



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL APPEAL NO. 7 OF 2018**

**SIMION KIPROTICH ARAP TOO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and sentence by Hon. S. K. Mokua (CM) in Kericho**

**CMCC No.1087 OF 2012 in a Judgment delivered on 16/3/2018)**

**JUDGEMENT**

1. The Appellant was charged with three Counts as follows:- Making a false document without authority Contrary to Section 357 (a) of the Penal Code.
2. The particulars of the 1<sup>st</sup> Count were that on 10/5/1985 in Kericho Township, Kericho District of the then Rift Valley Province, the Appellant with intent to deceive and without lawful authority or excuse made a Title Deed for the Parcel of Land KERICHO/KAPSUSER/2295 purporting it to be a genuine Title issued by the Land Registrar, Kericho. The Appellant was acquitted on the 1<sup>st</sup> Count.
3. The Appellant was charged with a Second Count of uttering the false document on 18/7/2011 at Kericho Police Station to No.61758 P.C. Kipkurgat Langat purporting it to be a genuine document.
4. The Appellant was charged with the 3<sup>rd</sup> Count of giving false information to a person employed in Public Service Contrary to Section 129(a) of the Penal Code.
5. The particulars of the 3<sup>rd</sup> Count were that the Appellant knowingly and fraudulently uttered false information to No.61758 P.C. Kipkurgat Langat, a person employed in the Public Service to the effect that Land Parcel No.KERICHO/KAPSUSER/2295 measuring 2.6 Hectares had been sold in an Auction yet he had not taken a loan which information he knew was not true causing P.C. Kipkurgat to arrest the person who bought the Land.
6. The Prosecution evidence in summary was that the Appellant had taken a Loan using the Title Deed KERICHO/KAPSUSER/2295 which was a subdivision from KERICHO/KAPSUSER/803.
7. The Loan was secured from KCB on two occasions being 24/5/1989 (Kshs.50,000/= and on 17/7/1990 (Kshs.100,000/= respectively. The Appellant failed to repay the Loan of Kshs.150,000/=.
8. The Property Land Parcel No.KERICHO/KAPSUSER/2295 (hereafter referred to as the suit Property) was sold in an Auction to PW.1 (LAWRENCE KIPNGENO RONO) on 18/11/2010 for Kshs.2,320,000/= and the suit property was transferred to PW.1.
9. On 18/7/2011 the Appellant went to the Police Station and gave PW.4 (P.C. Kipkurgat Langat) the Original Title Deed in respect of the Suit Property and he reported that he had not taken a Loan using the Suit Property as Security and he demanded to know who had taken the Loan. He said there was a person alleged to have bought his Land.
10. PW.4 did investigations and established that it was the Appellant who had taken the Loan amounting to kshs.150,000/=which he had failed to repay and the Suit Property was subsequently sold in a Public Auction and transferred to PW.1. PW.4 charged the Appellant with 3 Counts of making a false document Contrary to Section 357 (a) of the Penal Code, Uttering a False Document Contrary to Section 353 of the

Penal Code and giving False Information to a Person Employed in the Public Service Contrary to Section 129(a) of the Penal Code.

11. The Appellant said in his defence that he is the Registered Owner of the Suit Property which was subdivided from Land Parcel No. KERICHO/KAPSUSER/803 and he obtained this Titles KERICHO/KAPSUSER/2295 (the Suit Property) and KERICHO/KAPSUSER/2296.

12. The Appellant said he took a Loan of Kshs.80,000/= from NHC using Land Parcel No. KERICHO/KAPSUSER/2296 which he fully repaid and his title was discharged. He produced a discharge letter dated 3/7/2009.

13. The Appellant denied that he ever took Loans amounting to kshs.150,000/= from KCB using the title deed for the Suit Property and he denied that he has ever operated an Account with KCB Bank.

14. He said the charge he was show in Court was in favour of JOHN KIPKEMOI ROTICH. He said he used to see the said JOHN KIPKEMOI ROTICH in Town but he is now deceased. He denied that he was a guarantor of JOHN KIPKEMOI ROTICH.

15. The Trial Court found the Appellant guilty as charged on the 2<sup>nd</sup> and 3<sup>rd</sup> Counts and convicted him and sentenced him to pay a fine of Kshs.100,000/= in default to serve one (1) year imprisonment on each of the two Counts. The Trial Court acquitted him on Count 1.

16. The Appellant has now appealed to this Court on the following grounds:-

i. THAT the Appellant was convicted and fined Kshs.100,000/= in default One (1) year imprisonment in the absence of evidence that he had committed the offences of uttering a false document and giving false information to a Police Officer.

ii. THAT the Learned Trial Magistrate erred in Law and in fact by convicting the Appellant despite there being compelling evidence to the contrary.

17. The parties filed written submissions in this appeal which I have duly considered. The Appellant submitted in writing through his Counsel as follows:-

i. THAT the Prosecution did not prove their case beyond reasonable doubt as required.

ii. THAT the Appellant was acquitted on the 1<sup>st</sup> Count of making a false document and he should be acquitted on the 2<sup>nd</sup> and 3<sup>rd</sup> Counts since the evidence that there was no title deed in existence when the alleged title deed was issued.

iii. THAT there is no evidence that the Appellant knew that the title deed in his possession was a forgery and further, the Prosecution did not establish the origin of the disputed title deed.

iv. THAT the Trial Court failed to appreciate the inconsistencies of the testimonies of the Prosecution witnesses and further, the Court relied on the Testimony of the expert witness (PW.3) which is meant to be an opinion to seal doubts in the Prosecution but not evidence to be relied on to convict.

v. THAT the Trial Court shifted the burden of proof to the Appellant as there is no iota of evidence that the Appellant made a false document, or that he knowingly uttered a false document or that he gave false information to a Person employed in the Public Service.

18. The Respondent opposed the appeal and submitted as follows:-

i. THAT there was evidence that on 10/5/1985, the Appellant was issued with a Land title Certificate in respect of KERICHO/KAPSUSER/2295 and the same was used to obtain Loans of Kshs.50,000/= and 100,000/= respectively from KCB.

ii. That was evidence that the Appellant defaulted in payment of the Loan amounting to Kshs.150,000/= and that the property was auctioned for Kshs.2,320,000/= and that the property was transferred to PW.1 who bought it in the auction.

iii. THAT the Respondent submitted that in 1985 when the title deed in respect of the suit property was alleged to have been issued, Land Title Deeds were not in existence but it was Land Certificates which were being issued and that Title Deeds were issued from 1989.

iv. THAT the Respondent submitted that although the Trial Court acquitted the Appellant on the 1<sup>st</sup> Count of making a false document, he was guilty of the same and upon re-evaluating the evidence, this Court should find the appellant guilty of the 1<sup>st</sup> Count and convict and sentence him.

v. THAT the Respondent submitted that the Appellant did not challenge the Prosecution evidence and further, that his defence was a mere denial that he took a Loan from KCB using the Title Deed for the suit property.

19. This being the first Appellate Court, it is my duty to re-evaluate the evidence adduced before the Trial Court and to arrive at my own independent conclusion as to whether or not to support the findings of the Trial Court while bearing in mind that the Trial Court had the opportunity to see the witnesses.

20. The issues for determination in this appeal are as follows: -

i. Whether the Prosecution proved the guilt of the Appellant to the required standard in criminal cases.

ii. Whether the burden of proof was shifted to the Appellant.

21. On the issue as to whether the Prosecution proved its case to the required standard in Criminal Case, the law requires that the Prosecution proves its case beyond reasonable doubt.

22. I have re-evaluated the evidence adduced by the Prosecution witnesses, I find that no witness was called from KCB Bank to confirm that it was the Appellant who took the Loans as alleged by PW.2 and PW.4.

23. The Court acquitted the Appellant on Count 1 of making a false document. There is no evidence that the Title Deed the Appellant had was false.

24. The documents produced by the Prosecution Exhibit 22 (a) shows that one JOHN KIPKEMOI ROTICH took the Loan of Kshs.50,000/=. There is no evidence to show the nexus between JOHN KIPKEMOI ROTICH and the Appellant.

25. I find that it is not the duty of the appellant to prove his own case. There is a doubt as to whether the Loans were taken by the Appellant since there is no witness who identified the Appellant as the person who was issued with the Loans in 1989 and 1990 by KCB.

26. The Appellant said he has never taken any loan from KCB and neither does he know JOHN KIPKEMOI ROTICH. The appellant said he used to see the said JOHN KIPKEMOI ROTICH in Town and he learnt that he later died.

27. I find that it is not the duty of the Appellant to establish that he did not take the Loans, It is the duty of the Prosecution to prove that the Loan were taken by the Appellant.

28. I find that the Prosecution evidence wanting. There is no evidence that the Appellant had an Account with KCB and neither is there any evidence that demand letters were written to the Appellant to demand repayment of the Loans allegedly taken by the Appellant before the suit property was auctioned by the Kenya Commercial Bank.

29. There was no witness called from Kenya Commercial Bank to testify on the details of how the loans were dispatched and the process leading to the Sale of the Suit Property.

30. The Judgment of the Trial Court be and is hereby set aside and the Conviction is quashed.

31. I find that the appeal herein has merit and I accordingly allow it and order that the conviction be quashed and the fine paid by the Appellant be reimbursed.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 22<sup>ND</sup> MARCH 2021**

**A. N. ONGERI**

**JUDGE**