



REPUBLIC OF KENYA



KENYA LAW
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**Njeri v Republic (Criminal Appeal 28 of 2020)
[2023] KEHC 21212 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 28 OF 2020
SM MOHOCHI, J
JULY 31, 2023**

BETWEEN

MARY NJERI THUO ALIAS MARY NJERI KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against Conviction and Sentence of Resident Magistrate Hon E. Kelly. delivered on 4th and 11th June, 2020 respectively in Nakuru CM Criminal Case No. 930 of 2017 Republic - vs- Mary Njeri Thuo alias Mary Njeri Kariuki)

JUDGMENT

1. The Appellant, Mary Njeri Thuo Alias Mary Njeri Kariuki being aggrieved by the judgment delivered by Hon. E. Kelly Resident Magistrate on 4th June, 2020 and the sentence on 11th June, 2020 in Nakuru appeals against conviction and sentence on the following grounds among others: -
 - i. THAT, the learned trial magistrate, erred in law and fact in finding that the prosecution proved its case against the Appellant beyond reasonable doubt on the three charges facing the Appellant.
 - ii. THAT, the learned trial magistrate, erred in law and fact in failing to appreciate the evidence before her and hence arrived on the wrong conclusion of facts and the before the court.
 - iii. THAT, the learned trial magistrate, erred in law and fact in failing to appreciate that the dispute before the court although clothed as a criminal matter was indeed a land dispute over Nakuru/Piave 709 between the Appellant and her siblings.



- iv. THAT, the learned trial Magistrate erred in law and fact in failing to appreciate the effect of convicting the Appellant on her constitutional right to own Nakuru / Piave /709.
- v. THAT, the learned trial Magistrate, erred in law and fact when she refused to properly consider the defence offered by the Appellant and submissions by counsel.
- vi. THAT, the learned trial magistrate, erred in law and fact, when she failed to appreciate that there was no evidence presented by the prosecution to show that there was another person known as Mary Njeri Kariuki other than the Appellant.
- vii. THAT, the learned trial Magistrate, erred in law and fact, in convicting the Appellant with the charge of obtaining registration by false presence contrary to section 320 of the Penal Code when there was no evidence to defraud, over title No. Nakuru / Piave 709.
- viii. THAT, the learned trial Magistrate, erred in law and fact by failing to find that the guilt of the Appellant was not sufficiently established by the prosecution.
- ix. THAT the learned trial magistrate, erred in law and fact, in failing to find that in view of the circumstances of the case, non-custodial sentence was most appropriate but proceeded to fine the Appellant Kshs. 20,000/ and in default one year in jail and no proper reasons were given by the trial Court as to why the Appellant did not deserve a non-custodial sentence.
- x. THAT the learned trial magistrate, erred in law and fact when she failed to appreciate the Appellant's right to change her name as is provided for under section 16 of the [Registration of Persons Act](#) (Cap 107).

2. The Appellant was convicted on Count I for Obtaining registration by false pretence contrary to Section 320, Count II for Attempting to Obtain registration by false pretence contrary to section 320 and Count III: Giving false information to an officer in the public service contrary to section 129 (a) all of the Penal Code.

- i. On Count I, the particulars were that on 12th October, 1994 at the Nakuru Land Registry office in Nakuru town with intent to defraud obtained registration of land title deed number Nakuru Piave 709 in the name of Mary Njeri Kariuki by falsely pretending that she was Mary Njeri Kariuki, a fact that she knew to be false.
- ii. On Count II, the particulars of the offence were that on 25th September, 2007 at Rongai town within Nakuru County, with intent to defraud, willfully attempted to obtain registration of a Kenyan National Identity card in the name of Mary Njeri Kariuki by falsely pretending that her name was Mary Njeri Kariuki a fact that she knew to be false.
- iii. On Count III, the particulars are that on the 15th day of April 2016 at Rongai police station within Nakuru county, with intent to obtain a police abstract, informed no 106184 police Constable Faith Kithome a person employed in public service that she had lost her national identity card number 0333298 in the name of Mary Njeri Kariuki, which information she knew to be false, intending thereby to cause the said officers record a report in the occurrence



book as OB no 08/15/4/2016 also the police abstract was issued which the said officer ought not to have done if the true state of facts in respect to such information has been known to her.

3. The Appellant prays that the conviction and sentence imposed against her by the trial court be set aside and she be set free.
4. It is the duty of this first Appellate Court for an exhaustive examination of the trial court proceedings in criminal cases as was restated in the case of Charles Mwita –vs- Republic, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that;

“In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated: - “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] EA. 336) and to the appellate court’s own decision on the evidence”.
5. Being a 1st Appeal Court, I must weigh conflicting evidence and draw conclusions, (Shantilal M. Ruwalla –v- R [1957]EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; 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, see Peters v. Sunday Post, [1958] E.A. 424.”
6. In support of its case, the Respondent herein called a total of 5 witnesses. PW1 PC Faith Kithome in her evidence told the Court that on 15th April, 2016 a complaint was presented for loss of ID by Mary Njeri. She gave her police abstract which she also signed. She produced the police abstract as PEX1. She stated that the information she filed was given to her by the complainant. In cross-examination, she stated that she signed on behalf of the Officer in Charge Rongai Police Station and that the Complainant told her that her name was Mary Njeri Kariuki and she had no reason to doubt the Complainant. She confirmed that a woman can change her name by her to her husband's or father's name.
7. PW2 Simon Kariuki testified that he was the brother of the Appellant and that his mother Freshia Wangare Thuo had left two shambas Piave Settlements 362 and 709. 362 was in the name of the mother. It was his evidence that 709 was in the name of Njeri Thuo's name and his name.
8. He claimed that Appellant was misadvised to change her name on her ID to read Njeri Kariuki so that the shamba would be exclusively hers. He claimed not to know where the Appellant got the name Kariuki from. He stated that the Appellant had refused to have the dispute resolved at home.
9. On cross-examination, he stated that plot 709 is in the name of Mary Njeri Kariuki and that Appellant was known as Mary Njeri Thuo. He confirmed that from the green card, the land was registered to Mary Njeri Kariuki. He confirmed that he has never challenged the title in name of the Appellant. He also confirmed that Piave Settlement properties were being given to women only. He claimed that Appellant used his name in her documents.
10. PW 3 James Muturi Teresiah Mwaura Nioki, testified that the Appellant is his sister. He also claimed that their mother registered the suit property in the names of the Appellant and PW2. He testified that they had received a letter directing those on the suit land to vacate the Suit Property. He identified PMFI 3-5 and stated that they had never differed with the Appellant who was his elder sister.
11. On cross-examination, he stated that the name Kariuki belonged to his and that he got to know that the Appellant was known as Mary Njeri Kariuki, that she was using in college. He confirmed that the



- dispute before the Court was related to land. He knew his sister used to work but did not know the name Kariuki.
12. He also confirmed that the name on the Appellant's documents reflected Mary Njeri Kariuki and confirmed that the Appellant was not present in a meeting that was held over the land dispute. In re-exam, he suggested that Appellant had changed her name to take the shamba,
 13. PW4 Eliud Kinyanjui Thuo testified that the Appellant was his sister and that their mother had two properties which he left to his brothers. He claimed that the Appellant changed her name in order to evict them and prayed for the cancellation of the title in favour of the Appellant. He further claimed that the Appellant had two IDs with two different names. He claimed that the shamba had been registered in the name of paying rates for the shamba, Njeri Kariuki. He further claimed to have been the one.
 14. On cross-examination, he stated that, the Appellant was known as Mary Njeri Thuo and that she never lived in the shamba and she never attended the meeting held by their mother. He confirmed that the Appellant was baptized Mary and that the name Njeri Kariuki refers to both his elder brother and Appellant. He confirmed that the shamba was given to women and that he has never seen the ID issued to the Appellant.
 15. In re-exam, he stated claimed that the sister was not called Kariuki and the land should be in his name and that of his brother Kariuki. He claimed to be the one who paid the loan relating to the suit land.
 16. PW5 Police Corp James Mutinda DCI testified that on 28th March 2017, he was directed to meet a family of 3 men and woman. They said persons were complaining that their sister had fraudulently obtained their title deed in her name with the intention of selling the land. He confirmed that he recorded their statements and called the Appellant to his office who came with a faint copy of the title deed and informed him that the original was with his advocates. He stated that the Appellant told him that his name was Mary Njeri Kariuki.
 17. He further testified that he directed her to bring the originals to him within a week but Appellant never returned. He informed the Court how he proceeded with his investigations and found out that the Appellant had changed her name and she had also reported having lost her ID. He stated that his investigations showed that the Appellant had stolen the ballot card from her mother and fraudulently had the title deed in the name of Mary Njeri Kariuki. He stated that he went to the land's office and obtained the greed card. He then arrested the Appellant and charged her. He prayed for the Court to compel the lands office to correct the order in the title deed as it was fraudulently obtained. He produced PEX 2-9.
 18. On cross-examination, he confirmed that the complaint by the 4 people was related to land and not the name of the Appellant. He confirmed that people have at least 3 names and that women changed their names. When referred to PEX9 he confirmed that the same was an election card that was sealed bearing the name Mary Njeri Kariuki. He confirmed that he did not investigate the same and neither did he investigate the school leaving certificate (DMFI 1), PMFL and DMFI 3 (Sacco Card) all in the names of Mary Njeri.
 19. He further confirmed that: -
 - a. He never asked Appellant if she had an ID in the name of Mary Njeri Kariuki;
 - b. He did not visit the land's office nor did he visit the Director of Settlements, Nairobi to verify the documents of ownership or get the register and neither was he shown any receipt in the name of Appellant mother over the disputed property;



- c. He did not see the list of allottees of the settlement scheme; and
 - d. He did not know much about the family of Appellant name in terms of the full names of the deceased husband and father.
20. On re-exam, he stated that the National Registration confirmed the Appellant's name and the prosecution closed its case.

Appellant's Case

21. Upon being placed to her defence, the Appellant called 2 witnesses. DW1 Samuel Thiongo Assistant Director, from Land Department Nakuru, and Njoro Region testified that from the file he was in possession of, Nakuru/Piave 709 was owed by Mary Njeri Kariuki and the same was allocated to her in 1980 by Piave Settlement scheme. The land was allocated to women. He confirmed that he did not know the Appellant personally and confirmed that there was no alteration on her file.
22. On cross-examination, he confirmed that the property in dispute belonged to Mary Njeri and that two people could claim the same land when there has to be an alteration and such alteration is a process. He confirmed that when there is alteration they have a parallel file and list but that was not the case concerning the property in dispute. In re-examination, he confirmed that there were other claimant for the said property.
23. DW2 the Appellant herein, testified denying the charges against her stating that, she uses the name Mary Njeri Kariuki. At the time of her testimony, she was 65 years old. She testified that her father was known as Thuo Marenye Kariuki. She testified that she was given the disputed parcel of land which was being given to women who sang for the President between 1977-1978. She confirmed that two of her brothers are currently on her land and denied that the disputed land belonged to her mother Freshia Wangare Thuo. She testified that her ID got lost and she applied for a new one. She confirmed that her ID and voter's card were in the name of Mary Njeri Kariuki and so were all her documents. She confirmed that she has always been using the said voter's card to vote (PEX) and she has been using the same.
24. She confirmed that she had an ID in the name of Mary Njeri Thuo but she changed the same at DC's office which directed her to Court where she obtained an affidavit that was submitted to the DC's office and that was several years before the charges. She stated that she had been using the name Mary Njeri Kariuki and all her family members knew her by that name but because of the land issue, her siblings had turned against her. She confirmed that she had let her brothers stay on the land and it was when she took the surveyor on the land that the brothers caused her to be arrested.
25. She confirmed that her mother had sued her in CMCC 1108/1993 as Maria Njeri Thuo but the suit was determined in her favour.
26. In cross-examination, she stated that she was aware that the registrar of names stated that she was not Mary Njeri Kariuki. She confirmed that she has been using the name Mary Njeri Kariuki from the time she was in school. She confirmed that she is also referred to as Thuo and also Maria and that prior to her mother's death, they did not have any dispute.
27. In re-examination, she confirmed that the ID was given to her in the name of Mary Njeri Kariuki, and the same was duly given by the National Registration of Persons. That there was no other Mary Njeri in their family except her and she did not take the ID in the name of Mary Njeri Kariuki to defraud anyone.



28. DW2 Winnie Wangari, the daughter of the Appellant testified that her mother is known as Mary Njeri Kariuki. She confirmed that when applying for documents and they bore that name. She confirmed that the land in dispute belonged to her mother. On cross-examination, she confirmed that she was aware of her mother changing her name but she couldn't tell when. She confirmed that she took her ID in 1992 and that the name Kariuki belonged to her grandfather. In the re-exam, she reiterates that the name Kariuki was a family name and her mother had used the said name in several documents including employment contracts. The defence closed their case.
29. The Appellant contends that, the prosecution fell short of proving all the ingredients of the charge and relied on the case of *Serpepi Sanja Siromo v Republic* C2020] eKLR which held that: -
- “From the above definition, the ingredients of the offence are that; there must be a representation on matters of fact about the past or present; that representation must be false and it must have been made with the intent of defrauding someone of his property. It must have been acted upon to the disadvantage of the complainant. The prosecution must therefore prove these ingredients in order to succeed in the case of obtaining registration by false pretences.
- This fact is supported by judicial decisions. In *Edgington v Fitemaurice* (1 885) 29 ChD 459, Bowen, LJ. observed that”
- “In order to sustain his action he must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the Defendants, or that they made it not caring whether it was true or false...[Lastly, when you have proved that the statement was false, you must further show that the plaintiff has acted upon it and has sustained damage by so doing: you must shew that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting.”
30. Further reliance was placed on the Nigerian case of *Dr. Eduin U. Onwudiwe v Federal Republic of Nigeria* SC. 41 /2008, the Supreme Court of Nigeria observed that in order to prove the offence, there must be a pretence, that the pretence should have emanated from the accused person; that it was false, that the accused person knew of its falsity or did not believe in its truth, that there was an intention to defraud, that the thing is capable of being stolen and that the accused person induced the owner to transfer his whole interest in the property. And Further, in *Mathlida Akinyi Ouare v Republic*, Cr App. No 12 of1989, [1989] eKLR the Court of Appeal stated referring to the decision of “*Devlin, J.R.Vs. Dent, (1975)2All E.R.806* at pg 807 letter H, that to constitute a false pretence, the false pretence must be of an existing fact.”
31. The Appellant submitted that, the suit property was allocated to her and the initial ballot was in her name as Njeri Kariuki. This is confirmed by the evidence of DW1 who confirmed from their records that the subject parcel of land had been given to the Appellant herein in 1980 as confirmed on record that there was no alteration concerning that property.
32. PW3 confirmed that the Appellant had the name, Mary. The evidence before the Court is that the properties in Piave Settlement were being given to women herein. Being land from a settlement scheme, the record by DW1 must have been the one used to process the title deeds. The title deed was issued in the name of Mary Njeri Kariuki in 1994, and all the receipts produced by the prosecution bore the said name. No receipt was produced in favour of Freshia Wangari the Appellant's mother concerning that specific even as early as 1990 her documents reflected Mary Njeri Kariuki. There is no evidence of that piece of land. DEXB2 the Sacco card clearly shows except Freshia Wangari who sued the Appellant and left the case there was any other Mary Njeri who was claiming the property in dispute.



33. The evidence by the PW2 to PW4 that the property was to be registered in the name of the Appellant and the PW2 is not true as it is confirmed by them that the land was only set aside for women and PWN2 is not one. It has been contended throughout the evidence that the name Kariuki was a family name. The Appellant's father was also called Kariuki and so was her grandfather. There is no evidence that the said name was only meant for P 2 and no other family member could use the name. The Appellant contended that she had been using the name and for which her siblings knew but because of the land dispute, they are refusing to acknowledge the same. The Appellant submits that, that PW 2 to PW4 took advantage of the family name to instigate this suit to take away the Appellant's parcel of land.
34. The Appellant submits that, initially she had an ID in the name of Mary Njeri Thuo but subsequently, she changed her name to Mary Njeri Kariuki. That the law allows a person to change their name and as confirmed by the witnesses, a person can have more than one name and aliases. The Appellant gave a chronology of how she changed her name at the D.Cs office and she was directed to go to Court and get an affidavit which she did. This was the procedure given to her by a government official and which procedure she complied with it and she was thereafter issued with an ID in the name of Mary Njeri Kariuki which then got lost and was reported in 2016. And that all these processes were done by government offices including the issuance of the new ID by the National Registration of Persons who are the custodians of people's information. That it is therefore surprising that the said government officials would come back and attempt to discredit documents, emanating from their office. That before a new ID is issued, verification has to be done, and if the Appellant's documents were not in order a new ID would not have been issued. That PW1 confirmed that, when she received the report for the lost ID she had no basis and or reason to doubt the credibility of the Appellant.
35. The Appellant produced a voter's card that was sealed and issued to her by the government and which she had been using to vote. All her documents bear the name Mary Njeri Kariuki including her school leaving certificate which was issued in 1994 which means by the time she was enrolling in school, she was using the name Mary Njeri Kariuki. There is evidence that the Appellant was also employed by the Nakuru County Government and as expected before employment, they perform a background check.
36. The Appellant Submits that, PW2 to PW4 confirmed that they were aware that their sister was working in the county when referred to the defence documents. No evidence was produced by the prosecution to show that there was another person in the said family bearing the names Mary Njeri Kariuki other than the Appellant herein and or there is a claim that the Appellant is impersonating someone.
37. The Appellant submits that, there was no basis upon the PW5 Investigating Officer to charge the Appellant over her name. That PW5 in cross-examination confirmed that the complaint he got was related to land and not the names of the Appellant and he never verified the personal details and documents of the Appellant such as employment, school leaving certificate, etc. He admitted that he did not even visit the Lands Office or the Director of Settlement to verify the documents relating to the suit land. Save for making allegations that the Appellant was not cooperative, he never took any step to investigate or verify the claim against the Appellant but relied entirely on the evidence of PW2 to PW4 who in fact escorted him to arrest the Appellant.
38. The Appellant submits that, the prosecution failed to prove the charges that the Appellant obtained registration and or attempt to obtain registration by false pretence and or that she gave false information to a person employed in the public service and as such the trial court was wrong in its find that the Appellant was guilty.
39. That the trial court erred in failing to appreciate that the dispute before it was a land dispute thus convicting the Appellant on her right to own land. The evidence by PW 2 to PW4 is to the effect that the suit property Nakuru/Piave 709 belonged to their mother who left the same to her sons. The



Appellant and the evidence of her witnesses were that the land was allocated to her and belonged to her. It is also evident that the dispute arose when the Appellant served a notice of eviction upon her brothers. In the re-exam, PW 4 stated that the suit land ought to be registered in his name and that of his brother PW1. PW5 sought for the Court to compel the lands office to correct the order in the title as the same was fraudulently obtained while in cross-examination he stated: "the 4 claimed that the Appellant had taken the title from them, they did not complain about her name people do have at least 3 names."

40. That the evidence before this Court is clear that, the dispute related to who was the owner of the suit and the same ought to have been determined by a competent Court dealing with land disputes and not camouflaged through the charges that were preferred against the Appellant. PW5 went out of his way to institute the current charges when the complaint before his related to land.
41. In conclusion, the Appellant submits that, that the Appellant did not obtain registration by false pretence as claimed by the prosecution. No person other than the Appellant claimed ownership of the property in dispute. PW2 to PW4 told the Court that the Appellant was their sister. They did not claim that they have any other sister by the name Mary Njeri. That for the prosecution to succeed, there was need for evidence to show who lost property as a result of the registration in favour of the Appellant.
42. With regards to count II, the Appellant submits that there is evidence before the Court that she held a voter's card in the name of Mary Njeri Kariuki. She produced other documents bearing the said name at the defence hearing. She told the Court that she had an identity card in the name of Mary Njeri Kariuki. The Court is invited to take judicial notice of the process of registration of voters in Kenya that an applicant for the said card must possess an identity card. That there is no way the registering body would have issued a voter's card to the Appellant if she did not have an identity card in the name of Mary Njeri Kariki. The Appellant submits that, that she never impersonated any other person and in this instance, the person alleged to be impersonated was never availed by the prosecution.
43. The Respondent opposed the Appeal submitting that, the Trial Court was not in error to convict on all three counts and that the evidence tendered proved to the required standard of the guild of the Appellant. That it was unnecessary to demonstrate "who was being impersonated" or that there was another "Mary Njeri Kariuki".
44. I have considered the evidence on record, the submissions by each counsel, and the submissions made in the lower court. Section 320 of the Penal Code provides; 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."
45. Under Section 312 of the same Code self-pretences is defined: -

"Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."
46. It was expected that the prosecution would prove beyond a reasonable doubt that, the Appellant had that on 12th October, 1994 at the Nakuru Land Registry office in Nakuru town with intent to defraud obtained registration of land title deed number Nakuru Piave 709 in the name of Mary Njeri Kariuki by falsely pretending that her was Mary Njeri Kariuki, a fact that she knew to be false.



47. It was equally expected that, the prosecution would prove beyond a reasonable doubt that, on the 15th day of April 2016 at Rongai police station within Nakuru county, with intent to obtain a police abstract, informed no 106184 police Constable Faith Kithome a person employed in public service that she had lost her national identity card number 0333298 in the name of Mary Njeri Kariuki, which information she knew to be false, intending thereby to cause the said officers record a report in the occurrence book as OB no 08/15/4/2016 also the police abstract was issued which the said officer ought not to have done if the true state of facts in respect to such information has been known to her
48. It was equally expected that, the prosecution would prove beyond a reasonable doubt that, on 25th September, 2007 at Rongai town within Nakuru County, with intent to defraud, willfully attempted to obtain registration of a Kenyan National Identity card in the name of Mary Njeri Kariuki by falsely pretending that her name was Mary Njeri Kariuki a fact that she knew to be false..
49. No evidence was led by the prosecution to show that the Appellant did any of the alleged things on 12th October, 1994. On the contrary DW1 Samuel Thiongo Assistant Director, from Land Department Nakuru, gave supportive evidence of the records in their possession the investigating office not only failed to avail evidence in this count, he also admitted not visiting the departments of lands I need say no more.
50. No evidence was led by the prosecution to show that the Appellant did any of the alleged things on 25th September, 2007, in fact none of the witnesses testified on any incident relating to the Appellant on this day.
51. This Criminal prosecution was a red herring of a longstanding land dispute amongst siblings including the Appellant which dispute cannot be resolved in criminal proceedings.
52. The Appellant's Defence evidence tilted the scale to the Appellant's advantage to the extent that she demonstrated that she has and continues to use the name of Mary Njeri Kariuki and that she has done so for many years and that her certificates, employment records all bear the name.
53. This Court finds that the Conviction was unsafe to the extent that no evidence was led to demonstrate false pretence and giving of false information to an officer in the public service.
54. I am persuaded from the foregoing that the appeal is of merit and is hereby allowed.
55. The conviction is quashed, the sentence is forthwith set aside, and the fine paid by the Appellant (if any) be refunded to her.
56. It is so Ordered.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 31ST DAY OF JULY, 2023.

MOHOCHI S.M (JUDGE)

