



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 98 OF 2019

REPUBLIC.....APPELLANT

VERSUS

SAM NYAMARI MOSE.....RESPONDENT

(Being an appeal arising from the acquittal of the Respondent from judgment delivered

on 15th November 2019 by Hon. S.K Onjoro (Mr) SRM in Kisii Criminal Case No 1304 of 2016)

JUDGMENT

1. The respondent, SAM NYAMARI MOSE, was charged before the lower court on the following counts:

COUNT I: MAKING A FALSE DOCUMENT CONTRARY TO SECTION 349 OF THE PENAL CODE

Particulars of the Offence: The respondent on diverse dates between 28th August and 29th August 2015 at Kisii Township in Kisii County jointly with others not before court with intent to defraud made a false title deed to land parcel No CENTRAL/KITUTU/DARAJA MBILI/1994 which he purported to be genuine.

ALTERNATIVE: UTTERING A DOCUMENT WITH INTENT TO DEFRAUD CONTRARY TO SECTION 357 (a) OF THE PENAL CODE.

Particulars of the Offence: The respondent on diverse dated between 28th August 2015 and 29th August 2015 at Kisii Township in Kisii County with intent to defraud knowingly uttered a title deed to land parcel No CENTRAL/KITUTU/DARAJA MBILI/1994 which he purported to be genuine.

COUNT II: MAKING FALSE DOCUMENT CONTRARY TO SECTION 347 (a) AS READ WITH SECTION 349 OF THE PENAL CODE.

Particulars of the Offence: The respondent on diverse dated between 28th August 2015 and 29th August 2015 at Kisii Township in Kisii County jointly with others not before the court with intent to defraud made a false green card to land parcel No CENTRAL/KITUTU/DARAJA MBILI/1994 which he purported to be genuine.

ALTERNATIVE: UTTERING A DOCUMENT WITH INTENT TO DEFRAUD CONTRARY TO SECTION 357 (b) OF THE PENAL (sic).

Particulars of the Offence: The respondent on diverse dated between 28th August 2015 and 29th August 2015 at Kisii Township in Kisii County with intent to defraud knowingly uttered a green card to land parcel No CENTRAL/KITUTU/DARAJA MBILI/1994 which he purported to be genuine.

COUNT III: FRADULENTLY PROCURING THE ISSUE OF CERTIFICATE OF OWNERSHIP CONTRARY TO SECTION 103 (1) (c) OF THE LAND REGISTRATION ACT.

Particulars of the Offence: On diverse dated between 28th August 2015 and 29th August 2015 at Kisii Township in Kisii County jointly with others not before the court fraudulently procured the issuance of a title deed to land parcel No CENTRAL/KITUTU/DARAJA MBILI/1994.

2. The respondent pleaded not guilty and a full trial commenced before the lower court and the after considering evidence presented by the

rival parties the trial magistrate found that the prosecution, now appellant, had not proved their case beyond reasonable doubt and acquitted the respondent.

3. The appellant dissatisfied with the finding of the court has lodged an appeal against the finding of the trial court on the following grounds;

1. *The learned trial magistrate failed to take into account the expert evidence that connected the respondent with the offence.*
2. *The learned trial magistrate erred and wrongly evaluated the evidence in acquitting the respondent.*

4. The duty of a first appellate court was stated in **Kiilu & Another vs Republic(2005) 1KLR 174** where the Court of Appeal observed that:

“An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision in the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

5. Joseph Mochama Oluoch (Pw1) testified that land parcel No. CENTRAL/KITUTU/DARAJA MBILI/1994 (suit property) is registered in the name of Josemo Distributors (K) Limited where he is the director. He recalled that between 1st and 5th August 2015 he was approached by people who wanted his confirmation that the land belonged to him. They showed him documents of land belonging to land parcel No. CENTRAL/KITUTU/DARAJA MBILI/727 and told him the person indicated on the title was the one trying to sell the land to them. Pw1 then started fencing the suit property but the respondent stopped his workers claiming that the land was his. He then went to the police station and met the respondent who accused him of fencing his land and the respondent presented a photocopy of the title to land parcel No. CENTRAL/KITUTU/DARAJA MBILI/727. Pw1 conducted a search and found that the land belonged to the respondent. Pw1 raised the issue of ownership with the land registrar who upon looking at the files ascertained that the land belonged to his company.

6. Machana Ontiri (Pw2) testified that he sold the suit land to Josemo Distributors Limited. On cross examination he maintained that he sold the land to the company and the parties signed the agreement at the advocate’s office, Mr. Soire.

7. Corporal Maina No 64606 (Pw3) attached at the DCIO’S office testified that there was land dispute concerning ownership of the suit land between Pw1 and the respondent. He testified that they both brought copies of their title deeds and green cards. Pw1 testified that after conducting his investigations he ascertained that the land belonged Pw1. He told court that the land registrar denied that the signature on the respondent’s documents did not belong to him and he forwarded the documents to the documents examiner. He presented into evidence the document examiner’s report dated 3rd February 2016 and testified that the document examiner confirmed the signatures on the title documents of the respondent did not belong to the land registrar.

8. Land registrar Hezekiah Mochora Mogare (Pw4) testified that he left Kisii September of 2011 and in November 2011 he was working in Kakamega. He testified that the signature and stamp on the respondent’s document was not his.

9. When placed on his defence, the respondent testified that he has the original title deed. He told court that the green card was never produced. He testified that in the civil case instituted by Josemo Distributors Ltd against him was dismissed and the court found that he was the owner of the suit land. He testified that the case against him was instituted by malice as the investigating officer did not present the original title.

10. The appellant submitted that the prosecution evidence through the document examiner’s report and the testimony of the land registrar revealed that the title deed held by the respondent was not signed by the registrar. The appellant contends that the respondent knew that his title was forged. The records from the lands registry showed that the property is owned by Josemo Distributors Ltd. The appellant in support of its case cited **Joseph Mureithi Kanyita v Republic [2017] eKLR and Joseph Mukuha Kimani v Republic [1984] eKLR**.

11. The respondent in his submissions argued that the complainant instituted **Kisii Civil Case No 359 of 2015** against him but the suit was dismissed and he was awarded costs. The respondent in his submissions questioned the credibility of the Pw2 who purportedly had two identification numbers, that is, ID No 1635899/70 and ID No 16122004. The respondent further urged the court to consider the entry numbers noting that his entry was made on 18th November 2011. He further submitted that the green card to the suit land was never produced.

ANALYSIS AND DETERMINATION

12. The appellant’s main contention is that it proved its case beyond reasonable doubt. The respondent was charged with the first count of making a false document contrary to **section 349 of the Penal Code**. However the section 349 of the penal code is for the offence of forgery as the said section provides as follows:

“Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.”

13. However, this defect in my view was not prejudicial as to occasion any miscarriage of justice. The charge sheet including the particulars of the offence was read to the respondent.

14. The appellant in their submissions have submitted that the offence of making a false document without authority is provided for in **section 357 of the Penal Code** which provides as follows;

“357. Any person who, with intent to defraud or to deceive –

(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or

(b) knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.”

15. In **Dennis Binyenya v Republic [2018] eKLR** the court held that;

“...the offence constitutes the following ingredients;

i. proof of the making, signing or execution of a document and that the same was done by the accused,

ii. proof that the making, signing or execution was without lawful authority or excuse and

iii. proof that the making, signing and execution was with the intention to defraud or deceive.”

16. According to the prosecution evidence, Pw1 testified on cross examination that from the green card, the respondent was the registered owner on 18th November 2011 and his company became registered on 20th January 2015. Pw1 also testified that according to the title search certificate which he obtained in 2015, the respondent was indicated as the owner of the suit land. While I recognize that the land registrar, Pw4, testified that he did not sign the documents held by the respondent, a position supported by the document examiner's report, however, it is not clear from the prosecution evidence who is the real owner of the suit land.

17. The prosecution's case is one in which invites this court to make a finding on the contested ownership of the suit land, a matter that falls outside the jurisdiction of this court. The initial complainant in this case was the respondent who made a report that Pw1 was fencing his land. Pw1 testified after conducting a title search at the land's registry, it revealed that the respondent was the proprietor.

18. There was no explanation offered by the land's registry as to why their records initially showed that the respondent was the proprietor. It was also not clear why the prosecution did not produce into evidence the green card which would have shed light on the issue. Having considered the evidence in totality, I find that the prosecution failed to establish beyond reasonable doubt that the land belonged to Pw1 as both parties are contesting the title of the other, and such dispute can only be resolved by the Environment and Land Court after conducting a full hearing relating to the title.

19. In addition, there was no evidence led by the appellant that the document was made or signed by the respondent for reasons that it was not proved beyond reasonable doubt that Pw1 was the proprietor of the suit land. The prosecution case was that the title deed was uttered to parties who were interested in buying the suit property, however, the said persons were not called to testify. In the circumstance I find that the offence of making a false document contrary in respect to count 1 was not proved to the required standard. Similarly, the offence under the third count also falls.

20. The respondent was also charged with the offence of uttering a document with the intent to defraud. Mativo J the elements to be proved for uttering a false document in **Caroline Wanjiku Ngugi v Republic[2015] eKLR** observed as follows;

“I find useful guidance in the Nigerian case of Nelson Moore vs Federal Republic of Nigeria [17] where it was held that in an offence of this nature, the prosecution must prove the following ingredients, namely; that the accused person knowingly and fraudulently uttered a false document, or writing or counterfeit seal. Thus, the elements of uttering a forged document are:-

i. Uttering and publishing as true a false, forged, or altered instrument;

ii. knowing the instrument to be false, altered, forged, or counterfeited; and

iii. intending to injure or defraud.”

21. In respect to the first Count, I have already held above that the issue of ownership was not proved and thus the alternative charge cannot stand.

22. In regard to the second count, the prosecution failed to produce into evidence the green card which was crucial evidence to be considered court.

23. In the end, I find the appeal to be devoid of merit and it is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF JUNE 2020

R.E. OUGO

JUDGE

In the presence of:

Miss Kibungi For the Appellant

Mr. Magara For the Respondent

Ms. Ivyao Court Assistant