



Case Number:	Criminal Appeal 1112 of 1982
Date Delivered:	03 Mar 1983
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	John Henry Sydney Todd
Citation:	Joseph Mukuha Kimani v Republic [1983] eKLR
Advocates:	PS Gatimu for Appellant, FH Nabutete for Respondent
Case Summary:	<p style="text-align: center;">Joseph Mukuha Kimani v Republic</p> <p style="text-align: center;">High Court, at Nairobi March 3, 1983</p> <p style="text-align: center;">Todd J</p> <p style="text-align: center;">Criminal Appeal No 1112 of 1982</p> <p>Criminal Practice and Procedure - witnesses - charge of uttering false document - person named in the charge as the one to whom the document was uttered not called as witness - whether failure to call such person as a witness fatal to appellant's conviction - Criminal Procedure Code (cap 75) Second Schedule</p> <p>Criminal Practice and Procedure - charge - form of - contents of - charge of uttering false document - name of the person to whom the document was uttered the wrong one - effect of - whether such misnomer occasioning failure of justice - Criminal Procedure Code (cap 75) section 382.</p> <p>Sentencing - severity of sentence - offence of uttering false document - sentence of two years' imprisonment - whether sentence manifestly</p>

excessive.

The appellant was charged with two counts of forgery and one count of uttering a false document. After trial, he was convicted on all counts and sentenced to concurrent sentences of two years' imprisonment on each of them. The person to whom, according to the charge, the uttering of the false document had been made was the wrong one and in fact the person actually named was never called as a witness at the trial. The prosecution's case and the evidence, however, which was not disputed by the appellant, identified the person to whom the utterance had made. The appellant appealed against both the convictions and the sentences.

Held:

1. The fact that the person to whom the forged document was said to have been uttered by the appellant was not called as a witness was not by itself fatal to the appellant's conviction (*R v Yonasani Egalu & Others* [1942] EACA 65).

2. On a charge of uttering a false document, it is not fatal to omit the name of the person to whom the utterance is made in the particulars of the charge and the naming of the wrong person in the particulars of the charge is not fatal if it does not occasion injustice.

3. The sentence of two years' imprisonment for the offence of uttering a false document was manifestly excessive.

Appeals against convictions for forgery allowed. Appeal against conviction and sentence for uttering a false document dismissed.

Cases

1. *R v Yonasani Egalu & Others* [1942] EACA 65
2. *Okeno v Republic* [1972] EA 32

Statutes

1. Penal Code (cap 63) section 349, 353

	2. Criminal Procedure Code (cap 75) section 382, Second Schedule Advocates <i>PS Gatimu</i> for Appellant <i>FH Nabutete</i> for Respondent
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeals against convictions for forgery allowed. Appeal against conviction and sentence for uttering a false document dismissed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 1112 OF 1982

JOSEPH MUKUHA KIMANI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant Joseph Mukuha Kimani was charged on two counts of forgery contrary to section 349 of the Penal Code (cap 63) and one count of uttering a false document contrary to section 353 of the Penal Code and after trial he was convicted of all three offences and sentenced to two years' imprisonment on each of all the three offences to run concurrently, from which convictions and sentence he now appeals to this court.

Upon a perusal of the file I am unable to find any evidence against the appellant pointing to his guilt on the two counts of forgery and as learned state counsel does not support the convictions of forgery the appellant's appeals therefore, are allowed and the two convictions of forgery entered against the appellant are quashed and the sentences imposed thereon are set aside. As regards the count of uttering a false document, there is no doubt whatsoever that the National Trade Test Certificate grade II being

Ex 1 which the appellant uttered or caused to be uttered to James Orony Opiyo for the purpose of being promoted from a grade III mechanic to a grade II mechanic is indeed a forgery.

The particulars of the offence of uttering a false document brought against the appellant are that:

"On March 5, 1981 at Kahawa Garrison, within the Nairobi area he knowingly and fraudulently uttered a certain forged Trade Test Certificate No 65092 to Joseph Zimi, purporting it to be a genuine Trade Test Certificate signed by James Orony Opiyo."

Let me say at once that Joseph Zimi was never called as a witness at the trial of the appellant, which I think by itself need not be fatal to the prosecution case because of what was said in the case of *R v Yonasani Egalu & Others* [1942] EACA 65.

"By section 243(3)(v) (Uganda) Criminal Code the use of those forms set out in the second schedule to the Code is obligatory and any variation from the wording of those forms may in certain circumstances be fatal." It is observed in our second schedule to our Criminal Procedure Code there is a specimen charge of uttering a false document as follows ...

"Uttering a false document contrary to section 353 of the Penal Code.

PARTICULARS OF OFFENCE

AB, on the... day of ... 19 ... in the ... District within the province, knowing and fraudulently uttered a certain forged will purporting to be the will of CD.”

It will be noticed that no reference is made to the person to whom the forged will is uttered, so it seems to me that it does not matter whether or not such person is named or not in the particulars of the charge as really it is only verbiage. It is clear from the recorded evidence that the forged certificate Ex 1 was uttered by the appellant to Philip Bernard Omar (PW 4) towards the end of February, 1981 so therefore in accordance with the prosecution case and upon the evidence it produced and which is not denied and not disputed by the appellant that the certificate Ex 1 was uttered by him to Philip Bernard Omar for the purpose of the appellant being promoted from a grade III mechanic to a grade II mechanic so that the naming of a wrong person in the particulars of the charge did not in fact occasion any failure of justice *vide* section 382 of the Criminal Procedure Code. It is recorded in the evidence of James Orony Opiyo (PW 2) a motor-vehicle examiner that after he had checked his records he found that the appellant had been tested by him on May 28, 1980 and he had failed.

John Okote Wambuko (PW 5) who is the officer-in-charge of the grade testing section and in charge of all examinations testified that when candidates have been examined he finally looks to the files and sends the results to the candidates and who pass and then starts preparing the certificates while for those who fail he informs them accordingly that they did not do well in the examination. After describing the procedure the witness said after the certificates are signed they are brought to his office for dispatch. Letters are written advising the owners that certificates are ready for collection and in the Nairobi area they are collected from the witness's office. As I have said and as testified to Ex 1 the certificate is clearly a forgery, but what the trial magistrate had to decide and what I also have to decide is whether the appellant knew it was a forgery and fraudulently uttered it knowing it was a forgery to obtain a position as a grade II mechanic when in truth and in fact he was not entitled to such a position as he had failed in his examination. The appellant in his statutory statement from the dock said ...

“I sat for my examination and passed and I was given a document but it got lost with all my documents. I have the abstract form (produced and marked D1) I paid for it (Receipt No V 36907 dated March 12, 1981 produced and marked D2). This is to show that I had no documents. If forgery was done I was not aware. It was done in their office. I went and collected my certificate and signed for it. They are the ones who messed up as I passed. That is all I have to say.”

It will be observed that the certificate produced by the appellant Ex 1 is numbered 65092. John Okote Wambuko (PW 5) produced as Ex 10 a National Trade Test Certificate grade I No 65092 issued in the name of Peter Otieno Obura and bearing a photograph of a man who in no way looked like the photograph of the appellant in the forged certificate Ex 1.

Making my own assessment of the recorded word as I am required to do *vide* the case of *Okeno v Republic* [1972] EA 32 at page 36 I do not believe the appellant's claim that he had passed his grade II test as claimed by him in view of the evidence of James Orony Opiyo (PW 2) which I believe that the appellant in truth and in fact failed his test. I also believe the evidence of the other prosecution witnesses and I have no doubt that when the appellant uttered the forged certificate to Philip Bernard Omar (PW 4) he knew perfectly well that it was a forgery and he did what he did to fraudulently obtain a position as a grade II mechanic when he was not entitled to such a position. Accordingly the appellant's appeal against conviction is dismissed as also is his appeal against sentence as I do not find that the sentence of two years' imprisonment for the offence which the appellant committed, namely uttering a false document contrary to section 353, is manifestly excessive.

Dated and Delivered at Nairobi this 3rd Day of March, 1983

J. H. S. TODD

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JUDGE



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