



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 31 OF 2019**

**REMIGUS WATIERYI NGAANYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal against the Conviction and Sentencing by the Chief Magistrate's Court**

**at Kisumu in CMC Anti-Corruption Case No. 4 of 2015**

**delivered on the 25<sup>th</sup> day of June, 2019]**

**JUDGMENT**

The Appellant, **REMIGUS WATIERYI NGAANYI**, was convicted for the offence of **Fraudulent Disposal of Public Property** contrary to **Section 45 (1)** as read with **Section 48 (1)** of the **Anti-Corruption and Economic Crimes Act**.

1. He was sentenced to a fine of Kshs 500,000/= or in default Two Years Imprisonment.

2. In addition, the trial court imposed the mandatory fine of Kshs 12,000,000/=, which is double the value of the land which was the subject matter of the case. In default of the said mandatory fine, the Appellant would serve **FOUR** Years Imprisonment.

3. Being dissatisfied with both the conviction and sentence, the Appellant filed an appeal at the High Court. The 5 grounds of appeal which he raised can be summarized as follows;

***(a) The prosecution case was insufficient, fabricated, inconsistent and unreliable and lacked probative value.***

***(b) There were existing circumstances that that tended to reduce the inference of guilt on the part of the appellant, especially the failure by the prosecution to present valid documentation to show that the appellant acted intentionally.***

***(c) The appellant was sentenced in the most punitive manner, yet there are less punitive sentences in respect to the offence for which he was convicted.***

***(d) The sentences handed down did not take into consideration the circumstances behind the charge.***

***(e) The trial court did not take into account the Appellant's actions of remorse, and the effect of the sentence to his family's livelihood and financial obligations.***

4. It is evident that grounds (c), (d) and (e) all relate to the issue of the sentence.

5. When canvassing the appeal the Appellant dwelt on two issues, being the question about whether or not the mandatory sentence was unconstitutional; and, secondly that the conviction was not founded upon sound and sufficient evidence.
6. I will re-evaluate all the evidence on record and draw my own conclusions therefrom. However, whilst drawing conclusions from the evidence on record, I will bear in mind the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they testified.
7. **PW1, BENJAMIN MUDIMO ORWE**, was the Town Clerk of Kisumu Municipality in 2009. He testified about the procedure for alienating land belonging to the Council. He said that the primary law on the issue, was the **Local Government Act Cap. 265** of the **Laws of Kenya**.
8. **PW1** said that the Council could lease out land for private use. The two examples he gave regarding reasons why a Council would wish to lease out land were;
  - (a) *To meet financial needs; and*
  - (b) *To encourage investment, without selling-off the land.*
9. It was his evidence that the Council had to hold deliberations on the available land. Thereafter, information would be made available to interested parties, who could then file applications for the land.
10. The applications by the interested parties would be addressed to the Town Clerk, in his capacity as the Secretary to the Council.
11. The Town Clerk would then forward the applications to the Town Planning Committee, for consideration.
12. If the Committee passed a resolution in favour of the Applicant, the resolution would be forwarded to the full Council Committee; and the person who would do that is the Town Clerk.
13. If the Full Council Committee ratified the resolution of the Town Planning Committee, the Town Clerk would then forward the decision to the Manager of the Local County, for approval or disapproval.
14. If the decision was approved, the Town Clerk would be notified, and he would then facilitate the issuance of the Title Deed or the Lease.
15. **PW1** testified that **L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/148**, (hereinafter "*Plot 148*") was a Public Utility parcel of land. He said that during his tenure as the Town Clerk, Plot 148 did not come up for alienation.
16. During cross-examination, **PW1** reiterated that Plot 148 belonged to the Kisumu County Government.
17. **PW2, REV. NATHAN MUNOKO SIJARANI** was the Town Clerk for Kisumu Municipal Council in 1998. In that capacity, he was also the Secretary of most committees of the Council, as well as a signatory on land transactions.
18. He testified that when a piece of land had been identified for transfer or exchange, the issue would be discussed by the full Council, which could either approve or disapprove the same.
19. When the transfer or the exchange was approved, the requisite documents would be executed under seal, and then be forwarded to the Ministry of Lands.
20. As he was the Town Clerk in 1998, **PW2** said that he was one of the Officers who would sign documents. And during the period he held that position, **PW2** said that he never delegated his authority.
21. On 29<sup>th</sup> April 2010 some Officers of the Anti-Corruption office showed him some 2 documents. The documents were for the transfer of Lease of **KISUMU MUNICIPALITY/BLOCK 8/148**, to one **SIMON OKORE**.
22. The signatures on the document was not his.
23. He also noted that the Advocate who prepared the said documents was **RACHIER ADVOCATE**. However, the said Rachier was not the advocate for the Council in 1998.
24. **PW2** testified that the Council's advocate in 1998 was **RICHARD ONSONGO**.
25. During cross-examination **PW2** said that he did not inform the Public about the identity of the person who was the Advocate for the Council in 1998. In the circumstances, if any other advocate signed documents, members of the public would not know.
26. **PW3, DUNCAN OTIENO** worked as a Law Clerk at the Municipal Council of Kisumu. He was In-charge of Litigation case files. His duties also included the co-ordination of witnesses for the cases in which the Council was involved, and the perusal of

Court Cases for purposes of giving briefs to the Town Clerk.

27. **PW3** testified that in 1998, the Advocate representing the Council was M/S Onsongo & Co. Advocates. He told the Court that it was only one Law Firm that was retained by the Council.

28. **PW3** produced a letter dated 16<sup>th</sup> March 1998, from the Permanent Secretary to the Ministry of Local Government, through which the Advocate was appointed.

29. He also said that the appointment was approved by the Minister.

30. During cross-examination **PW3** said that whilst 2 titles were lost, the same were in relation to a property in Milimani, whilst this was about a property in Block 4, which is situated in Tom Mboya.

31. **PW4, PIUS METHYA**, is a registered Valuer, who was working with the Ethics and Anti-Corruption Commission [**EACC**].

32. He carried out the Valuation of Plot 148, and produced his Valuation Report in Court; which showed that it was valued at Kshs 6,000,000/=.

33. **PW5, NICHOLAS MUCHUNGA**, is the Assistant Director Lands. He testified that Plot 148 was purchased by the Municipal Council of Kisumu in 1966.

34. However, a Certificate of Official Search dated 25<sup>th</sup> November 2008 showed that Plot 148 changed hands on 25<sup>th</sup> September 2008, when it was transferred to **SIMON OKORE**.

35. **PW5** testified that a transfer of title from the Municipal Council would have required a resolution of the Council and the consent of the Minister of Local Government. He also said that there ought to have been a letter of allotment and a survey.

36. None of the documents were found.

37. However, the Appellant issued the Certificate of Lease showing that Simon Okore was the new proprietor of Plot 148.

38. During cross-examination **PW5** said that the Land Registrar does not ordinarily attend Council Meetings.

39. **PW6, MUNG'AR RACHIER**, was a resident of Nairobi. He is a practicing Advocate of the High Court of Kenya. He was based in Nairobi, and that is also the place where he practices law.

40. On 13<sup>th</sup> March 2012, **PW6** was visited by Officers of **EACC**, who were investigating the transfer of 2 parcels of land. The Officers showed him the lease documents which had purportedly been witnessed by him, in 1998.

41. **PW6** testified that at the material time (on 9<sup>th</sup> November 1998) he worked for a Law Firm called **OWINO OKEYO & CO. ADVOCATES**, who were located on the 3<sup>rd</sup> Floor of **TOWN HOUSE**, Nairobi.

42. The first anomaly **PW6** noted is that the lease purportedly signed by him, bore the stamp of **WALTER RACHIER** of P O Box 1667, KISUMU.

43. **PW6** said that the signature on the lease document was not his.

44. During cross-examination **PW6** said that the Land Registrar does not appear before the Advocate who was witnessing the signing of the transfer documents. Therefore, **PW6** believes that the Land Registrar may not know whether or not the documents were forged.

45. **PW7, MATHEW ODHIAMBO ODINGA** was a Senior Committee Clerk at the Kisumu County Council. His duties were to be in-charge of Council Minutes and the production of Committee Minutes.

46. On 13<sup>th</sup> October 1998 there was a meeting, at which M/S Onsongo & Company Advocates were retained as the Advocates for the Council.

47. The minutes showed that Gumbo & Co. Advocates were also retained as Advocates for the Council.

48. During cross-examination, **PW7** said that it is the Town Clerk who would relay communication to the Land Registrar. However, **PW7** did not find the record on the transfer of Plot 148.

49. **PW8, KIPSANG SAMBAI**, is a Senior Investigations Officers, with the Ethics and Anti-Corruption Commission.

50. He carried out investigations into the transfer of 2 parcels of land, being **KISUMU MUNICIPALITY/BLOCK 7/240**, and **KISUMU MUNICIPALITY/BLOCK 8/148**.

51. He testified that the then Town Clerk, **RASHID HAMISI MWAKIWIWI**, gazetted the loss of the certificates of lease for the 2 parcels of land.
52. A new lease was issued to 3 people, (Odalo M. Odul, Fredrick Okeyo & Paula Akoth), in respect of Plot 240; whilst Plot 148 had a New lease issued to Simon Okore.
53. **PW8** ascertained that there were no Council Resolutions or Council Minutes that would have authenticated the transfers to those persons.
54. The investigations by **PW8** also revealed that the advocate, **RACHIER WALTER**, who had allegedly witnessed the signing of the Transfer instruments, had not been a witness to that exercise.
55. The investigations further revealed that the Identity Card whose particulars were used to transfer the Plot 148, did not belong to **SIMON OKORE**. The said **ID NO. 13890539** belonged to **JAMES OJWADI ODONGO**.
56. During cross-examination **PW8** said that although the Land Registrar did not attend the Council Meetings, he ought to only have acted upon seeing the Minutes which showed that the Council had resolved to transfer its parcel of land.
57. He also said that, in his report, he had recommended that the Town Clerk, Rashid Mwakiwiwi be jointed into the criminal case alongside the Appellant.
58. Although it was only the Appellant who was the accused when **PW8** was testifying, the witness said that Rashid Mwakiwiwi had also been charged with the offence.
59. After **PW8** testified, the prosecution closed its case. Thereafter, the learned trial magistrate put the appellant to his Defence.
60. The Appellant gave a sworn defence. He said that it was the Town Clerk who requested him to register the transfer of Plots 148 and 240.
61. He also said that the documents given to him had signatures and the seal of the Municipal Council.
62. According to the Appellant, he had acted in good faith, as he dealt with the Town Clerk, whom he believed.
63. During cross-examination, the Appellant confirmed that he did not receive Minutes from the Town Clerk. He also did not receive the Consent of the responsible Minister.
64. However, the Appellant was well aware that he was bound by **Local Government Act**.
65. Having given due consideration to all the evidence on record, I find that the transfer of Plot 148 was done without following due process.
66. Plot 148 was Public Property, belonging to the Municipal Council of Kisumu.
67. If the Council wished to transfer or lease out the said parcel of land for private use, the Council would have to hold a meeting at which there would be deliberations in that respect. Therefore, there should be minutes at which a decision was made.
68. If there was a resolution to give out the land for private use, the said decision would be conveyed to persons who might have expressed an interest in the same. In effect, there should be a record of persons who had expressed an interest in the land.
69. Such interested persons, and any other persons would then be required to make a formal application, each. The said applications would be placed before the Town Planning Committee, for appropriate consideration.
70. If the Town Planning Committee passed a resolution in favour of any particular person, the resolution would be placed before the Full Council Committee for deliberation.
71. In the event that the Full Council Committee ratified the resolution of the Town Planning Committee, the said decision would be sent to the Manager of the Local County for approval or disapproval.
72. It is only when the Manager of the Local County gave his approval, that the Town Clerk would facilitate the issuance of the title deed or the lease.
73. Whereas the Town Clerk's function is one of facilitation, it is the duty of the duly appointed advocate to prepare or to witness the requisite documents.
74. In this instance, there were absolutely no minutes which would demonstrate compliance with the laid down procedures.
75. When canvassing the appeal, the Appellant submitted that he cannot be held responsible if he placed reliance upon the

communication from the Town Clerk.

76. Therefore, if the communication herein was defective, the Appellant believes that it is not he who should bear the blame.

77. He described himself as an innocent person, who should possibly have been a state witness in a prosecution of the Town Clerk, for the offence of abuse of office or for giving false and misleading information to a government officer.

78. The Appellant pointed out that he would not derive any financial or material benefits from the transfer, which he processed in the normal course of his duties.

79. As far as the Appellant was concerned;

***“A proper analysis of the defence evidence, looked at from the eye of the law obtaining then, would have pointed an indication that only part of the transfer process would be irregular as opposed to being fraudulent.***

***There is a stark legal distinction between an irregular transfer and a fraudulent transfer. The former is not criminal, the latter is.”***

80. The Appellant has acknowledged that there was irregularity in a part of the process of the transfer process.

81. I also find that the evidence tendered by the prosecution proved beyond any reasonable doubt that several key steps that ought to have been taken, had not been taken.

82. The question that arises, from the Appellant’s submission, is whether or not the irregularity could only become criminal if it was proved to have been fraudulent.

83. A perusal of the Charge Sheet shows that Count 2 was for the offence of;

***“Wilful failure to comply with the law relating to Disposal of Public Property contrary to Section 45 (2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.***

***PARTICULARS OF OFFENCE: REMIGIUS NGAANYI WATIERY: On or about 10<sup>th</sup> November, 2008 at Kisumu Land Registry, being a person employed in the Public Service as a District Land Registrar, and whose functions concerned the administration and management of public property, wilfully failed to comply with the law relating to the disposal of public property, to wit, Sections 8, 48 and 109 of the Registered Lands Act and Section 144 (3) of the Local Government Act, by registering the transfer dated 9<sup>th</sup> November, 1998 in respect of land Parcel KISUMU MUNICIPALITY BLOCK 8/148; the property of the Municipal Council of Kisumu and issuing the Certificate of Lease dated 10<sup>th</sup> November, 2008 in the names of SIMON OKORE.”***

84. The Appellant confirmed that, at the material time, he was a Land Registrar. Therefore, he was a Public Officer.

85. He also confirmed that, it is he who registered the transfer of Plot 148, from the Municipal Council of Kisumu, to Simon Okore.

86. Although the Appellant was well aware that he was bound by the provisions of the **Local Government Act**, he effected the transfer of Plot 148 notwithstanding the absence of the requisite Consent from the Minister for Local Government.

87. I therefore find that he “*wilfully or carelessly*” failed to comply with the requisite law, applicable for the disposal of public property.

88. Pursuant to the provisions of **Section 45 (2) (b)** of the **Anti-Corruption and Economic Crimes Act**, there is no legal requirement that the failure to comply with the law or the applicable procedures, be shown to have been fraudulent.

89. Therefore, I find that the Appellant’s conviction was founded upon solid evidence, which proved beyond any reasonable doubt that he committed the offence.

90. On the issue of the sentence, it is now settled that the mandatory nature of sentences was unconstitutional, as it deprived the court of the opportunity to fashion an appropriate sentence, after the court had given due consideration to the peculiar circumstances in each particular case.

91. Pursuant to **Section 48 (1) (a)** of the **Anti-Corruption and Economic Crimes Act** the sentence shall be a fine not exceeding Kshs 1,000,000/=, or to imprisonment for a term not exceeding 10 Years, or both.

92. Pursuant to that provision, the trial court sentenced the Appellant to a fine of Kshs 500,000/=, in default 2 Years Imprisonment.

93. The Appellant did not appear to be contesting that aspect of the sentence.

94. And, in any event, upon re-evaluation, I find that the said sentence was fair in the circumstances.

95. In addition to the fine of Kshs 500,000/=, the trial court imposed a Mandatory Fine of Kshs 12,000,000/=, which is

***“equal to two times the amount of the benefit described in subsection (1) (b).”***

96. The prosecution adduced evidence which proved that Plot 148 was valued at Kshs 6,000,000/=, therefore the extra fine of Kshs 12,000,000/= was equal to 2 times the value of the subject matter of the said case.

97. The said additional mandatory fine is payable;

***“..... if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.”***

98. Therefore, although the Appellant did not receive any quantifiable benefit, the Kisumu County Council suffered a quantifiable loss.

99. Prior to handing down the sentence, the learned trial magistrate gave to the accused person, an opportunity for mitigation.

100. The accused said that he had served the public for 30 years. He blamed the offence on the trust he had in the Town Clerk. He also pointed out that he did not benefit from the offence.

101. When sentencing the accused, the trial court gave consideration to the mitigation.

102. Nonetheless, in respect of the additional mandatory penalty of double the value of the land, the learned trial magistrate felt obliged to impose the same. In effect, the trial court did not take into account the particular circumstances of the case, when determining whether or not the accused ought to be punished slightly differently.

103. In my considered opinion, the casual manner in which the accused went about issuing a lease that transferred public property to an individual, without taking any steps to verify whether or not the required procedural and legal steps had been undertaken, calls for stiff punishment.

104. Those officers who are entrusted with the authority and mandate to protect Public Property and Revenue, must take their tasks in a demonstrably serious manner. The Appellant failed miserably in that regard.

105. The courts are duty-bound to impose sentences that ultimately reflect the objective seriousness of the offence committed, whilst taking into account the circumstances in which the crime was committed.

106. In this case I have taken into account the fact that the trial court ordered that the land in question should revert to the County Government of Kisumu. Therefore, the court performed its sacred duty of ensuring that Public Property was appropriately safeguarded. The Appellant cannot get the credit for that action, which was taken by the court.

107. In the final analysis, I find that an appropriate additional penalty in this case, should make it clear to the offender and to any other person who may have similar impulses, that if they yield to such impulses, they will be adequately punished.

108. In the result, I allow the appeal against the sentence, set aside the additional fine of Kshs 12 Million, and substitute it with an additional fine of Kshs 6 Million; in default 2 Years Imprisonment.

**DATED, SIGNED AND DELIVERED AT KISUMU**

**THIS 28TH DAY OF APRIL 2021**

**FRED A. OCHIENG**

**JUDGE**