



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & KOOME J.J.A)**

**CRIMINAL APPEAL NO. 57 OF 2017**

**BETWEEN**

**JERMAIN JOHN GRANT.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Mombasa, (Muya, J.) made on 2<sup>nd</sup> December, 2015*

*in*

***H.C.CR.C No. 15 of 2015)***

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**JUDGMENT OF THE COURT**

1. Jermain John Grant (the appellant), is challenging the conviction and sentence imposed on him by the High Court at Mombasa for various charges, ranging from making a false statement for register of birth contrary to section 363 of the Penal Code, procuring execution of a document by false pretences contrary to section 355 of the Penal Code, attempt to procure registration by false pretences contrary to section 320 of the Penal Code, making a false document contrary to section 347 (a) as read with section 349 of the Penal Code; to uttering a false document contrary to section 353 of the Penal Code. The conviction saw him sentenced to 9 years imprisonment. The decision of the High Court overturned the judgment and the resultant acquittal of the appellant by the trial court (A. Ndungu - RM).

2. The case as presented by the prosecution, was that the appellant, a person who went by five aliases; Jermain Grant alias Ali Mohamed Ibrahim alias Peter Joseph alias Robert Mark Mwato alias Robert Mwakio Mwata jointly with others not before court attempted to illegally procure a birth certificate using false documents for nefarious motives. In the month of September, 2011, Samuel Makosa Alexander (PW1), a tailor and a village elder in Maweni village in Kaloleni sub location, Voi division, was approached by an elderly lady who went by the name Marilyn (Nyanya). She was soliciting for monetary donations from well wishers for purposes of raising school fees for her grandchildren, who were orphans and who solely relied on her for survival. She also indicated that she would be most grateful if he, as a village elder, helped her secure birth certificates for the said children.

3. Asked which village she hailed from, Nyanya stated that she was from Tanzania village, Kaloleni sub location. At this point, PW 1 got curious and enquired why she was seeking help with regard to the birth certificates in a different village yet they had a village elder at Tanzania who could help her. In response, she simply said the elder at Tanzania village would not help her. With this information, PW 1 referred Nyanya to his immediate boss, the Assistant chief Kaloleni, one Shaban Nkrumah (PW 2). The following day, the lady visited PW 2 and in no time, PW 1 was summoned by PW 2 over the matter. On arrival at PW 2's office, he found some two young men outside PW 2's office, whom Nyanya introduced as Mustapha and Peter. To PW 1, the duo seemed to be of mixed race. PW1 and Nyanya were both ushered into PW2's office at which point PW1 explained the purpose of Nyanya's visit and requested the Assistant chief to speak to them. PW 2 stepped out to speak to the duo, leaving PW1 and Nyanya behind. On his part, PW1 took the opportunity to interrogate Nyanya on the boys' lineage. However, on seeing PW2 approaching them, the boys took off and all PW2 got to see was Mustapha's back as he made his hasty retreat. PW1 was then directed by PW 2 to report the matter to the Criminal Investigations Department (CID), as the entire transaction appeared suspicious.

4. Another witness was Thomas Mwawasi Kirubai (PW 3) a tyre repairer; who said Nyanya was his maternal grandmother and that he had lived with her during his school days. His education was mainly funded through bursaries as his parents had passed on a long time ago. Sometime in September, 2011, PW3 passed by Nyanya's house to see how they were faring and while there, he learnt that some three visitors had come by earlier. The names of two of the visitors were given as Peter and Mustapha. According to Nyanya, the three had

promised to help her pay school fees for Rozina (a standard 8 pupil) as well as Doris and Emmah who were also still in primary school.

5. After a week, he learnt that Mustapha had called Emmah and asked that they go to Mombasa to see him. Suspicious, PW3 insisted on accompanying Emmah to Mombasa. The following day, PW3 was sent Kshs. 1,000/- on his phone and a day after, the duo proceeded to Mombasa. They met at a petrol station, with Mustapha arriving in a car with tinted windows. In the car were two other individuals. Mustapha alighted and requested private audience with Emmah then handed her an envelope containing Kshs. 3000/- for text books and fare back to Voi. Also in the envelope was a stamped school leaving certificate bearing the name Robert Mark Mwata purporting to be from Tom Mboya Primary school, P.O Box 80648, Mombasa. They then left for Voi and handed the document to Nyanya. PW3 added that Mwata is their family name. Nyanya told him that the school leaving certificate was for purposes of obtaining a birth certificate for the said Robert Mark Mwata and that the following day she would go to Wundanyi to get the necessary forms in order to have the birth certificates for Priscilla and Robert Mwata processed.

6. Thereafter, Nyanya informed him that while she was successful in procuring the birth certificate for Priscilla, she ran into difficulties with regard to Robert Mark Mwata's and that investigations were underway over the matter. Even as this was going on, PW3 nonetheless received Kshs. 500/- from one Amina, with instructions to hand over the cash to his mother for her fare to Wundanyi. He duly gave her the money, but could not be certain how many times Nyanya went to Wundanyi over the matter.

7. The headmaster of Tom Mboya Primary School, Babu Suleiman (PW4), told the court the official name of the school is Tom Mboya Primary School Mombasa, P.O Box 80646 GPO 80100 Mombasa. He stated that he was the custodian of all the school documents and is the designated signatory of all the school leaving certificates emanating from the school. He stated that a valid school leaving certificate must bear the name of the school, the school address, the year of completion of education, the pupil's date of birth and industry, the school stamp as well as the signatures of the pupil and the headmaster. With regard to the school leaving certificate in question herein, PW 4 stated that the same did not emanate from Tom Mboya Primary School. He stated that not only was the postal address wrong, but that the admission number was also fictitious; that while the form presented had genuinely emanated from the Ministry of education, the contents therein were entirely fictitious. According to the certificate presented to court, the school's postal address was given as P.O Box 80648 yet as stated earlier, the proper address was 80646; the pupil's admission number was stated as 7826, a fictitious number given that the school's admission presently stood at 600; the suspicious form also stated the pupil as Robert Mark Mwata, was admitted on 16/01/1989 and left on 30/11/1994 whilst in standard 6 yet as per school records, no such individual was ever admitted as stated or at all.

8. Moreover, he added, the requisite duration for the primary school course is 8 years and no school leaving certificate can be purported to have been issued to a standard 6 drop out. Other disparities noted were that in the suspicious document, the stamp impression was endorsed above the student signature; which should not be the case as the signature must be above the stamp. He also cited the stamp impression as fake, as the same did not correspond with the school stamps used by the school. Though he neither presented the school stamps in court, nor did he bring the relevant school records with him to court, PW4 stated that the document in question was a forgery and that he was able to ascertain as much by reference to school records when the Investigating officers approached the school seeking to verify the authenticity of the certificate.

9. However, Nyanya's (PW9) version of events was slightly different. According to her, she met the two boys (meaning the appellant and Mustapha) while going about her funds drive in September, 2011. In her testimony, she ran into Mustapha first and he gave her a contribution of Kshs. 50/- and informed her that he had an orphaned brother and enlisted her help in meeting the village elders for purposes of acquiring an identity card. He also promised her that should she be able to help him, he would give her an additional Kshs. 15,000/- for her grandchildren's school fees. Motivated by that proposition, she introduced him to PW1 who spoke to Mustapha and agreed to fill the form for Mustapha and thereafter referred them to PW2. However, PW2 refused to take the form and summoned Nyanya to his office. He told her he knew her late son and that there was no way the deceased had such an old child. All this time, Mustapha was present but outside as was Mr. Samuel Makosa (PW1). The appellant was not present at the assistant chief's office, and the assistant chief told Nyanya that if the boy had been present, they would have all been taken to the police to explain whether he was her grandson. Though the matter appeared to have ended at that, when Nyanya went home, she reckoned that the money Mustapha had offered to give her was too much to lose. She then resolved to go to the chief at Mbololo with other forms to try once again to secure the Birth certificate.

10. At Mbololo she presented the forms and gave out a copy of her ID card together with copies of her late son's and daughter in law's death certificates also attached. Later, after all the forms were duly filled she was once again given fare by Mustapha to take the documents to the Registration of Births office at Wundanyi. The forms she took to Wundanyi sought birth certificates for three individuals; Cromwel Mwakisau, Priscilla Mghoi and the one that was before court (Robert Mwata) which was rejected. The Birth Certificates for the other two were however issued. The age of the applicant on the form was indicated as 22 years while on the leaving certificate it was 26 years. The forms she took to Wundanyi were the same forms in court. Following the non issuance of Robert's certificate, she was advised to tell the applicant (Robert) that he needed a waiting card and to this end, she told (PW8) to call Mustapha to go pick the forms so that he could apply for an ID and get a waiting card. The message was relayed to Mustapha. As to how many times she met the appellant, Nyanya stated that they only met once, on the first day she met Mustapha in the streets when she was raising funds. Since then, she had never seen the appellant again save in court over this matter. She however recalled that even at the time, the appellant only spoke in English.

11. Other witnesses called by the prosecution included Francis Njoroge Waweru, PW5, a civil registration officer at the Civil registration Department under the Immigration and Registration of Persons. He was in charge of registration of births and deaths in Taita Taveta which covers Voi, Mwatate and Wundanyi Districts. He stated that in December, 2011 three police officers visited his office and showed him a form for late registration. They told him that the form had been presented at their office but they did not issue a birth certificate. On his part, he explained to them the requirements before one is issued with a birth certificate; and that for that particular form, the office could not issue the birth certificate because the requirements had not been met. The identification card of the child who was over 18 years was missing; and that he became aware of this missing document after going through the forms. He added that although the requirements under part two of the form include a leaving certificate they would not substitute a leaving certificate for an ID for an applicant above 18 years. They did not have records for any Robert Mwakio Mwata having been born at Moi Voi Hospital as purported. The general records for all persons born in Taita Taveta are in Wundanyi. He acknowledged that he did not know the appellant and that none of his colleagues indicated having ever met him.

12. Similarly conversant with the procedure of registration of persons was Esther Wanjiku Waiganjo, PW 6, a District Officer, previously

stationed at Voi District; who testified that a person had tried to get a birth certificate through her office by way of forgery. She could however not remember seeing the appellant in her office. She had nonetheless seen him in the media and in Court. She however admitted having appended her signature on the registration forms which turned out to be forged and she also acknowledged that the stamp on the form belonged to her office. In addition, she identified the handwriting on Part 6 of the form as belonging to her clerk; with whom she had worked for 2 ½ years at Voi. She indicated that she appended her signature on reliance of information provided by the assistant chief and chief; as to her, this meant that the assistant chief had verified the information provided. She had a specimen signature of the assistant chief and chief. In this particular form the assistant chief signed for both assistant chief and chief. Her certification of the documents meant that she had verified through the chief that the particulars on the documents were correct. In her view, the persons who filled the forms misled the people verifying the documents. She however had no proof that the person arrested was the person who tried to procure registration falsely. The forms were filled in 2011.

13. Turning to the version presented by the police, SGT Stephen Munyai, NO. 77600, (PW 7) of the Anti-terrorism Unit Nairobi, stated that in December, 2011, they received information from an informant that there was a person who was fraudulently attempting to procure registration in Voi. He and his colleague Corporal Bakari left Nairobi for Voi to carry out investigations into the matter. On arrival, they headed to Tanzania village within Voi where they met Immaculate Mwata (PW 8) at her home. They inquired from her the whereabouts of the person they were looking for. She took them to her grandmother's home. When they interviewed her, she repeated to them the story we have summarized above. She indicated that Mustapha and his friend told her they were willing to assist her, but on condition that she would assist the foreign guy acquire a Kenyan birth certificate. They agreed the foreign guy should pose as one of the children of her deceased children. Mustapha gave his contribution of 50/= and wrote his name in the proforma. The duo then accompanied her (PW 9) to her home. They found the other children, Immaculate Mwata (PW 8), one of the girls whose school fees was being raised and other children. They discussed how they would help the foreign friend get a birth certificate. She narrated to the two officers all the steps she had undertaken in a bid to procure the birth certificate but the birth certificate application was however rejected by the registrar; who cited the absence of a copy of the applicant's ID (since he was above 18 years of age).

14. At the time of his visit, PW7 found that PW9 still had the rejected forms with her. The documents included, the form itself, death certificates for Joyce Mwata and her husband, a copy of PW 9's ID and a copy for Elizabeth Chege. He proceeded to record statements from PW1, PW3, PW5, PW9 and, PW10 and handed over all the documents to the Investigating Officer. PW3 and PW8 also narrated to the officers how Mustapha approached them after being introduced to them by their grandmother. They confirmed meeting Mustapha and the foreign friend. PW 3 showed them the mpesa message that he received once the money was sent to his phone. None of them refuted the part she/he played in procuring the registration documents. During cross examination, he stated that before they left Nairobi they had information that Nyanya was assisting someone to procure registration. The witnesses told him Mustapha's friend for whom they were trying to procure an ID was called Peter. According to PW 9, Mustapha told her his friend's parents had passed on and he needed someone to stand surety for him to get Kenyan registration.

15. Another of the grandchildren, Immaculate Sau Mwata, a.k.a Emmah (PW 8) stated that she had lived with the grandmother from Form 1 – Form 4, 2008 – 2011. She has a sister called Priscilla Mghoi and a brother called Danson Ighombo. She stated that they used to live at her grandmother's together with her orphaned cousins, Rosina, Cromwel and Dorris. They were all in school at the time. PW 9 used to pay the school fees but would often rely on bursaries. One day, the grandmother came back with two light skinned men. During this period PW8's sister had been sent home for school fees. The two men were in their house for 5-10 minutes. According to PW8, the one called Mustapha spoke in Swahili. The other one who was before court, the appellant, spoke in English but was quiet most of the time.

16. At a later date, the grandmother left and when she returned, she said she had gone to see the village elder and the assistant chief Shabaan to look for a birth certificate but she had not been successful as they were told they needed to have a leaving certificate which they did not have. After 2 days, Mustapha sent Kshs.1000 to PW 3's number for fare, and she left Voi for Mombasa with PW 3 where they met Mustapha at Kobil Petrol Station. He gave them a leaving certificate, Kshs.1600 and a paper with the name Robert Mwakio in the forms since he was an orphan. He asked them to write the name Robert Mark Mwata in the forms since he was an orphan. The leaving certificate had only the name Robert. They were to add Mark Mwata. She did not know who added the name on the leaving certificate. She found the same added when she returned from school.

17. Later, she said, PW 9 went to Wundanyi and when she returned she told them that she was told Mustapha should at least have a waiting card. She called Mustapha and told him a waiting card was needed. On 25<sup>th</sup> December, 2011 at around 1.00 p.m., she received a call from chief Mwangemi of Mbololo who said he wanted to meet with her. On her way to meet the chief she met with the police. The appellant was the other person with Mustapha at their home. He greeted them in English. He was quiet and did not maintain eye contact. She stated that she was not present when the two first met her grandmother. Nor did she meet the appellant again until she saw him again in court. She stated that she was never called to identify anyone.

18. Gibran Ninah Tumbo, PW10, assistant chief of Mraru, Mbololo, Tausa, Voi District acknowledged having signed the ill-fated forms as the assistant chief and on behalf of the chief who was away. He however stated that at the time of signing them, the form had the death certificates of the parents, ID card for Emerlin Sau and guarantor's ID and leaving certificate for Robert Mark Mwata.

19. Following investigations by PW7 and his team, given the apparent irregularity and falsity of the documents in question, the appellant was arrested and arraigned in court, facing a raft of charges which we mentioned earlier in this judgment.

20. He denied the charges and trial began with the prosecution presenting its witnesses as aforesaid. At the close of the prosecution case, the appellant was found with a case to answer and placed on his defence, but he elected to remain silent and await the court's decision. The trial magistrate in a reserved judgment delivered on 28<sup>th</sup> January, 2015 found that no case had been proved against the appellant on any of the counts and accordingly, acquitted him on all charges. Dissatisfied with that verdict, the state appealed against the decision pursuant to section 348A of the Criminal Procedure Code.

21. After re-analysing the evidence adduced before the trial court, the learned Judge (**Muya.J.**), like the trial magistrate was satisfied that the appellant herein had been 'properly identified' by PW1, PW8 and PW9 as the person who was in the company of Mustapha and for whom the birth certificate was being sought. The learned Judge also agreed with the trial magistrate who had observed that although both PW8 and

PW9 were truthful and credible witnesses, they were the appellant's accomplices and their evidence therefore needed corroboration. Their point of departure was on the issue of corroboration, or rather the manner in which the trial magistrate had handled the issue. From the record, the magistrate had expressed herself as follows:-

***“However, taking into consideration the evidence on record as a whole, the court is satisfied that the accomplice witnesses told the truth hence credible witnesses. Most of their evidence was corroborated by other evidence of independent witnesses like PW1, PW2, PW3 and PW10.”***

According to the learned Judge, having made the above finding, the trial magistrate could not turn around and acquit the appellant on the basis of lack of corroboration. Furthermore, according to the learned Judge, PW12's evidence accorded corroboration to the evidence of PW8 and PW9. The learned Judge also faulted the trial magistrate's finding that common intention between Mustapha and the appellant had not been proved, yet the entire evidence revealed that the birth certificate, the subject of the entire proceedings was being sought for the appellant. In point of fact, the appellant had been presented before the then District Commissioner Voi, (PW12), for interview for purposes of being issued with the fake birth certificate, and the appellant had presented the fake documents to the witness.

22. After considering all these issues, the learned Judge found that the prosecution had actually proved its case against the appellant beyond reasonable doubt on all the 9 counts and he overturned the trial court's judgment and reversed the acquittal. Consequently, he sentenced the appellant to serve one year imprisonment on each of the nine counts and ordered that the said sentences run consecutively. This effectively meant that the appellant serves a 9 year jail term.

23. Aggrieved by that outcome, the appellant preferred this appeal which is premised on grounds that the learned first appellate Judge erred by; failing to re-evaluate the evidence thereby arriving at an erroneous decision based on weak circumstantial evidence; misinterpreting the evidence particularly on identification; misapplying the law with regard to joint offenders in prosecution of a common purpose; arriving at conclusions that were unsupported by the evidence and ordering that the sentence shall run consecutively instead of concurrently. He urged us to allow the appeal, quash the conviction and set aside the sentence.

24. Appearing for the appellant was learned counsel Mr. Chacha Mwita, who submitted that the evidence presented before the trial court was purely circumstantial on all counts. He contended that in order to mount a successful case, the prosecution needed to have somebody to present the impugned false documents to the complainants. To the contrary, the witnesses stated that the appellant never presented the said documents nor did he sign any of them. Counsel added that even the identification of the appellant was also questionable noting also that this was not a case of identification by recognition and that no identification parade was ever conducted. In addition, he said, the witnesses admitted having been shown a picture of the appellant before they testified in court and that all in all, the identification of the appellant was highly irregular; a fact that the first appellate Judge failed to appreciate.

25. According to Mr. Mwita, the prosecution case appeared to be solely hinged on the evidence of joint offenders. He pointed to the testimony of PW9 who stated that he was told by Mustapha that the documents in question were to be executed in favour of his friend (ostensibly the appellant) and that the said conversation took place in Swahili. Counsel pointed out that the appellant was not conversant in Swahili and as such, they could not have had a common purpose. Not only that, the prosecution witnesses were also inconsistent on the issue, since PW 8 had in fact stated that the birth certificate sought to be processed would have been in favour of Mustapha and not the appellant. In addition, that when PW 8 spoke to Mustapha with the appellant in tow, they never spoke face to face as the appellant had his back to them the whole time. With regard to the sentence, counsel submitted that obtaining a birth certificate is a process and the sentence imposed (if at all) should not be consecutive. He thus urged the court to allow the appeal.

26. Opposing the appeal was Mr. Yamina, learned Principal Prosecution Counsel for the state. He relied on his submissions before the trial court and also before the High Court. Before us, he submitted that the case did not rest on circumstantial evidence as the appellant was asserting. Rather, that the most important aspects of the case were premised on accomplice evidence. Further, that the trial court rightly established that the accomplices were truthful and that their evidence was corroborated by independent witnesses. Counsel added that by choosing to remain silent in his defence, the appellant forewent the opportunity to give an explanation or to contradict the testimony of these reliable witnesses; particularly in the face of testimony by independent witnesses who placed him at Voi town in the company of his accomplices. That though Mustapha, the Swahili speaking accomplice is still at large, that does not derogate from the fact that the appellant, a British national with nefarious objectives, had come into the country and enlisted the help of a local who would interpret Swahili in furtherance of the appellant's agenda and that in the process, the appellant had committed all the offences he was charged with. Counsel submitted that the appellant had appeared in all the places to which the offences relate and with regard to the sentence, he stated that a default sentence is always consecutive. He added that even though the transactions were similar in nature, they were committed before separate officials on separate dates and therefore, the consecutive sentences were the most applicable in the circumstances.

27. As mentioned earlier, this is a second appeal and this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -vs- R, [1984] KLR 611*. Also in *Karingo -vs- R, (1982) KLR 213 at pg. 219, where* this Court

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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 C/O Karanja -vs- R, (1956) 17 EACA 146)”***.

*We must point out at this point that this appeal is somewhat unique in that whereas there was no concurrence on the end result or verdicts in the two courts below, there was concurrence in most of the crucial pertinent issues, particularly on the facts and the law. It was only the conclusions that were different. We shall advert to that issue later. Having considered the matter before us in entirety, we identify the issues for determination in this appeal as follows: -*

- a) Whether the first appellate Judge misapprehended the evidence and the law with regard to identification of the appellant;
- b) Whether the learned first appellate Judge misapprehended the law on joint offenders;
- c) Whether there was corroboration of what was found to be accomplice evidence; and ultimately;
- d) Whether the sentences should have been ordered to run concurrently or consecutively.

28. On the first issue, it was common ground among all the witnesses that the appellant was a person who prior to the series of transactions herein was not known to them. Nonetheless, it is not disputed that most of the witnesses who testified before the trial court saw him at one point or other. PW1 the village elder said he was introduced to ‘two boys’ by PW9 who she said were her grandchildren named ‘Mustapha and Peter’. He was curious because ‘Peter’ looked like he was of mixed race, and he even asked the witness whether her late daughter had been married to a white man. PW8 also saw the appellant when he was taken to their home. Although she said that the two men had stayed in their house for between 5 to 10 minutes, in our view 10 minutes during daytime is more than enough to identify a person. PW9 (Nyanya) told the court that she had met the appellant when he was in company of Mustapha when Mustapha told her that it was the appellant who needed the birth certificate. She said she could not forget the appellant after she saw him with Mustapha. PW12 said the appellant appeared before him in presence of PW9. The issue of identification of the appellant was not raised before the trial court at all and so there were no specific findings made on the same. As stated earlier, the learned Judge was satisfied that the appellant was properly identified by PW1, PW2, and PW9 and also by PW12. We have no reason to upset these findings of the learned Judge on the issue of identification.

29. With regard to the second issue, PW 8 and PW9 were the appellant’s alleged accomplices whose evidence was corroborated that of PW 1, PW 2, PW3 and PW10. The appellant has taken issue with the findings of the first appellate Judge on this aspect and has argued that from the testimony of the alleged accomplices, no nexus could be drawn between the appellant and the offences. Further, that the appellant never participated in the communication between PW9 and Mustapha; given that the appellant is a British national with no knowledge of Swahili. This Court in the case of **Michael Muriithi Kinyua v Republic [2002] eKLR** elaborated on the guidelines to be applied by courts when dealing with accomplice evidence by stating as follows: -

***“Under section 141 of the Evidence Act, Cap 80 Laws of Kenya an accomplice is a competent witness and a conviction based on his evidence is not necessarily illegal or irregular. However, there is a firm rule of practice that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if satisfied that the accomplice witness is telling nothing but the whole truth, and upon the court duly warning itself and the assessors, where the trial is with the aid of assessors, on the dangers of doing so. Before corroboration can be considered however, a court of law dealing with accomplice witnesses must first make a finding as to the credibility of the witnesses. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence, and unless there is some other evidence, the prosecution must fail. If the court decides that the witness, though an accomplice witness, is credible, then the court goes further to decide whether the court is prepared to base a conviction on the evidence of the accomplice witness without corroboration. If this is so, the court must direct and warn itself accordingly. On the other hand, if the court decides that the accomplice witness, though credible, requires corroboration, the court must look for, find, and identify the corroborative evidence. – see also Rex v Kariuki & Others (1945) 12 EACA 84 and Morjaria v Republic [1972] EA 10.***

30. In its judgment, the trial court not only appreciated the principles enunciated in the **Kinyua case** (supra), it also pronounced itself on the credibility of the accomplices in this case by stating as follows:

***‘Being guided by the foregoing case law, from the evidence on record PW8 and PW9 participated in the commission of a crime, knowingly, voluntarily and intentionally whether as principal offenders or accessories. Their level of participation of the unlawful purpose can be discerned from their evidence and that of other witnesses. The court therefore finds PW8 and PW9 to be accomplices. However, taking into consideration the evidence on record as a whole, the court is satisfied that the accomplice witnesses told the truth hence (are) credible witnesses. Most of their evidence was corroborated by other evidence of independent witnesses like PW1, PW2, PW3 and PW10.’***

On his part, the first appellate Judge appreciated the trial court’s findings aforesaid when he expressed himself as follows:

***“It is precisely as a result of reliance on this authority that the learned magistrate found that PW8 and PW9 were accomplices and their evidence was truthful and credible. She also said that it was corroborated by independent witnesses.”***

Notwithstanding the different final verdicts from the two courts below, these were their concurrent findings of fact which as stated earlier we must hold with deference. (See **Kaingo vs Republic**, (supra). The court on second appeal will be wary of upsetting concurrent findings of fact from the two courts below unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the Court has loyalty to accept the concurrent findings of fact of the two courts below provided they are based on clear evidence which was adduced at the trial. See also **Bernard Mutua Matheka vs Republic (Criminal Appeal No. 155 of 2009** unreported). Consequently, the findings of the two courts below on the issue of accomplice evidence cannot be faulted. The same was subjected to the requisite legal test and found to be worth relying on.

31. On the issue of principal offenders, we are satisfied the learned Judge interpreted Section 20(1) of the Penal Code correctly. There is no doubt the entire transaction was being done for the benefit of the appellant. He could not do it on his own as he could neither speak the local vernacular languages nor Kiswahili. Mustapha was just a facilitator. The appellant procured the services of Mustapha who had the local connections. Had Mustapha been arrested, he could have faced the same charges. We find no fault in the learned Judge’s findings, and we have no basis for upsetting the same.

32. On the issue of the sentences, we agree that obtaining a birth certificate is a process and not a singular transaction. The process however involved separate distinct incidents on different dates with different persons. The consecutive sentences were therefore justified, and we find no need to interfere with the same. In all we find this appeal lacking merit and we dismiss it accordingly.

**Delivered and dated at Mombasa this 7<sup>th</sup> day of June, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**