



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**ACEC APPEAL NO. 34 OF 2019**

**(Consolidated with ACCEC Appeal No. 35 & 36 of 2019)**

**REPUBLIC.....APPELLANT**

**VERSUS**

**CHARLES ONYAMBU BIRUNDU.....1<sup>ST</sup> RESPONDENT**

**KENNEDY BEGI ONKOBA.....2<sup>ND</sup> RESPONDENT**

**SAMUEL OTARA ARAMA.....3<sup>RD</sup> RESPONDENT**

(Appeal from the original conviction and sentence in Milimani

Chief Magistrate Court ACC No. 20 of 2018 delivered

by Hon. F. Kombo on 22/11/2019)

**JUDGMENT**

**INTRODUCTION**

1. The Respondents were charged together with two others before the Chief Magistrate Court ACC No. 20 of 2018 with the following offences: -

1<sup>st</sup> appellant (Charles Onyambu Birundu)

Count 1: Abuse of office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.

Particulars: On or about 7<sup>th</sup> August, 2015 at Nakuru Land Office being a land registrar at Nakuru Land Registry used his office to impropriety confer a benefit to Mr. Samuel Otara Arama to wit plot Nakuru Municipality Block 6/95 the property of Ahmed Muhammad Nisar by transferring the said plot and issuing a certificate of lease to Mr. Samuel Otara Arama without verifying the land transfer instrument as required by law.

**Count IV:** Conspiracy to defraud contrary to Section 317 of the Penal Code.

Particulars: Together with others and the 2<sup>nd</sup> Respondent on diverse dates between 3<sup>rd</sup> August, 2015 and 4<sup>th</sup> August, 2015 at unknown place in Nakuru County conspired with intent to defraud Mr. Ahmed Muhammad Nisar by means of dispossessing him off plot Nakuru Municipality Block 6/95 within Nakuru County fraudulently and deceitfully pretended that they were carrying on a genuine business of land transfer of the said plot.

**Count X:** Obtaining registration of land by false pretenses contrary to Section 320 of the Penal Code.

Particulars: On 7<sup>th</sup> day of August, 2015 at Nakuru Land Registry in Nakuru Town willfully procured for Samuel Otara Arama a Land registration of certificate of lease of Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar by falsely pretending that he had transferred it from Yusuf Mustafah Ratemo.

**Count XI:** Fraudulently making an entry contrary to Section 103 (1) (c) (ii) of the Land Registration Act No. 3 of 2012.

Particulars: On or about 7<sup>th</sup> day of August, 2015 at Nakuru Land Registry with intent to defraud fraudulently made an entry into the white card purporting to register a transfer of lease of plot Nakuru Municipality Block 6/95 the property of Ahmed Muhammad Nisar to one Mr. Samuel Otara Arama.

**Count XII:** Fraudulently procuring Registration of certificate of ownership contrary to Section 103 (1) (c) (1) of the Land Registration Act No. 3 of 2012.

**Particulars:** On or about 7<sup>th</sup> August, 2015 at the office of the Ministry of Lands Housing and Urban Development, in Nakuru town, within Nakuru County being a person employed by a public body to wit the Ministry of Land, Housing and Urban Development as a Land Registrar fraudulently procured the issuance of a certificate of lease of plot Nakuru Municipality Block 6/95 to Mr. Samuel Otara Arama by signing the said certificate of lease dated 7/8/2015 an purporting to transfer to the said person the lease of said plot without following due process.

**COUNT XII:** Fraudulently procured the making of an entry contrary to Section 103 (1) (c)(ii) of the Land Registration Act NO. 3 of 2012.

**Particulars:** On or about 11<sup>th</sup> August, 2015 at the office of the Ministry of Lands, Housing and Urban Development in Nakuru town within Nakuru County in Republic of Kenya, being a person employed by a public body fraudulently procured entry No. 16 and 17 of 11/8/2015 in the white card register record by entering and signing the said entries purporting to transfer the lease of plot Nakuru Municipality Block 6/95 to Mr. Samuel Otara Arama 2<sup>nd</sup> Respondent (Kennedy Begi Onkoba)

**Count XIX:** Knowingly misleading an Investigator acting under the Anti-Corruption and Economic Crimes Act No. 3 of 2003 contrary to Section 66 (1) (b) as read with Section 66(2) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

**Particulars:** - on 27<sup>th</sup> day 2017 at EACC Offices at Nakuru within Nakuru County knowingly misled Ethics & Anti-Corruption Commission investigators named Ms. Agosta Mecca and Ms Vera Nyambok in respect of an investigation into allegations of abuse of office by Hon. Samuel Otara Arama, the representative Nakuru West Constituency in the acquisition of plot Nakuru Block 6/95 that the paid investigators were undertaking under the Anti-Corruption and Economic Crimes Act No. 3 of 2003 by recording a statement and stating Mr. Yusuf Mustafa Ratemo and Hon. Samuel Otara Arama visited your office and entered into a sale agreement in your presence a fact which you know was false and misleading.

### **3<sup>rd</sup> Respondent (Samuel Otara Arama)**

**COUNT XIV:** Making a document without authority contrary to Section 357(a) of the Penal Code.

**Particulars:-** On diverse dates between 3<sup>rd</sup> August, 2015 and 11<sup>th</sup> day of August, 2015 at unknown places in Nakuru, with intent to defraud, without authority made a land sale agreement in respect of plot Nakuru Municipality block 6/95, the property of Mr. Ahmed Muhammad Nisar, purporting to have been signed by Mr. Yusuf Mustafa Ratemo.

**Count XV:** Knowingly altering a document with intent to deceive contrary to Section 357 (b) of the Penal Code.

**Particulars:** On 9<sup>th</sup> day of February, 2016 or there about at Shiv Plaza, EACC office in Nakuru Town, with intent to deceive knowingly altered a land sale agreement to the Ethics and Anti-Corruption Commission (EACC) Investigations, namely Mr. Agosta Mecca and Ms Vera Nyambok purporting the same to have been signed by Yusuf Mustafa Ratemo, a purported vendor of plot Nakuru Municipality Block 6/95.

**Count XVI:** Willfully obtaining registration of land by false pretense contrary to Section 320 of the Penal Code.

**Particulars:** on or about 7<sup>th</sup> day of August, 2015 at the office of the Ministry of Land, Housing and Urban Development, in Nakuru being a state officer to wit, a member of parliament of Nakuru West constituency willfully procured the issuance of certificate of lease and Registration of transfer of lease of plot Nakuru Municipality Block 6/95 to himself by false pretense purporting to have purchased the said plot from Mr. Yusuf Mustafa Ratemo.

**Count XVII:** Fraudulently procured the registration of a certificate of ownership contrary to Section 103 (1)(c) (1) of the Land Registration Act No. 3 of 2012.

**Particulars:** on diverse dates between 7<sup>th</sup> August, 2015 and 11<sup>th</sup> August, 2015 at the offices of the Ministry of Lands, Housing and Urban Development in Nakuru Town, fraudulently procured the registration and issuance of a certificate of lease of plot Nakuru Municipality Block 6/95 to himself purporting to have purchased the said plot from Mr. Yusuf Mustafa Ratemo.

2. They all pleaded not guilty to the charges, were tried and at the close of the prosecution case the trial court found that the prosecution has

not established a prima facie case and therefore acquitted all the Respondents under Section 210 CPC but placed the 1st accused JOHN MUIRU MWAURA and the 2<sup>nd</sup> accused DANIEL KIMORI NYANTIKA on their defenses.

### **PETITION OF APPEAL**

3. Being aggrieved by the said determination, the Appellant (Republic) filed these appeals against each of the Respondents and raised the following grounds of Appeal:-

1. THAT the learned Magistrate erred in law by not considering the overwhelming evidence on record and went ahead to acquit the Respondents under Section 210 of the Criminal Procedure Code.
2. The learned magistrate erred in law and fact by failing to properly consider the weight of the charges as against the evidence adduced.
3. The learned magistrate erred in law and fact by finding that Count 19 against the respondents could not stand as it flowed from a misconception of Section 66 of the ACECA and that it is wholly unfounded as a matter of law against the respondents.
4. The learned magistrate erred in law and fact by failing to consider that the prosecution had discharged its burden of proof by establishing its case beyond reasonable doubt.
5. The learned magistrate erred in finding that there is no evidence that the persons charged in count four were acting in concert with a common intention and hence the offence of conspiracy to defraud in count four was not proved by the prosecution.
6. The learned magistrate erred in finding that the evidence adduced by the prosecution was insufficient to establish a prima facie case against the respondent.

4. The appellant therefore sought the orders THAT:-

**a. The appeal be allowed.**

**b. The Respondents be placed on their defence on the weight of the evidence adduced.**

5. The appeals were duly admitted for hearing on 23/7/2020 and on 30/9/2020 all the appeals were consolidated with an order that proceedings be recorded in Appeal No. 34 of 2020, with further directions that the appeals be disposed off by way of written submissions, which were duly filed and on 24/2/2021, the parties herein indicated to the court that they were relying on the written submissions without highlighting the same.

### **SUBMISSIONS**

6. On behalf of the Appellant (Republic) it was submitted that the evidence tendered by the prosecution was overwhelming and it proved the counts that the Respondents were charged with. It was submitted that there was evidence on record that the subject land was sold by PW1 to PW5 whose sales agreement was drawn by PW8 an Advocate and therefore the 3<sup>rd</sup> Respondent's name was fraudulently registered on the lease since PW3 who he claimed sold the land to him denied having done so. It was therefore submitted that the trial court erred in acquitting the three Respondents.

7. It was submitted further that the offence of abuse of office was proved against the 1<sup>st</sup> Respondent who was the Land Registrar who used his office to confirm a benefit to the 3<sup>rd</sup> Respondent over the said plot by issuing a certificate of lease to the same without verifying the land transfer instruments as required by law contrary to Section 46 of the ACECA and as stated in the case of **CHARLES KIZITO WANJALA v REPUBLIC [2018] eKLR**.

8. It was contended by the Appellant that the 1<sup>st</sup> Respondent by procuring for the 3<sup>rd</sup> Respondent a land registration certificate of the subject property, the property of one Mr. Ahmed Muhammad Nasir without the necessary documents for PW8 and having signed the lease certificate as confirmed by PW13, the same has committed the offence of obtaining registration of land by false pretense contrary to Section 320 of the Penal Code.

9. It was further submitted that the learned magistrate erred in law and fact by finding that Count 19 could not stand as it flowed from a misconception of Section 66 of ACECA contrary to evidence on record and further that the prosecution had tendered overwhelming evidence to prove that the purported registration was obtained fraudulently.

10. On behalf of the 1<sup>st</sup> Respondent, it was submitted that the prosecutor did not prove its case beyond reasonable doubt on the charge of conspiracy to defraud, since the 1<sup>st</sup> Respondent being a land Registrar only registered the land based on the documents presented and once verified that they were original and conform to the records in the white card. It was contended that he was caught in the malicious acts innocently, while he was performing his duties as a Registrar and that the charge could not stand without any evidence of the essential ingredients of common intention, for which the case of **KARUGO NDUMIA alias CYRUS KAIRI KANYING v REPUBLIC [2014] eKLR** was submitted in support.

11. It was contended that the offence of abuse of office was not proved, since there was no evidence that he misused his office for personal

gain. It was submitted that the prosecution did not prove that the 1<sup>st</sup> Respondent made fraudulent entry, as the documents had to undergo a process before they are presented to be registered. It was submitted further that the prosecution did not prove its case beyond reasonable doubt because none of the evidence adduced by the prosecution showed that the 1<sup>st</sup> Respondent conspired to defraud the complainant.

12. It was finally submitted that the prosecution did not comply with Section 35(1) of the Anti-Corruption and Economic Crimes Act as no evidence was tendered to show that the consent of DPP was sought, for which the case of **PATRICK MUNGUTI MUNGA v REPUBLIC** was tendered in support.

13. It was contended that throughout the trial, no investigation report was tendered and no recommendation to the DPP were tendered. It was therefore submitted that the prosecution evidence could not sustain the 1<sup>st</sup> Respondent being placed on his defence.

## **2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

14. Whereas the 2<sup>nd</sup> Respondent stated that he had filed his written submissions, at the time of writing this ruling, the same was not on the court file and neither could it be traced in the e-filing portal.

## **3<sup>RD</sup> RESPONDENT'S SUBMISSIONS**

15. On behalf of the 3<sup>rd</sup> Respondent it was submitted that the trial court rightly concluded that the prosecution had failed to produce necessary evidence that could place the 3<sup>rd</sup> Respondent on his defence. It was submitted that there was no evidence of conspiracy between the 3<sup>rd</sup> Respondent and with any other accused person or at all, for which the cases of:- **REBECCA MWIKALI NABUTOLA & 2 OTHERS v REPUBLIC [2016] eKLR** and **STEPHEN KODIAGA KIKOMBERO & ANOTHER v REPUBLIC [2019] eKLR** were tendered in support.

16. It was submitted that the prosecution evidence against the 3<sup>rd</sup> Respondent was purely circumstantial and that the prosecution failed to establish prima facie case as was stated in the Malaysian case of **PPV DATOSIRI ANWAR BIN IBRAHIM No. 3 of 1999 2 LLJ 215** and as discussed by Lord Parder CJ in **SANJIL CHATTEL v THE STATE [1985] 39 WLR 925**.

17. It was submitted that the evidence on record did not support the prosecution claim that PW3 Ratemo, had never transacted on the subject land relating to the 3<sup>rd</sup> Respondent since he signed all the documents and therefore the offence of obtaining registration by false pretenses was not proved, for which the case of:- **MORRIS NJUGUNA MWANGI v A.G [2012] eKLR** was submitted in support.

18. It was therefore submitted that the prosecution did not establish prima facie case and therefore the trial Magistrate rightly found that the evidence tendered was insufficient to prove the essential element of the charges.

19. This being a first appeal, this court is required to evaluate the evidence tendered before the trial court so as to come to its own conclusion as was stated in the case of **OKENO v REPUBLIC [1972] eKLR**.

## **PROCEEDINGS**

20. The prosecution case was that one Mr. Nadeem Mohammed, the registered proprietor of the subject property, entered in an agreement with one Justus Mongare Onyiko at a consideration of Kshs. 12 million to enable him redeem his bank loan with Eco Bank and that sometime in 2015, the said Nadeem called him to inquire whether he had entered into an agreement on the said property with the 3<sup>rd</sup> Respondent, which he answered to the negative and that when the fence to the said property was brought down, he went to the site and saw the 3<sup>rd</sup> Respondent with somebody thereat. He did not hear anything about the property until the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Respondents who were his father's friends were arrested.

21. **PW2 MOHAMMED NADEEM IQBAR** corroborated the evidence of the alleged sale with the property being transferred into the name of his brother Nasir Mohammed and they took possession, until the 3<sup>rd</sup> Respondent went to take over the same with thugs, leading them to report to the police. It was his evidence that at that time, the title of the suit property was with Eco Bank.

22. **PW3 YUSUF MUSTAPHA RATEMO** testified that the subject property was never registered in his name. He used to live in Nakuru and was a friend of the 3<sup>rd</sup> Respondent, but later on moved to Mombasa and still maintained contact with him. He denied entering into any agreement with the 3<sup>rd</sup> Respondent on the subject property. **PW4 JOHN KIRIGA ONGAU** confirmed the sale of the suit property, then owned by MODERN DISTRIBUTORS LTD, wherein he was a director to the complainant herein, **PW5 MOHAMMED NISSER AHMED** who corroborated the said evidence.

23. **PW6 DESTERIO ODUOR NGANYI** confirmed that postal Box 24 **LIKONI** used on the alleged sale agreement between the 3<sup>rd</sup> Respondent and PW3 did not exist same with **Box 90642 LAMU**. **PW8 DANIEL NDEKE GATUMO** confirmed the sale of the subject property where he acted as an Advocate for the parties. **PW9 CALEB WANJALA SUNGUTI** a District Land Registrar Nakuru handed the document on the suit property to EACC and confirmed that it was at that time registered in the name of the 3<sup>rd</sup> Respondent and that one alleged transfer from **PETER ALFRED HANS** to **YUSUF MUSTAPHA RATEMO** was missing from the records.

24. **PW11 JACOB ODUOR** a Forensic Document Examiner confirmed that the signatures on the transfer document were made by the same author. **PW13 STEPEHN YEGO** further confirmed that the three certificates of lease were signed by the same person. **PW14 AUGUSTO MECCA** confirmed that they could not trace one **PETER ALFRED HANS** who allegedly bought the subject property from the complainant which he allegedly sold to Mustapha Ratemo.

25. It is on the basis of the said evidence that the trial court found that the prosecution did not establish a prima facie case against the Respondents herein and the subject matter of this judgment.

### **DETERMINATION**

26. The only issue for determination in this appeal is whether or not the Appellant had established a prima facie case to enable the court put the Respondent on their defence, put different, whether the court was right in holding that no prima facie case was established.

27. In answer to this question, the court is called upon to examine what prima facie case is and whether the trial court arrived at a correct determination thereon. The starting point is the definition of prima facie case which was stated and adopted by superior Courts in Kenya in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC [1957] EA 332** which was quoted by the trial court where the court stated that it means:-

**“one on which a reasonable tribunal properly directing its mind to the law and evidence, could convict if no explanation is offered by the defence.”**

28. In the case of **REPUBLIC v WACHIRA [1975] EA 262** the court had this to say:-

**“It has been settled for many years that the sufficiency or otherwise of evidence at the close of the prosecution case so as to require an accused to make his defence thereto, it a matter of law. A court is only entitled to acquit at trial stage if there is no evidence of material ingredients of the offence or if the prosecution has been so discredited and the evidence of the witnesses so incredible and untrustworthy that no reasonable tribunal properly directing itself could safely convict ....apart from these two situations, a tribunal should not in general be called upon to reach a decision to convict or acquit until the whole of the evidence which either side wishes to tender has been placed before it. If, however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict, if a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.”**

29. The court set out what to consider in the case of **REPUBLIC v GALBRAITH [1981] WLR 1039**

“1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

2) The difficulty arises when there is some evidence, but it is of a tenuous character, for example because of interment, weakness or vagueness or because it is inconsistent with other evidence.

a. Where the Judge comes to the conclusion that the prosecution evidence taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty upon a submission being made to stop the case.

b. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability or other matters which are generally speaking within the province of the jury and where no one possible view of the fact there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.” See **REPUBLIC v SILAS MAGONGO ONZERE alias FREDRICK NAMEMA [2017] eKLR.**”

30. Finally, it has been said in the case of **REPUBLIC v CHARLES KIMANI MBUGUA [2017] eKLR.**

**“In exercising discretion on this matter is provided by Section 306 of CPC the most important constitution principle to bear in mind to the right of an accused person not to be forced into assisting him or prosecution. It therefore means that before a court makes a finding on a prima facie case, the prosecution is under a legal duty to establish that there is a case to compel the accused to answer. My understanding of a prima facie case is not whether this court has to decide the accused innocence or guilt but to review the evidence and consider whether the prosecution has put up a case and material to the extent to fairly call the accused to defend himself.”**

31. At this stage of the proceedings, the prosecution is not required to prove its case beyond reasonable doubt, but only to present before the court evidence on a balance of probability, to enable the court call upon the accused persons to offer some explanation.

32. In this cause, I have noted that the fact that the 3<sup>rd</sup> accused (Respondent) had been registered as the property of the subject property was confirmed through the evidence tendered before the trial court. The issue in controversy is the alleged transfer of the subject land from the complainant to one Peter Alfred Hans who allegedly transferred it to one **YUSSUF MUSTAFA RATEMO (PW3)** who has denied ever owning the suit property. I take the view and hold that the issue of the transfer of the subject property are matters which are with the special knowledge of the Respondent for which they ought to offer some explanation.

33. The said property having been transferred to the 3<sup>rd</sup> Respondent, a fact which has not been denied, the issue which was before the court was not whether or not the PW3's name was used in the transaction, but whether the accused persons herein conspired to fraudulently register the said title in the name of the 3<sup>rd</sup> Respondent using the details of PW3 whose evidence was that he was known to the Respondent but had no land in Nakuru.

34. It is clear that in reaching the determination herein the trial court was in error as there is adequate evidence presented before the court which would have warranted putting the accused persons on their defence so as to offer an explanation on how the title of the property was registered in the name of the 3<sup>rd</sup> Respondent. The trial court erred in requiring the Appellant to prove its case beyond reasonable doubt at the no case to answer stage.

35. I have noted from the record of the proceedings and the ruling of the trial court, that the same did not take into account the evidence of **PW3 YUSUF MUSTAPHA RATEMO** on this relationship with the Respondent herein before the date of the alleged transfer of the subject property to the 3<sup>rd</sup> Respondent, the evidence of **PW4 JOHN KIRIGA ONGAU** and **PW5 MOHAMMED NISSER AHMED** on how the 3<sup>rd</sup> Respondent forcefully took possession of the suit property in arriving at its determination complained against.

36. I therefore find and hold that the appeal herein has merit as the trial court fell into error of both law and fact in arriving at his decision herein. I allow the appeal, set aside the trial court ruling acquitting the Respondents herein and substitute the same with an order putting the Respondents on their defence under the provision of Section 211 (1) of the Criminal Procedure Code.

37. In view of the finding herein, I hereby order that the Lower Court file ACC No. 20/2021 Nairobi be placed before the Chief Magistrate Anti-Corruption Court, who shall assign the same to another magistrate rather than FELIX KOMBO for further trial and determination, in view of the content of the Judgment herein and his decision thereon now overturned.

38. And it is ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY, 2021**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:**

Mr. Mongeri for 1<sup>st</sup> Respondent

Mr. Clapton for 3<sup>rd</sup> Respondent

Mwae for Omari for 2<sup>nd</sup> Respondent

Ms Ndombi for Appellant

Court Assistant – Hope