



REPUBLIC OF KENYA



**Nabuko v Director of Public Prosecutions (Criminal Appeal 81 of 2019)
[2022] KEHC 16943 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 81 OF 2019
WM MUSYOKA, J
DECEMBER 23, 2022**

BETWEEN

GAMALIEL LUKOSE NABUKO APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(Being an appeal from the judgment of Hon. Cheruto C. Kipkorir, Senior Resident Magistrate, in Mumias SPMCCRC No. 745 of 2017, delivered on 2nd July 2019)

JUDGMENT

1. The appellant had been charged, jointly with another, before the trial court of the 7 counts. Count I being of making a false document without authority, contrary to section 357(a) of the [Penal Code](#), Cap 63, Laws of Kenya. The particulars were that on an unknown date and at an unknown place, he stole a motorcycle registration mark and number KMEA 812G Chassis No. GE55G1L27853, valued at Kshs. 89, 000.00, the property of James Ombi Opanda, with intent to defraud, he, without lawful authority, made an identity card no. 21709195, in the names of Ernest Wakhungu Odongo, purporting it to be a genuine national identity card issued by the registrar of persons. Count II charged him with personation, contrary to section 382 of the [Penal Code](#). The particulars were that on 10th May 2017, at Otinga Ochume and Company Advocates, in Mumias Town, within Kakamega County, he falsely presented himself as Ernest Wakungu Odongo, the proprietor of East Wanga/Isongo/3250, with intent to defraud Joyce Sagazi Lungai of Kshs. 400, 000.00.
2. Count III charged the appellant and his co-accused of conspiracy to defraud, contrary to section 317 of the [Penal Code](#), particulars being that he and his co-accused, on 10th May 2017, Mumias town, jointly with others not before the court, they had conspired to defraud Joyce Sagazi of Kshs. 400, 000.00. Count V had charged him, together with his co-accused, of forgery, contrary to section 350(1) of the [Penal Code](#), having with intent to defraud forged a title deed, no. 1102834, in respect of East Wanga/Isongo/3250, in the names of Ernest Wakungu Odongo, purporting it to be a genuine title deed issued



to the said Ernest Wakhungu Odongo by John Fundia, the district land registrar, Kakamega. Count V also charged him with forgery, with respect to a Kenya Revenue Authority PIN Certificate No. A00222XXX4M, issued to Ernest Wakhungu Odongo by the Kenya Revenue Authority. Count VI related to a charge of uttering a forged document, contrary to section 353 of the *Penal Code*, alleging that he uttered the forged title deed No. 1102834 to Joyce Sagazi Lungai purporting to be a genuine title deed issued to him by the deputy land registrar, John Mumasi Fundia. The last count, Count VII, charged an intent to defraud, by obtaining Kshs. 400, 000.00 from Joyce Sagazi Lungai, by pretending he had his accomplice were in a position to sell East Wanga/ Isongo/3250 to her, a fact that they knew was false.

3. He pleaded not guilty, and a trial was conducted.
4. Ten witnesses testified. PW1, Joyce Sagazi Lungai, the complainant, testified that the appellant's co-accused approached her brother, and informed him that the appellant had land that he was selling, they transacted, including paying the purchase price, but it turned out that the transaction was fraudulent. PW2, Patsan Amukoyo, was a brother of the complainant, who had asked him to source a piece of land for her to buy. The appellant's accomplice of the appellant introduced the appellant as a person who had a piece of land to sell, and they transacted, where money changed hands. It transpired later that the sale transaction was fraudulent.

PW3, Tadayo Abaliwa, was one of the witnesses of PW1, in the transaction. PW4, Jeremy Aramana, was the person who linked PW1, PW2 and PW3 with the accomplice of the appellant, who led them to the appellant. PW5, Ernest Wakhungu, was the proprietor of East Wanga/Isongo/3260, who testified that someone came to inform him that he had sold land to another, when in fact his title deed had been deposited at the Mumias law courts as security, for he had stood surety for someone in a criminal case. He said that the land sold was not his, but the details used in the transaction were not his.

5. PW6, Grace Nyongesa, was an officer from the registry of persons at Mumias. She testified that, after comparing the thumbprint impression in their database with those used in the transaction, it transpired that those purported to belong to Ernest Wakhungu in fact belonged to the appellant. PW7, Kiplagat Duncan, was an officer from the Kenya Revenue Authority, Kakamega, and he testified that the PIN certificate used in the transaction, as that of the alleged seller, Ernest Wakhungu Odongo, did not exist. PW8, Corporal Martin Kitai, a forensics examiner, testified that his office was given documents allegedly issued from the lands office, Kakamega, to confirm whether they were genuine, and after analysis, it was found that all the signatures on those documents were not genuine. PW9, John Fundia, the land registrar. He testified that he established that the title deed for East Wanga/ Isongo/3250, used in the said transactions was not genuine, and that the signature on it, purported to be his, was not his. He said that the seal on the title deed was smaller compared with the genuine one. He further testified that he did not create the green card relied on in the transaction. PW10, No. 101803 Police Constable Kevin Muriuki, was the investigating officer. He testified on the steps that he took in the course of the investigations.
6. After reviewing the prosecution evidence, the trial court put the appellant and his accomplice on their defence. The appellant gave a sworn statement, in which he denied the charges levelled against him.
7. The trial court delivered a judgment on 2nd July 2019, and convicted the appellant of Counts I, II, IV, V and VII; and acquitted him of Counts III and VI. The sentences were handed down on 3rd July 2019, by FM Nyakundi, Resident Magistrate. The appellant was given custodial sentences for all the counts on which he was convicted, as follows: 3 years for Count I, 3 years for Count II, 5 years for Count IV, 5 years for Count V and 1 year for Count 7. All the terms of imprisonment were to run concurrently.



8. The appellant was aggrieved by his conviction and sentence, and filed the instant appeal. He raises issues around the trial court not properly exercising its discretion under sections 200 and 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya; the ownership of the Kshs. 400, 000.00; the evidence on the inventory and rejecting averment by the appellant that he never signed the inventory; the evidence being flimsy, disjointed, malicious, fabricated, uncorroborated and doubtful; conviction not complying with section 200 of the *Criminal Procedure Code*; shifting the burden of proof; and the defence not being considered.
9. Directions were given on 30th July 2020, for filing of written submissions. The appellant filed written submissions, on 4th March 2022, dated 3rd March 2022. He avers that he does not challenge the conviction, but prays for leniency, submitting that he was first offender and was remorseful. He avers to have been rehabilitated, having gone through spiritual and vocational training. He also asks for consideration of the period that he spent in custody during the trial. He submits to be a family man and a sole breadwinner. He asks for a probation sentence.
10. In view of the above, I shall consider the appeal only to the extent that it relates to sentence.
11. In total, the appellant faced seven counts of offences relating to dishonesty and cheating. He was convicted of five of them. In mitigation, he asked for forgiveness saying that he was first offender, was remorseful, he had rehabilitated and was a family man. In the sentencing ruling, the trial court considered that the offences were serious and rampant in the area. The court considered that a deterrent sentence was called for.
12. Sentencing is discretionary. A sentence is imposed by the trial court after assessment of the facts and circumstances. The trial court made that assessment. The offences relating to cheating and dishonesty are prevalent in the Mumias region, and the most effective way to deal with them is to impose deterrent sentences. The prison terms imposed by the trial court are not unreasonable or outrageous in the circumstances. I shall not interfere with the sentences from that perspective.
13. The appellant has cited section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. That is about considering the time spent in custody. The appellant was charged on 1st August 2017. He was not bailed out, despite being granted bail/bond, and was in custody throughout, from the date of plea on 1st August 2017 to his conviction on 2nd July 2019 and sentencing on 3rd July 2019. That would be about 23 months and 2 days. That period, spent in remand custody, ought to be considered in determining the total period the appellant will have to remain in prison.
14. The appeal is allowed to that very limited extent, stated in paragraph 13 hereabove. The appeal is disposed of in those terms. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Gamaliel Lukose, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

