



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MARAGA & KIAGE JJ.A)**

**CRIMINAL APPEAL NO. 595 OF 2010**

**BETWEEN**

**CHARLES NDUNGU GITHUKA ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit, J.) dated 10<sup>th</sup> May, 2007***

***in***

***H.C.C.R.A. NO's. 968, 988, 1053 & 1096 OF 2003)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal is by **CHARLES NDUNG’U GITHUKA** who is aggrieved by a judgment of the High Court at Nairobi (Lesiit, J.) by which his conviction and sentence for the offence of forgery contrary to **Section 349** of the Penal Code imposed by a subordinate court were upheld and confirmed.

The particulars of the charge that faced the appellant were that on the 4<sup>th</sup> day of March 1997 in Nairobi within Nairobi area jointly with others not before court, with intent to defraud [he] forged a certain document namely Transfer of Land reference 1012/47/2 purporting to be genuine transfer by **Sheila Thompson** and that on behalf of **Anthony John Thompson**.

The grounds of the appellant’s appeal are set out in the memorandum of appeal dated and lodged herein on 3.6.11. In summary it alleges that the learned Judge fell into error by;

- (a) Concluding that the appellant’s attestation of the transfer amounted to and rendered the transfer a forgery.*
- (b) Holding that the appellant was not an advocate on 4<sup>th</sup> March 1997 and had therefore personated one in attesting to the transfer.*

(c) *Upholding the conviction notwithstanding that the State had conceded the appeal.*

At the hearing of the appeal, **Mr. Wandugi**, the appellant's learned counsel, took issue with the learned Judge's conclusion that the appellant ceased to be an advocate of the High Court of Kenya by reason of failure to take out and hold a practicing certificate as at the time he appended his attestation signature to the transfer in question. Counsel argued that whereas an advocate's failure to take out a practicing certificate may attract penalties and consequences spelt out under the **Advocates Act, Cap 16**, Laws of Kenya, a charge of personation or of forgery was not one such consequence. **Mr. Wandugi** further contended that the appellant could not possibly have forged the transfer when all he did was sign as a witness to the makers of the same. He also took issue with the learned Judge's reliance on the evidence of PW2, **Sheila Thompson** who was a liar and part of a conspiracy to defraud her own brother and therefore unworthy of belief in line with the guidance given by this Court in **NDUNGU KIMANYI Vs. THE REPUBLIC [1979] KLR 282.**

Opposing the appeal, **Mr. Kivihya** learned counsel for the respondent described the appeal as one devoid of merit fit only for dismissal. He maintained that in so far as the appellant did not have a practising certificate at the material time, "he personated a practising advocate." When we pointed out to him that in her judgment the learned Judge stated that the appellant had personated an advocate, and not a practicing advocate, **Mr. Kivihya's** response was that "even though the judge did not make that distinction directly, that is what she had in mind".

We think that the determination of this appeal turns on the single issue of whether an advocate who fails to take out a practising certificate for a particular period ceases to be an advocate and commits the offence of forgery every time he purports to sign any document and refers to himself therein as an advocate. The learned Judge proceeded on that footing when she expressed herself as follows;

***"The 4<sup>th</sup> appellant forged the transfer form exhibit 3 in that at the time of signing it, in 1997, and continuously up to 2000, the 4<sup>th</sup> appellant had no practising certificate authorizing him to practise as an advocate. By signing the transfer in his capacity as an advocate, he was purporting to be what he was not, and his signature on the document personated what he was not that is an advocate which it was not. To that extent the transfer was a forgery. Causing the practising certificate he took out in 2000, backdated to 1997 did not cure the forgery of the transfer document herein. It is my view that whether or not Sheila signed the transfer document does not change the position and conclusion that the transfer form was a forgery on account of the signature of the 4<sup>th</sup> appellant."***

She repeated the same later in the judgment stating thus; "the transfer form was not genuine for the fact that the signature of the 4<sup>th</sup> appellant was a forgery as he was not licenced as advocate yet he personated an advocate at the time he signed it".

With due respect, the learned Judge fell into grave error in declaring that the appellant was not an advocate during the period he did not hold a practising certificate. The **Advocates Act, Cap 16** Laws of Kenya, which is the statutory expression of the law relating to advocates, defines an advocate in Section 2 to mean, in relevant part;

***"Any person whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel ...."***

A person whose name has been entered upon the Roll of Advocates would then, *prima facie*, be an advocate and remain such until it should be removed therefrom either upon application by the advocate under **Section 59** or being struck off under **Section 60 (4)(c)** as a disciplinary measure.

It would seem that the learned Judge conflated the provisions relating to the prohibition of unqualified persons to act as advocates, with the provisions relating to the removal from the Roll of Advocates that we have referred to. **Section 34** of the Act, which is relevant to the document that was said to have been forged provides as follows;

**“34(1) No unqualified person shall, either directly or indirectly, take instructions to draw or prepare any document or instrument –**

**(a) Relating to the conveyancing of property; ....**

**(3) Any person who contravenes subsection (1) shall be guilty of an offence.”**

The penalty for the offence described above is the general one provided for under **Section 85** of the Act namely, a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or both. Sub-section (2) of that section then provides as follows;

**“(2) Any advocate who is guilty of an offence under this Act shall be liable, whether or not he has been charged with, convicted or acquitted of such offence, to proceedings [disciplinary], under Section 60.”**

It seems clear to us that these are the legal penal consequences that flow from the drawing and preparation of documents by an advocate who has not taken out or renewed a practising certificate. It is not even remotely suggested and neither can it have been the intention of Parliament that the documents in question would thereby be rendered forgeries. The only other consequence that flows attaches to the unqualified person himself in that he is not entitled to and can neither claim nor sue for any fee or reward for drawing or preparing the document or instrument.

The learned Judge must have had **Section 33** of the Advocates Act in mind when she concluded that the appellant was not an advocate at the material time and had pretended to be one. The Section provides as follows;

**“Any unqualified person who willfully pretends to be, or takes or uses any name, title, addition or description implying that he is qualified or recognized by law as qualified to act on an advocate shall be guilty of an offence.”**

Whereas a cursory reading of this section may justify the learned Judge’s conclusions, we think that read in proper context and with the entire architecture of the Advocate’s Act in view, the section can only apply to persons who have never been admitted as advocates and whose names do not appear on the Roll of Advocates. We hold that one never ceases to be an advocate merely because they have not taken out a practicing certificate for a particular period. One may be an advocate of the High Court of Kenya but elect not to practise law. Being of that view, the conclusion is inevitable that the learned Judge’s holding that the appellant personated an advocate when he attested to the transfer, is erroneous and amounted to a misdirection.

At any rate we would think that the appellant on a criminal charge, was entitled to the construction of the Advocates Act more favourable to him.

What we have held ought to dispose of this appeal but we need to comment on one other matter. The conviction of the appellant was upheld by the learned Judge based on the evidence of PW2, **Sheila Thompson**. Mr. Wandugi has faulted the learned Judge for relying on that evidence and we think he is justified in so complaining. The learned Judge found as a fact that despite **PW2’s** denials, she may have signed the transfer. The learned Judge also found that “**Sheila** was involved in a conspiracy with the appellant’s co-accused to have the land in question transferred (sic) from her deceased mother to herself without informing her brother Anthony.” In a High Court Civil Suit No. 1706 of 1998 where she had been sued, **Sheila** did aver in her defence that she in fact signed the transfer. All of this goes to show that **Sheila** was a person of questionable veracity and the learned Judge ought to have taken her entire testimony with a pinch of salt. We think there is justification in **Mr. Wandugi’s** contention that **Sheila** was the kind of witness this Court had in mind in **NDUNGU KIMANYI Vs. THE REPUBLIC** (supra);

**“The complainant was not a virtuous virgin. A man of loose conscience, on a previous occasion also he had been involved in a swindle operation for making easy money when he lost Sh. 40,000. In our opinion the evidence of the complainant does not come up to the minimum standard which we require**

**before upholding a conviction in a criminal case. We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he was not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

(Our Emphasis)

Had the learned Judge given these issues due consideration, she would probably have accepted the State’s concession of the appeal before her. She was of course not bound to accept it.

For the reasons we have set out herein we find that the appellant’s conviction on the charge of forgery was not safe. We accordingly allow this appeal, quash the conviction and set aside the sentence.

We further order that the fine paid by the appellant be refunded to him.

***Dated and delivered at Nairobi this 14<sup>th</sup> day of February, 2014.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**/mwn**