



REPUBLIC OF KENYA



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**Sijenyi v Republic (Criminal Appeal E021 of 2021)  
[2023] KEHC 22805 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22805 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E021 OF 2021  
JRA WANANDA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**PETERLICE ODUOR SIJENYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged in Butere Principal Magistrates Court Criminal Case No. 114 of 2018 with three counts of offences as follows:
  - i. Count 1: conspiracy to commit a felony contrary to Section 393 of the *Penal Code*. The particulars were that on an unknown date and place within the Republic of Kenya, jointly with others not before the Court, with intent to defraud conspired to commit a felony by defrauding Peter Omondi Odunge of the parcel of land number Kisa/Muhaka/358 measuring 1.4 acres situated within Khwisero Sub-County.
  - ii. Count 2: In the alternative, forgery contrary to Section 350(1) of the *Penal Code*. The particulars were that on an unknown date and place within the Republic of Kenya, jointly with others not before the Court, with intent to defraud, forged a Succession Cause No. 230 of 2009 at Kakamega High Court purporting it to be a genuine Succession cause and obtain registration of the parcel of land Kisa/Muhaka/358.
  - iii. Count 3: Intermeddling with the property of the deceased person contrary to Section 45(1) *Law of Succession Act*, Cap. 160, Laws of Kenya. The particulars were that on diverse dates between 01/02/2011 and 01/12/2011 at Kakamega land Registry County in Kakamega town within Kakamega County with intent to defraud intermeddled with land parcel number Kisa/Muhaka/358 situated at Ukaya village in Khwisero sub-County, measuring 1.4 acres



and valued at Kshs. 1,500,000/-, the property of Hellen Okello by procuring for himself the registration of the said parcel of land.

2. The Appellant denied the charge and the case proceeded to trial. The prosecution then presented 5 witnesses in support of its case. After close of the prosecution case, the trial Court found that the Appellant had a case to answer and put him to his defence. The Appellant gave sworn testimony and called 3 other witnesses.

### **Prosecution evidence**

3. PW1, Peter Omondi, was the complainant. He testified that around 2010, the Appellant went to him alongside a land broker seeking to purchase a portion of parcel of land from PW1 who told the Appellant that he lives on the land with his brother and that it was registered in their mother's name, PW1 showed him the parcel of land known as Kisa/Muhaka/358 which he was willing to sell, the whole land is about 1.4 acres and he showed them approximately ¼ acre, they agreed that he would sell the land to them at Kshs. 70,000/-, he sought the assistance from the area Assistant Chief who advised him to carry out a land search which he did, PW1 then gave to the Appellant the Search and burial permit relating to his mother, PW1 received Kshs 30,000/- from the Appellant at the Chief's office before he gave the Appellant the search and the burial permit.
4. PW1 added that later, the Appellant told him that he had the title yet no Succession was done, he does not know how the Appellant obtained the title, in 2011 he received the balance of Kshs 40,000/-, they had entered into the sale agreement at the Chief's office, the agreement was dated 18/12/2010, the people who signed the agreement were Peter Omondi, Edwin Olwande, William Onyango and the purchaser, Peterlice Oduor, he has never transferred the land to the Appellant, he has never gone to the Land Control Board nor given the Appellant his photographs or copy of Identity Card for purpose of transfer, he once gave the Appellant a copy of his PIN Certificate which the Appellant photocopied and returned, he does not know where the Appellant took it. PW1 then identified the land transfer forms in Court purportedly from him to the Appellant and stated that he could not tell whose photograph is on the front page of the form but that the Appellant's photograph is on the back as the "purchaser". He stated that he sold only a small portion of the land to the Appellant but the Appellant has taken everything.
5. In cross examination, he stated that he only executed one sale agreement between himself and the Appellant at Kshs 110,000/-, the size of the land was 1.4 acres, he is indicated as the Vendor and the Appellant as the Purchaser, he never signed the second agreement and that there was money to be paid for Succession, it was Kshs. 40,000/-.
6. PW2 was Johnfrey Omachi Ojwang. He stated that he is a retired Assistant Chief, he was working as the Muhaka Sub-location Assistant Chief when PW1 and the Appellant arrived wishing to transact in his presence, it was a land sale agreement for Kisa/Muhaka/358, the Appellant paid PW1 Kshs. 30,000/- in PW2's presence and they put it down in writing, the entire purchase price was Kshs 70,000/-, the three of them as well as their witnesses signed the agreement. He stated that he is the one who drafted the sale agreement and that the witnesses for PW1 as Vendor were Edwin Olwande and William Onyango while the witnesses for the Appellant as purchaser were Joseph Sijeny and a priest whose name he could not recall. He stated that PW1 was only selling a portion of the land and not the entire land, the next day they went to the land with the parties to see the boundaries and they put up a boundary between the two portions.
7. In cross-examination, he stated that in the agreement they did not state the size of land being purchased, at the time the land was registered in the name of Hellen Auma, PW1's mother but the Agreement



does not state so, the parties told him that a Survey and Succession would be done but the same were not included in the Agreement and that it was part of his job as a Chief to draft Sale Agreements

8. PW3 was William Onyango. He stated that he was a village elder, on 18/12/2020 PW1 was selling land to the Appellant, PW3 was called to witness an agreement before the Assistant Chief for sale of land between PW1 and the Appellant, he went to the chief's office and found that the parties had agreed on the transaction, the land was to be sold at Kshs. 70,000/, it was about ¼ acre, on that date the Appellant paid Kshs. 30,000/- to PW1, PW3 signed as a witness, later the Assistant Chief arrived with a Surveyor in the absence of the Appellant, the Surveyor established the ¼ acre and they put up a boundary. In cross-examination, PW3 stated that the land was registered in Hellen Okello's name - PW1's mother, in the Agreement the land is indicated as belonging to PW1, the Appellant was purchasing ¼ acre but this is not indicated in the Agreement and he does not know how the Appellant obtained a title deed.
9. PW4 was Matthews Gitau, a police constable stationed at Khwisero DCI. He testified that that the case was reported in January 2018, the Appellant had purchased a ¼ piece of land out of Kisa/Muhaka/358 from PW1, the land was in PW1's mother's name, instead of transferring the ¼ acre land, the Appellant transferred the entire parcel of land into his name instead of a portion thereof, the investigating officer had requested the Land Registrar to furnish the Green Card and any other relevant document, the land Register furnished the Green Card which showed that the land was transferred to the Appellant under Kakamega High Court Succession Case No 230 of 2009, the transfer documents were also furnished, the Investigating Officer also requested for the Court proceedings and the same were furnished, the Grant however shows that the proceedings were in respect of the estate of one Paul Muranje and that the suit land was Kisa/Ematsatsa/518. He stated that the Appellant conspired and used a different Succession Cause to obtain the suit land, Kisa/Muhaka/358 belonged to Hellen Okello then transferred to her son PW1 and later transferred to the Appellant, the Succession Cause used to transfer the land related to a different deceased and a different parcel of land and that currently, the land is registered in the name of the Appellant.
10. In cross-examination, he stated that the matter took long before being reported because the parties had a series of disagreements including a case of assaulting of PW1. He conceded that he has no expert evidence that the documents are forgeries, the land belonged to the PW1's mother who was deceased so there is no issue of PW1 visiting the Land Control Board to give consent, the consent was given for transfer of the entire parcel of land, the transfer form is between PW1 and the Appellant and that, currently the Appellant is living on the land.
11. PW5, George Obondo Ogutu was the Land Registrar, Kakamega. He referred to a letter which requested certain documents in respect of Kisa/Muhaka/358, and which documents were dispatched to DCI. He also referred to the transfer documents between PW1 and the Appellant and stated that the transfer was dated 28/06/2011. He then produced the green card and stated that the initial registration was in 1967 in favour of Hellen Okello, Kakamega Succession Cause No. 230 of 2009 confirming ownership to PW1 was then entered on 1/02/2011, entry 3 was the confirmed Grant issued in the Succession Cause, on 25/02/2011 PW1 got a title deed and on 30/11/2011 the property was transferred to the Appellant and who was then given a title on 1/12/2011. In cross examination, he conceded that he could not confirm that the entries in the registry were procedural or genuine.

## **Defence Evidence**

12. The Appellant gave evidence as DW1. He stated that the land came to his possession legally, in 2010 the retired Chief Andrew Okwaso looked for a land parcel for him, the Chief told him that there was a man (PW1) who wanted to sell his land and that he wanted to live on the parcel with the purchaser, afterwards, he entered into an agreement with PW1 at the Assistant Chief's office, he had 2 witnesses



and PW1 also had 2 witnesses, they agreed on the purchase price of Kshs 70,000/- and Kshs 30,000/- for Succession proceedings so the total was Kshs 100,000/-, he paid Kshs 30,000/- leaving a balance of Kshs 40,000/- which he paid later, he started using the land by planting trees along the boundary, PW1 continued with Succession proceedings on his own and he (Appellant) does not know how PW1 went about it, he paid for the land and took possession, on 25/03/2011 PW1 informed him that he had obtained title to the land, in May 2011 they went to the Land Control Board to obtain the consent. He then referred to the minutes of the meeting of the board particularly minute No. 7 which confirms the consent, later PW1 told him that the Surveyor had stated that the title was ready, the Appellant was living with PW1 the entire time in peace, PW1 did not have any children, the Appellant lived with PW1's brothers and nephews peacefully until 2016 when PW1 cut down the Appellant's trees, thereafter the Appellant was charged in a criminal case, PW1 did not attend Court and the Appellant was acquitted, all this time he never heard that that he had illegally purchased the land, in January 2018 he was summoned by the chief to explain how he got the land, he lived on the land peacefully for 8 years until people tried to dispossess the land from him so as to sell it and Health Centre to be built, the chief ordered the Appellant to surrender the land save for his compound but the Appellant declined, he was later summoned by the District Officer (DO) who told him the same, the DO alleged that the Succession cause was not properly done, on 9/02/2018 the Appellant was arrested and charged. He and PW1 then unsuccessfully attempted to settle the matter out of Court, the land is valued at Kshs 2,300,000/-, according to the Green Card PW1 conducted Succession and transferred the land to the Appellant and that there is nothing showing that the Appellant did the Succession.

13. In cross-examination, he stated that the retired Chief Andrew Obwasi is at home and yet he was not called as one of the witnesses. He stated further that he never carried out a Search and conceded that the Kshs 30,000/- for Succession proceedings is not mentioned in the agreement. He observed that the two agreements are different, the balance of payment is only in the Appellant's copy and not in PW1's copy. He added that the Land Board's consent was given prior to payment of the full purchase price, that he was never shown any documents for the Succession, that the land was in PW1's mother's name and that PW1 was literate. He stated further that the Surveyor's office is in Kakamega, and is still operational but conceded that he has not called the Surveyor as a witness.
14. DW2 was Joseph Sijeny Obiero, the Appellant's father. He testified that he witnessed the agreement dated 18/12/2010 and signed it, that his son (Appellant) was purchasing the land. In cross-examination, he stated that the Appellant gave Kshs 30,000/- on the date of the agreement, that he did not know the purchase price, that he was never involved in any other matter in the transaction and he did not know the acreage that the Appellant was purchasing.
15. DW3 was one John Oaka Wandiko. He too stated that he witnessed the agreement, the purchase price was Kshs 70,000/- and that on that day the Appellant paid Kshs 30,000/-. In cross examination, he too conceded that he did not know the acreage that the Appellant was purchasing.
16. DW4 was one Doris Shiroko who was attached to the criminal registry at Butere Law Courts. She produced the proceedings in Butere Criminal Case 31 of 2016 – Republic v Peter Oduor Sijeny and stated that the matter was withdrawn and that neither the complainant nor the witnesses attended. She also produced the Court file in Butere Magistrates Environment & Land Court No. 29 of 2019 – *Peter Oduor Sijeny v Samson Oyoo*. In cross-examination, she stated that the criminal case was withdrawn on 1/02/2021.

### **Judgment of the trial Court**

17. Upon considering the testimonies and the evidence presented, on 18/06/2021 the trial Court acquitted the Appellant of the charge in Count 2 (forgery) but found him guilty in Counts 1 (conspiracy to



commit a felony) and 3 (intermeddling with the property of a deceased person). The Court then convicted the Appellant on the two counts. In Count 1, the Appellant was sentenced to a fine of Kshs, 20,000/- and in default, to serve 18 months in prison. In Count 2, he was sentenced to a fine of Kshs 10,000/- and in default, to serve 18 months in prison. The sentences were to run consecutively.

### **Filing of the Appeal**

18. Aggrieved with the decision of the trial Court, the Appellant instituted the present appeal. The Petition of Appeal was filed on 21/06/2021 through Messrs Simba Law Associates and was premised on the following grounds:

- i. That the Learned trial Magistrate erred in law and fact in convicting the Appellant for the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code Cap 63 when the evidence was insufficient to sustain the charge.
- ii. That the Learned trial Magistrate erred in law and fact in convicting the Appellant for the offence of intermeddling with the property of a deceased person contrary to Section 45(1) of the Penal Code Cap 63 when the evidence was insufficient to sustain the charge.
- iii. That the Learned Trial Magistrate erred in Law and fact in convicting the Appellant for the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code Cap 63 when the charge sheet on the above charge was incurably defective.
- iv. That the Learned trial Magistrate erred in law and fact in convicting the Appellant for the offence of conspiracy to commit a felony contrary to Section 393 and intermeddling with the property of a deceased person contrary to Section 45(1) of the Penal Code Cap 63 when the prosecution's evidence was marred by contradictions and inconsistencies.
- v. That the Learned trial Magistrate erred in law and fact in convicting the Appellant for the offence of conspiracy to commit a felony contrary to Section 393 and intermeddling with the property of a deceased person contrary to Section 45(1) of the Penal Code Cap 63 when the complainant and other prosecution witnesses were the architects of the entire process of selling and transferring the deceased's property in the Appellant's name hence making him the first and prime suspect of the alleged offences.
- vi. That the Learned trial Magistrate erred in law and fact in convicting the Appellant for the offence of conspiracy to commit a felony contrary to Section 393 and intermeddling with the property of a deceased person contrary to Section 45(1) without taking into consideration of the Appellant's submissions on record.
- vii. That the Learned trial Magistrate erred in law and fact in convicting the Appellant for the offence of conspiracy to commit a felony contrary to Section 393 and intermeddling with the property of a deceased person contrary to Section 45(1) without taking into consideration the Appellant's defences of a bonafide claim of right to the land and an innocent intention and absence of mens rea in acquiring land comprised in Kisa/Muhaka/358 when he testified that he honestly acquired the land from the complainant.
- viii. That the Learned trial Magistrate erred in law and fact in sentencing the Appellant to a fine of Kshs 200,000/- and in default 18 months imprisonment in count one (1) and a fine of Kshs 10,000/- and in default 6 months imprisonment in count three (3) with both sentences running consecutively.



- ix. That the Learned trial Magistrate erred in law and fact in sentencing the Appellant in total disregard for the principals of sentencing in law.

### **Hearing of the Appeal**

19. It was then directed, and agreed, that the appeal be canvassed by way of written submissions. Pursuant thereto, through Prosecution Counsel Ms N.K. Chala, the Respondent filed its Submissions on 11/12/2022 conceding to the Appeal. There is however a second set of Submissions filed by the Respondent on 20/12/2022 through Principal Prosecution Counsel Loice Nyaboke Osoro, also conceding to the Appeal.
20. On his part, apparently taking cue from the Respondent's concession to the Appeal, the Appellant's Counsel, Mr. Mushindi, opted not to file any Submissions.

### **Respondent's submissions**

21. In the first set of the Respondent's Submissions, Prosecution Counsel N.K. Chala, referred to the case of *Ronald Kiptoo Yator v Republic*, Criminal Appeal No. 155 of 2018 Nairobi, [2019] eKLR and also *Jane Wambui Gakungu v Republic* [2017] eKLR and submitted that a charge of conspiracy to defraud must involve two or more persons and not a single accused person, for the prosecution to prove the offence of conspiracy it ought to have shown by way of evidence that the Appellant had a plan or agreement with another person or persons who had a similar mindset of committing the crime, the evidence of PW1 was that he entered into a sale agreement with the Appellant but the agreement was for him to sell to the Appellant a part of the land and not the entire land, this cannot be said to have been a meeting of the minds to commit a crime, the other person who was mentioned to have been with the Appellant was the land broker by the name Wilson Omwasa, apart from the evidence showing that the land broker had just accompanied the Appellant, no evidence was lead to show that the land broker took part in the execution of the sale agreement, there was therefore no connection established as between the Appellant and any other person(s) meant realize the offence of conspiracy, and that as such, the conviction should be set aside as the evidence did not meet the required threshold.
22. Counsel also submitted on the charge of forgery. However, since the Appellant was acquitted on this charge, I will not set out this part of the Submissions.
23. Regarding the charge of intermeddling with the property of a deceased person, Counsel submitted that for the charge to have succeeded, the prosecution needed to prove that the Appellant had fraudulently procured registration of the said parcel of land in the manner set out in the particulars in the charge sheet, this is because the particulars spoke specifically to that and not of him disposing the land or taking possession of the land, the type of intermeddling that was described in the particulars of the charge was that he procured registration for himself to mean he fraudulently transferred the land to himself, the transfer documents were never subjected to forensic analysis to confirm forgery of signatures thereon and that the Appellant was never charged with the offence transferring the land.
24. In the second set of Submissions filed by Prosecution Counsel Loice Nyaboke Osoro, it is submitted that PW1 admits that he sold the land without consulting his other siblings, this already showed that he was complacent in the sale, PW1 claimed that he only sold ¼ acre of the land while the sale agreement showed that the whole land parcel was up for sale, the trial Magistrate put this down to PW1 being illiterate, PW1 was a retired police officer, he therefore cannot be illiterate, naive maybe but not illiterate, a retired police officer who used to investigate crimes should have been more precise in the terms of sale agreement. Counsel submitted further that the investigating officer never subjected any of the documents to forensic examination, most especially the second agreement dated 10/05/2011,



- the failure by the prosecution to subject that sale agreement to a forensic examiner was fatal, the denial by PW1 that he did not know that agreement did not carry any weight since a document examiner did not analyse the document to establish that the signatures did not belong to PW1, there was an earlier agreement dated 18/05/2010 signed, the signatures in the two agreements should have been compared.
25. Counsel also submitted that it was not clear who intermeddled in the property of the deceased, PW1 admitted receiving money from the Appellant and selling the land without any Succession proceedings, he who comes to equity must come with clean hands, PW1 cannot sue the Appellant for intermeddling with the estate yet he was the genesis of the intermeddling, it is actually PW1 who intermeddled with the estate.
  26. It was also Counsel's contention that the investigating officer should have subjected the stamp duty declaration form to a document examiner to enable him exclude PW1 from having signed the document, this did not happen and therefore PW1's denying knowledge of the document is mere denial which should not have held any weight, PW1 admitted that he disposed the land without the consent of other siblings, the letter that the Chief is said to have written to facilitate Succession was also not subjected to forensic examination to exclude the Chief as the author of the letter, the letter was not even availed as an exhibit, PW1 stated that he failed to get the Appellant to surrender a portion of the land and that is why they are in Court, this implies that had the Appellant acceded to the request then PW1 would not have been charged.
  27. It was further submitted by Counsel that the charge of forgery failed because according to the trial Magistrate, the prosecution tendered evidence that was at variance with the particulars of the charge, the trial Court held that Succession cause No. 230 of 2009 was genuine only that it did not relate to the deceased or the land subject matter to the case, Count II should have also failed because the investigating officer did not carry out any investigation into the forgery, by failing to subject the sale agreements to forensic examination and also the stamp duty declaration forms, transfer documents and the letter from the Chief that introduced the parties to the Court for Succession made it impossible to prove a conspiracy to defraud because the fraud itself was not proved, the investigating officers were extremely lazy. Counsel therefore conceded that the convictions were unsafe.

### **Analysis & Determination**

28. As a first appellate Court, I am obligated to revisit and re-evaluate the evidence afresh, assess the same and make my own conclusions bearing in mind that, unlike myself, the trial Court had the advantage of hearing and observing the demeanour of the witnesses (see *Okeno v Republic* (1972) EA 32).
29. Although the State conceded to the appeal herein, it does not follow that this Court must therefore automatically allow the appeal. Despite the concession by the State, this Court still has the duty to scrutinize the evidence afresh and arrive at its own determination. In *Odhiambo v. Republic* (2008) KLR 565, it was stated as follows:

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”
30. I have read the record of the trial Court, the impugned Judgment and the Submissions presented. In my view, I find the issues that arise for determination in this appeal to be the following:
  - i. Whether the prosecution proved the charge of conspiracy to defraud.



- ii. Whether the prosecution proved the charge of intermeddling with the property of a deceased person.
  - iii. Whether the sentences imposed were justified.
31. I now proceed to analyze the said Issues.

**i. Whether the prosecution proved the charge of conspiracy to defraud to the required standard**

32. The first Count in which the Appellant was convicted was the offence of conspiracy to commit a felony contrary to Section 393 of the *Penal Code*. The Section provides as follows;

“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 that lesser punishment.”

33. In *Lawrence Gitau Karanu v Republic* [2020] eKLR, Hon. Lady Justice Mary Kasango, stated as follows;

“The dominant aspect of the offence of conspiracy is that there must be an agreement, a meeting of the mind.”

34. On her part, in *Ann Wangechi Mugo & 6 others v Republic* [2022] eKLR, Hon. Lady Justice L. Njuguna stated as follows:

“29. As earlier stated, all the appellants herein were charged with the offence of conspiracy to commit an offence of corruption while the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants were charged with abuse of office. The *Penal Code* and ACEA do not define the word “conspiracy”. The *Black Law Dictionary* 9<sup>th</sup> Edition defines conspiracy as follows;

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

30. In Archibold; *writing on criminal pleadings, evidence and practice*, he observes;

“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.”



31. The Court of Appeal in *Gichanga v Republic* [1993] KLR 143 held that;

“With respect to the offences of conspiracy, the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money.”

32. To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court (see *Republic v Anne Atieno Abdul & Others* [2017] eKLR). Further *Halsbury’s Laws of England* Vol. 25 observes that;

“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 minds, a consensus to effect an unlawful purpose.

33. It requires that a common purpose between them or among the subject parties is proved. Common intention is set out in Section 21 of the *Penal Code* as follows;

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.”

35. Applying the above principles to the facts and circumstances of this case, it is my considered view that the prosecution failed to prove that there was a meeting of minds to constitute the offence of a conspiracy to commit a felony. The prosecution did not demonstrate that the Appellant was acting with another person or persons with the common intention of defrauding PW1 of his land. This is compounded by the fact that the trial Court acquitted the Appellant of the charge of forgery.

36. I also note that in his defence, the Appellant stated that it is PW1 who handled the Succession proceedings on his own and that he (Appellant) does not know how PW1 went about it. The Appellant stated further that he paid for the land and took possession, that on 25/03/2011 PW1 informed him that he (PW1) had procured title to the land, that in May 2011 they went to the Land Control Board to get the transfer, that later PW1 told him that the Surveyor had informed them that the title was ready, that he was never shown any documents for the Succession. This narrative was not disproved by the prosecution and in the circumstances, the Court is unable to unravel the correct position. In the circumstances, the benefit of doubt tilts in favour of the Appellant.

37. I am also disturbed by the fact that although the transfer to the Appellant was effected in the year 2011, it was not until the year 2018, 7 years later that PW1 made a complaint to the police after which the Appellant was arrested and charged in the matter before the trial Court. Since PW1 conceded that the two resided in the same land for all these years, the belated complaint by PW1 leading to the Appellant’s arrest seems to have been an afterthought, most likely a result of pressure from his brothers who wanted their land back.



38. I agree, there are apparent irregularities in the manner in which the transfer to the Appellant name was procured. The main irregularities are the fact that the Succession Cause relied upon in procuring the title related to a stranger, and not PW1's late mother (the initial registered owner) and also referred to a different parcel of land. On this, the office of the Lands Registrar stands indicted since there is no explanation how such an obvious irregularity was not noticed by the Registry staff. If indeed no Succession proceedings were conducted over the estate of PW1's late mother, then obviously the transfer process is void ab initio and the transfer is liable to nullification. However, my view is that PW1 or any other interested party seeking to recover the land from the Appellant stands a better chance of succeeding in a civil suit where the standard of proof is on a balance of probabilities, unlike in a criminal Court where the standard is that of proof beyond reasonable doubt. I say so because, apart from mere suspicion, no evidence has been presented to demonstrate that it is the Appellant who committed or caused the said apparent irregularities. Who was behind the flawed transfer process is what was not addressed by the prosecution and as a result, the Appellant easily escapes criminal liability.
39. It is therefore my finding that the prosecution did not prove beyond reasonable doubt, that the Appellant was guilty of the offence of conspiracy to commit a felony. The prosecution therefore correctly conceded to this ground of the appeal.

**ii. Whether the prosecution proved the charge of intermeddling with the property of a deceased person**

40. The Appellant was also convicted of the offence of intermeddling with the property of a deceased person contrary to Section 45(1) of the [Law of Succession Act](#). The Section provides as follows;
- “Except so far as expressly authorized by this [Act](#), or by any other written law, or by a grant of representation under this [Act](#), no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
41. It is therefore clear that for the offence to have been proved, the prosecution was required to show that the Appellant took possession of or intermeddled with the property of the deceased. I have perused the particulars of the charge sheet and they categorically state that the Appellant intermeddled with the property of Hellen Okello with the intent to defraud. The evidence of intermeddling that informed the decision of the trial Court was based on the fact that the Appellant was the sole beneficiary of the transfer of the land in question and which was effected pursuant to a Succession Cause relating to a different deceased person. Further, as evidence of the conspiracy to defraud, the trial Magistrate relied on the minutes from the Khwisero Land Control Board.
42. I however find that the trial Magistrate failed to consider the admission by PW1 that he sold the land or the portion thereof without consulting the other siblings and before Succession proceedings had been concluded. In my view, PW1's admission that he received money from the Appellant as purchase price for the land is evidence that he was himself complicit in the intermeddling. If anyone should be accused of intermeddling then that person should be PW1. He should have been charged with the same offence.
43. There was also no nexus or link established between the proceedings of the Land Control Board and the Appellant. In other words, no attempt was made to demonstrate that the Appellant was the person behind the application for consent made before the Board.
44. Regarding the Transfer documents and the Grant issued in the impugned Succession proceedings described as Cause No. 230 of 2009 and relied on by the Land Registry to transfer the land to the Appellant, no investigations seem to have been carried out to establish who presented the documents to the Lands Registry. It was also not demonstrated that it is the Appellant who applied for the Land



Control Board's Consent. The list of attendees before the Board on the date when the consent was granted also not having been presented, it cannot be established whether or not the Appellant and/or PW1 attended before the Board. Further, the Appellant having been acquitted of the charge of forgery and the signatures on the transfer document not having been subjected to forensic examination to exclude the same as having been signed by PW1, it follows that it was not proved that the signature was not that of PW1. In the circumstances, I agree with Counsel that the investigations conducted were shoddy and left a lot to be desired.

45. It is not judicious to deem the Appellant guilty simply because he stood to benefit from the above actions. In my view, PW1 too stood to benefit since he needed to be paid the balance of the purchase price and which could only be done if he furnished the Appellant with a title. He too therefore had sufficient motive to procure the title. In the circumstances, I find that it was not safe for the trial Court to convict the Appellant for the offence of intermeddling. The Appellant is entitled to the benefit of doubt. Again, I agree that the prosecution correctly conceded to this further ground of appeal.

### **iii. Whether the sentences imposed were justified**

46. I have already found that the prosecution failed to prove its case beyond reasonable doubt and that the Appellant's conviction was not sustainable. In the circumstances, canvassing this third issue will only be academic as the same no longer arises. I will therefore not belabour this issue.

### **Final Orders**

47. The upshot of my findings above is that this appeal succeeds in its entirety. I therefore order as follows:
- i. The conviction of the Appellant is hereby quashed and sentence set aside.
  - ii. Consequently, the Appellant is hereby set at liberty forthwith unless he is otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023**

**WANANDA J. R. ANURO**

**JUDGE**

