Koros v Republic (Criminal Appeal 32 of 2019)
[2022] KEHC 10250 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10250 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 32 OF 2019

WK KORIR, J

JUNE 30, 2022

BETWEEN

AUGUSTINE K. KOROS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. S.O. Temu, PM, delivered on 15/5/2019 in Kabarnet PMC Criminal Case No. 504 of 2017, R. v Augustine K. Koros)

JUDGMENT

1. The Appellant, Augustine K. Koros, was charged, tried, convicted and fined Kshs. 1,000,000/= in default 12 months' imprisonment for the offence of abuse of office contrary to Section 101(1) as read with Section 102(A) of the Penal Code, Cap. 63. The Appellant being dissatisfied with the judgment of the lower court has lodged this appeal against conviction and sentence through his petition of appeal dated 27th May, 2019 in which he raises the following grounds:

    i. The trial magistrate erred in fact and in law in convicting and sentencing the appellant where the prosecution had not proved the case to the standard of beyond reasonable doubt as [is] the case in criminal matters;

    ii. The trial magistrate erred in fact and in law in convicting and sentencing the appellant on allegation which was purely a lie and not committed by the appellant;

    iii. The trial magistrate erred in fact and in law in convicting and sentencing the appellant on allegation of abuse of office where the prosecution witnesses adduced evidence that the due process was followed by the appellant;

    iv. The trial magistrate erred in fact and in law by convicting and sentencing the appellant without analysing the prosecution and appellant's evidence on record and by disregarding or

not looking into the appellant's submissions of which he could have arrived on a contrary judgment;

v. The trial magistrate erred in fact and in law by convicting and sentencing the appellant where the complainant was involved in the whole process of transferring his parcel of land LR No. Baringo/Kiboino/606 to one Reuben K. Cheruiyot whom the prosecution failed to call with others as important witnesses in the trial and where the appellant never profited from the transaction;

vi. The trial magistrate erred in fact and in law in convicting and sentencing the appellant on allegations which are civil but not criminal in nature since it touches on procedure and regulations on process of transfer of land;

vii. The trial magistrate erred in fact and in law by meting conviction and sentence by relying on the prosecution evidence where they failed to call the witnesses who were very important to shed light on the signatures and ownership and transfer of the parcel of land no. Baringo/Kiboino 'B'/606;

viii. The trial magistrate erred in fact and in law by meting conviction and sentence which was harsh and excessive without considering the appellant's mitigation;

ix. The trial magistrate erred in fact and in law by meting conviction and sentence where he had no jurisdiction on economic crime tendering on abuse of office;

x. The trial magistrate erred in fact and in law by meting harsh sentence against the appellant without an option of non-custodial sentence.

2. The prosecution called five witnesses. PW1 Mark Kipruto Chemjor testified that he met the Appellant when he collected his title deed at Kabarnet Lands Office on 3rd April, 1997. PW1 stated that he had initially given his title deed to one Reuben Cheruiyot (hereinafter simply referred to as Reuben) who wanted to procure some loan. His evidence was that he made copies of the title deed which he gave to Reuben while he retained the original copy of the title deed. PW1 stated that the Reuben was his neighbor and a relative.

3. PW1 further stated that Reuben gave him some forms including a sale agreement and asked him to sign but not to date them. He stated that he signed the agreement. He, however, did not sign all the forms because he became tired in the process. PW1 also testified that in the same year around September, Reuben informed him that he had secured the loan and at the request of Reuben, he accompanied Rueben's brother (PW2 Daniel K. Cheruiyot) to Nairobi where they procured a posho mill for Reuben.

4. PW1 testified that Reuben died in 2002 and in 2015, there was an advert in the newspapers that a powerline was to pass through his land. The advert, however, indicated that the land belonged to Reuben. He sought clarity from the lands office and he was informed that the transfer regarding the land was properly conducted and he was referred to the chief. He testified that he never sold the land to Reuben but only signed documents guaranteeing the loan taken by Reuben.

5. On cross-examination, PW1 testified that he never signed any sale agreement. His evidence was that at the Appellant's office, he had refused to sign the many forms given to him. He also testified that the application for consent was forged and that the transaction between him and Reuben started in April 1997 and not February 1997.

6. Daniel K. Cheruiyot testified as PW2 and stated that he is a brother to Reuben Cheruiyot who is now deceased. He further stated that Reuben informed him that he had approached PW1 to guarantee him a loan of Kshs. 189,000/= which he intended to use to purchase a posho mill. PW2 testified that when Reuben's loan was disbursed, Reuben asked him to go with PW1 to Nairobi to purchase a posho mill for him. His evidence was that they indeed travelled to Nairobi with PW1 and purchased a posho mill which they delivered to Reuben.

7. On cross-examination, PW2 stated that PW1 informed him that Reuben had obtained the title deed as if he was to purchase the land and this was only meant to assist Reuben obtain the loan facility. PW2 further stated that Reuben had given them Kshs. 145,000/= for the purchase of the posho mill.

8. Fred Okoth Nandwa testified as PW3 and informed the Court that he was the Baringo County Lands Registrar from 2014. His testimony was that on 14th March, 2017, he received a letter from the DCIO Baringo requesting for the green card and transfer forms with respect to land parcel number Baringo/Kiboino 'B'/606. He supplied the requested documents for the land which belonged to Reuben with the ownership being registered on 1st September, 1997. He produced as exhibits an application form for consent dated 12th February, 1997, a consent letter from the Lands Control Board dated 12th February, 1997 between PW1 and Reuben Cheruiyot and transfer forms. He also produced an official search certificate dated 14th March, 2017 in respect of the land in question. He further testified that the land was charged to Kenya Posts and Telecommunications Corporation on 30th October, 1997. PW3 also stated that there was an omission since the old title deed was not surrendered or gazetted as lost before the new one was issued.

9. On cross-examination, PW3 testified that as per his understanding, the transaction was conducted in the right manner.

10. Police Constable Sarah Kamau testified as PW5. From the record she was the fourth witness and ought to have been indicated as PW4. I will therefore refer to her as PW4. She stated that in March 2017, PW1 reported a land fraud case to their office. During her investigations, she requested for the transfer documents and green card from the lands office. In her testimony, she acknowledged receipt of the documents referred to by PW3. She stated from the statements of the witnesses she established that PW1 had authorized Reuben to take a loan using the parcel of land in question. Further, that PW1 did not surrender his original title deed to Reuben while at the lands office where the Appellant was the head. She reiterated the evidence of PW1 with respect to what transpired at the Appellant's office. She also testified as to how PW1 got to know that the land had been advertised as belonging to Reuben. PW4 further stated that she took samples of the documents for signature analysis and the report indicated that they all belonged to PW1.

11. On cross-examination, PW4 confirmed that the signatures belonged to PW1. She stated that the Appellant was charged because there were no minutes from the land control board and that the old title deed was never revoked. She also stated that the transfer documents were attested to by an advocate called Rutto. Further, that PW1 informed her that the transaction was under a gentleman's agreement.

12. When the Appellant was placed on his defence, he testified as DW1 and stated that the standard procedure in respect to the transfer of land is for the transfer documents to be presented to the clerks who then peruse them before forwarding them to the registrar for further action. He stated that the standard procedure was followed when the land in issue was transferred. He further stated that when he received the transfer documents attested by Ruto & Co. Advocates, he assessed the stamp duty and upon payment of the duty the documents were signed. He produced the documents as exhibits. DW1 also indicated that all the documents that are required prior to the transfer of title to land were

supplied. He denied that the transfer forms were signed in his office as claimed by PW1. He also denied having known Reuben or being acquainted to him. DW1 further testified that on 23rd October, 1997, he registered a charge on the title in favour of Kenya Posts and Telecommunications Corporation. He produced a consent to charge and an application for the loan as exhibits.

13. The Appellant called DW2 Esther Lagat as his witness. Her testimony was that her late husband Reuben bought the land in question from PW1. DW2 told the trial court that she was present when her deceased husband bought the land from PW1 for Kshs. 189,000/= and that PW1 was paid by Kenya Posts and Telecommunications Corporation. Her testimony was that she had given the title deed which was in her late husband's name to Kenya Electricity Transmission Company Limited (KETRACO) as the company wanted power lines to pass through the land. According to DW2, after her husband purchased the land, PW1 removed his houses from the land and went to his new land. Further, that she had fenced off the land without any complaints from the PW1.

14. DW2 also told the trial court that she carried out succession in respect of the estate of her late husband between 2004 and 2007. Her testimony was that PW1 just reappeared claiming the land after KETRACO advertised an impending payment to land owners whose parcels of land were affected by the power lines.

15. This appeal was canvassed by way of written submissions. The Appellant filed submissions dated 4th April, 2022. On whether he was guilty of the offence charged, the Appellant submitted that the trial court erred in law and in fact by finding him guilty. He submitted that he diligently discharged his duty as a lands registrar and that all the pre-requisites for transfer of land were in the land file and were produced as exhibits. He further submitted that no criminal charges were preferred against the advocate who attested the sale agreement and that his actions came at the tail end of the transfer of the title hence his culpability was not proved. The Appellant also submitted that the failure on his part to ensure that the old title was surrendered cannot be said to amount to foul play because he ensured that a photocopy of the same was in the file. The Appellant also submitted that he was not directly involved in the sale and he did not therefore play a major role in the disposal of the land.

16. Regarding the sentence, the Appellant submitted that the trial court erred by imposing a sentence as "a lesson to others" as this resulted in a harsh sentence. He therefore urged this Court to quash both the sentence and conviction of the trial court.

17. The Respondent file submissions dated 2nd March, 2022. The Respondent submitted that it proved the case against the Appellant beyond reasonable doubt and that all the witnesses gave consistent and corroborative evidence. The Respondent submitted that the evidence on record showed that due process was not followed by the Appellant in conferring the title of the land in question to Reuben. Further, that the Appellant failed to explain to the complainant the impact or effect of the documents he was appending his signatures to.

18. The Respondent submitted that the title to the land in question was erroneously transferred at the instance of the Appellant hence he abused his office.

19. On the Appellant's claim that the trial court had no jurisdiction to entertain the matter, it was submitted that the trial court was not statutorily barred from hearing the case as the offence emanated from the Penal Code and was therefore heard in accordance with the *Criminal Procedure Code*.

20. Lastly, the Respondent submitted that the trial court considered both the evidence and mitigation of the Appellant hence the conviction and sentence were in accordance with the weight of the evidence on record.

21. Having perused the petition of appeal, the record of appeal and submissions by both parties, I find that the issues for determination in this appeal are whether the trial court had jurisdiction to hear the matter; whether the prosecution proved its case against the Appellant; and whether the sentence imposed on the Appellant complied with the sentencing principles.

22. This being a first appeal, this Court is required to evaluate the evidence on record afresh and come up with its own independent conclusion. In doing so, this Court must also be cognizant of the fact that unlike the trial court, it did not enjoy the benefit of seeing and hearing the witnesses give evidence. In support of this statement of law, I only need to cite the holding by the Court of Appeal in *Thuo v Republic* [2022] KECA 461 (KLR) that:

> "24. This being a first appeal, this Court is required to conduct a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. The Court is not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. It must weigh conflicting evidence, make its own findings and draw its own independent conclusion. See Okeno vs. Republic [1972] EA 32 and *Kiilu & Another vs. Republic [2005] KLR 174*.
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> 25. In re-appraising the evidence, the Court will however bear in mind and take account of the fact that it does not have the advantage that the trial court had of hearing and seeing witnesses as they testified. As a general rule therefore, the Court will not interfere with the findings and conclusions of the trial court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or that the trial court is demonstrably shown to have acted on wrong principle in reaching the findings it did. See Joseph Kariuki Ndungu & Another vs. Republic [2010] eKLR."

23. It is the Appellant's contention that the trial court lacked jurisdiction to hear and determine the case against him. The Appellant advanced two arguments namely that the allegations were civil in nature and that the offences fell within the purview of economic crimes hence the trial court lacked jurisdiction. The Respondent's position is that the trial court had jurisdiction as it was not statutory barred from presiding and hearing a charge under the *Penal Code*.

24. A similar issue arose in *Julius Meme v Republic & another* [2004] eKLR and the Court held that:

> "We hold that the charges being brought against the applicant are in respect of section 101 of the Penal Code, and have no relationship to Act No 3 of 2003; that therefore, it is not tenable for the applicant to impugn the provisions of Act No 3 of 2003 in this application, or to suppose that Act No 3 of 2003 has repealed the offence specified in section 101 of the Penal Code by implication. We hold too that the proper Court to try the application is the Subordinate Court."

25. The offences under the *Penal Code* are tried by magistrates in accordance with the jurisdiction bestowed upon them by the First Schedule of the *Criminal Procedure Code*, Cap. 75. As per the said schedule, a charge brought under Section 101 of the Penal Code is triable by any subordinate court. The jurisdiction of the trial court cannot therefore be impeached. Since the Appellant did not argue this ground of appeal in his submissions, I will depart from this issue by holding that the trial court was indeed clothed with the jurisdiction to try the matter and impose the sentence provided by the law.

26. The next issue is whether the prosecution proved its case against the Appellant to the required standards. In determining whether the prosecution discharged its burden of proof, it is necessary to

identify the elements of the offence of abuse of office. The Appellant was charged with the offence of abuse of office contrary to Section 101(1) of the *Penal Code* which provides that:

> " Any person who, being employed in the public service, does or directs to be done, in abuse of authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony."

27. From the wording of Section 101(1) of the *Penal Code*, four elements of the offence emerge: the accused must be an employee in public service; the accused in abuse of his authority acts or sanctions an act; such act or direction to act must be made arbitrarily; and the act must be prejudicial to the rights of another person. It is also important to point out that the offence created by Section 101(1) of the *Penal Code* is distinct and independent from the one established under Section 46 of the Anti-Corruption and Economic Crimes Act.

28. For a conviction to arise under Section 101(1) of the *Penal Code*, the prosecution ought to prove all the four elements of the offence. It is not disputed that the Appellant was an employee in the civil service as at the time when the offence is alleged to have been committed. It is also not disputed that he worked as a land registrar and was mandated to process and issue title deeds.

29. Before addressing the remaining three elements, it is imperative to point out that it is not the business of a criminal court to determine the validity or otherwise of the title or ownership of the land. That issue remains within the purview of the Environment and Land Court. What this Court is concerned with is assessing whether the actions of the Appellant while performing his duties amounted to misuse of his power or authority.

30. The question therefore is whether the actions of the Appellant were arbitrary and in abuse of his authority as a land registrar. This issue will be answered by assessing the evidence that was adduced at the trial. At page 33 of the typed record of appeal, PW3 stated in his evidence-in-chief that:

> " As normal once there is transfer the person transferring attaches the original title deed together with the application for consent and consent to the lands office before the transfer is esteeled."
>
> The handwritten proceedings of the magistrate show that the actual term used is "executed" in the place of the word that appears as "esteeled" in the typed record.

31. PW3 continued in the same page that:

> " The old title is surrendered at the point of registration. In this case the old title was never surrendered. There is a requirement to have board minutes which are prepared before the board sits...
>
> It is clear that the original owner had possession of his title. There was an omission that the old title was not surrendered and there were no reasons given as to why."

32. At page 35 of the record of appeal, PW3 stated during cross-examination that:

> " It is a practice that the old original title deeds should be surrendered. If the title is lost it must be gazetted or surrendered late... What is important is not the title but the entry in the lands registry."

33. At pages 43 and 45 of the record of appeal, it is indicated that the Appellant testified as follows:

> "The standard process or procedure at the time to transfer land was that the parties were to present their documents to the clerks who were to take them to the Registrar for further action... Once there is consent to transfer the registered owner transfers ownership to the other party."

34. In response to questions put to him during cross-examination, the Appellant is captured at page 46 of the record of appeal as stating that:

> " The old title deed is required to be cancelled. I did not cancel the first title deed in this case... Once transfer is estated another title deed can be issued in a new title deed by the same day which involves cancellation of the said title deed."

Again, the handwritten record shows that the word used is "executed" and not "estated" as indicated in the typed proceedings.

35. I have narrowed down to the evidence of PW3 and the Appellant because they are experts in matters of transfer of land and issuance of title deeds. The two were in agreement that there was a requirement that prior to issuing a new title deed, the old title deed ought to have been surrendered and the same cancelled. If the same was not available, the registrar was required to gazette it as lost or revoked. Additionally, reasons ought to be indicated as to why the said title deed was not surrendered. In this case however, the Appellant proceeded to issue a new title deed without either receiving and cancelling the old one, gazetting it as lost, or indicating any reason as to why it was not surrendered.

36. The Appellant in his defence stated that his role came at the tail end of the transfer process and that the clerks were the initial handlers of the documents. Further, that the clerks were to receive the documents, peruse them then forward the same to him for further action. I find the position adopted by the Appellant untenable. The Appellant being the final authority in the process was mandated to verify and confirm that all the requirements were in place before taking the action of issuing a new title deed. Furthermore, it is the Appellant who was tasked to ensure cancellation of the old title or the issuance of a gazette notice that the title had been lost. From the evidence of PW3 and the Appellant it is clear that the actions of the Appellant amounted to misuse of his authority as the custodian and issuer of title deeds.

37. According to the *Black's Law Dictionary, 8th edition, at page 112,* the term 'arbitrary' is defined as:

> " 1. Depending on individual discretion... 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact."

38. The *Concise Oxford English Dictionary, 12th edition, 2011* defines the word "arbitrary" as "based on random choice or personal whim."

39. In simple terms and from the foregoing, where an action is not founded on law or predetermined procedure, the action is said to have been done arbitrarily. In order for the prosecution to prove that the Appellant acted arbitrarily, all it needed to prove was that the Appellant's actions were done according to his will or whim without due regard to the legal requirements or procedures hence upsetting the predictability of the required procedures and outcomes. From the evidence on record, the prosecution proved this aspect and the burden shifted to the Appellant to prove that his actions were neither willful nor resulted into derogation of the predictability of the procedures and outcomes of the legal process

of transferring titles. Indeed, the Appellant admitted that he knew that the old title ought to have been surrendered before a new one could be issued.

40. In his defence, the Appellant offered no explanation as to why he deviated from the normal procedure of transferring title to land. I also find his assertion that the title must have been there but he is not sure whether the complainant took it back unbelievable. It only goes to confirm his unconcerned attitude to his work. Even if it was indeed true that PW1 had taken away the original title deed, the Appellant was required to halt the transfer process and require that the old title be surrendered to him. The actions of the Appellant in processing a new title in disregard to the standard procedure and requirements and without any valid reason whatsoever amounted to arbitrariness.

41. Indeed, the arbitrariness of the Appellant's action is further confirmed by the contradictory posture of the documents that the Appellant acted upon in transferring the land of PW1 to the late Reuben. On this I only need to point to the fact that application for consent of the land control board and the letter of consent all dated 12th February, 1997 preceded the land sale agreement which is dated 4th April, 1997 or 7th April, 1997 depending on the date one picks from that agreement. The genuineness of the application for consent and the letter of consent should have raised a red flag especially when one considers the evidence of PW3 that the minutes of the land control board ought to have been provided.

42. The final issue on this point is whether the actions of the Appellant were prejudicial to the rights of the registered owner of the land. PW1 testified that he lost his piece of land due to the actions of the Appellant. PW1 further stated that he did not sanction the transfer of his land to the late Reuben. It is obvious from the evidence of PW1 that he suffered prejudice as a result of the Appellant's actions.

43. The summary of it all is that the prosecution indeed proved its case against the Appellant with regard to the offence of abuse of office.

44. The Appellant's complaint against the sentence imposed on him is that the same was harsh. The Appellant was sentenced to a fine of one million shillings in default to serve 12 months in prison. The punishment for the offence for which the Appellant was charged is provided in Section 102A of the *Penal Code* as follows:

> " A person convicted of an offence under sections 99, 100, 101 or 102 of this Part shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding 10 years or to both."

45. It is a well-established principle of law that an appellate court can only interfere with the sentence of a trial court in specific circumstances. The Court of Appeal spoke to this issue in *Bernard Kimani Gacheru v Republic,* Cr App No. 188 of 2000, as cited in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR, as follows:

> " On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

46. It is the Appellant's position that the sentence is harsh and excessive in the circumstances. The Appellant also argues that the trial court took into consideration irrelevant factors by making him "a

lesson to others" in passing the sentence. The Kenyan Judiciary Sentencing Guidelines which were issued through Gazette Notice No. 2970 of 29th April, 2016 at page 29, paragraph 11.11 provides how a court should determine the fine to impose as follows:

> " The fine fixed by the court should not be excessive as to render the offender incapable of paying thus liable to imprisonment. In determining such a fine, the means of the offender as well as the nature of the offence should be taken into account. Except in petty cases and in which case the necessary information is within the court's knowledge, a pre-sentence report should be requested from the probation officer to provide information which would assist the court in reaching a just quantum."

47. From the record of appeal, it is evident that the Appellant had retired from the public service at the time of his conviction and sentencing. It is also apparent from the record that despite the negligence or omission on the part of the Appellant, the complainant was careless in the manner he dealt with his title deed. The Appellant's role in the whole process was therefore limited to processing the transfer request which the complainant admitted to have initiated for the purpose of helping Reuben to secure a loan. It is further observed that the Appellant in his mitigation indicated that he was a first offender and remorseful.

48. Taking all the above factors into consideration, it is my view that the fine of one million shillings imposed by the trial court was harsh and excessive. The trial magistrate did not explain why he imposed the maximum fine provided by the law on a first offender. The fine imposed was not even proportionate to the default sentence of one year in prison because from the sentence provided by the law the default sentence for a fine of Kshs. 1,000,000/= would be ten years in prison. There is an apparent imbalance between the fine and the default sentence.

49. In the circumstances of this case, the fine imposed by the trial court was not only excessive, but offended the sentencing principle that requires that the maximum sentence should ordinarily not be imposed on first offenders. The Appellant has established a basis that requires this Court to interfere with the sentence imposed by the trial court. I therefore set aside the sentence passed by the trial court and substitute the same with a fine of Kshs. 100,000/= in default one year's imprisonment.

50. In view of my findings above, the final orders of this Court are as follows:

    (a) The Appellant's appeal against conviction is without merit and is hereby dismissed; and

    (b) The Appellant's appeal against sentence is allowed and the fine of Kshs. 1,000,000/= in default imprisonment for one year is set aside and substituted with an order reducing the fine to Kshs. 100,000/= in default one year's imprisonment.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 30TH DAY OF JUNE, 2022.

W. Korir,

Judge of the High Court