Odwoma v Republic (Criminal Appeal 197 of 2019)
[2024] KEHC 3132 (KLR) (Crim) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 3132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 197 OF 2019

GL NZIOKA, J

JANUARY 25, 2024

BETWEEN

MICHAEL ODWOMA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the decision of; Hon. M. W. Njagi, Principal Magistrate (PM), delivered on, 26th March, 2019, vide Chief Magistrate's Criminal Case No. 1533 of 2012, at the City Law Courts, Nairobi)

JUDGMENT

1. The appellant was arraigned in court on 4th October 2012, initially charged in two counts with the offences of abduction with intent to confine contrary to section 259 of the Penal Code (hereinafter "the Code), and forcible detainer contrary to section 91 of the Code. Subsequently, on 26th February 2013, the prosecution amended the charge and charged him in seven (7) counts.

2. In count (1) he was charged with the offence of; abduction with intent to confine contrary to section 259 of the Code The particulars are that on 21st February 2010, in Kitusuru Estate Plot No. 17/75 Kitusuru in Nairobi County, with intent to cause Purvis Kara Baker to be secretly and wrongfully confined abducted the said Purvis Kara Baker.

3. In count (2) he was charged with the offence of forcible detainer contrary to section 91 of the Code. The particulars are that, on diverse dates between 1st February, 2010 and 3rd April 2012 at Murberry Apartment House number A4 in Lavington Estate within Nairobi County being in possession of Plot number LR 17/75 Kitusuru of Purvis Kara Baker without colour of right, held possession of the said land in a manner likely to cause breach of the peace or reasonably apprehension of breach of the peace, against Purvis Kara Baker who was entitled by law to the possession of the said land.

4. In count (3), (4), (5), (6), and (7) was charged with the offence of forgery contrary to section 349 of the Code. The particulars of the offence in count (3) is that on the 15th July 2004, at an unknown place in the Republic of Kenya with intent to defraud forged a certain document namely a Land Sales Agreement number Kiambu/N. of Nairobi Municipality/17/75 purported to have been signed by Purvis Kara Baker.

5. The particulars in count (4) are that on the 15th July 2004, at an unknown place in the Republic of Kenya with intent to defraud forged a certain document namely a Land Sales Agreement number Kiambu/N. of Nairobi Municipality/17/75 purported to have been drawn and signed by Wachira and Company Advocates.

6. The particulars of the charge in count (5) are that, on the 4Th December 2005, at an unknown place in the Republic of Kenya with intent to defraud forged a certain document namely Friendly Loan Agreement purported to have been signed by Purvis Kara Baker.

7. The particulars of the charge in count (6) are that, the appellant on the 30th March 2012, at an unknown place in the Republic of Kenya with intent to defraud forged a certain document namely, Development Loan of Kshs. 165,000,000 purported to have been signed by Purvis Kara Baker.

8. Finally, the particulars of the offence in count (7) are that, the appellant on the 10th July 1997, at an unknown place in the Republic of Kenya with intent to defraud forged a certain document namely a Conveyance from Purvis Kara Baker abd Margaret Curry to Michael Odwoma LR 17/75 purported to have been signed by Purvis Kara Baker.

9. The appellant denied all the charges levelled against him and the matter proceeded to full hearing. The prosecution called a total of fifteen (15) witnesses in support of its case. The prosecution's case is that, on or about the year 1995 or 1996 the Purvis Kara Baker (PW3), (herein "the complainant), met the appellant at her office at Kenindia House when the appellant was repairing her office windows.

10. The appellant informed the complainant that he was also offering plumbing, carpet cleaning, and electrical services. That a year later, the complainant called the appellant to carry out repairs at her house in Kitusuru. However, the appellant fell into a tank he was repairing and became unconscious. He was treated at Aga Khan Hospital at the complainant's cost.

11. That later the appellant visited the complainant to thank her for saving his life, but then warned her that her life was in danger and she would die. Thereafter the complainant was carjacked, and also robbed at her home and her jewellery stolen. She became apprehensive.

12. That, the appellant visited the complainant after the unfortunate incidents and suggested to get one Omar Maalim, to pray for her. Omar then visited the complainant and between 2006 and 2007 the appellant and Omar subjected the complainant goat slaughtering ceremonies which was done initially on a monthly basis and progressed every fortnight.

13. Subsequently, the appellant resorted to getting money from the complainant's thrice a week for goat slaughtering. In December 2010, the appellant, his wife, his daughter, Omar and other people held a meeting in her house but she was not allowed to attend but was instructed to remain in an enclosed room with the curtains closed.

14. At the end of the meeting, the appellant informed the complainant that Omar had given instruction that the appellant and his family move into the complainant's house That the same evening, the appellant and his family moved into the guest room of the complainant's house.

15. After ten (10) days another meeting was held at the complainant's house after which the appellant ordered the complainant to move to the downstairs bedroom while the appellant and his wife moved into her bedroom. That the appellant threatened to shoot her if she refused to comply.

16. That, the appellant forced the complainant to continue giving him money for slaughtering goats failure of which Omar would fix her. That she was forced to sign and transfer her cars to the appellant, and to give him the key to her study room where she kept all her title deeds and jewellery consisting of pearls, gold and diamonds worth over Kshs. 1,000,000. Furthermore, the appellant took over management of the complainant's workers and eventually sacked all of them except Rodgers and Alex

17. The complainant testified that, during the slaughtering of goats she would be given liver with powder that made her dizzy and her joints to ache. Additionally, when her sister, (PW1) Nadia Kara tried to visit her, she was denied access and the complainant told to warn her sister from going to her house or she would be killed.

18. That the complainant allegedly angered the appellant and he moved her out of the house and took her to an apartment at Eldon Court along Ngong Road where she stayed for two (2) months without any money and not allowed to leave the house or have any visitors. That, the appellant's wife would bring her food on few days.

19. Thereafter, she was moved to an apartment on the 2nd floor at Mulberry Apartments where she stayed for one (1) year. She stiil would not allowed to bring in any visitors and warned not to open the door for anyone. That, a care taker was appointed to do house chores for her and watch over her.

20. Further, the appellant would come to the house after three (3) months to pay the rent while his wife would bring her scarce food supplies. That she communicated with the appellant and his wife through text messages.

21. In the year 2012 unable to trace her, the complainant family members published an advert of a missing person and reported the matter to the police. Alex Mmbano (PW13) informed the police that the appellant had moved the complainant with her household goods to Lavington in 2010 and the appellant moved into the house with his wife and one child.

22. (PW15) No. 74710 Sergeant Nicholas Ole Sena, Corporal Martin and Inspector Clement Mwangi commenced investigations and traced the complainant's phone signals at Hurlingham. On 4th April 2012, they received information that the complainant was at Mulberry Apartments and proceeded to the apartments where they met (PW4) Isaiah Musungu Shikwakha, the caretaker, who informed them that there was a lady of Indian descent in Apartment A4.

23. The police went to the house where they found the complainant and her sister Nadia (PW1) confirmed that she the one took her to Aga Khan Hospital where she was admitted for treatment.

24. On the same day, the police officers summoned the appellant and in the company of his advocates, the appellant and the police officers proceeded the complainant's house at Kitusuru where they recovered several documents among them a sale agreement dated 15th July 2004, between the complainant and the appellant for Kshs. 25 million; a friendly loan agreement for Kshs. 165 million between the complainant and the appellant; and a document titled "Development loan" for Kshs 165 million.

25. In the course of investigations, (PW15) wrote a letter dated; 20th June 2012, to the Ministry of Lands seeking for information on L.R. No. 17/75. Joseph Wang'ombe Kamuyu (PW8) a Land Registrar prepared a report which indicated that the property was registered under the name of; Kenneth Robert Baker deceased and the Letters of Administration granted to Purvis Kara Baker.

26. Similarly, on 22nd November 2012, Sergeant Ole Sena (PW15) forwarded documents; specimen signatures of the complainant, the appellant, and stamp impression of Njoroge Wachira Advocate to Jacob Oduor (PW11) a forensic document examiner to ascertain the signatures on the questioned documents and authenticate the stamp impression. The analysis revealed that the complainant's signature on documents B, C, and D was forged. At the end of his investigations the appellant was arrested and charged.

27. At the close of the prosecution's case, the trial court ruled that the appellant had a case to answer and put him on his defence. The appellant gave an unsworn statement and denied committing the offences. He testified that he is a contractor since 1987 and that the complainant was his customer. That he would carry out repairs at her office at Kenindia House.

28. That, the complainant wanted to sell her house and they negotiated a purchase price of Kshs. 25,000,000. The complainant prepared an agreement and forwarded it to him to sign. He signed the agreement and gave it back to Nelson, the bearer.

29. That, the complainant asked for the purchase price in cash which he paid and thereafter transferred the property into his name. That on 21st October 2009, he conducted a search on the property and it showed that the property was duly registered in his name. Furthermore, by a letter dated 8th February the Kitusuru Estate Association acknowledged him as the owner of the property.

30. He stated that he gave the complainant a room in the house to reside as she prepared to move out and retained her workers. Later, the complainant moved to Ngong Road but later wanted to move houses. That as she wanted to move back to her house, the appellant got a house for her at Lavington, as she said that she was not financially stable and so he paid her rent through his company.

31. The appellant denied being in possession of the friendly loan agreement and the development loan agreement, arguing that the documents were not found in his house neither were they listed in the inventory.

32. That, he wanted to take a loan with CFC Stanbic Bank Limited and therefore had taken all his documents to the bank's advocates. However, on presenting the documents at the Land Registry they were informed that the necessary documents could not be traced and was instructed to prepare a Deed of Indemnity, which he did, but was later arrested.

33. He denied abducting the complainant and argued that she was residing in an estate with many people. He stated that he had moved out of the subject house and relocated to Kakamega, and advised by his advocate not to return to the house until the case is concluded.

34. At the close of the case the trial, the court vide a judgement dated 26th March 2019, acquitted the appellant on counts 1, 4, and 6 due to lack of adequate evidence.

35. The appellant was convicted on counts 2, 3, 5 and 7 and sentenced him to pay a fine of Kshs. 100,000 on each count and in default to serve one (1) year imprisonment on each count, and sentence ordered to run consecutively.

36. However, being aggrieved by the conviction and sentence, the appellant has appellant vide a memorandum of appeal dated 20th May 2019 on the following grounds: -

    a. That the learned trial magistrate erred in law in holding that the offences of forgery and forcible detainer had been proved by the prosecution beyond reasonable doubt.

b. That the learned magistrate erred in law by relying solely on the evidence of the handwriting expert as the basis of the conviction of the appellant.

c. That the learned magistrate erred in law in finding that the evidence of the handwriting expert on which she based the conviction was sufficient to sustain a conviction.

d. That the learned trial magistrate erred in filing to uphold the appellant's defence.

e. That the learned trial magistrate erred in failing to give the appellant the benefit of doubt.

f. That the learned trial magistrate erred in law and fact in failing to consider other factors which when considered as a whole were consistent with the innocence of the appellant.

g. That the learned magistrate erred in fact and in law in failing to appreciate or to appreciate fully submissions by counsel for the appellant that the prosecution had failed to discharge the burden to prove the offences.

h. That the learned magistrate erred in convicting the appellant against the weight of the evidence.

i. That the learned magistrate erred in law in convicting the appellant in the circumstances of the case.

37. The respondent opposed the appeal through its grounds of opposition dated, 15th March 2022 which states: -

a. The prosecution proved its case against the appellant to the required standard of beyond reasonable doubt.

b. The sentence that was meted out by the trial court was extremely lenient.

c. The appellant appeal lacks merit, and should accordingly be dismissed.

38. The respondent further filed a notice of enhancement of sentence dated 15th March 2022, seeking that the sentence meted out by the trial magistrate be enhanced to a sentence commensurate with the offences.

39. The appeal was disposed of by way of written submissions. The submissions are considered in the following analysis of the case.

40. At the conclusion of the hearing of the appeal and in considering the appeal, I note that, the role of the first appellant court thereof is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.

41. In that regard, the Court of Appeal in the case of; Okeno vs Republic (1972) EA 32, thus observed:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) EA. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M, Ruwala u R [1957] EA. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported ln doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

42. To revert back to the matter herein, the appellant was convicted on counts 2, 3, 5 and 7. I shall now deal with conviction on count 2, where the appellant was charged with the offence of forcible detainer.

43. The appellant submitted that, it is not in dispute that he and the complainant executed a sale agreement which indicates he bought the property from the complainant and took possession thereof and the complainant voluntarily moved out of the property. Therefore, he was in lawful possession.

44. That, the prosecution failed to adduce evidence that, the possession was unlawful or against the registered or legal owner. He relied on the case of Samson Kipuki & Another -vs- Republic (2020) eKLR where the court cited with approval the case of Richard Kiptalam Biengo v Repubic [2015] eKLR where the court held that, where legal ownership or entitlement of the land cannot be established beyond reasonable doubt a conviction cannot be sustained.

45. Further that the prosecution did not produce a genuine title held by the complainant instead brought an alleged forgery. That, there was no official search at the Lands office. Furthermore, it is illogical and absurd for the appellant who is alleged to have forcibly detained the complainant's property to spend over one million shillings (Kshs 1, 000, 000) per year on her up keep.

46. However, the respondent submitted that, the appellant has admitted he took possession of the subject property after purchasing the same, yet he had no right to possess the land. That, PW8 the Land Registrar produced the records of conveyance of the subject land indicating that, the Ministry of Lands did not register a charge over the property as sought by the appellant because, it was unable to trace documents of ownership to the said property by the appellant.

47. That, the property ought to have devolved upon the complainant after the death of her husband. Further, the appellant had no legal right to occupy the land, therefore occupation thereof was likely to call a breach of peace.

48. Furthermore, the appellant's allegation that he bought the land from the complainant does not hold water, as there is no evidence that he paid Kshs 25,000,000 in cash. Further there is no evidence that he paid for stamp duty. That, under section 111 of the *Evidence Act*, the appellant had the burden of proof in the given circumstances.

49. Furthermore, under section 8 of the *Evidence Act*, the appellant's condition of paying rent for the complainant, water bills and supplying the complainant with food after purchasing her property is inconsistent with his evidence of a purchaser.

50. The responded submitted that, the appellant paid the bills because he knew he had dispossessed her of all her earthly possession, hence his conduct is inconsistent with innocence. Further reliance was placed on section 119 of the *Evidence Act*.

51. The respondent further submitted that, the finding of the court that, both the appellant and complainant signed the sale agreement was erroneous as it is not supported by the findings of the document examiner. Furthermore, the appellant's acquittal on count 4 was due to insufficient evidence of which law firm drew and stamped the agreement. Finally, even if the complainant signed the agreement, a sale agreement is not proof of ownership.

52. In convicting the appellant of the offence of forcible detainer, the learned trial magistrate held that having found the purported land sale agreement exhibit 3, was a forgery. the accused's claim on the said land parcel based on the purported sale was a nullity and so were all the other consequential transactions and therefore, occupation of land parcel based on illegality amounts to forcible detainer. That count 2 was therefore been proved beyond reasonable doubt.

53. Having considered the afore submissions, I note that, the provisions of section 91 of the Code states as follows: -

> Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer.

54. In addition, the court in the cases of Albert Ouma Matiya -vs- Republic (2012) eKLR and Richard Kiptalam Biengo -vs- Republic HCCRA No. 430 of 2013, set out the ingredients of the offence as; the accused is in actual possession of the land, such possession is without any right over the land, is against legal and/or beneficial owner of the land, and such possession is likelyto cause a breach of the peace or reasonable apprehension of a breach of the peace

55. As regard the instant matter, and pursuant to the afore said ingredients of the offence and the provisions of section 91 of the Penal Code, the question herein is; at the time of the alleged offence, was the appellant in possession the property? The answer is in the affirmative as conceded by him. The next question is, was he in lawful or legal possession thereof? In other words, did he have a right over the property?

56. In answering this question, the evidence of the complainant is considered. She denied having sold the property in question to the appellant. In addition, Joseph Wangombe Kamuyu, the Land Registrar testified that from the records held at the Land Registry, the Ministry was unable to "trace documents of ownership of Michael Odwoma".

57. Indeed, the appellant was to prepare a deed of indemnity to verify his ownership of the said property, which he did dated 19th April 2010, but was rejected on the basis of the conveyance dated, 10th April 1997, between Margaret Curry and Purvis Kata Baker as vendor and the appellant as the purchaser and which was suspected to be fraudulent or forged as it was not reflected in the records at the Ministry of Lands.

58. It follows from the evidence of PW8 that, there is no record at the Ministry of Lands that, the appellant is the registered proprietor or legal owner of the subject property. Therefore, the prosecution properly proved that, he was not in possession of the subject property as the legal owner.

59. Furthermore, the document examiner found that, the signature of the complainant on the land sale agreement marked "B" on the exhibit memo and produced as exhibit 3, which is the basis of the charge in count 3, was not made by the complainant who is purported to have signed the agreement as the seller and that, the signature of the appellant thereon as the purchaser was indeed made by him. Therefore, there was no transfer of title in the property to the appellant. If the subject sale agreement is anything to go by.

60. Further still, the whole issue of ownership must be considered in the light of the entire evidence. The prosecution led evidence through (PW5) Francis Wambua Mutala, who was employed by the complainant and who resided at her residence to the effect that, the appellant used to slaughter goats in the complainant's premises, give meat to the workers and liver to the complainant.

61. That at times he would go with the complainant to I & M Bank to withdraw money. Further whenever, the complainant wanted to do anything he would consult the appellant first. Eventually the appellant sacked all employees of the complainant.

62. Similarly, (PW13) Alex Mmbano testified that, he used to work for the complainant as a domestic worker and that the complainant was taken to Lavington by the appellant, and later moved out with all her belongings. That the appellant continued paying him until he left. He stated that the complainant used to complain that she was unwell.

63. He too confirmed during cross-examination that, the appellant used to slaughter sheep in the complainant's premises when she was still there.

64. It is noteworthy that the appellant did not adduce any evidence in defence over the allegation of moving into the complainant's house, slaughtering goats and distributing out meat, taking management of her employees, firing and paying others, and eventually removing her from her property.

65. Furthermore, the appellant conceded to the evidence that he rented a house for the complainant. The lease agreement in respect of the premises where the complainant was moved to at Lavington, was signed by the appellant, as per the evidence of (PW7) Teresia Wambui Ngugi, the land lady.

66. The key questions that arise as posed by the respondent and conceded by the court are: Is it a normal practice in a simple sale agreement of a property that, the purchaser moves into the property before the sale is concluded and title is issued in the purchaser's name? Is it also a practice that the purchaser continues to provide for her basic needs; food and accommodation and utility bills of the seller? In this case to a tune of Kshs 1,000,000 as stated by the appellant. It the finding of the court that the transaction herein was out of character.

67. Therefore, it is clear that, the complainant's evidence to the effect that, she was forcefully evicted from her property is more reliable than the appellant's evidence that she voluntarily moved out after selling the property. I therefore find that based on the aforesaid evidence, the prosecution proved that the appellant was in possession of the suit property without right of colour or legal right. As such the ingredients of the offence of forcible detainer were well established and proved. The finding of the learned trial magistrate on the same is upheld.

68. I shall now deal with the conviction on counts 3, 5, and 7. I note that, the appellants submitted that, the trial court erred by relying solely on the evidence of the handwriting expert and holding that the subject documents were found in his house, and at the contents favoured him.

69. The appellant further relied on the decision in the case of; Hassan Salim -vs- Republic (1964) EA 126, to argue that the handwriting expert should have pointed out the particular features of similarity or dissimilarity between forged signature on the "receipt" and specimen of handwriting.

70. That the document examiner herein admitted that signatures can vary with time and also "change sometimes" for instance, when a person is tired or depending on what he is writing.

71. However, the respondent submitted that, the intention of drafting the loan agreement was to receive money, therefore the appellant's allegation that he did not intend to derive a benefit is not tenable.

72. Further, the appellant was convicted on counts 3, 5 and 7 after all the evidence was considered. Therefore, his allegation that, the defence evidence was not considered, is devoid of veracity and wholly untrue.

73. In convicting the appellant on the subject accounts, the learned trial magistrate stated as follows: -

> " From the evidence of PW3 and the document examiners report, I find that the questioned signature on exhibit 3, 13 and 2 also marked "B", "C" and "E" respectively purported to have been made by PW3 were not made by her, hence they are forged, while those on the

said documents circled in blue when compared with the specimen signature of the accused were found similar hence document examiners opinion that they were by the same author"

The learned trial magistrate further stated: -

> " I don't find any reason on record as to why PW15 could have falsely planted the aforesaid documents on the accused. I believe him that, they were recovered from his PW3's house where the accused was residing. The contents are in favour of the accused and his signature was traced on it"

74. Having considered the arguments by the parties on the subject counts, I find that, the ingredients of the offence of forgery were highlighted by the Court of Appeal in the case of; Republic v Omar (Criminal Appeal 50 of 2018) [2023] KECA 293 (KLR) (17 March 2023) (Judgment) where it was stated that: -

> " 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."

75. Further, in the case of; Francis Bwire Omada v Republic [2006] eKLR the Court of Appeal held that: -

> " The term forgery literally means making a false document with intent to defraud or deceive. A document is false if it tells a lie about itself. (See Baigumamu v. Uganda [1973] EA 26). In Words and Phrases Legally Defined, Vol.2 D-H page 273 it is stated that a document is false, among other things,
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> "(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein."

76. In the instant matter, three documents marked as "B" "C" and "E" being; land sales agreement dated; 15th July 2004, friendly loan agreement, and a conveyance respectively were submitted to the document examiner vide exhibit memo produced as P.exh.47. The document examiner was requested to examine and compare the questioned signatures circled in red and in blue.

77. It is noteworthy that, the signature circled in red belonged to the complainant while the ones in blue were for appellant. The document examiner carried out the exercise and as per the report produced as P.exh.48, it is confirmed that the complainant's alleged signature on the questioned document was not made by her. To the contrary, the signature of the appellant thereon was made by him.

78. However, the appellant argues that, there is no evidence that these documents were found in the house where he was residing. But the respondent argues that, it is immaterial where the documents were found.

79. In my considered opinion the issue is not where the documents were recovered from nor the appellant being in possession thereof but whether the complainant's signature thereon is forged. I therefore concur with the respondent's submission that where the documents were found is immaterial.

80. Secondly, the appellant alleges that the trial court erred by inferring that, the contents of the subject documents were in his favour. I have considered the content of all the three documents and I find that document "B" (P.exh.3) is the alleged sale agreement of the complainant house to the appellant.

81. Further documents "C" (P.exh.13) is the friendly loan of Kshs 165,000,000 which was to be advanced to the appellant by the complainant and finally the document marked "E" (P.exh.2) is a conveyance to transfer the subject property from the complainant to the appellant.

82. Is it not clear from the afore going that, the appellant would benefit from all these documents? Would he then be in possession thereof? Doesn't it support the prosecution case that the documents were recovered from him irrespective of lack of the inventory?

83. The appellant further argues that the trial court should not have relied on handwriting expert as it was not conclusive. In that regard, the provision of section 48 and 77 of the *Evidence Act* (Cap 80) Laws of Kenya, relates to the same. Section 48 of the states as follows: -

> " (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
>
> (2) Such persons are called experts".

84. Further, section 77 of the Act states that: -

> " (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof".

85. Furthermore, the Court of Appeal in the case of; Kagina v Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment) stated as follows as regard expert evidence: -

> " 42 In Shah and Another vs. Shah and Others [2003] 1 EA 290 wherein Ombija, J. expressed himself on this issue, inter alia, as follows:
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> "One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct... The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance

of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

43. See also the reiteration by the High Court in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139; and Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988, that a court is entitled to reject expert opinion if upon consideration of such an opinion in conjunction with all other available evidence on the record, there is proper and cogent basis for doing so, and secondly, that a court must form its own independent opinion based on the entire evidence before it and such evidence must not be rejected except on firm grounds".

86. Further, the Court of Appeal in the case of; Mutonyi & Another v Republic [1982] eKLR the court held that:-

> " Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.
>
> Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science or art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specially skilled" in such matters.
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> So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
>
> 1. Establish by evidence that he is especially skilled in his science or art.
> 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.
>
> Judged by this standard, the expert evidence was most unsatisfactory."

87. Additionally, in the case of; Stephen Kinini Wangondu v The Ark Ltd (2016) eKLR the court stated as follows: -

> " Firstly, expert evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision. Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court

in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even a provisional one."

88. Pursuant to the afore said, statutory and case law provisions and principles, it follows that, expert evidence cannot be considered in isolation. It must be considered in the light of the facts of the case and the entire evidence. Further there must be cogent reasons for the court to reject expert evidence, as much as the court is not bound to accept it. Finally, the expert evidence once admitted forms strong case for conviction, in the absence of any other contrary or rebuttal evidence.

89. In the instant matter, the documents examiner's qualification and skill is not in issue. The report clearly indicates the method applied in the analysis of the documents submitted. It also speaks to characteristics and similarities and the natural variations noted resulting from various factors such as; sickness, age, poor eye sight etc. Similarly, peculiar characteristics in signatures is considered and the peculiar characteristics terminal considered are indicated in the report.

90. In the light of the afore, the appellant's argument that the report is not reliable as the document examiner admitted that handwriting and signature of an individual change with time is not tenable. It also suffices to note that, there is no report to the contrary or in rebuttal to the document examiners report.

91. As such, the learned trial magistrate was well guided in relying on the document examiner's report and holding that the prosecution had proved its case beyond reasonable doubt on all the three counts of forgery.

92. As regards the notice of enhancement of sentence filed by the state, I concur that the sentence meted herein was very lenient taking into account, the circumstances of this case. This is a clear case where the appellant took advantage of the complainant being; a widow, separated her from her family members, manipulated her with non-existent threats, stage managed robberies and threatened her with death if she did not cooperate.

93. In fact, by the time she was rescued she was frail and had lost her memory of events. Therefore, the non-custodial sentence was not appropriate. More so, the amount of fine imposed was not with due respect reasonable. It calls for enhancement of sentence.

94. However, the prosecution did not file an appeal after the sentence was meted out on; 6th May 2019 nor filed a cross appeal herein, when the appeal herein was in the year 2019. The notice of enhancement was served upon the respondent on 15th March 2022. Taking into account the trial commenced on; 4th October 2012 and sentence passed in the year 2019, it is now twelve (12) years after commencement.

95. In my considered opinion, it is not tenable to enhance a sentence after twelve (12) years. The accused who was 62 years old in 2019 must be heading to 70 years. I shall not therefore in the interest of justice, interfere with the sentence.

96. The resultant of the aforesaid is that, I find the appeal herein has no merit and dismiss it in its entirety.

97. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 25TH DAY OF JANUARY 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Kisaka for the appellant

Mr. Abwajo for the respondent

Ms Ogutu: Court Assistant