



REPUBLIC OF KENYA



**Republic v Omar (Criminal Appeal 50 of 2018)  
[2023] KECA 293 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 293 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL 50 OF 2018  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
MARCH 17, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**KULTHUM ABDILLAHI OMAR ..... RESPONDENT**

*(An appeal from the judgement of the High Court of Kenya at Mombasa delivered on 6th September 2018 by Hon D. S. Majanja in High Court Criminal Appeal No 64 of 2015) (Original Mombasa CMC Criminal Case 1072 of 2012)*

**JUDGMENT**

1. The Respondent herein was charged before the Chief Magistrate's Court, Mombasa in Criminal Case No 1072 of 2012 with three Counts of Forgery Contrary to Section 349 of the [Penal Code](#), making a document without authority contrary to Section 357(a) of the [Penal Code](#) and uttering a document with intent to defraud/deceive contrary to Section 357(b) of the [Penal Code](#).
2. After hearing the case, the Learned Trial Magistrate (G O Kimanga, RM) on May 15, 2014 found that all the counts were not proved and acquitted the Respondent under Section 215 of the [Criminal Procedure Code](#).
3. Aggrieved by the said decision, the Appellant herein appealed to the High Court in Mombasa High Court Criminal Appeal No 65 of 2015. That appeal was September 6, 2018 dismissed by Majanja, J. In his judgement, the Learned Judge found that whereas it was possible to conclude that the document in question was a forgery, there was no evidence to show that the document was made by the Respondent. He further found, from the evidence presented, that there was doubt that the notification of approval was a forgery and that the document was uttered in the manner stated in the charge.



4. Undeterred by the appellate decision of the High Court, the Appellant is before us on a second appeal seeking to overturn the finding of the trial court and the High Court. The appeal is based on the following grounds:
  1. That the Learned Judge erred in law and fact in re-evaluating the evidence on record where he found that the offence of forgery was not proved despite overwhelming evidence on record from PW2.
  2. That the Learned Judge misdirected himself in law and fact in holding that the appellant to succeed in an offence of forgery it must prove that the respondent made the document thus arriving at a wrong decision.
  3. That the learned judge erred in law and fact in holding that the offence of a document without authority was not proved despite overwhelming evidence of PW2 which was corroborated by the evidence of PW4.
5. When the appeal was called out for virtual hearing before us, Mr Alex Gituma, Principal Prosecution Counsel appeared for the appellant while Mr Khatib, Learned Counsel, appeared for the Respondent. Both counsel relied on their written submissions filed pursuant to the directions given by this Court.
6. In support of the appeal, the Appellant cited the decision of this Court in [\*Joseph Mukuba v republic \(1984\) eKLR\*](#), where the Court set out the ingredients required to prove the offence of forgery as the falsity of the document, the fact that it was forged by the accused and the intention to defraud. It was submitted that the prosecution proved these ingredients during trial. The appellant relied on the evidence on record and submitted that the opinion evidence of the handwriting was ignored. It was therefore submitted that the learned judge erred in re-evaluating the evidence and reaching a conclusion that the offence of forgery was not proved without basing his conclusion on the evidence as presented by the prosecution. In that regard, the Appellant relied on the case of [\*Patrick Niuguna Richu v Republic \(2018\) eKLR\*](#) in which the definition of forgery in [\*R v Dodge and Harris \(1971\) 2 All ER 1523\*](#) was adopted.
7. It was submitted that the prosecution did prove the 3 counts the respondent was charged with and the learned judge erred in making a finding to the contrary.
8. It was therefore submitted that this appeal has merit and we were urged to allow the same.
9. In opposing the appeal, the Respondent, cited Section 361 of the [\*Criminal Procedure Code\*](#) as well as the case of [\*Karingo v Republic \(1982\) eKLR\*](#) for the position that a second Appeal must be confined to points of law and that this court will not interfere with concurrent findings of fact arrived at in the two courts below unless there was no basis or evidence. In this appeal, it was submitted that the main grievance is that the Respondent was wrongfully acquitted. It was submitted that whereas the PW2 alleged that the document was forged, he did not lead any evidence to prove that the Respondent had forged the documents. It was submitted that when the PW2 disowned the signature on the notification of approval plans, the Appellant ought to have sought for the services of the hand writing experts to establish whether the Respondent herein had forged the signature.
10. It was submitted that from the analysis of the determination of the High Court Judgment delivered on September 6, 2018, the Judge properly applied the law in determining whether the offences were proved or not. We were urged to find no merit in the appeal and dismiss the same.

## ANALYSIS AND DETERMINATION

11. We have considered the submissions made on behalf of the parties herein.



The matter before us is a second appeal and the principles guiding such an appeal are well settled. Section 361(1) of the [Criminal Procedure Code](#) provides that:

(1)A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section -

- a. on a matter of fact, and severity of sentence is a matter of fact; or
- b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

12. This section has been the subject of judicial exposition and as was held in [Chemagong v Republic \(1984\) KLR 213](#) at page 219:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (*Reuben Karari s/o Karanja v Republic 17 EACA146*)”

13. In the 1<sup>st</sup> ground of appeal it is contended that the Learned Judge erred in law and fact in re-evaluating the evidence on record where he found that the offence of forgery was not proved despite overwhelming evidence on record from PW2. Whichever way one looks at it the appellant is challenging the finding of fact by the learned judge. It is contended that had the learned judge properly re-evaluated the evidence on record, he would have found that the offence of forgery was proved.
14. It is not contended that the learned judge did not re-evaluate the evidence but that he did not properly re-evaluate the same. While the failure to re-evaluate the evidence by the first appellate court is a matter of law since the first appellate court is obliged to do so, an allegation of improper re-evaluation of the evidence in our view cannot be elevated to a point of law where there are concurrent findings of fact by both the trial court and the first appellate court.
15. We have, ourselves subjected the record to scrutiny and we find that the complaint against the learned judge has no basis. While the law obliges the first appellate court to re-evaluate the evidence, we adopt the position of this Court in [Benjamin Mbugua Gitau v Republic \[2011\] eKLR](#) that:

“It must be stated that there is no set format to a re-evaluation of evidence by the first appellate court should conform. We adopt what was stated by the Supreme Court of Uganda in the case of [Uganda Breweries Ltd v Uganda Railways Corporation](#), thus:

“The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In [Sembuya v Alports Services Uganda Limited \[1999\] LLR 109](#) (SCU), Tsekooko JSC said at 11:

‘I would accept Mr Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).’



In *Odongo and another v Bonge Supreme Court Uganda* Civil Appeal 10 of 1987 (UR), ODOKI JSC (as he then was) said: “While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.”

16. We find no merit in the first ground of appeal.
17. In the 2<sup>nd</sup> ground, the complaint is that the Learned Judge misdirected himself in law and fact in holding that the appellant to succeed in an offence of forgery it must prove that the respondent made the document thus arriving at a wrong decision. Both the trial court and the Learned Judge found that while there was evidence that the document in question could have been forged, there was no evidence that it was in fact forged by the Respondent or that the Respondent knew that it was forged. Those being concurrent findings of fact, they cannot be interfered with. In this ground that Appellant seems to argue that the appellant could still be found guilty of the offence notwithstanding lack of evidence linking him to the alleged forgery. With due respect to the appellant that is not the law. We agree with the learned Judge that for one to be convicted of the offence of forgery, evidence must be led to prove that he did in fact make the said document. Without such evidence, the offence of forgery cannot be sustained. Uttering false or forged document, on the other hand requires knowledge of the falsity of the document. As both ingredients were not proved, the decision of the learned Judge cannot be faulted.
18. The 3<sup>rd</sup> ground was that the learned judge erred in law and fact in holding that the offence of making a document without authority was not proved despite overwhelming evidence of PW2 which was corroborated by the evidence of PW4. It is our view that the complaint herein revolves around the sufficiency or otherwise of the evidence adduced. That, in our respectful view, cannot be a ground for consideration before us in light of the concurrent findings of the two courts below.
19. Having considered this appeal, we find no merit in this appeal which we dismiss in its entirety.
20. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**S GATEMBU KAIRU (FCI Arb.)**

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**JUDGE OF APPEAL**

**J LESIIT**

.....  
**JUDGE OF APPEAL**

**G V ODUNGA**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original  
signed*

**DEPUTY REGISTRAR**

