



**Republic v Awke (Criminal Appeal 003 of 2023)
[2024] KEHC 16675 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL 003 OF 2023
JL TAMAR, J
SEPTEMBER 30, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

ABDULHAMID SALEH AWKE RESPONDENT

*(Being an appeal from the judgement of Hon B.
Cheloti SRM in CMC Criminal Case No. 509 of 2017)*

JUDGMENT

1. The respondent herein Abdulhamid Saleh Awke was charged in the magistrate court Kajiado with two counts; Count 1. Conspiracy to commit a felony contrary to section 393 of the penal code. The particulars were that on diverse dates between the 3rd day of June 1998 and 6th day of October 2015, at Kajiado County Government land Registry, within Kajiado County with others not before the court, jointly conspired to commit a felony namely Obtaining Land Registration by False pretences and subsequently managed to fraudulently register land plot no 20B-Ngong Township to his name.
2. Count 2. Forgery of document of title to land (plot allotment letter) contrary to Section 350 (1) of the Penal Code. The particulars were that on 3rd day of June 1998 at unknown place within the Republic of Kenya, jointly with others not before the court, wilfully and unlawfully forged an allotment letter reference no.153521(165664/4) in plot number 20B-Ngong Township, purporting to be rightly entitled to it.
3. The accused was also charged with an alternative to count 2. Intemeddling with the free property of the deceased person contrary to Section 45 (1) As read with section 45 (a) (b) of the *Law Of Succession Act*, Cap 160 Laws of Kenya. The particulars were that on diverse dates between 3rd day of June 1998 and 6th day of October 2015, at Kajiado County Government land registry offices, within Kajiado County, jointly with others not before the court, wilfully and unlawfully intermeddled with



the deceased persons free property, to wit, one Plot No 20B- Ngong Township, the free property of the late Sala Awke who died domiciled in the Republic of Kenya on 16th February 1965, the plot valued at ksh. 20,000,000/=

4. After the trial and hearing seven prosecution witnesses, the court determined that the prosecution had not established the charges against the accused beyond reasonable doubt and acquitted him under section 215 of the criminal procedure code. It is against the order acquitting the accused person that the state preferred this appeal setting out six grounds as follows;
 - i. That the learned magistrate erred in law and fact in acquitting the accused person under section 215 of the criminal procedure code while the evidence presented proved the prosecution case beyond reasonable doubt
 - ii. That the learned magistrate erred in misdirecting herself to fail to determine the issues placed before her being two criminal charges of offence of conspiracy to commit a felony contrary to section 393 of the penal code and forgery of document of title to land contrary to section 350 (1) of the penal code
 - iii. That the learned magistrate erred in law and in fact by failing in her judgement to address herself on the overwhelming evidence that was given by the witnesses to support the charges
 - iv. That the learned magistrate despite having found that the accused had a case to answer, proceeded to acquit the respondent without addressing herself on the evidence for the two offences facing the respondent.
 - v. That the learned magistrate erred in law and fact by misconstruing the charges presented and making a finding that the same was a family issue despite there being overwhelming evidence.
 - vi. That the learned magistrate erred in addressing herself to the issues that were beyond her jurisdiction and were not part of the charges that were presented
5. I am required as a first appellate court to revisit and re-evaluate the evidence afresh, assess the same independently and make my own conclusions bearing in mind the limitations inherent in the appellate process that I neither saw nor heard the witnesses testify, and cannot therefore comment on their demeanour an important aspect in a criminal trial. See *Okeno vs Republic* [1972] E.A 32.

The evidence

6. The accused person, AbdulHamid Saleh Awke, Pw1 Mariam Saleeh, Pw2 Katum Saleeh Awke and Dw2 Hassan Salee Awke are all siblings and children of the late Sale Awake who died in 1965 leaving behind some properties that would otherwise devolve to them as beneficiaries of their deceased father upon succession. Some of the landed properties identified as belonging to their late father include Plot no 20B and Plot no 17B -all in Ngong township. PW1 Mariam saleeh and Pw2 Katum saleeh Awke told the trial court that a search at the land registry Kajiado indicated that the two properties were registered in their late father's name. It was also established that in the succession cause filed at the Khadi's court Nairobi, plot no 20B Ngong township was excluded from properties forming the estate of their deceased father.
7. The accused claimed ownership of the property and had deponed an affidavit to that effect. They sought to have the property revert to the estate but the accused person refused. consequently, the matter was reported to the police, investigations commenced and leading to the arrest and arraignment of the accused in court.



8. According to the County Government of Kajiado vide letter dated 04 April 2017 in response to a query from the County Criminal Investigation Officer, the two plots were in the name of Sala Awke (deceased) as the Original allottee. An allotment letter dated 10th February 1993 (exh 1) was produced evidencing this fact.
9. The prosecution case was that the accused person while aware that plot no 20B was registered to his late father's name, conspired with others to have the property registered in his name with the intention of having the said property removed as part the estate of the deceased and had it fraudulently registered in his name to the disadvantage of the other beneficiaries. An allotment letter in favour of the accused person dated 3rd June 1998 was produced and marked as exh.2.
10. PW5 Bernard Cheruiyot Chief Inspector of police and a document examiner of over seven years of experience examined the allotment letters dated 3rd June 1998 and the one dated 10th February 1993 with the known signature of SN Osodo who signed for commissioner of lands to ascertain whether the question signature were made by the same person. The examination established that the signatures appearing in the two letters were made by two different authors.
11. Phillip Murkurkur PW6 an employee of County Government of Kajiado confirmed that according to the records held at the County Land Registry, the original allotment letter dated 10th February 1993 in respect of Plot no 20/B is in the name Saleh Awke. Further that according to the records held the property had never been transferred to any other party. He told the court that the allotment letter dated 3rd June 1998 in favour of the accused person is not supported by the records held at the County Land Registry.
12. The accused in his defence admitted that plot no 20B Ngong Township was initially allocated to his late father but that the same was subsequently cancelled to avoid some confusion regarding overlapping with other plots such as plot no 17 and 19. Subsequently and on application by the accused, the plot was allocated to him vide letter dated 9th April 1998. After the plot 20 B was allocated to him vide allotment letter dated 3rd June 1998, he started making land/rent rates payments. The accuse further contend that the property under dispute is subject of civil proceedings in Ngong SPM ELC NO 18 OF 2002 in which one Josephat Thuo is laying claim to the said property and that the property cannot be declared to be part of the estate of their deceased father.

Parties Submissions

13. I have read and found useful the submissions by the state as well as those filed by Mr. E.J. Mutemi counsel appearing for the complainant. The respondent in this appeal did not file any submissions, but I have read the submissions filed in the lower court and have taken that into considerations in this judgement.

Analysis and Determination.

14. The following are in my view are issues for determination as discerned from the proceedings in the lower court as well as the present appeal.
 - I. Whether the prosecution proved its case beyond reasonable doubt
 - II. Whether the trial court erred in law and in fact in finding that the Respondent was not guilty of the offences for which he was charged.
 - III. Whether the magistrate erred in law and fact by failing to determine the issues placing before her.



a. On whether the prosecution proved its case beyond reasonable doubt: count one and two

15. The first count in which the respondent was charged and acquitted was the offence of conspiracy to commit a felony contrary to section 393 of the penal code. The section provides that;

any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to the lesser punishment'

16. To establish a charge of conspiracy, the prosecution needs to lead evidence demonstrating that the respondent with others, by his actions committed the offence with which he is charged. There must be a meeting of mind between the respondent and the other conspirators. (see Republic vs Anne Atieno Abdul & others [2017] eKLR.

17. There must also be a common intention by two or more persons to commit an offence as set out in section 21 of the penal code which provides that;

Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in prosecution of such purpose an offence is committed of such a nature that its commission was probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence'

18. In the present appeal, the appellant contends that the respondent with others not before the court, jointly conspired to commit a felony namely obtaining Land Registration by false pretence. The prosecution argues that plot no 20B Ngong- Township form part of the estate of Saleh Awke (Deceased) but the respondent with others had the property allocated to himself to the detriment of the other beneficiaries. An allotment letter dated 10th February was produced as exhibit. And to show that the respondent committed the offence, the prosecution produced an allotment letter dated 3rd June 1998 in the name of the accused person. But with whom did the accused person conspire to commit the offence and obtain land registration by false pretence? In the particulars of the charge in count one, the accused is said to have conspired with others not before the court to commit an offence. The prosecution must therefore demonstrate by cogent evidence the involvement of any other person especially in this case where the respondent was charged alone. Halsbury's laws of England vol.25 notes as follows;

It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show a meeting of the mind, a consensus to effect an unlawful purpose'

19. There is no other person adversely mentioned or indicted by the prosecution either in County of Kajiado Land Registry or in the Commissioner of Land office at Ardhi house that is said to have formed the intention with the respondent to commit the offence with which he is charged. According to the evidence of the document examiner, the two letters of allotment bears two different signatures, one dated 10th February 1993 bearing the genuine signature of Osodo and the one of 3rd June 1998 having different signature. Samples of the accused handwriting and his known signature were not taken by the prosecution for purposes of establishing whether the signature appearing on the letter of allotment dated 3rd June 1998 were his or not. The failure by the prosecution to subject the respondent



handwriting for forensic examination and analysis to determine whether the accused person was the one who made the document or not therefore means that the offence of forgery as charged cannot stand.

20. I therefore agree with the respondent that the prosecution has not proved the charges in count one and two to the required standard.

b. On the issue whether the magistrate erred in law and in fact in failing to determine the issue before her, I entirely agree with the appellant in that respect.

21. The learned magistrate determined that the land in question revolved around family feud following the demise of the father to both the accused and the complainant and directed that the matter be resolved by the Environment and Land Court. The court further found that it was difficult to determine who the legitimate owner of plot no 20 B is considering the two letters of allotment.
22. With respect, the observations by the learned magistrates were not based on the issues that fell for determination. The magistrate ought to have specifically pronounced herself on each of the counts either way and in particular whether or not the accused had conspired with others to commit the offence in count one and whether he had forged a document of title to land in count two as contended by the prosecution. The fact that the parties in a criminal trial are related does not remove it from the criminal jurisdiction of the trial court. In any event the proceedings indicated that the attempt to have the matter resolve outside the criminal justice system had failed.
23. Where the trial court finds that the prosecution has established a prima facie case against an accused person to warrant his being called to offer an explanation, the court is under a duty to appraise the entire evidence and arrive at a logical conclusion supported by the evidence. To acquit an accused person without any objective analysis of the evidence as was done in this case, and after placing the accused on his defence is to err in law and in fact.
24. There is however, evidence that the respondent while aware that plot no 20B Ngong Township was in his deceased fathers name actively participated to have the same changed, cancelled and allocated to himself. He told the court that he had applied to be allocated the plot and thereafter started paying land and rent rates and was in the process of acquiring title to it. It is not therefore by coincidence that the plot the respondent allegedly applied for bears the same parcel description number as the plot originally allocate to his deceased father.
25. The power of the High Court in dealing with appeal against acquittal is provided for in section 354 (3) (c) which provides as follows;

The court may in an appeal from an acquittal,... hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, remit the matter with the opinion of the high court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the high court may think necessary, and make such other order in relation to the matter, including an order as to cost, as the high court may think fit.’

26. I have independently evaluated the evidence on record and found that the charges against the respondent in counts one and two has not been proved beyond reasonable doubt and therefore affirm the determination of the subordinate court acquitting the respondent in the two counts.
27. However, in regard to the alternative count of intermeddling with the free property of the deceased person contrary to section 45 (1) as read with section 45 (a) (b) of the [Law of Succession Act](#), cap 160



laws of Kenya, I find the respondent guilty as charged and Convict him accordingly. As this court has reversed the finding of the lower court acquitting the respondent in all counts and has convicted him in the alternative count, he shall be required to enter his plea in mitigation for sentencing in the subordinate court.

28. I therefore order that this file be forwarded to the chief magistrate and the respondent be summoned to appear before the court for mitigation and sentence hearing.

DATED AND DELIVERED AT KAJIADO THIS 30TH DAY OF SEPTEMBER 2024.

J.T. LOLWATAN

JUDGE

