



REPUBLIC OF KENYA



**KENYA LAW**  
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**Isiongo v Republic (Criminal Appeal 71 of 2012)  
[2024] KEHC 357 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 357 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL 71 OF 2012  
RN NYAKUNDI, J  
JANUARY 25, 2024**

**BETWEEN**

**ALPHAEUS MADASYO ISIONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal Against a Judgement Delivered by Senior  
Resident Magistrate E.A. Ombima in CR. Case No 116 of 2009)*

**JUDGMENT**

1. The Appellant was charged with the offence of with making a document without authority contrary to Section 357 (a) of the *Penal Code*. The particulars of the offence were that on diverse dates between 1<sup>st</sup> and 30<sup>th</sup> July 2008, at Eldoret, jointly with others not before the court, with intent to deceiving without lawful authority, he made a title deed for Eldoret Municipality Block 27/2499 purporting the same to be a genuine document /Title deed issued by Registrar of Lands Uasin Gishu district.
2. He was also charged with one count of forgery contrary to section 349 of the *Penal Code*. The particulars of the offence were that between 1<sup>st</sup> and 30<sup>th</sup> July 2008, at Eldoret Township, he forged a title deed for Eldoret Municipality Block 21/2499 purporting it to be a title deed of Timothy Pius Okulo.
3. He was charged with one count of obtaining by false pretences. The particulars of the offence were that on diverse dates between 19<sup>th</sup> August 2008 and 21<sup>st</sup> December 2008, at Eldoret town jointly with others not before the court, with intent to defraud, he obtained Kshs. 400,000/= by falsely pretending that he was in a position to sell to him Eldoret Municipality Block 21/2499 a fact he knew to be false.
4. The accused pleaded not guilty and the matter proceeded to full hearing.
5. The prosecution called five witnesses in support of its case.



6. PW 1, David Andanyi Ilomo, who was the complainant, testified that he knew the accused as he attempted to sell him a non-existent parcel of land. He stated that he met with a person named Pius Okulo who was selling a parcel of land for Kshs. 400,000/=. The meeting was organised by Vincent Angulo. He stated that the person did not have an identification card but he produced a search certificate for the parcel known as Eldoret Municipality Block 21/2499 and told them that the title was with his advocates. On 19<sup>th</sup> August 2008, they went to the office of J.K Birir Advocates where they agreed on a purchase price of Kshs. 400,000/- and the advocates gave him the title for the land. The accused then gave them an identity card indicating that he was Timothy Pius Okulo. He paid the down payment of Kshs. 320,000/- and on 21<sup>st</sup> October 2008 he paid the balance of Kshs. 80,000/-. He later signed the transfer documents but the transfer process did not succeed. Upon going to the Lands office, he discovered that the documents were fake. He reported the same to the CID who confirmed the allegations and arrested the accused.
7. PW2 was Mr. Chepkwesi who was a land registrar in charge of Uasin Gishu district at the time. He stated that on 23.6.2008 a client went to his office to do an official search for Eldoret Municipality Block 21(Kingongo) 2499 in the name of Timothy Pius Okulo. However, he discovered the land belonged to Nahashon Kabari and Timothy Mwangi. Further, that the search had been forged and had no seal. He stated that he alerted the CID who commenced investigations.
8. PW 3, Reuben Itambo Amokora was the father to the complainant. stated that the accused had introduced himself to him as Timothy Pius Okulo and had land to sell and he promised to sell and to his son but it all happened to be a farce. He confirmed he witnessed payments made to the accused.
9. PW 4, John Kirwa, stated that he was the advocate who did the agreement. He confirmed the accused received Kshs. 400,000/= from the complainant he produced the sale agreement in court as ex.4.
10. PW5, a finger prints expert, Evans Manyori confirmed that id no 6694518 bore the names Alphaeus Madasyo Isyongo but born in 1950 in Kakamega district. He produced the original id of the accused person a search on id 4760041 bore the name of Atuko Mwarima but in the automated database, it ought to have been in the name of Duncan Onyango Oyoo of ID 3559728. He stated that the ID purported to be issued to Timothy Okulo was not issued by the National Registration Bureau and he produced his full report of his finding as exhibit 9.
11. The defendant was put on his defence and denied all the charges. He denied the making of the agreement or meeting the complainant.
12. Upon considering the evidence tendered, the testimonies of the witnesses and the submissions of the parties, the Learned trial magistrate convicted the accused on all three charges. On the first count he was sentenced to pay a fine of Kshs. 100,000/- in default serve one year, on the second count he was sentenced to pay a fine of Kshs. 100,000/- in default serve one year in jail, on the third count he was sentenced to pay a fine of Kshs. 100,000/- in default to serve one year in jail. The complainant was to recover his Kshs. 400,000/- by way of execution as a civil debt.
13. Being aggrieved with the sentence and conviction, the Appellant instituted the present appeal vide a petition of appeal dated 30<sup>th</sup> April 2012 premised on the following grounds;
  1. That the Learned Magistrate erred in law and fact in allowing the Respondent to be represented by an unqualified person as a prosecutor contrary to the requirements of section 85 of the *Criminal Procedure Code*, Cap. 75.



2. That the Learned Magistrate erred in law and fact allowing the prosecution to proceed after the substitution of charges without according the Appellant an opportunity to recall PW1 who had testified as required by section 214 of the *Criminal Procedure Code*. Cap. 75.
  3. That the Learned Magistrate erred in law and fact in failing to find that the offence of making a document without authority contrary to section 357(a) of the *Penal Code*. Cap. 63 had not been proved as no exhibit of a title deed corresponding with the title number mentioned in count 1 of the charge sheet was produced.
  4. That the Learned Magistrate erred in law and fact in failing to find that the offence of forgery contrary to section 349 of the *Penal Code*. Cap. 63 had not been proved as required as no handwriting expert in-terms of section 48 of the *Evidence Act*. Cap. 80 gave evidence in court over the claims of the forgery.
  5. That the Learned Magistrate erred in law and fact in failing to draw an adverse presumption against the Respondent over the failure to call Timothy Pius Okulo as a witness while he had been mentioned in count 2 of the charge sheet and Nahashon M. Kabari together with Suleiman Mwangi.
  6. That the Learned Magistrate erred in law and fact in relying on dock identification of the Appellant.
  7. That the Learned Magistrate erred in law and fact in sentencing the Appellant to consecutive sentences of imprisonment instead of concurrent sentences and in imposing fines that are beyond the jurisdiction of the court contrary to section 14 of the *Criminal Procedure Code*. Cap. 75.
14. The Appellant filed his submissions on the appeal whereas there were no submissions on record for the Respondents.

### **Appellant's Case**

15. The Appellant questioned the credibility of the record of the court due to a missing original lower court file. He urged that in the instant case, the lower Court file is missing and is not part of the record. It is not clear why the said file is missing and all efforts to trace it have so far been futile. At the time of Appeal, the Appellant was in custody and there is absolutely no evidence to show that he had in any way contributed to the loss of the file. He relied on the case of *John Karanja Wainaina V Republic*, Criminal Appeal No. 61 of 1993 (unreported) in support of this submission. He urged the court to take regard of this issue and acquit the accused.
16. The Appellant urged that the prosecution has a duty to call all witnesses relevant to their case whether or not the evidence is adverse to their case, provided the witness will assist in the just resolution of the case. Citing the case of *Bukenya & Others v Republic* (1972) EA 549 page 551, the Appellant submitted that the prosecution should have called Timothy Pius Okulo as a witness while he had been mentioned in count 2 of the charge sheet and Nahashon M. Kabari together with Suleiman Mwangi. The omission to call him as a witness in the case should leave the court wondering whether the prosecution was holding back some evidence that may have been adverse to its case.
17. It is the Appellant's case that there were no exhibits of any title deed corresponding with the title number mentioned in count 1 of the charge sheet that were produced as evidence by the prosecution to corroborate the witness testimonies. He urged that the witness accounts cannot be the only basis of conviction without the material claimed to have been used to commit the crime. Further, that



the prosecution failed to bring a handwriting expert in terms of Section 48 of the *Evidence Act* to corroborate and/or prove the claims that the Appellant committed forgery of the alleged documents, which documents were never produced as evidence. The prosecution completely failed to prove their case and are working on mere suspicion.

18. The Appellant submitted that he was never given an opportunity to have the witnesses who had already testified and, in particular PW1, recalled so that he could have cross-examined them as required as per section 214 of the *Criminal Procedure Code*. It is noteworthy that a trial court ought to call upon the accused person to plead to the altered charge which was done in the instant case. The court should have further endeavoured to ensure that the requirements of the provision and in particular subsection (ii) of Section 214 of the *Criminal Procedure Code* were followed. The court ought to have recalled the witnesses for cross-examination or explain to the Appellant his right to call such witnesses and such procedure should be followed.
19. The Appellant urged that his right to a fair trial was infringed upon. Further, that there is no doubt that there are infringements in this case of these principles including a missing court file, which highly points out to a lacuna in whatever happened during the original trial and only alleged court proceedings that have been and/or not availed. The change to the charge and in particular adding a name to the accused as an alias, which name he totally denies, is a major change.
20. The Appellant submitted that as regards the issue of who committed the alleged crime, the prosecution failed to link the accused to the crime. He relied on the case of *R V David Ruo Nyambura & 4 others* [2001] eKLR. He maintained that there is doubt as to who committed the alleged crime. Further, that the evidence on record has a gap as the prosecution has failed to adduce direct evidence to prove that the accused is the one who committed the crime. He urged that the circumstantial evidence adduced must point at the accused and at no other person as the culprit. All other possible explanations of how the crime was committed must be satisfactorily excluded by the prosecution as was in this case.
21. The Appellant urged the court to allow his appeal, quash the conviction and set the imposed sentence(s) aside.

### **Analysis & Determination**

22. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses (see *Okeno v Republic* (1972) E.A 32)
23. Upon considering the record of appeal and the submissions on record, the following issues emerge for determination;
  1. Whether the prosecution proved his case to the required standard
  2. Whether the sentence was harsh/excessive

### **Whether the prosecution proved his case to the required standard**

24. The appellant was charged under sections 357(a), 349 and 313 of the *Penal Code*. Section 357(a) states as follows;

Section 357 of the *Penal Code* states as follows;

Any person who, with intent to defraud or to deceive—



- (a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or
- (b) knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.

Section 349 of the *Penal Code* states as follows;

Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.

25. The evidence produced by PW5, Evans Manyori, revealed that the identity card that the appellant had used in the transaction was a forgery. There was no evidence in rebuttal and therefore, this charge was proved beyond reasonable doubt.

26. Section 313 of the *Penal Code* states as follows;

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.

27. From the evidence of PW4, it was evident that the accused received Kshs. 400,000/- from the complainant for the purported purchase. The evidence of the land registrar also proved that the complainant was not the owner of the land he purported to sell. The evidence of the complainant identifying the appellant as the person who received the money was corroborated by the evidence of PW3, the complainant's father. None of this evidence was rebutted.

28. It is my considered view that the prosecution proved its case to the required standard on all counts. I find no reason to interfere with the conviction.

#### **Whether the sentence was harsh/excessive**

29. Having said that, I shall now turn to case law and precedence, the privy council in *Spence v. The Queen, Hughes v The Queen (Spence & Hughes)* unreported, 2 April 2001) (Byron CJ) was of the view that:

in order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially prescribed principle and standards, and should be subject to effective judicially review”

30. Further in the case *R v. Scott* (2005) NSWCCA 152 Howie, Grove and Barr JJ stated

There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed....one of the purposes of punishment is to ensure that an offender is adequately punished a further purpose of punishment is to denounce the conduct of the offender.”



31. The principle guiding interference with sentencing by the appellate court were properly set out in *S v Malgas* 2001 (1) SACR 469 at para 12 where it was held that:

A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court however, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling”, or “disturbingly inappropriate”

32. The sentence proffered for the offence of forgery contrary to section 349 of the *Penal Code* is a sentence of three years imprisonment, for the offence making documents without authority contrary to section 357 of the *Penal Code* is seven years and for the offence of obtaining by false pretences contrary to section 414 of the *Penal Code*, a sentence of three years. I have considered the sentences meted out by the trial court and it is my view that they were commensurate to the offence. I find no reason to interfere with the same and uphold the conviction and sentence.

33. The appeal is hereby dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25<sup>TH</sup> DAY OF JANUARY, 2024**

**R. NYAKUNDI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In the presence of;

Mr. Oyaro present

Mr. Mugun for State

