



**Macharia & another v Republic (Criminal Appeal 108 of 2021)
[2023] KECA 720 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 720 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 108 OF 2021
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
JUNE 9, 2023**

BETWEEN

CAROLINE WAMBUI MACHARIA 1ST APPELLANT

JOHN HENRY MWANGI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ngenye-Macharia, J. J.) dated 29th April, 2020 in HC. CR.A. No. 156 & 157 of 2019)

JUDGMENT

1. The appellants, Caroline Wambui Macharia and John Henry Mwangi were charged before the Chief Magistrate's Court at Kibera on 3 counts – Count 1 was a charge of conspiracy to defraud contrary to section 317 of the *Penal Code*; Count 2 related to a charge of forgery contrary section 350 of the said *Code* and Count 3 was also a charge of forgery contrary to section 349 of the said *Code*. They were acquitted in respect of Count 1 but were convicted on
2. Counts 2 and 3 and each sentenced to serve 7 years and 3 years imprisonment respectively. They appealed to the High Court of Kenya at Nairobi and in a Judgment delivered on April 29, 2020 (G.W. Ngenye-Macharia, J. (as she then was) the appeal was dismissed. They filed a second appeal to this court where various grounds of appeal are taken challenging both conviction and sentence.
3. When the appeal came up for hearing before us on May 16, 2023 on a virtual platform the appellants were present represented respectively by learned counsel Mr. Were and Mr. Ayieko. Learned Counsel Mr. Muriithi appeared for the office of Director of Public Prosecutions (ODPP) and learned counsel Miss Akinyi Odhiambo appeared for an unnamed interested party. Mr. Muriithi referred us to a letter dated March 29, 2023 under the hand of Mr. Peter Mailanyi, Senior Assistant Director of Public Prosecutions addressed to our Registrar in respect of this appeal. That letter in essence states that the



ODPP had perused the record and proceedings in the trial court and in the High Court and noticed that there were some serious omissions on the part of the investigations which led to miscarriage of justice to both appellants. That office identified some gaps in the investigations such as the investigating officer who testified at the trial court as PW6 deliberately forwarding the wrong thumbprint of one Josephine Wambui Ndungi for comparative analysis with the testator's (Josephine Wambui Mwangi) which would obviously lead to a negative result. That office looked at the totality of the investigations and reached a conclusion that the investigator seemed hell-bent to ensure the appellants were charged. In those circumstances, ODPP conceded the appeal and withdrew Notice to Enhance Sentence.

4. Mr. Muriithi confirmed the contents of that letter and asked us to make appropriate orders.
5. Mr. Were had no objection to the concession stating that the 1st appellant's position all along had been that the investigations had been bungled.
6. Mr. Ayieko similarly had no objection to the concession asking that the appeal be allowed.
7. Miss Odhiambo at first opposed the position taken by ODPP but finally conceded that once the ODPP concedes to an appeal she could not have any standing.
8. We have considered the positions taken by the parties in this appeal.
9. As we have seen the appellants were convicted and sentenced and their first appeal dismissed.
10. The appellants challenge their conviction and sentence in this appeal. The ODPP has taken a position that investigations were bungled and the conviction cannot stand in those circumstances.
11. The appellants agree with the position taken by ODPP.
12. In the circumstances where ODPP has conceded to the appeal the appeal is allowed. We quash the conviction and set aside the sentences entered against the appellants. The appellants shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

