**Mwangi v Republic (Criminal Appeal E011 of 2024)**
**[2024] KEHC 7867 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7867 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KIAMBU**

**CRIMINAL APPEAL E011 OF 2024**

**S MBUNGI, J**

**JUNE 28, 2024**

**BETWEEN**

**CHARITY RWAMBA MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal on conviction and sentence in Criminal Case 922 of 2018 SPM Hon. M. A. Opondo)***

**JUDGMENT**

## A. Introduction

1. The appellant herein Charity Rwamba Mwangi was convicted after trial of two offences as follows;-

    1. Making a document without authority contrary to section 357 (a) of the *Penal Code*.

        Particulars were that Charity Rwamba Mwangi: on the 30th day of June 2016 at unknown place within the Republic of Kenya, jointly with others not before court with intent to defraud and without lawful authority or excuse, made a document namely Notice Of Appointment dated 30th June 2016, purporting it to be a genuine and valid document signed by Nathaniel Kanyagia.

    2. Forgery contrary to section 345 as read with section 349 of the *Penal Code*.

        Particulars were that Charity Rwamba Mwangi: on the 30th of June 2016 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Notice of Appointment dated 30th June 2016 purporting it to be a genuine and valid Notice of appointment signed by Nathaniel Kanyagia.

2. On 15th February 2024 she was sentenced to serve three (3) years imprisonment on count I and one (1) year eighteen (18) months in count II. The appellant has appealed against both conviction and sentence.

3. The appeal was canvassed by way of submissions where the respondent chose not to escalate his participation.

4. The prosecution called a total of 7 witnesses. PW1 the complainant stated that the appellant was a broker who brought him a buyer for a plot in Dandora No 1835. He did not know her before. They had agreed on a purchase price of Kshs 2,675,000/. She paid Kshs 1,605,000/ into his account and has never paid the balance to him. He was told the appellant took a note to the buyer saying that he gave alternative instructions on where to pay the balance and the buyer thus paid her the balance. He denied giving any instructions and that the Notice of Appointment was a forgery. He reported to the police when he learnt that the appellant had received the cash on his behalf. He added that she was an agent and he paid her a commission of Kshs 200,000/ for getting the buyer. He had a sale agreement with the buyer and there was no timeline to clear the balance. He recalled having an allotment letter and he never sent the appellant for any documents and he did not have anything to show that he paid her the commission.

5. PW2 an advocate stated that on 26 May 2016 he was approached by a client, Shaban Hassan Hillow, who wanted to purchase land in Komarock. He was acting for the purchaser and preparing the sale agreement. On signing they were to pay Kshs 1,605,000/ and the vendor paid to Equity bank and got the RTGS confirmation. There was an allotment letter relating to the property on sale and he acted for both parties. Afterwards he had received a letter form T. M Kuria & Co. Advocates advising them of a new address for PW1. completion documents would be released upon receipt of the balance. A notice of appointment was sent with T. M Kuria &Co. Advocates letter. They remitted Kshs 1,050,000/ to T.M Kuria& Co. Advocates. A receipt was issued from the company on 30th June 2016 where the amount paid was less Kshs 20,000/ which he deducted for previous services. He later learnt that the balance paid was never remitted to PW1and the CID asked him to record a statement, and the appellant had been arrested. She had previously visited his office with PW1 . The buyer was in physical possession and he was not aware that the allotment letter was lost. They got no undertaking from T.M but he sought the balance which they paid.

6. PW3 stated that he had asked his friend Hussein Somo to help him get a plot at Nasra Garden. On 23/5/2016 he went to see the plot No 1835, traced the owner and met at Tembo housewith Mwangi, Director and Dandora owners association. PW1 had given out all his details and Mwangi identified him, he said he had lost his allotment letter but was willing to sell. A search was done through Saad & Saad Advocates where he gave the plot details and confirmed ownership as genuine. They proceeded to PW2's office together with Hussein, the appellant and PW1 and agreed on Kshs 2,675,000/ as the purchase price and he paid 65% of the deposit being Kshs 1,615,000/ through PW2's account. On 30/5/2016 he paid Kshs 1,050,000/ to PW2 so that he could pay to the seller. While at the office the appellant had agreed that she had someone at Ardhi House who could fast track the allotment letter to come out on time. The appellant had soun=ght Kshs 25,000/ and he paid her Kshs 15,000/ via Mpesa. He reported to the DCI when he learnt that the funds never reached PW1 and the appellant could not be traced and had to be lured to be arrested after they arranged a meeting on 15/10/2017 at Ardhi house where they were to get an allotment letter.

7. PW4 an advocate stated that he was approached by the appellant and one Kihenjo as the two were known to him as real estate agents and would bring him clients for conveyancing. PW2 had prepared the documents and brought them to him after he got authority to sell them, dated 30/6/2016. He

prepared a document to confirm the information he had and notice of compliance with instructions. The notice gave him authority to receive but of the purchase price Kshs 1,000,000/ after a deposit of Kshs 1,605,000. Based on it he believed he had full authority to act and that is when he did the Notice of Appointment. The appellant had brought the instructions to him. The funds (Kshs 1,050,000/) were later deposited to him on his account on 8/07/2016 where he called the appellant and informed her about the cash receipt and he was to deduct Kshs 23,000/ as handling charges. He released the money to the appellant and Kihenjo at the Co-operative Bank tower.

8. PW5 stated that he was an accountant of kiambu- dandora farmers company and processed titles. Pw1 was a shareholder of the company and had 2 plots, he had disposed of one which he later complained that he did not receive the full purchase price after the sale through an advocate.the plot had a new survey number 1055 and was sold for over Kshs 2.6 million. They learnt that PW1 had given more instructions to have the balance paid to PW4 so they could not help. They would also give allotment letters but PW1 lost his. He had a copy which was certified and they okayed it for processing of titles. The search document dated 16/5/2016 also confirmed ownership.

9. PW6 a forensic document examiner stated that on 16/11/2017 he got an exhibit memo form accompanied by exhibits sent from DCI. he received the questioned documents and specimen signatures of PW1 to ascertain whether the signatures made in the Notice of Appointment was made by the same person in the specimen signatures of PW1. They found that the signatures were made by different persons after all considerations and did a report dated 11/12/2017.

10. PW7 an Investigating Officer stated that PW1 reported that in 2016 he intended to sell one of his properties which he had bought through Kiambu- Dandora farmers ltd. The appellant had brought PW3 to PW1. PW2 acted as the counsel for PW3, the purchaser where the purchase price was agreed at Kshs 2,675,000/. PW2 had been given instructions to prepare the sale agreement and once done transferred Kshs 1,660,000/ to the advocates account. PW4 came on record and wrote a notice to PW2 firm notifying him that PW1 had appointed them to act for him in the transcation. The notice had an instruction letter allegedly signed by PW1 attached dated 30/6/2016. Upon receiving the letter PW2 transferred Kshs 1,050,000/ through RTGS. He obtaind bank statements vide court orders then summond PW2 who gave them the notice of appointment and letter of instructions which he had received. PW1 denied appointing the firm of T.M Kuria & Co. Advocates to represent him. He tookmspecimen signatures of PW1 , prepared an exhibit memo which he forwarded to PW6. the report was that the signatures were made by different authors. They visited the office of Kiambu-dandora farmers where they recorded statement of PW5 and was given a letter dated 16/5/2016 which confirmed PW1 owned the suit properties. PW4 stated that he received instructions from the appelant and one Kihenjo, he had acted for them in previous matters and was instructed to ask for the balance. He then went ahead and handed over the money to the appelant since in the entire transcation she was a broker an dintriduced herself as the relative of the accused. The appelants account was never investigated as she was given the monmey in cash.

11. DW1 stated that she met the complainant when she was married but later separated. She stated that his grandmother left him 2 parcels of land but had no documentation and agreed that she would assist him to get titles so that he could sell the land. They were given plot numbers at kiambu-dandora farmers ltd. he was the uncle to her ex- husband. Her inlaws promised to pay her if she was succesful and thats why she decided to help them. T.M Kuria & Co. Advocates explained to her what a notice of appointment was. PW1 had been paid a down payment of the purchase price and paid the lawyer. The investigaing officer investigated the forged letters byt never asked for his sample signature or specimen writing. Her name did not appear in any of the documents and that she was only paid Kshs 20,000/.

12. It was the trial's court holding that the prosecution hasd established their case beyond all reasonble doubt tat the appelant with the intent to defraud and without lawful authority made and forged official notice of appointment.

13. The appelant faulted the trial court for failing to take into account that the appelant was convicted and sentenced on basis of a defective cahrge sheet where the second count was amennded after 6 prosecution witnesses testified, and that the prosecution failed to proved their case beyond a reasonable doubt.

**Analysis and determination**

14. It is now the onerous duty of this court to reevaluate the evidence on record and make independent conclusions. See *Okeno v Republic* [1972] EA 32. The Supreme Court of India explained the duty of a first appellate court in *K. Anbazhagan v State of Karnataka and others* Criminal Appeal No 637 of 2015 as follows:-

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

15. I have accordingly considered the evidence on record and the respective submissions. I find that the following issues arise for determination:

    a. Whether the charge sheet was fatally defective?

    b. Whether the prosecution proved its case beyond a reasonable doubt?

    c. Whether the sentence meted out was manifestly unlawful, harsh and excessive?

16. The legal burden of proof in criminal cases rests on the shoulders of the prosecution; to prove the guilt of the accused beyond reasonable doubt. Viscount Sankey L.C puts it more subtly;

> " Throughout the web of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject also to any statutory exception.. No matter what the charge or where the trial is, the principle that the prosecution must prove the guilt of the prisoner is part of common law of England and no attempt to whittle it down can be entertained."

17. The court in the case of *Republic v Ismail Hussein Ibrahim* (2018)eKLR placing reliance on the principle of burden of standard of proof and reasonable doubt in criminal cases stated that:- to give meaning to this concept of burden of proof beyond reasonable doubt in criminal cases, the federal

court of the *United States v Smith* 267 F. 3d 1154, 1161 (D.C. Cir 2001) 9 citing *In Re Winship*) 370,90 (1970) the court stated:

> " The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant;s guilt, but it does not mean that a defendant;s guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant guilty of the crime under consideration."

**Whether the charge sheet was defective?**

18. It is trite that an accused person should be charged with an offence that is known in law. A charge should also specify or spell out all the relevant information in such a manner that would enable an accused person put up an appropriate defence. This principle is premised on Section 134 of the *Criminal Procedure Code* which stipulates the manner in which a charge should drafted as follows: -

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

19. The particulars of a charge can therefore render a charge defective. I draw guidance from the Court of Appeal in *Yongo v R* [1983] eKLR where the learned judges held that a charge can be defective if the evidence adduced in its support is at variance with the offence disclosed in the charge or its particulars. They stated thus: -

> "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> i. When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein;
>
> ii. when for such reason it does not accord with the evidence given at the trial." (emphasis added)
>
> (See also *Archbold, Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53.)

20. It is my finding that the Prosecution evidence did not render the charge in question defective. Consequently, a court must consider the defects in a charge from a two-step test. First is to determine

whether the charge is defective and if so, whether such defect can be remedied. This was stated by the Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR thus:-

> "On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not."

21. Section 386 of the *Criminal Procedure Code* provides a remedy for defects in charges sheets. It states as follows: -

> "382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

22. The Court of Appeal gave guidance on determining whether a defect in a charge is fatal in *Benard Ombuna v Republic* [2019] eKLR as follows:-

> "In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence." (emphasis added)

23. Similarly, the Supreme Court of India in *Willie (William) Slaney v State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], held that:-

> "Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

24. A close perusal of the charge sheet shows that the second count was amended to include the the offence and the punishment for the offence of forgery which was not earlier indicated. The previous charge sheet count II thus read;- forgery contrary to section 350 of the *Penal Code*. I find that this does not prejudice the appelant since she she escalated to participate in the defence of her case and the charge sheet was amended before the close of prosecution case.

25. Section 349 of the *Penal Code* provides as follows:

> "Any person who forges any document 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."

26. Clearly, this Section provides for the punishment for forgery. The offence is created by Section 345 of the *Penal Code* which defines forgery and identifies the ingredients of the offence as follows:-

> "Forgery is the making of a false document with intent to defraud or to deceive."

27. . On this issue, we start with first principles, which is that our law provides that a charge or information must contain the offence or offences with which an accused person is charged. This is provided for in Section 134 of the *Criminal Procedure Code*.

28. However Section 134 of the *Criminal Procedure Code* is also clear that the charge as sufficient of a statement of the specific offence with particulars as may be necessary "For giving reasonable information as to the nature of the offence charged". The focus of the section is that the accused person must not be prejudiced or impeded in understanding the case he or she must face so they can defend themselves.

29. The argument suggest that the Charge Sheet should have contained the offence in "Section 345 as read with Section 349" which is the common way for this charge to be made. The point has been dealt with by the decisional law of our courts in such serious cases as those of robbery with violence where the outcome is capital punishment. The Court of Appeal in *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR and *Joseph Onyango Owuor & Cliff Ochieng Oduor v Republic* [2010] eKLR has provided the principles that Section 137 of the *Criminal Procedure Code* on form and content of a charge will be complied with if:

    1. the charge is under a section creating the offence, and

    2. that charge discloses or explains the ingredients for that offence which the accused needs to know so as to appreciate the offence he is facing and prepare his case in defence.

30. Taken as a whole, I think that the objects of Section 137 of the *Criminal Procedure Code* were met in the framing of the charge. The charge was therefore not fatally defective nor is it shown that the appellant was prejudiced or did not know she was defending herself against charges of forgery of the notice of appointment. This ground of appeal therefore fails.

31. In a case of forgery the prosecution must establish and prove that the accused person knowingly and fraudulently uttered a false document in writing or counterfeit seal knowing the same to be false, forged or altered in order to deceive, injure or defraud another or to gain unfairly or reap some benefit. It was argued that the allegation that the appellant either forged or made the notice of appointment without authority cannot stand since there was no evidence that she made the alleged document. All that was produced in evidence was the letter of notice of appointment and the forensic report that was adduced showed that the signature was authored by a different person not the complainant PW1 Nathaniel Kanyagia. The accused samples were not taken to establish clearly indeed that she was the sole maker of the document herein in question. It is my considered view that the document itself is not a sham but the signature affixed on the document is the bone of contention. Who authored the signature? The prosecution did not establish the maker of the signature rather ciuntered it to show that PW1 was not the one who affixed his signature therein. There is mo nexus showing the accused indeed was the maker of the signature affixed that is being contested.

32. In the case of *Elizabeth Achieng Nyanya v Republic* HCCRA No 123 of 2017 (Siaya) where it was stated:

> " The operative word here is forgery, as the word suggests the name forgery means fake i.e. not real. The Black's Law Dictionary, 9thedition defines it as the act of fraudulently making a false document or altering a real one to be used as a genuine.

33. In the Nigerian case of *Alake v The State* the court listed the following as the ingredients of the offence of forgery:-

    i. That there is a document or writing;

    ii. That the document or writing is forged;

    iii. That the forgery is by the accused person;

    iv. That the accused person knows that the document or writing is false;

    v. That he intends the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine."

34. the cases of *Patrick Njuguna Richu v R* [2018] eKLR and *Joseph Wanyonyi Wafukho v R* [2014] eKLR. Both cases cite the definition of forgery set out in *R v Dodge and Harris* (1971) 2 ALL E.R. 1523 where it was stated:

> " A document is false must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: *Omar Bin Salem v R* (1950) 17 EACA 158, and to defraud is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see (*Samuel v Republic.*)"

35. There must be proof beyond reasonable doubt that the actus reus, the act of forgery, or an omission resulting in the forgery, was effected specifically by the appellant. From the evidence, there can be no doubt that, as affirmed by PW6, the signature on the notice of appointment was not that of PW1. This was confirmed by the forensic examination. Thus the document satisfies the criteria for forged document. However, it is not clear from the evidence who forged the document. The charge alleges that the appellant forged the document. This cannot be for fault must be proved to lie.

36. Forgery is the making of a false document (Sec 345 PC). The making of a false document is clearly described under section 347 (a) to (g) of the *Penal Code* which highlights the actus reus, the actions that constitute making a false document. They include:

    a. Making a document;

    b. altering a document;

    c. introducing matter into a document;

    d. signing a document;

    e. fraudulently making or transmitting an electronic record; affixing a digital signature; making any mark denoting the authenticity of a digital signature;

    f. fraudulently cancelling or altering an electronic document;

g. fraudulently causing a person to sign, seal or execute or alter a document.

37. None of these actions were demonstrated by the evidence availed by the prosecution. Accordingly, the charge of forgery or making a false document was not proved to the required standard. This ground of appeal succeeds.

38. The charge under Section 357(a) of the *Penal Code* fails for the same reasons as the previous charge discussed above. Section 357(a) provides:

> " 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;? (Emphasis supplied).

39. The elements of the offence require that there is proof that the accused person made or signed or executed the notice of appointment for or in the name of or on account of another person. As already noted, the evidence of the act is not availed. In the present case PW4 alleged that the accused in the company of one Kihenjo approached him to make a notice of appointment to act for PW1 in the transaction for payment of the purchase price balanceof Kshs 1,070,000/ pursuant to the sale agreement.

40. I cannot belabor in restating the fact that the appellant in presenting the instructions of notice of appointment to PW4 knew the same to be false and she so did it with the intention of deceiving so that the payment of the purchase price balance could be effected to her. However, a key element herein is the proof that the document was made by another person. In this case, I have not found that it is either the appellant who made the false instructions notice of appointment or aided in the making of the same which vitiates the proof of this key element. Her conviction in this count was not safe.

41. Making a document without authority contrary to section 357(a) of the *Penal Code* is not of itself an offence. It is merely the actus reus of the offence of forgery defined in that section 357. The mens rea is the intent to defraud or deceive mentioned in the definition of forgery under section 345 aforesaid. Intent to defraud is more particularly explained in section 348 of the *Penal Code*. It is axiomatic that mens rea of itself does not constitute an offence. The offence is completed when there is also the actus reus. The convictions cannot stand and are hereby set aside.

42. The appelant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED, DELIVERED AND SIGNED VIRTUALLY THIS 28TH DAY OF JUNE 2024 AT KAKAMEGA.**

**.....**

**BY S. MBUNGI J**

Appearances

1. Appellant

2. Respondent

3. Court Assistant