserve equity as they approached the court with unclean hands.

15. The appellant submits that his sentences ought to run concurrently as they arise out of the same incident. The appellant further submits that the learned magistrate failed to call for a pre-sentencing report which could have guided her in the sentencing process and grant him a favourable sentence such as a non custodial one or even issue him with a probation order.

The Respondent's Submissions

16. The respondent submits that the prosecution proved beyond reasonable doubt that the appellant forged the affidavit purportedly sworn by Felistas Wachera that is purported to have donated power of attorney to the brother, the appellant. Thus the affidavit was false and it was intended to defraud. The appellant together with others forged the signature of S.K. Wandai Advocate, the stamp and the signature of Felistas Wachera. PW3, Advocate Karuga was called as a witness and he told the court that the affidavit did not originate from his office as he did not have an associate at the time.

17. The respondent argues that forensic examination was done on both the stamp impression and the signature purporting to belong to Karuga Wandai Advocates and the return was negative. The respondent further submits that it proved that the document was not drawn by the said

Karuga Wandai Advocates to the required standard which then proves that the document was forged as the signature purported to belong to Felistas Wachera was not made in her hand. The affidavit was presented at Kandara Investment offices where the secretary was given and the effect of it is that she transferred share from Felistas Wachera to a third party. The appellant hence used the document as though the same was genuine and transfer was effected. Further, in the affidavit was a thumb print which was found to belong to the appellant and he admitted to be the one who made the finger print to show that the plot belonged to him and that he sold the parcel while at Kandara Investment offices.

18. The respondent submits that the appellant uttered a forged affidavit at Kandara Investment Limited purporting it to have been signed by Felistas Wachera Njoroge and executed before Samuel Karuga Wandai, advocate and a commissioner for oaths. PW2, Lucy Mwangi a secretary at Kandara Investment told the court that the appellant was the one who presented the document to her. The appellant admitted to presenting the document to the investment company and even impressed his thumb print on the affidavit to confirm that he was the owner and seller of the land. The respondent argues that knowledge and intention are key ingredients in proving the offence of uttering. The appellant knew that the parcel did not belong to him and the power of attorney had not been genuinely donated to him but he still presented it to the

company and fraudulently had the parcel transferred to a third party.

19. The respondent submits that during the trial, the appellant did not deny stealing the share certificate no. 27 in respect of parcel number LR. 107725/3 of Kandara Investment Limited from Wamwangi on unknown dates in the year 2019. In the investigations, it was noted that the certificate in question was among the documents stolen. The appellant was asked to return the documents in his custody which he did not produce prompting further investigations. They then learnt that the property had been transferred by the appellant to a third party.

20. The respondent submits that the sentences passed were very lenient and further the appellant has not argued or even suggested that the sentences passed were illegal or improper or that the trial court acted on wrong principle or omitted relevant factors or took into account irrelevant factor in sentencing or that the proceedings were irregular or in violation of his right or fundamental freedom. He just made generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warranting upsetting the sentence imposed by the trial court. both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed mitigating circumstances. Neither the appellant or his advocate tendered any mitigation and thus it is not true that the appellant had no

legal representation. Further, the appellant's advocate in mitigation stated that they did not have anything in mitigation save for the status quo to be maintained. Thus, the respondent urges the court to uphold the sentence passed by the lower court which is legal.

21. The respondent relies on **Section 2** and **208(1) of the Criminal Procedure Code** and the cases of **Republic vs Mwaura (1979) KLR 209**; **Ruhi vs Republic (1985) KLR 373** and **Roy Richard Elimma & Another vs Republic Cr. Appeal No. 67 of 2002** and submits that all criminal proceedings are commenced and initiated by the Republic against a particular person or authority or legal entity. In the instant case, Felistas made a complaint to the police where investigations were carried out and after completion, the file was brought to the office of the prosecution who found that there was sufficient evidence and initiated the criminal proceedings against the appellant which was proper and legal. Further the respondent submits that the appellant has not demonstrated any wrong doing on the part of Felistas or the prosecution on the issue of who the complainant was.

22. The respondent argues that Felistas stated during cross examination that she is a member of Kandara Investment as she had bought a parcel number F144 and there were documents to support the same. Further PW2, the secretary of the Kandara Investment group for 30 years stated that Felistas Wachera has a share certificate and

was the registered owner of plot number F144 and she identified the share certificate in court as PMFI1. Thus, she had identifiable interest in Kandara Investments and the appellant did not prove the contrary.

23. The respondent submits that the appellant was at liberty to call all the witnesses he wished to corroborate his side of the story as he was free to conduct his defence the way he wished and thus failure to call his witnesses cannot be visited upon anybody else.

Issues for determination

24. The appellant has cited 13 grounds of appeal which can be compressed into three main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt.

    b. Whether the trial magistrate erred in failing to take into consideration that the appellant did not have legal representation.

    c. Whether there is a dispute as to who was the complainant in the matter.

    d. Whether the principles of equity and company law were ignored.

e. Whether the investigations carried our were impartial.

f. Whether the sentence meted out against the appellant is justified.

The Law

25. This being a first appeal, this court is guided by the principles set out in the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the Court of Appeal stated:-

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

26. Similarly in the case of **Okeno vs Republic [1972] EA 32** where the Court of Appeal set out the duties of the appellate court as follows:-

“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 vs Republic (1957) EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 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 finding 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, see Peters vs Sunday Post [1958]EA 424.” This was also set out in the case of **Kiilu & Another vs Republic [2005] KLR 174.**

Whether the prosecution proved its case beyond any reasonable doubt

27. The cardinal rule in criminal procedure on prove is that the burden is always on the prosecution to prove the elements of an offence. The standard of proof beyond reasonable doubt as was held in the case of **Woolington vs DPP 1935 AC 462** and **Miller vs Minister of Pensions 2 ALL 372-373.**

28. **Section 345 of the Penal Code** defines forgery as **“the making of a false document with intent to defraud or deceive.”**

29. In the case of **Joseph Mureithi Kanyita vs Republic [2016] eKLR** G.W Ngenye-Macharia J cited the Court of Appeal case of **Joseph Mukuha Kimani vs Republic (Criminal Appeal No. 76 of 83) [1984] eKLR** which held 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 utter intended to defraud.

30. Similarly, in the case of **Kilee vs Republic [1967] EA 713** at page 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 vs 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 vs Republic [1968] 1.**

31. Mativo J in **Caroline Wanjiku Ngugi vs Republic [2015] eKLR** while relying on the case of the High Court in India in the case of **Sukanti Choudhury vs State of Orisa CRL REV No. 1407 of 2008** held that the following ingredients are necessary for an offence of forgery to be proved:-

    a) **The document must be forced**
    b) **Accused used the document as genuine**
    c) **Accused knew or had reason to believe that it was a forged document, and**
    d) **Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.**

32. In the Nigerian case of **Alake vs The State [1997] 7NWLR 568** the court listed the following as the ingredients of the offence of forgery:-

    a) **That there is a document in writing**
    b) **That the document or writing is forged**
    c) **That the forgery is by the accused person**
    d) **That the accused person knows that the document or writing is false**
    e) **That he intends the forged documents to be acted upon to the prejudice of the victim in the belief that it is genuine.**

33. In this appeal, the evidence of PW5 and PW6 is crucial. PW5, **CIP Samson Kathuri Ireri**, working at DCI Headquarters Nairobi National Forensic Lab, forensics finger prints bureau, testified that he had worked in the

unit for 13 years. He further testified that on 31/3/2023 he received from PW7, the investigating officer an exhibit memo form; Exhibit (a) questioned document an affidavit purported to be executed by Karuga Wandai Advocate from Thika being a finger print in question; Exhibit marked (h) elimination finger print from Felistas Wachera; Exhibit (i) known finger print impression of Felistas Wachera issued from a finger print bureau vide an identification receipt; Exhibit (j) elimination finger print of Gabriel Kimani and Exhibit (k) known finger print impression of

Gabriel Kimani issued from national registration bureau identification report. He was tasked with identifying whether the finger impression on exhibit marked (a) was identical with the finger impression of Felistas Wachera on exhibit marked (i) and (h) and whether the finger impression marked exhibit (a) was identical to the finger print impression of Gabriel Kimani, the appellant, on exhibit marked (k) and (j). The witness concluded that the finger print impression on document marked (a) compared against that marked (i) and (h) for Felistas Wachera were not identical and the finger print impression exhibit (a) compared against those marked (k) and (j) were identical for the appellant. He further added that the thumb print on the affidavit donating power of attorney belonged to the appellant which he made using his left thumb print.

34. **PW6, IP Awiti Adhiambo,** a document forensic examiner, testified that they were tasked to examine the

following document (A) affidavit purportedly executed by Karuga Wandai; (B)known signature of Karuga Wandai Advocate, (C)specimen signature of Karuga Wandai; (E)Rafiki micro-finance with known signature of Felistas Wachera; (D)specimen stamp of Karuga Wandai; (F)specimen of Felistas Wachera and (I)national registration bureau report of Felistas Wachera. The witness stated that they carried out an examination and concluded that the signature in the affidavit, exhibit A was made by a different author from the known signature of Karuga Wandai, exhibit C; the stamp impression in exhibit A was made by a different implement from that of exhibit D which was a

specimen stamp of Advocate Karuga Wandai. Further, the signatures of Felistas Wachera made in exhibit A was different with that of exhibit F and known signature marked E and I. The witness testified that the specimen and known signature provided were deemed to be different upon forensic analysis.

35. **PW7, CPL Stephen Murage,** the investigating officer testified that Ann Muthoni Njoroge, PW4 went to his office and lodged a complaint that some documents including title deeds and share certificates had been stolen from their father’s premises and she suspected the appellant, her brother had stolen them. He began his investigations and recorded a statement by Felistas Wachera, a sister to the appellant and PW4 and she informed him that among

the stolen documents was a share certificate from Kandara Investment Limited. The witness testified that he went to see the parents of the complainant and her mother stated that all she wanted was for the documents to be returned as there was a complaint that the appellant had changed ownership of a title deed fraudulently and registered it in his name. The investigating officer testified that they had a sit down with the appellant and the parents and the appellant returned some of the documents and handed them over to his mother. The investigating officer further stated that he wrote to Kandara Investment Limited requesting for the original affidavit that the appellant presented for the change of ownership of the parcel of land being Plot No. 144. The affidavit indicated that Felistas Wachera had given the appellant power of attorney to sell

the plot on her behalf and it was signed and attested before Karuga Wandai Advocates and purportedly Felistas had appended her fingerprint. On perusal of the register, he noted that plot number 144 was registered to Felistas Wachera and was transferred to George Kamau on 5th January 2019. The witness testified that upon questioning the advocate about the affidavit, he disowned the same and gave him his specimen signature, stamp impression of the stamp he was using which he had not changed. The investigating officer further obtained finger impression from Felistas Wachera and the appellant to be compared with the impression from the affidavit in question. He

prepared an exhibit memo and forwarded the fingerprint impression , specimen signatures and rubber stamp impression as well as the questioned document and known fingerprint impressions he had obtained from the fingerprint bureau for both the appellant and Felistas Wachera to the DCI lab. He received the results back and learnt that the finger print impressions belonged to the appellant and that the specimen and known signature belonging to Karuga Wandai did not tally neither did the stamp impression tally with that of the advocate's.

36. From the forensic evidence, it is evident that the prosecution proved that the affidavit donating power of attorney to the appellant was executed by the appellant by appending his thumb print and was not executed before the advocate Karuga Wandai. **Karuga Wandai PW3**, disputed that the affidavit originated from his office as he testified that when PW7, the investigating officer went to his office

to question him, he perused the affidavit dated 11th December 2018 and noted that he did not prepare the said affidavit nor witness the appellant executing the same. The witness testified that the appellant never went to his office nor did the complainant. The appellant in his defence testified that he was sent by his sister Felistas Wachera to collect the affidavit from the offices of the said advocate, who was their family lawyer. He further testified that he was given the affidavit by Kamau, a receptionist at

the firm. The appellant however did not produce the said Kamau as a witness and thus this court is of the considered view that his defence does not raise doubt on PW3's evidence. Thus, it is my view that the prosecution proved that the affidavit did not originate from the office of PW3 neither did he draw the same or witness the appellant execute the same. In that regard, I find that the document was a forgery.

37. On the issue of the appellant using the document as genuine, PW2, Lucy Njeri Mwangi, a secretary at Kandara Investment for 30 years testified that the appellant went to their premises and stated that he wanted to sell the plot. She further testified that he went with Felistas Wachera's documents, a power of attorney indicating that Felistas had authorized him to sell the plot on her behalf and the share certificate. The appellant further was accompanied with a buyer of the plot and she effected the sale of the said plot. The appellant stated in his defence that the suit land was his but he registered it in his sister's name for purposes of consolidation. He

stated that consolidation could only be done if the properties were in names of different owners. The appellant further testified that he needed money for his father's treatment and approached the complainant to redeem the plot as they had agreed. They had an agreement that she could own the plot if she would refund its worth at the current market value or the plot would

revert back to him. The appellant stated that since his sister did not have money, she told him to look for a buyer to purchase the land. Although the appellant testified that the suit land belonged to him he produced receipts and a share certificate in respect of the suit land in the names of Felistas Wachera.

38. **PW1, Felistas Wachera** testified that she purchased the plot number 144 at Kandara Investments and she was given a certificate. She further testified that her father also bought one plot at Kandara Investments and she used to transfer her salary to Kandara Investment for the payment of the plot. To support her contentions, she produced receipt dated 27/10/2012 to show she was making payments. The ownership of the suit land was corroborated by PW2 who testified that PW1 was the registered owner of the plot 144 and she was a member of Kandara Investments by virtue of buying the said plot from her father who bought it for her. It is therefore evident that the appellant used the affidavit as genuine when he knew it was not as he was not the proprietor of the suit property. Furthermore, he admitted that he took the affidavit to Kandara Investments for the sale of the property to take place. The

prosecution thus proved that the appellant appended his thumb print on the affidavit and presented the document as genuine when he knew the same was forged with the

intention to defraud Kandara Investments in selling PW1's parcel of land.

39. **Section 353 of the Penal Code** provides for the offence of uttering and it reads 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 forged the thing in question.

40. The ingredients for this offence were set out in **Joseph Mukuha Kimani vs Republic [1984] eKLR** where the Court of Appeal stated:-

    a) The prosecution must prove that:-

    b) The document was false; in the sense that it was forged

    c) The accused knew it was forged

    d) The utterer intended to defraud.

41. From the evidence the court has determined that the appellant forged the affidavit and presented it to Kandara Investment Limited purporting it to have been signed by PW1 and drawn and executed by Karuga Wandai, an advocate and commissioner of oaths with the intention of defrauding Kandara Investments Limited to selling PW1's land. It is evident that the appellant knew that the suit land did not belong to him and that he obtained a power of attorney that was not donating to him and presented it to the company to procure the sale of the suit land.

42. On the offence of stealing, PW4 testified that she reported the matter to the police station that documents were missing from their home including title documents and her brother is the one who had taken them. PW1 also testified that their mother told her and PW4 that the appellant had taken some documents from her bedroom which included title deeds. PW7 also testified that during investigations in the case, they had a meeting with the appellant and their parents when he returned some of the title documents that he had taken. However, they noted that the share certificate in respect of plot number 144 was missing and that is when he went to inquire at Kandara Investments Limited. Furthermore, PW2 testified that when the appellant showed up at their offices to sell the suit land, he had the share certificate in the name of PW1. On further perusal of the record, it is noted that the appellant never denied having stolen the said share certificate but did not explain how he came into its possession in his defence. The appellant in his defence kind of admitted being in possession of the stolen title deed as well as the forged document although he alleged witch hunting by his sisters. The case of the prosecution was overwhelming and not shaken in cross-examination. In my considered view, the ingredients of the offences were proved.

Whether the trial magistrate erred in failing to take into consideration that the appellant did not have legal representation.

43. The appellant argues that he was not conversant with the law and ought to have been offered legal representation and thus the trial

magistrate ought to have taken the same into consideration during the trial especially cross examination and while sentencing.

44. **Article 50 (2) (h)of the Constitution** stipulates:-

Every accused person has the right to a fair trial, which includes the right-

To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

45. A closer reading of **Article 50 (2)(h) of the Constitution** denotes that the right to legal representation is not an absolute right but qualified. Legal representation at the expense of the state is thus only available where there is a likelihood of substantial injustice to occur to the detriment of an unrepresented accused person. The Court of Appeal in the case of **Macharia vs Republic** stated as follows:-

Article 50 of the Constitution sets out a right to a fair hearing which includes the right of an accused person to have an advocate if it is in the interest of

ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to

effectively conduct his or her own defence owing to disabilities or language difficulties or simply where public interest requires that some form of legal aid be given to the accused because of the nature of the offence….We are of the considered view that in addition to situations where substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at the state expense.

46. In the instant appeal, the appellant was charged with the offences of forgery, uttering a false document and stealing and he was sentenced to 3 years imprisonment. I have gone through the trial record and noted that the appellant in the beginning of the case and when taking plea was represented by legal counsel, one Mr. Mbogo. The matter proceeded for hearing on 4/7/2023 and the appellant sought an adjournment on the basis that his advocate was unwell which the trial court granted. On 27/7/2023, the matter came up for hearing and the appellant stated that he was ready to proceed with the case. He made no mention of his advocate nor did he request the court to

provide an advocate to represent him. During the hearing, the appellant informed the court that he was ready to proceed with the hearing and cross examined the prosecution witnesses. Nowhere did the appellant inform the court that he did not understand what was occurring or that he needed the assistance of legal counsel. When the matter came up for defence, the appellant stated that he would give unsworn statement and wished to not call any witnesses. On 20/8/2024, the matter proceeded on the defence

case and Mr. Joseph Mbiyu, wished to be placed on record for the appellant and stated that he was ready to proceed and that the appellant would give a sworn defence. The said advocate filed submissions and judgment was rendered on 22/10/2024 in his presence. During sentencing, the appellant's advocate stated that they did not have anything in mitigation save that the status quo be maintained. He further requested the trial court to stay sentencing and the appellant be accorded an opportunity to appeal the decision of the court.

47. It is evident from the record that the appellant was represented by counsel during plea taking and during his defence and sentencing. During the hearing, the appellant always maintained that he was ready to proceed and participated in the trial by cross examining the prosecution witnesses. He did not raise any objection to him proceeding by himself and neither did he inform the court that he needed legal representation. Furthermore

during sentencing, he was represented by counsel who informed the court that they had no mitigation. Thus, no injustice occurred throughout the trial. Further, it is my considered view that this ground is an afterthought by the appellant as he never requested to have legal representation after his advocate became unwell.

Whether there is a dispute as to who was the complainant in the matter

48. The appellant argues that the complainant in the matter herein should have been his mother and not PW1 or PW4, who reported the matter to the police.

49. **Section 208(1) of the Criminal Procedure Code** reads:-

If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

50. The Court of Appeal in the case of **Roy Richard Elirema & Another vs Republic [2003] eKLR** stated:-

The parties named in Section 202 for example are the complainant and the accused person. If the complainant is aware of the hearing date and is absent without explanation, the court may acquit an accused person, unless the court sees some other good reason for adjourning the hearing. The

complainant in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of the crime who is merely the chief witness on behalf of the Republic.

51. Thus, it follows from the above interpretation that the Republic through the office of the respondent is the actual complainant in a criminal charge against a particular person or authority or legal entity. Thus when PW4 reported the matter to the police, the police carried out their investigations and presented their findings to the office of the director of prosecution who then instituted the case in the trial court. PW1 was the victim and chief witness in the matter as it was her property that the appellant fraudulently sold by forging an affidavit that he purported was drawn by Karuga Wandai Advocate and presenting the same at Kandara Investments to effect the sale.

Whether the principles of equity and company law were ignored.

52. The appellant faults the trial magistrate for ignoring principles of company law and Section 147 of the Evidence Act, in particular in regarding the evidence of PW2 who was a secretary of Kandara Investments yet she was not a director and therefore not fit to give testimony on company matters. I have perused **Section 147 of the Evidence Act** and it provides that a person called to

produce a document does not become a witness by the mere fact that he produces it, and cannot be cross examined unless and until he is called as a witness. I have perused the record, and PW2 was called as a prosecution witness, not to give evidence of the company but because the appellant personally presented the affidavit donating him power of attorney and PW1's documents to PW2 to effect the sale of the suit property. PW2's testimony was crucial in the case as she directly dealt with the appellant, who was not the owner of the suit property but defrauded her into selling PW1's suit land. Furthermore, PW2 was a secretary in the company having worked there for 30 years and therefore she knew the members of the company whereby she testified that Felistas Wachera was a member of Kandara Investments. Therefore, Section 147 of the Evidence Act or principles of company law do not apply in this regard.

53. The appellant has further argued that the trial magistrate did not consider the equity maxim that he who comes to equity must come with clean hands. He argues that the trial court disregarded that his parcel of land Juja/Kalimomi Block 3/137 was illegally and fraudulently transferred to PW1 and PW4 and the same was reported yet they maliciously prosecuted him for similar wrongs. It is prudent to note that the matter herein is a criminal case and the complainants are not seeking any equitable reliefs. That notwithstanding, the appellant has stated that he reported that the complainants illegally transferred

land that belonged to him. Therefore he is at liberty to pursue the same in a court of law. The charges he is facing have nothing to do with land parcel Juja/Kalimomi Block 3/137 and he is at liberty to bring a case against his sisters. The appellant is also at liberty to institute a malicious prosecution suit if he so wishes. It is therefore my considered view that the trial magistrate did not ignore principles of law, company law or equity.

Whether the investigations carried out were impartial.

54. The appellant states that the investigating officer threatened him and pointed a gun at him forcing him to write an authorization letter to the land registrar directing him to cause the transfer of property registered in his name to the original owner and who also forced him to set his thumb print to some documents that he came to later learn were transfer documents which can be inferred as a confession.

55. I have perused the record and noted that the appellant did not write any confession and when he was presented in court, he took plea and pleaded not guilty to all the charges. On further perusal the

appellant did not bring this issue at the beginning of the trial noting that he was represented by counsel. Furthermore, the said investigating officer testified as PW7 and the appellant did not bring forth the said issues on cross examination. In fact the appellant brought up this

issue during his defence. He further produced a letter from IPOA informing him that since the matter was in court they were proceeding to close the file but invited him to seek clarifications on the same. The appellant did not provide any further correspondence from him or IPOA. It is my considered view that the issues as raised by the appellant are an afterthought as they have been brought late in the day. Furthermore, the appellant did not bring up the same when questioning the investigating officer in court.

Whether the sentence ought to run consecutively or concurrently.

56. According to the appellant, the sentences ought to run concurrently instead of consecutively because the offences emanate from one transaction.

57. This court can only interfere with the sentence prescribed by the trial court if the sentence is manifestly excessive in the circumstances or if the trial court has overlooked some material fact. This principle was enunciated in the case of **Bernard Kimani vs Republic [2002] eKLR** where the court held:-

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the

discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with

sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

58. The Court of Appeal in **Peter Mbugua Kabui vs Republic [2016] eKLR** stated:-

As a general principle the practice is that if an accused person commits a series of offences at the same time in a single act/transaction concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus

we find that the trial court and the High Court did not err in directing or ordering a consecutive term

of imprisonment for the conviction in the two counts. It is our considered view that the exception in Section 1493) of the Criminal Procedure Code is inapplicable to this case in light of the provision of Section 7(1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling to 20 years imposed on the appellant, cannot be said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful. We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.

59. Applying the above principles to the present case, the trial court sentenced the appellant to 18 months imprisonment on Count I – IV, sentence to run concurrently. 1 year imprisonment on Count V and 6 months imprisonment on Count VI. Relying on the case law stated I uphold the

sentence meted out by the trial court. The prison term of 3 years is not excessive or harsh such as to warrant interference by this court. Further I note that during sentencing, the trial court noted the circumstances under which the offence was committed whereby the appellant stole the documents from his sick father and transferred some of the properties using a forged

affidavit. The trial court further noted that the appellant appeared to have the intent of defrauding PW1.

60. The appellant has further faulted the trial court in failing to call for a pre-sentence report which would have guided the court in sentencing him. **Section 216 of the Criminal Procedure Code** provides:-

The court may, before passing sentence or making an order against an accused person under Section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.

61. The provision is clear in that it gives the trial court discretion to call for evidence to inform it of the proper sentence to pass. The provision does not require the trial magistrate to mandatorily order for a pre-sentence report nor does it require the trial magistrate to follow what the report states. The pre-sentence report is only a tool used to assist the court to determine on what kind of sentence to impose on an accused person. Furthermore, from the

record it is clear that during sentence when the trial court called for mitigation by the appellant, he stated through his advocate that he had no mitigation. Therefore it is improper for the appellant to argue that the trial did not consider any evidence before sentencing when he declined to give any mitigation. That notwithstanding, the sentences are within the law and are legal. Thus, I uphold the sentence of the trial court.

62. I therefore find that the appeal lacks merit and uphold the conviction and sentence of the trial court.

63. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 11TH DAY OF DECEMBER 2025.

F. MUCHEMI

JUDGE