



REPUBLIC OF KENYA



KENYA LAW
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**Nasieku v Republic (Criminal Appeal E009 of 2023)
[2024] KEHC 15865 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E009 OF 2023
DR KAVEDZA, J
DECEMBER 18, 2024**

BETWEEN

NASINKOI ENE NASIEKU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence imposed by Hon. C Mwaniki (P.M) on 25th September 2023 at Kibera Chief Magistrate's Court Criminal Case No. 366 of 2014 Republic v Nasinkoi Ene Nasieku & 2 Others)

JUDGMENT

1. The appellant was charged and convicted on several counts of offences: Forgery contrary to section 350(1) of the *Penal Code*; Uttering a false document contrary to section 357(b) of the *Penal Code* and Obtaining a false registration contrary to section 320 of the *Penal Code*. She was sentenced to serve 5 years, 3 years, and 6 months imprisonment respectively. The sentences are running concurrently.
2. Aggrieved, the appellant filed an appeal challenging her conviction and sentence. The appellant challenged the totality of the prosecution's evidence against which she was convicted. The appellant argued that the prosecution evidence did not prove the charge to the required standard. She urged the court to quash her conviction and set aside the sentence imposed.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).
4. The prosecution evidence was as follows: Simon Ndungu Supeyo (PW1) recounted his story, beginning in 1938 when he was born. Together with his brother, Tumpes Sumpeyo he jointly owned a parcel



- of land Ngong/Ngong/845. In 1976, they resolved to share the land equally. This decision, however, would lead to decades of disputes and challenges.
5. Joseph Chrispus Sumpeyo (PW3), son of Tumpes, stated he was born in 1958 and inherited his father's share of the land following Tumpes' death in 1996. In 2008, he instituted a succession cause and was issued a certificate of confirmation of grant on 25th November 2010. This formalised the division of Ngong/Ngong/845 between PW1 and PW3, resulting in PW1's portion, Ngong/Ngong/41726 (16.77 hectares), and PW3's, Ngong/Ngong/41727 (15.58 hectares). PW3 received his title deed on 27th September 2011.
 6. However, the family's legal ownership did not equate to physical possession. PW1, PW2 (Thomas Santera Supeyo, PW1's son), and PW3 testified that since the 1980s, they had been unable to enjoy the land. The family of Mzee Karkise Mosiro, owners of the neighbouring parcel Ngong/Ngong/846, persistently claimed ownership over portions of Ngong/Ngong/845. This encroachment was at the heart of disputes that had escalated over time.
 7. PW1 recalled that as early as 1976, he and his brother required a police escort to delineate the boundaries of their land. In 2006, PW1 attempted to establish a building on the land, but it was destroyed by a large group led by the Mosiro family, including the 2nd accused (Elijah Mosiro). PW2 testified to witnessing the attack, which involved the theft of construction materials and an assault on him and others. The matter was reported to the police.
 8. Following the issuance of his title, PW1 subdivided his share among his five children, including PW2. When they visited the land, they discovered new beacons already in place, suggesting fraudulent interference. Alarmed, PW1 reported this to the authorities, prompting an investigation led by Chief Inspector Wilson Koech (PW12).
 9. PW12 delved into historical records of parcels Ngong/Ngong/845 and 846, accessing microfilms from the Kenya National Archives. He confirmed that Ngong/Ngong/845, measuring 80 acres, had been registered in 1968 under Simeon Ole Supeyo and Karangu Ole Supeyo, while Ngong/Ngong/846, at 338 acres, was registered under Kuriti Ole Mosiro, Karikise Ole Mosiro, and Kapoya Ole Mosiro. His findings revealed that Ngong/Ngong/846 had been improperly subdivided into Ngong/Ngong/20075, resulting in significant encroachment onto Ngong/Ngong/845. A fraudulent mutation form facilitated this process.
 10. Land Surveyor David Ndegwa Ndungu (PW8), tasked with surveying Ngong/Ngong/845 under a court order in 2012, confirmed the encroachment. His analysis showed that Ngong/Ngong/846 overlapped Ngong/Ngong/845 entirely. Errors on the mutation form were apparent, including inconsistencies in the acreage. The title deed for Ngong/Ngong/20075 indicated 24.83 hectares (approximately 60 acres), yet the mutation form inaccurately allocated 130 acres across 43 plots.
 11. The mutation form was attributed to Surveyor Benson Meshack Okumu (PW6), but he denied involvement. Summoned by the Directorate of Criminal Investigations (DCI) in 2013, PW6 refuted the authenticity of the signature attributed to him. Forensic document examiner Chief Inspector Alex Mwongera (PW9) corroborated PW6's claims, confirming the signature on the mutation form did not match PW6's verified samples.
 12. Further discrepancies emerged regarding thumbprints on the mutation form, purportedly belonging to Rangina Ole Mosiro and Marituai Karingithe. Fingerprint specialist Bernard Wanjohi Taiko (PW4) analysed the thumbprints and concluded they did not belong to the named individuals. Instead, one thumbprint matched the appellant's left-hand thumbprint, directly implicating them in the fraudulent transaction.



13. Retired Lands Registrar Daniel Masika Kyule (PW7) testified about the approval process for the mutation form in 2010. Although he noted acreage discrepancies, his concerns were dismissed by the district surveyor. PW7 stated he reluctantly approved the form but maintained that Ngong/Ngong/20075 measured only 24.83 hectares.
14. In her defence, the appellant denied forging mutation form serial number 3xxxx2, asserting it was distinct from the form with serial number 3xxxxx2 presented in court. She disputed the fingerprint evidence in Exhibit 25, claiming it was not hers, and emphasized she was neither a surveyor nor had ever worked as one. She acknowledged the existence of parcel Ngong/Ngong/20075, which she identified as belonging to Regina Ole Mosiro, maintaining that the mutation document was legitimate.
15. The 2nd accused highlighted discrepancies between the mutation form serial numbers in the charge and the evidence presented. He denied any involvement in the alleged theft of the complainant Supeyo's property. He testified that parcel Ngong/Ngong/20075 belonged to his father, Karikise Ole Mosiro, and stated his name and signature did not appear on the questioned mutation form.
16. The 3rd accused also pointed out the inconsistency between the charges and the evidence regarding the mutation form serial numbers. He denied the allegations in Count III, stating that the title documents in question originated from Ngong/Ngong/20075, a property belonging to his parents, which was inherited by him and his 30 siblings. He noted that none of the title documents arising from this parcel were presented in court and argued that no other sibling was implicated.
17. After a full trial, the trial court acquitted the 2nd and 3rd accused of all charges and convicted the appellant.
18. In counts I the appellant was charged with the offence of forgery. The offence of forgery is created and declared by section 349 of the [Penal Code](#) in the following terms –

Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.
19. Forgery is defined in section 345, as “the making of a false document with intent to defraud or deceive.” Section 347 deals with making of a document while section 348 defines intent to defraud. The prosecution was required to prove that there was a forgery of the mutation form in issue to the sub-division of the parcel of land.
20. From the record, Surveyor Benson Meshack Okumu (PW6) testified that he did not conduct the survey nor sign the mutation form, despite the form purporting to bear his signature. He denied the signature as his and provided a sample for comparison for forensic Analysis of Signatures. The forensic document examiner Chief Inspector Alex Mwongera (PW9) analysed the signature on the mutation form and confirmed that it did not match PW6's sample signature.
21. Fingerprint expert Bernard Wanjohi Taiko (PW4) examined the thumbprints on the mutation form. While they purportedly belonged to Rangina Ole Mosiro and Marituai Karingithe, he found that one thumbprint matched the appellant's left-hand thumbprint.
22. Collectively, these evidential components establish a substantial link between the appellant and the alleged offence of forgery, indicating intentional participation in the fraudulent transfer of property. This implicated the appellant in the preparation of the allegedly forged document passing it as genuine. The conviction on count I was therefore safe and is affirmed.



23. In count II, the appellant was convicted for the offence of uttering a false document contrary to section 357(b) of the *Penal Code*.

Making documents without authority Any person who, with intent to defraud or to deceive

—

- (a) without lawful authority or excuse makes, signs, or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or
 - (b) knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.
24. The elements of the offence require that there is proof that the accused person(s) made, signed, or executed the document in issue in the name of or on account of another person. As already noted, the evidence of the act was availed by the prosecution.
25. In *Dennis Binyenya v Republic* [2018] eKLR Ngenye, J (as she then was) was satisfied that the offence under Section 357(a) had been proved in a case where the appellant had presented a KCSE certificate that had been forged. The learned Judge set out the ingredients of the offence as follows:

- “27. From the definition, the offence constitutes the following ingredients;
- i. proof of the making, signing, or execution of a document and that the same was done by the accused,
 - ii. proof that the making, signing or execution was without lawful authority or excuse, and
 - iii. proof that the making, signing and execution was with the intention to defraud or deceive.

She then explained her reasoning:

- “28. It was clear that the Appellant was a candidate during the 2003 KCSE examinations and he was therefore not authorized or was in a position to issue his own certificate. From the particulars of the offence [it] was not disclosed where the certificate was made and with whom the Appellant had produced the certificate. But it is doubtless that the certificate was received from the Appellant and submitted for purposes of his recruitment to join the disciplined forces. The same was thereafter forwarded to the Kenya National Examinations Council for verification. At the Council, the document was found to differ from the information produced by the Council leading to the conclusion that the grades in the individual subjects as well as the mean grade were altered. Undoubtedly then, the certificate held false information regarding the grades attained by the Appellant as can be clearly seen from comparing them with the grades apparent in Exhibit 3. This alteration of the results meant that the certificate was not a genuine document. This leads to the inference that the Appellant was either involved in the alterations or procured the making of the alterations.”



26. In the present case, the mutation appeared like they were made with the authority of the owners of the land which was disputed. The evidence was therefore adequate to prove the ingredients of the offences in counts II. The conviction is affirmed.
27. In count III, the appellant was convicted for the offence of obtaining registration by false pretences contrary to section 320 of the *Penal Code*.
320. Obtaining registration, etc., by false pretence
- Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence, or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.
28. It was the prosecution's evidence that the subdivision of Ngong/Ngong/846 was carried out based on a fraudulent mutation form, which encroached onto Ngong/Ngong/845. As earlier stated PW6 denied preparing or signing the mutation, indicating the use of false documents to secure registration. The mutation form also falsely represented the land's size. While the title deed for Ngong/Ngong/20075 indicated 24.83 hectares, the mutation form incorrectly listed it as 130 acres, further supporting fraudulent registration. Forensic analysis revealed that the signatures on the mutation form did not match those of the claimed signatories, including the appellant's thumbprint, further indicating falsification.
29. These discrepancies and fraudulent actions show that the registration of Ngong/Ngong/20075 was obtained through deceit and misrepresentation, constituting obtaining registration by false pretences. The appellant's conviction in count III is also affirmed.
30. The appellant was sentenced to three (3) years, five (5) years and 6 months for counts 1, II and III respectively. The trial court considered that the appellant was a first offender, the presentencing report, and the appellant's mitigation before imposing the sentence. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed.
31. Although the statutory maximum sentence for count one is three years, I find this term to be excessive. Furthermore, given that the three offences arose from the same transaction, imposing a cumulative sentence of five years is disproportionate.
32. For the foregoing reasons, I hereby make the following orders:
- i. The sentence of three (3) years imprisonment in Count I is hereby substituted with a fine of 100,000 in default to serve twelve (12) months imprisonment.
 - ii. The sentence of five (5) years imprisonment in count II is substituted with a fine of Kshs. 150,000 in default to serve twelve (12) months imprisonment.
 - iii. The default sentences in Counts I and II shall run consecutively.
 - iv. The sentence of six (6) months imprisonment imposed in Count III is upheld.
 - v. The consecutive default sentences in Counts I and II shall run concurrently with the sentence in Count III.
- Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2024



D. KAVEDZA

JUDGE

In the presence of:-

Appellant present

Mburugu for the Respondent

Achode Court Assistant

