



**Arama v Republic (Anti-Corruption and Economic Crimes Appeal E007 of 2022)
[2023] KEHC 18773 (KLR) (Anti-Corruption and Economic Crimes) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E007 OF 2022**

PN GICHOHI, J

MAY 31, 2023

BETWEEN

SAMUEL OTARA ARAMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being appeal against the conviction and sentence of Hon. Victor Wakumile SPM of the Anti-Corruption and Economic Crimes Court sitting at Nairobi made on 30th March 2022 and 30th June 2022 in Milimani Anti-Corruption and Economic Crimes Criminal Case No. 20 of 2018)

JUDGMENT

1. This appeal arises from the Nineteen (19) various charges facing the Appellant (4th accused) and his four (4) co-accused persons under the [Anti-Corruption And Economic Crimes Act, 2003](#); the [Penal Code](#) and [Land Registration Act](#) No 3 of 2012 before the Chief Magistrates Court Anti-Corruption and Economic Crimes Court Case No 20 of 2018. The subject of all those charges was a plot known as Nakuru Municipality Block 6/95 where the accused persons were specifically charged as follows:
2. [Count 1](#) : Abuse of office contrary to section 46 as read with section 48 (1) of the [Anti-Corruption And Economic Crimes Act, 2003](#)

Particulars of the offence 1st accused Mr. John Muiuru Mwaura:

On or about 8th of May 2012 at Nakuru Land Office , in Nakuru Town , Nakuru County in the Republic of Kenya, being the Land Registrar Nakuru Land Registry , used your office to improperly confer benefit to a Mr. Peter Alfred Hans to wit plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar by transferring the said plot to



a Mr. Peter Alfred Hans without the knowledge or consent of the legitimate owner of the said plot and without verifying the land transfer instruments as required by law.

3. Count II -Abuse of office contrary to section 46 as read with section 48 (1) of the [Anti-Corruption And Economic Crimes Act, 2003](#)

Particulars of the offence 2nd accused Daniel Kimori Nyantika:

On or about 12th of July 2013 at Nakuru Land Office, in Nakuru Town , Nakuru County in the Republic of Kenya, being the Land Registrar Nakuru Land Registry , used your office to improperly confer benefit to a Mr. Yusuf Mustafa Ratemo to wit plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar by transferring the said plot and issuing a certificate of lease to Mr. Yusuf Mustafa without verifying the land transfer instruments as required by law.

4. Count III -Abuse of office contrary to section 46 as read with section 48 (1) of the [Anti-Corruption And Economic Crimes Act, 2003](#)

Particulars of the offence 3rd accused Charles Onyambu Birundu.

On or about 7th of August 2015 at Nakuru Lands Office in Nakuru Town , Nakuru County in the Republic of Kenya, being the Land Registrar Nakuru Land Registry , used your office to improperly confer benefit to Mr. Samuel Otara Arama to wit plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar by transferring the said plot and issuing a certificate of lease to Mr. Samuel Otara Arama without verifying the land transfer instruments as required by law.

5. Count IV -Conspiracy to defraud contrary to section 317 of the [Penal Code](#).

Particulars of the offence 1. Mr. John Muiru Mwaura 2. Daniel Kimori Nyantika 3. Charles Onyambu Birundu 4. Mr. Samuel Otara Arama 5. Kennedy Begi Onkoba:

On diverse dates between 3rd August 2015 and 11th August 2015 at unknown place in Nakuru County conspired to defraud Mr. Ahmed Muhammad Nisar by means of dispossessing him off plot Nakuru Municipality Block 6/95 within Nakuru County fraudulently and deceitfully pretended that you were then carrying on a genuine business of land transfer of plot Nakuru Municipality Block 6/95 within Nakuru County and that you had capacity to transfer to Samuel Otara Arama by means of entries inserted by you in the Nakuru lands office white card register records.

6. Count V Fraudulently making an entry contrary to section 103 (1) (c) (ii) of the [Land Registration Act](#) No 3 of 2012

Particulars of the offence 1st accused John Muiru Mwaura :

On or about 8th day of May 2012 at Nakuru Lands Office in Nakuru Town ,Nakuru County in the Republic of Kenya, being the Land Registrar Nakuru Land Registry ,with intent to defraud , fraudulently made an entry into the white card register purporting to register a transfer of lease of plot Nakuru Municipality Block 6/95, the property of Mr. Ahmed Muhammad Nisar to one Mr. Peter Alfred Hans.

7. Count VI- Knowingly permitting an entry in which in any material particular is to his knowledge false, to be made in the register or record contrary to section 361 of the [Penal Code](#).



Particulars of the offence 1st Accused John Muiru Mwaura:

On or about 8th day of May 2012 at the offices of Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, knowingly permitted entries in the lands office registry white card record material particulars which to your knowledge were false to wit, entries No 12 and 13 of the white card purporting to transfer lease of plot Nakuru Municipality Block 6/95 to a Mr. Peter Alfred Hans on 8th May 2012.

8. Count VII - Fraudulently adds to any document or instrument relating to land contrary to section 103 (1) (d) of the Land Registration Act No 3 of 2012.

Particulars of the offence : 1st accused John Muiru Mwaura:

On or about 8th day of May 2012 at the offices of Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, fraudulently added entries nos. 12 and 13 of 8th May 2012 in the white card record purporting to transfer lease of plot Nakuru Municipality Block 6/95 to a Mr. Peter Alfred Hans.

9. Count VIII - Fraudulently making an entry contrary to section 103(1) (c) (ii) of the Land Registration Act No 3 of 2012.

Particulars of the offence 2nd accused Daniel Kimori Nyantika:

On or about July 12, 2013 at the offices of the Ministry of Lands, Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, fraudulently entries nos. 14 and 15 dated 12th July 2013, in the white card register record by entering and signing the said entries purporting to transfer the lease of plot Nakuru Municipality Block 6/95 to Mr. Yusuf Mustafah Ratemo.

10. Count IX - Fraudulently procuring the issuance of a certificate of ownership contrary to section 103(1) (c) (i) of the Land Registration Act No 3 of 2012.

Particulars of the offence 2nd accused Daniel Kimori Nyantika:

On or about July 12, 2013 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, fraudulently procured the issuance of a certificate of lease to Mr. Yusuf Mustafah Ratemo by making entries nos. 14 and 15 dated 12th July 2013, in the white card register record and purporting to transfer the lease of plot Nakuru Municipality Block 6/95 to the said person.

11. Count X- Obtaining registration of land by false pretences contrary to section 320 of the Penal Code.

Particulars of the offence 3rd accused Charles Onyambu Birundu:

On the 7th of August 2015 at Nakuru Lands Registry in Nakuru Town of Nakuru County wilfully procured for Samuel Otara Arama a land registration of certificate of lease of plot Nakuru Municipality



Block 6/95 the property of Mr. Ahmed Muhammad Nisar, by falsely pretending that you had transferred it from Yusuf Mustafah Ratemo.

12. Count XI- Fraudulently making an entry contrary to section 103(1) (c) (ii) of the [Land Registration Act](#) No 3 of 2012.

Particulars of the offence 3rd accused Charles Onyambu Birundu:

On or about 7th of August 2015 at Nakuru Lands offices in Nakuru Town of Nakuru County being a Land Registrar at the Nakuru Land Registry, with intent to defraud, fraudulently made an entry into the white card purporting to register a transfer of lease of plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar to one Samuel Otara.

13. Count XII- Fraudulently procuring the issuance of a certificate of ownership contrary to section 103(1) (c) (i) of the [Land Registration Act](#) No 3 of 2012.

Particulars of the offence 3rd accused Charles Onyambu Birundu:

On or about 7th of August 2015 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, fraudulently procured the issuance of a certificate of lease of plot Nakuru Municipality Block 6/95 to Samuel Otara Arama by signing the certificate of lease dated 7th August 2015 and purporting to transfer to the said person the lease of the said plot the said person without following due process.

14. Count XIII - Fraudulently procuring the making of an entry contrary section 103(1) (c) (ii) of the [Land Registration Act](#) No 3 of 2012.

Particulars of the offence 3rd accused Charles Onyambu Birundu:

On or about 11th of August 2015 at the offices of Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban Development as a Land Registrar, fraudulently procured entries nos. 16 and 17 of 11th August 2015 in the white card Register record by entering and signing the said entries purporting to transfer the lease of plot Nakuru Municipality Block 6/95to Samuel Otara Arama.

15. Count XIV- Making a document without authority contrary to section 357 (a) of the [Penal Code](#).

Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On diverse dates between August 3, 2015 and 11th day of August 2015 at unknown place in in Nakuru Town, within Nakuru County, with intent to defraud, without lawful authority made a land sale agreement in respect of plot Nakuru Municipality Block 6/95, the property of Mr. Ahmed Muhammad Nisar, purporting to have been signed by Mr Yusuf Mustafah Ratemo.

16. Count XV- Knowingly uttering a document with intent to deceive contrary to section 357 (b) of the [Penal Code](#)



Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On 9th day of February 2016 or thereabouts, at Shiv Plaza , EACC Offices, in Nakuru Town, within Nakuru County, in the Republic of Kenya, with intent to deceive, knowingly uttered a land sale agreement to the Ethics and Ant- Corruption Commission (EACC) investigators, namely Mr. Agosta Mecca and Ms Vera Nyambok purporting the same to have been signed by signed by Mr Yusuf Mustafah Ratemo, a purported vendor of plot Nakuru Municipality Block 6/95.

17. Count XVI- Wilfully obtaining registration of land by false pretences contrary to section 320 of the Penal Code.

Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On or about 7th of August 2015 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a State Officer to wit a Member of Parliament of Nakuru West Constituency, wilfully procured the issuance of certificate of lease and registration of transfer of lease of plot Nakuru Municipality Block 6/95 to yourself by false pretences, purporting to have purchased the said plot from Mr Yusuf Mustafah Ratemo on 3rd August 2015.

18. Count XVII- Fraudulently procuring the issuance of a certificate of ownership contrary to section 103(1) (c) (i) of the Land Registration Act No 3 of 2012.

Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On diverse dates between 7th of August 2015 and 11th August 2015 at the offices of Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, fraudulently procured the registration and issuance of a certificate of lease of plot Nakuru Municipality Block 6/95 to yourself by false pretences, purporting to have purchased the said plot from Mr Yusuf Mustafah Ratemo .

19. Count XVIII - Knowingly misleading an investigator acting under the Anti- Corruption and Economic Crimes Act, No 3 of 2003 contrary to section 66 (1) (b) as read with section 66 (2) of the Anti- Corruption and Economic Crimes Act, No 3 of 2003.

Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On 9th day of February 2016 at EACC Offices at Nakuru, within Nakuru County, knowingly misled Ethics and Ant- Corruption Commission (EACC) investigators, namely Mr. Agosta Mecca and Ms Vera Nyambok in respect of an investigation into allegation of abuse of office by you as the MP Nakuru West Constituency , in the acquisition of plot Nakuru Municipality Block 6/95 that the said investigators were undertaking under the Ant- Corruption and Economic Crimes Act No 3 of 2003 by recording a statement that you had bought the said plot for Kshs 60 million and by providing the investigators with a purported sale agreement signed by Mr, Yusuf Mustafah Ratemo , facts you knew to be false and misleading.

20. Count XIX - Knowingly misleading an investigator acting under the Anti- Corruption and Economic Crimes Act, No 3 of 2003 contrary to section 66 (1) (b) as read with section 66 (2) of the Anti- Corruption and Economic Crimes Act, No 3 of 2003.



Particulars of the offence 5th Accused Kennedy Begi Onkoba :

On the 27th day of April 2017 at EACC at Nakuru, within Nakuru County, knowingly misled Ethics and Ant- Corruption Commission (EACC) investigators , namely Mr. Agosta Mecca and Ms Vera Nyambok in respect of an investigation into allegation of abuse of office by you Hon. Samuel Otara Arama , the MP Nakuru West Constituency, in the acquisition of plot Nakuru Municipality Block 6/95 that the said investigators were undertaking under the Ant- Corruption and Economic Crimes Act No 3 of 2003 by recording a statement and stating Mr. Yusuf Mustafah Ratemo and Hon. Samuel Otara Arama visited your office and entered into a sale agreement in your presence, a fact you knew to be false and misleading.

21. After trial, all the accused persons were convicted but of various counts and sentenced accordingly. According to the judgment dated and delivered by Hon. V. Wakumile SPM on March 30, 2022, the accused persons were convicted as hereunder: A1 is convicted on counts; i, iv, vi, vii A2 is convicted on counts; ii, iv, vii, ix A3 is convicted on counts; iii, iv, x, xi, xii, xiii A4 is convicted on counts; iv, xiv, xv, xvi, xvii, xviii A5 is convicted on counts; iv, xix
22. Each was sentenced to pay a fine of Kshs 260,000/- on each of the counts and in default to serve Six (6) months imprisonment. The Appellant was aggrieved by both conviction and sentence.
23. The Appellant (4th accused) was aggrieved by both conviction and sentence and in his Petition of Appeal dated July 5, 2022, he raised eighteen grounds of appeal and which are hereby condensed as follows :-
 1. The Learned Magistrate erred in fact and law admitting evidence based on suspicion to convict the Appellant and which evidence does not meet the threshold of prove beyond reasonable doubt.
 2. The Learned Magistrate erred in fact and law by convicting the Appellant on Counts iv, xiv, xv, xvi, xvii and xiii without satisfying himself that the prosecution had tendered insufficient evidence in support and corroboration of the counts.
 3. The Learned Magistrate erred in law and fact in finding that the Prosecution had proved beyond reasonable doubt that the Appellant and his co-accused had conspired to commit fraud contrary to section 317 of the Penal Code yet there was no independent evidence connecting the Appellant to the charge of conspiracy.
 4. The Learned Magistrate erred in fact and law in convicting the Appellant of the offence of conspiracy without addressing the elements thereof thus causing miscarriage of justice.
 5. The Learned Magistrate erred in fact and law by failing to consider the Appellant's forensic document examiner's evidence.
 6. The Learned Magistrate erred in fact and law in convicting the Appellant on the offence of making a document without authority contrary to section 357 (a) of the Penal Code yet the document was not made by the Appellant. .
 7. The Learned Magistrate convicted the Appellant on entirely wrong principles of law and conclusions without addressing himself whether the ingredients of the offences had been proved.



8. The Learned Magistrate erred in fact and law in not addressing the evidence by the Appellant and making conclusions contrary to the evidence presented.
9. The Learned Magistrate erred in law and fact by shifting the burden of proof to the appellant and ignored the presumption of innocence under Art. 50 (2) (a) of *the Constitution*.
10. The Learned Magistrate erred in law and fact by failing to take into account the mitigation by the Appellant and passing a sentence that was manifestly harsh and /or excessive.

Submissions

24. This appeal was canvassed by way of written submissions. In their submissions dated January 9, 2023 and filed by the firm of Marende & Nyaundi Co. Advocates for the Appellant, counsel lists three broad issues for determination as follows;
 1. Whether there was sufficient evidence laid by the prosecution to support the charge of conspiracy to defraud.
 2. Whether the prosecution presented evidence beyond reasonable doubt or whether the learned magistrate erred in law and fact in admitting evidence on suspicion to convict the Appellant.
 3. Whether all the elements of offences presented had been met/whether the learned magistrate erred in law and fact in convicting the Appellant on Counts xvi, xvii and xviii by failing to consider that the ingredients of the offences had not been met.
25. On the first issue relating to the offence of conspiracy to defraud which was the subject of Count iv, counsel submits that the offence cannot be proved without proving the presence of an agreement to defraud between the persons the subject of the charge; and , the presence of a common intention to defraud. Citing Sec. 21 of the *Penal Code*, counsel submits that the prosecution failed to prove that the Appellant was involved in any conspiracy to defraud and that he was acting in concert towards that common intention towards dispossessing PW5 of the title. Counsel further submits that there was no weighty evidence that Appellant was involved in the conspiracy.
26. He submits that the evidence presented by PW3 was problematic in all forms and contradictory despite that he was the key witness. Further , he submits that the Appellant is still an innocent purchaser of the land and was not a direct beneficiary of the alleged conspiracy as before he handled the title, it had undergone more than one transfer.
27. On the second issue, counsel cites several authorities among them the case of *Gordon Omondi Ochieng v Republic* [2021]eKLR and *Philip Nzaka Watu v Republic* [2006]eKLR on the degree of proof beyond reasonable doubt and the affirmation by courts that any evidential gaps in the prosecution case raising material doubts must be in favour of the accused. He submits that the Appellant purchased the said parcel of land from Yusuf Mustafa Ratemo (PW3) and entered into an agreement. Subsequently , he was issued with a transfer of lease after due process was followed and processed by his advocates. He therefore submits that any iota of doubt left should cause the charges being dropped. He urges the court to dismiss the case against the Appellant.
28. On the third issue as to whether the ingredients of the offences he was convicted on that is , xvi, xvii and xviii were proved to the required standard, counsel relies on the case of *Rebecca Mwikali Nabutola & 2 others v Republic* [2016]eKLR and *Musili v Republic* [2012]eKLR on the elements to be proved before a conviction on an offence of conspiracy to defraud under Sec. 317 of the Penal Code.



29. He reiterates that there was no evidence to prove the conspiracy between the 3rd Respondent with any other accused or at all . He further submits that the prosecution witnesses called to testify in this case contradicted themselves and no inference of conspiracy could be reasonably deduced from their testimony.
30. Counsel further submits that the Appellant was charged with the offence of obtaining registration by false pretences but the court found that the witnesses were lying, that it was the duty of the investigator to investigate and find the truth. However, despite Trial Magistrate rightly making that finding and that the prosecution had not provided ample evidence to prove the ingredients of the offence, he decided otherwise in his judgment. Lastly counsel urges the court to acquit the Appellant on all charges.
31. In submissions dated January 13, 2023 and filed by Ms Chistine Kathambi a Senior Principal Prosecution Counsel for the Respondent, framed three issues for determination that is;
1. Whether sufficient evidence was laid by prosecution in support of the charge of conspiracy to defraud.
 2. Whether the prosecution presented evidence beyond reasonable doubt whether learned magistrate erred in law and fact by admitting evidence based on suspicion to convict the Appellant , which evidence does not meet the standard of proof beyond reasonable doubt.
 3. Whether all elements of the offences presented had been met/whether the learned magistrate erred in law and fact in convicting the Appellant on counts xvii and xviii by failing to consider that ingredients of these offences had not been proved to the required standard.
32. Conceding the first ground, counsel submits that a charge of conspiracy has to be in relation to one transaction where accused persons jointly charged had an agreement and common intention to defraud. She submits that in this case , Prosecution Exhibit 19 which was a white card in relation to Nakuru Municipality Block 6/95, indicated that entry No 16, where the Appellant was indicated as the proprietor, was made on August 11, 2015. That means there was no link between the appellant and the Registrars who did not make the entry on the white Card.
33. Further , she submits that this break in the link to all accused persons jointly charged is enhanced by Prosecution Exhibit 19 where no explanation was tendered to show how the property was transferred to one Peter Alfred Hans and no evidence was tendered to illustrate that the entry was made with eventual intention of delivering the title to the property to the Appellant.
34. In support of this ground, counsel cites *Archibold's Criminal Pleadings, Evidence and Practice 2010* (Sweet & Maxwell0, pp 3025-2026 that;
- “ ...the offence of conspiracy cannot exist without the agreement , consent or combination of two or more persons ...so long as design rests in intent only, it is not indictable ; there must be an agreement...”
35. On the second ground, counsel cites extracts of evidence on the lower court record and submits that the charges as framed were to substantially to be proved by the Appellant. PW3's evidence whose alleged transaction between him and the Appellant was totally denied by PW3 and therefore, just as there was no proof of transfer between Peter Alfred Hans to PW3 , there was no explanation as to how the transfer happened between PW3 and the Appellant. Counsel submits that PW3 was not a reliable witness and his evidence was contradictory, yet it is his evidence that was relied on by the trial court to convict



36. While questioning the credibility of PW3, counsel submits that the investigations may have been hurried and if the transaction was an illegality, then PW3 was an accomplice and should have been charged alongside the co-accused in the trial. Lastly, counsel submits that the trial magistrate erred in holding that this evidence was reliable, inconsistencies and contradictions notwithstanding.
37. On the third ground, counsel recalls the Appellant's sworn statement as to how he engaged his legal counsel (Accused 5) to do the transactions for him and submits that the Appellant may be taken as a bona fide purchaser based on the evidence of District Land Registrar (PW9) who testified that the transaction was an ordinary one for which he too would have approved.
38. While arguing that 2nd accused Daniel Kimori Nyantika who was one of the Appellant's co accused had been charged with abuse of office, counsel submits that no evidence was tendered to prove that the appellant had a hand in conferring benefit to Mr. Yusuf Mustapha Ratemo .
39. In regard to Count XIV where the Appellant was charged with making a document without authority contrary to Section 357 (a) of the *Penal Code*, counsel submits that according to the Forensic Document Examiner (PW11), he did not examine any specimen signature by the Appellant yet he testified that he examined the signature on the transfer and sale agreement documents presented to him which include the KRA payslip (Prosecution Exhibit 10) against the specimen signature of PW3 and found that the signatures were very different.
40. Counsel therefore submits that had the investigating officer asked for Appellant's specimen signature for presentation to the document examiner for purposes of ascertaining that the Appellant was the maker of the document or may have forged the signature of PW3 who was the vendor , it would have given the witness more credibility.
41. Counsel further submits that there was no sample of known signature for Mustafa according to the document examiner. From the evidence by document examiner PW11, then it is possible PW3 deliberately gave a different signature as a specimen and this creates doubts on his truthfulness. While conceding this ground, counsel relies on the case of *JMN v Republic* [2021]eKLR where the court held that a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient and that an accused is entitled to the benefit as a matter of right.
42. As regards Count XV (15) where the Appellant was charged with the offence of knowingly uttering a document with intent to deceive, contrary to Section 357 (b) of the *Penal Code*, counsel submits that it would be duplication of charges if person who presents a document to an investigating officer as requested, is charged with the offences that emanate from the findings of those investigations as happened for the Appellant in this case.
43. Counsel therefore urges the court to make a pronouncement on whether a document presented to an investigating officer in relation to material under criminal investigations can be said to have been uttered by a suspect. Lastly, while conceding the appeal on conviction, counsel submits that the ingredients of the offences for which the Appellant was charged were not proved beyond any reasonable doubt. Having conceded on conviction, counsel submits that in default, the Respondent also concedes on sentence.



Determination

44. This being a first Appeal, this is guided by the Court of Appeal case of *Okeno v Republic* [1972] E.A 32 which stated that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] E A 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 v. 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 courts’ 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. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

45. This Court will bear the above in mind as it considers the grounds of appeal herein from which arise two broad issues for determination and these are;

1. Whether there was sufficient evidence laid by the prosecution to support the charge of conspiracy to defraud in Count IV.
2. Whether the learned magistrate erred in law and in fact in convicting the Appellant on Counts xvi, xvii and xviii by failing to consider that the ingredients of the offences had not been met and that they were not proved beyond reasonable doubt.

46. Regarding the charge of Conspiracy to defraud contrary to section 317 of the *Penal Code* which is the subject of Count IV where the Appellant was jointly charged with the other four accused persons, section 317 of the *Penal Code* provides:

“Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.

47. Further, *Black Law Dictionary* 10th Edition at page 375 defines the word conspiracy as follows;

“An agreement by two or more persons to commit an unlawful act, coupled with intent to achieve the agreement’s objective, and motive and (in most states) action or conduct that furthers’ the agreement; a combination for an unlawful purpose”.

48. Further *Archibold; Writing On Criminal Pleadings, Evidence and Practice*, states;

The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons so long as a design rests in intention only, it is not indictable. There must be an agreement; proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

49. It is therefore clear from the above provisions of the law and description in regard to the word conspiracy that there has to be more than one person working in concert in order to commit this offence. The line of cross-examination of prosecution witnesses by the defence before the trial court



was that no one saw the accused persons meeting to conspire. Indeed, it would not be expected that such a meeting is obvious to third parties. Conspirators would not normally meet in the open to plan their joint endeavour to accomplish their intention.

50. What is important for the prosecution to establish the chain of events and actions by each of the accused person to demonstrate that they had a meeting of mind between August 3, 2015 and August 11, 2015 and worked together for a common goal. Such is the spirit of section 21 of the [Penal Code](#) joint offenders in prosecution of common purpose. The section provides;

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

51. The Court of Appeal in the case of [Eunice Musenya Ndui v Republic](#) [2011] eKLR stated regarding common intention:

“A reading of section 21 of the [Penal Code](#) reveals the following identifiable ingredients which in turn trigger the presumption:-

- 1) There must be two or more persons
- 2) They must form a common intention
- 3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another.
- 4) An offence must be committed in the process.
- 5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose.”

52. The Court of Appeal went ahead to acquit the Appellant as it held;

“From the analysis of the evidence on record it should be fairly apparent that ingredients 2, 3 and 5 above are conspicuously missing in the circumstances of the appeal before us.

We think the conviction was based on a misapprehension of the law and on the failure by the two courts below to give the appellant’s defence its rightful place. In the result, we hereby set aside the conviction and quash the sentence imposed on the appellant. The appellant to be immediately released unless otherwise lawfully held.”

53. In this case reliance was placed on Prosecution Exhibit 19 which is a copy of white card for Nakuru Municipal Block 6/95 where Entry 16 indicated the Appellant as the proprietor and that was made on August 11, 2015. A charge of conspiracy has to be in relation to one transaction but there is a clear break in the link between the persons who are alleged to conspire.

54. In his judgment, the learned magistrate found that the prosecution had clearly demonstrated during trial that all the accused persons acted in concert and participated individually at various stages towards the processing of Exhibit 5 which has been found to be a fraudulent document since it was processed without the primary instruments of transfer of land and on the basis of a forged lease.

55. In arriving at this conclusion which led to the conviction of the Appellant and his four co-accused, the learned magistrate believed the evidence of Yusuf Ratemo (PW3) while attacking and disbelieving



- the evidence Daniel Gatumo (PW8). Those two were prosecution witnesses who were supposed to support the case against the accused persons.
56. The reasoning behind his disbelief which appear on page 54 and 55 of the judgment appear to have been selective and attack on witnesses including Advocate . It is noted that even Caleb Wanjala Sunguti (PW9) also a prosecution witness termed the transfer an ordinary transfer which he would approve and that transfers between Yusuf Mustafa and the Appellant were verified and executed.
 57. There is a clear break in the link between the persons who are alleged to conspire whose effect is that there is no proof of conspiracy and there is no evidence that the Appellant was acting in concert towards that common purpose allegedly geared towards dispossessing PW5 of the title. There is no inference of conspiracy where the prosecution witnesses called to testify give contradictory evidence as happened in this case. This ground is properly conceded by the Respondent.
 58. Yusuf Mustafah Ratemo (PW3) who the learned magistrate believed was the key witness in the prosecution case. He stated that he did not know Peter Alfred Hans. That though the certificate of lease (Dexh. 1) contained several signatures including his, he never gave out his documents and has never given his documents to anyone. He admitted however that he had sold land in Nakuru and had given his copy of Identity Card , KRA Pin Number and his photographs to his lawyer who took his documents to the land registry but he does not recall the name of his lawyer or his lawyer's law firm. He admitted giving his sample signature for analysis. He admitted his statement to police had mistakes. This is not a reliable witness. This being the case then, then it is clear that the learned magistrate acted on suspicion in convicting the Appellant.
 59. That brings us to the second issue as to whether the learned magistrate erred in law and fact in convicting the Appellant on Counts xvi, xvii and xviii by failing to consider that the ingredients of the offences had not been met and that they were not proved beyond reasonable doubt.
 60. What was before the trial court required proof beyond any reasonable doubt and the Court of Appeal in *Philip Nzaka Watu v Republic* [2016]eKLR, had this to say about proof beyond reasonable doubt;

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.”
 61. In regard to Count XIV where the Appellant was charged with making a document without authority contrary to Section 357 (a) of the Penal Code, Forensic Document Examiner (PW11) did not examine any specimen signature by the Appellant yet he testified that he examined the signature on the transfer and sale agreement documents presented to him which include the KRA payslip (Prosecution Exhibit 10) against the specimen signature of PW3 and found that the signatures were very different. No specimen signature was taken from the Appellant for purposes of ascertaining the maker or whether the Appellant had forged PW3's signature.
 62. Further, it would have been prudent to have sample of known signature for Yusuf Mustafah Ratemo was not taken to ascertain if he had made the document using a different signature or whether it was the Appellant who made the document. There was no sufficient evidence to support this charge and



therefore the doubts therein should have been resolved to the benefit of the Appellant as a matter of right.

63. As regards Count XV- Knowingly uttering a document with intent to deceive contrary to section 357 (b) of the [Penal Code](#) , the sale agreement is said to have been uttered to the officers working at EACC as investigators and in the course of investigations they were carrying out in respect of plot Nakuru Municipality Block 6/95 and which was purported to have been signed by Yusuf Mustafa Ratemo. Section 357 (b) of the [Penal Code](#) provides:

Any person who, with intent to defraud or to deceive - (a) (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.

64. Under Section 4 of the Penal Code, the word “utter” means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with, or act upon the thing in question.
65. The prosecution witness Vera Nyambok ,an investigator from EACC, testified that she received a complaint for Mohamed Nissar in regard Block 6/95 and recorded his statement. She received documents in relation to that property and recorded witness statements. She received a sale agreement from the Appellant (Arama) between him and Mustafa dated August 3, 2015.
66. The Appellant told her that they appeared with Yusuf Mustafa before advocate Onkoba and who drew the sale agreement and this was confirmed by Onkoba but when she interviewed Yusuf Mustafa Ratemo , he denied. There is no doubt that the Appellant uttered the said document to the said officers . He maintained the line of defence .
67. As already shown in this appeal, the prosecution did not prove beyond reasonable doubt that the sale agreement was fraudulent . Further , even Vera Nyambok told the court she could not say the agreement was fake. The two document examiners reports (Exh. 41 and 45) which were used to convict the accused persons including the Appellant herein were contradictory.
68. Having found that the two reports were contradictory, the trial magistrate erred in law by convicting the appellant and his co -accused on the strength of the same. The doubts ought to have been resolved in favour of the Appellant. In the circumstances, the Appellant could not be said to have presented the document to deceive the investigators. It is this court’s considered view that an accused person who presents a document before investigators in the course of investigations cannot be charged with the offence of uttering .
69. Flowing from, the above and with the key witness Yusuf Mustafa Ratemo having been found not to be reliable and there being contradictions between prosecution witnesses, the same fate would befall the charge of Wilfully obtaining registration of land by false pretences contrary to section 320 of the Penal Code which is the subject of Count XVI could not be sustained against the Appellant.
70. As regards Count XVIII - Knowingly misleading an investigator acting under the [Anti- Corruption and Economic Crimes Act, No 3 of 2003](#) contrary to section 66 (1) (b) as read with section 66 (2) of the [Anti- Corruption and Economic Crimes Act, No 3 of 2003](#), Section 66 under which the Appellant is charged provides;

(1) No person shall—

(a);



(b) deceive or knowingly mislead the Commission or a person acting under this Act;

(c); or

(d)

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both

71. There is no sufficient evidence to prove that the Appellant in presenting sale agreement to the EACC officers was causing any obstruction or misled them. There was a complainant and a suspect and each was bound to present their documents for investigations. The prosecution was duty bound to prove all charges the Appellant was facing and beyond reasonable doubt as was held by Court of Appeal in [*John Mutua Munyoki v Republic*](#) [2017] eKLR thus;

“...in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged.”

72. In conclusion, the Prosecution failed to discharge its burden as required by law as against the Appellant and therefore, the Respondent properly conceded that the conviction was unsafe on all Counts in this appeal. Having conceded the appeal on the conviction, the Respondent in default conceded the appeal on sentence. The appeal therefore succeeds on both the conviction and sentence.

73. As a consequence, I hereby quash the conviction, set aside the sentence and order that any money deposited by the Appellant in form of a fine in this matter be released to him forthwith.

DATED,SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 31ST DAY OF MAY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Lukoye or Appellant

Ms Ndobu for Respondent

Kevin Isindu, Court Assistant**

