



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 43 OF 2018

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon. T. Gesora (S.P.M)

in Narok CMCR No. 651 of 2013 on 17/10/ 2018)

GEORGE SIRONKA KATAMOKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Appellant was charged with four counts;

[2] **Count I.** Obtaining land registration by false pretences contrary to Section 320 of the Penal Code. Particulars were that on 17th day of September 2008 at Narok land office in Narok North District within Narok County, willfully procured for himself registration of land parcel number CISMARA/OLMBOKISH/131 measuring approximately 10.80 hectares by falsely pretending that the land transfer form used to transfer the said land was signed by Olmbokishi Group Ranch officials a fact he knew to be false.

[3] **Count II.** Making a document without authority contrary to Section 357(a) of the Penal Code. Particulars were that on 8th September 2008 at the district land registry in Narok North District within Narok County, with intent to defraud, without lawful authority or excuse made a certain document namely, a land transfer form for parcel number CISMARA/OLMBOKISHI/131, purporting it to be a land transfer forms signed by Olmbokishi Group Ranch officials.

[4] **Count III.** Forgery contrary to Section 349 of the Penal Code. Particulars were that on 8th September 2008 at the Narok Township in Narok North District within Narok County, with intent to defraud, forged a certain document namely land transfer form for parcel number CISMARA/OLMBOKISHI/131 purporting it to be a genuine land transfer form signed by Olmbokish Group Ranch officials.

[5] **Count IV.** Uttering false document contrary to Section 353 of the Penal Code. Particulars were that on 8th September 2008 at the district land registry in Narok North District within Narok County knowingly and fraudulently uttered a certain document namely land transfer form for parcel number CISMARA/OLMBOKISH/131 to Philip Mengi the land registrar Narok land office purporting to be a genuine land transfer form issued and signed by Olmbokish Group Ranch officials.

[6] The appellant denied all the four counts. The prosecution called 11 witnesses and the appellant testified and called three witnesses. He was convicted and sentenced to pay a fine of Kshs 100,000 in default to serve 12 months' imprisonment in each count. In addition, the court ordered that the title of the subject matter of the trial be surrendered for cancellation by the registrar to issue the victim with a proper title that shall be deemed for all intended purposes to have superseded the present one.

[7] The appellant being aggrieved with both convictions and sentences he lodged this appeal raising the following grounds, namely;

i. That the learned trial magistrate erred in law and fact when he disregarded the evidences of various witnesses including the prosecution own witnesses that no member of the ranch in issue used to sign the transfer forms in order for him / her to be issued with a title deed.

ii. That the learned trial magistrate erred in law and fact when he held that the accused signed the transfer form in issue when there

was no evidence before him to that effect.

iii. That the learned trial magistrate erred in law and fact when he disregarded the evidence of the accused person and his witnesses on account that they could not remember their dates of birth while the truth is they have never known their dates of birth and could therefore not be expected to know such dates.

iv. That the learned magistrate erred in law and fact when he failed to put into account that the parcel of land in issue CISMARA/OLMBOKISH/131 is in the company's records indicated as belonging to the accused which records all witnesses admit could not be accessed by the accused and therefore he could not forge a transfer form to give himself a parcel of land that was already determined to be his.

v. That the learned magistrate erred in law and fact when he held that no member of the ranch in issue could be allocated two (2) different parcels of land while the evidence on record clearly indicates that indeed some members got more than one parcel of land and not just the accused person. The members who got more than one parcel of land will be pinpointed to this honourable court during the hearing of the appeal.

vi. That the learned magistrate erred in law and fact when he failed to appreciate that there was elective picking of just one transfer form that gave the parcel of land to the accused whereas as a court of equity had the court ordered for other transfer forms to be brought before it as requested by the accused it would have come out clearly that the signatures in those other transfer forms not brought before court were similar to the ones on the transfer form produced as prosecution exhibit1.

vii. That the learned magistrate erred in law and fact when he failed to appreciate the duty of locating land within the ranch in issue was entirely left to the officials of the group who could decide who to give what including giving more acreage to some members than others and the members role was only to sign at the time of picking their title documents.

viii. That the learned magistrate erred in law and fact when in his judgement he relied heavily on the legal expectation expected for a land transfer to happen but failed completely to appreciate the actual events that took place as relates to transfers at the ranch in issue.

ix. That the learned magistrate erred in law and fact when sentencing the accused by imposing a fine so high (kshs. 400,000/=) thereby effectively making it impossible for the accused to raise such an amount and consequently ensuring that the accused serves a custodial sentence which in the circumstances of this case was not warranted.

x. That the learned magistrate erred in law and fact when he failed to question the failure by advocate Onduso who testified that he commissioned and / or executed the transfer form without seeing the transferors (group officials) and who were supposed to be his clients which if he had done and there was a plot by the accused to unlawfully transfer the land in issue to himself then he could have arrested the situation at that juncture. The advocate's duty was to see and / attest to the signatures of his clients the group officials which had failed to do.

xi. That the learned magistrate erred in law and fact when he failed to appreciate that the whole transaction in transferring various parcels of land to the members of Olmbokish group ranch was done outside the law and therefore the transactions should not have been brought before court thereafter to be clothed with a form of legality. All including complainant had opted to do their transactions under a special system (uamuzi wa wakubwa) not known to the law.

[8]. On 20/5/2021 the prison authorities told this court that the appellant had paid fine and was released from custody on 17/7/2020.

[9]. Mr. Gachoka the appellant's advocate emphasized that this court should consider the alibi seriously. The land in issue still belongs to the appellant and complainant has never been a member of the ranch in issue.

[10]. Ms. Torosi pointed out that the alibi is not raised in the submission or in the appeal. According to her it was not an issue in the trial.

[11]. On the application dated 18th November 2018 J. Bwonwonga J. ordered that ;

i. The evidence sought to be adduced was available at trial. If the appellant had exercised due diligence, he could have found and produced the evidence sought to be produced.

ii. The issues raised by counsel for the appellant are matters that are capable of being raised during the hearing of the appeal.

iii. In the premises the application fails and is hereby dismissed.

EVIDENCE.

[12]. **PW1-Benson Saitabu Katamoki**, the complainant testified that sometimes in 1997 he was in EoRekale Secondary School in form three. There was a group ranch meeting. He was summoned to take up a share as a beneficiary. His father one Jackson Parmuat Katamoki was one of the original members of the ranch. He was now deceased and as per the custom, his first 3 sons were to be recognized. The complainant was registered as member no. 56 while his brothers got different numbers. After registration he went back to school.

[13]. The time came for him to be shown his parcel and he was shown no. 131 measuring 10 hectares. He paid the required Kshs 7,000/= for

processing of title. In the year 1999 he was recruited as an administration police officer and was posted to Siaya district. He kept inquiring about the title process.

[14]. Finally, in 2007 when he visited the lands survey office to request that beacons be placed, he found that someone else had been registered in his place. He complained and the matter was investigated. His cousin George Tompoi Katumoki had been registered. Tompoi had previously been shown parcel no. 571. He was asked to surrender no. 131 but he refused. George Tompoi Katumoki is the accused he had only twisted his name. The register reads George Sironka Katamoki. In effect George Tompoi Kutumoki and George Sironka Katamoki refer to one and the same person.

[15]. On cross examination, he insisted that each member is entitled to one share. He was shown **DMFI 1** a list of members. In **DMFI 1** no. 56 is the name of Nicholas Ntimama Sironka but his answer is that **DMFI 1** is not the member's list but the parcel allotment list.

[16]. There was balloting for the parcels but he did not have his with him. He agreed that he did not see the forms signed by the accused or transfer forms for other members. The modalities of title deed processing were left to the officials. All he needed to do was collect his title. He conceded that he had not seen the accused sign the forms or present himself to the registrar Mr. Mengi.

[17]. **PW2-Daniel Keriamou**, testified that in 1992 they did new registration of olombokishi group ranch. He was one of the new members. He is member no.115. Both **PW1** and the accused also became members of the ranch. Memusi Katamoki is the deceased father to Benson Katamoki. Memusi was one of the original members of the group ranch. George Katamoki was allocated parcel no. 571 and **PW1** no. 131. He confirmed that the group land could only be given as one share. A member could not be allotted two shares. In 2007 **PW1** complained that he was yet to receive his land. The committee made an inquiry into the matter and they discovered that parcel no. 131 had been taken by George Tompoi Katamoki. He was designated by the committee to request George to surrender the land. George refused to surrender the land.

[18]. On cross examination, he testified that he is the area sub chief. He confirmed that the accused is Tompoi. He did not have the list but he was aware of the register. He stated that members were only required to give an ID card and names only then they will go and wait for title deed. After some time will be called to sign a form to collect title deed. The officials were the ones who processed the title deeds. He conceded that he did not know how George got his title.

[19]. **PW3 Oltimbau Ole Sikuroi**, testified that he is a committee member of the ranch since 1995. The group sub-divided land to its members who now total 700 members. The main sub division took place in 1995. He recalled that in 2010 **PW1** complained and wanted the committee's intervention because someone had taken the title for his share. He confirmed that **PW1's** parcel was no. 131. George Tompoi Katamoki was member no. 571 and each member was only entitled to one share. He confirmed that the committee through **PW2** asked the accused to surrender the land but he declined. The accused is now in possession of both parcel 131 and 571.

[20]. On cross examination, he stated that there was a group register to show who was entitled to which parcel. The register was kept by the secretary it was a requirement that one signs for the title before the officials. For the accused to have two shares is fraudulent.

[21]. **PW4, James Ole Mpoke**, in 1972 Olombokish Group Ranch was formed. He was the chairman in 1972. He stepped down in 1995 when the land was being sub- divided to its members. He confirmed that each member was entitled to one share only. He knows George Tompoi Katamoki well. He also knows **PW1** and both are members were entitled to one share each. **PW1** was a member with 1 share. He confirmed that he got to learn that the accused had registered **PW1's** parcel in his name. Elders asked him to surrender but he refused.

[22]. On cross examination, he denied that he had signed a transfer in the accused's name the exhibit was **PMFI 1**. He agreed that he had signed for members using his name which is the only thing he could write. He doesn't know who it is that signed **PMFI 1** with his name. He stated that it is impossible that one member has 2 shares. One could only have one share irrespective of its acreage. He stated that it is the lands registry that processed the title after the officials signed the transfer.

[23]. **PW5, Kenduala Nampaso**, a committee member also confirmed the events narrated by **PW2, 3** and **4**.

[24]. **PW6, C.I. Alex Mwongela** a forensic document examiner. He examined signatures on **PMFI 1** the transfer forms against certain specimen signatures. He concluded that **PW4** did not sign the form. The other officials also did not sign the exhibit. His report was **P Exh2**, memo form **P Exh 3** and specimen signatures **PMFI 1 4, 5** and **6**. He stated that **DMFI 1** is a copy not original. He could see crossings and alterations on the copy **DMFI1**. The cancellations of **DMFI 1** rake eyebrows.

[25]. On cross examination he could not confirm that the officials were the ones who signed **DMFI 1**. He could not tell who signed **PMFI 1** He also did not get specimen signatures for the accused.

[26]. **PW7-Dixon Tontol**, He testified that he was the secretary to Olombokishi group ranch in 1998. He recalled that they sub divided the group land and shared out parcel of land to each member. After sub division, surveyors were instructed to mark out the boundaries and acreages. The rules required that each member has only one parcel of land. Members were required to complete transfer form before an advocate. Then he takes the completed transfer form to the group officials for signing so that the transfer can take place. He then goes with the signed transfer form to the land registrar to extract a title. He confirmed that **PW1** and accused were both valid members of the group ranch. He denied that he signed the transfer for the parcel subject matter of the case. He stated that each member had been shown their land. He told the court that after **PW1** complained that his land was given to the accused, he completed the transfer form but on presenting it to the lands office he found that the accused had already extracted a title deed in the accused's name. He stated that the Accused's parcel no. 571 which is 9 kms away from 131 so there is no way the accused could have acquired no. 131 lawfully. It is his testimony that the accused took advantage of **PW1's** long absence to grab 131. The accused was asked to surrender 131 but he refused and became evasive.

[27]. On cross examination, he testified that he keeps the register but in this case it was kept by the chairman. **PMFI 7** is the original register

of members. He confirmed that **PW1** was the allottee of parcel no. 131. He also denied having signed **PMFI 1**.

[28]. He was recalled and shown **DMFI 1** that shows that there are some people who had more than one parcel.

[29]. **PW8 James Ochego Onduso**, He testified that he is an advocate of the high court of Kenya. He recalled that the accused went to him on 8/9/2008 as the advocate for Olmbokishi group ranch. He presented to him a transfer form for CISMARA/OLMBOKISH/131 duly signed by James Mpoke (chairman), Dixon Ntontoi (secretary) and Julius Parmuala (the treasurer). He witnessed the signatures including the signature of the accused. Later he came to learn from the officials that the form was fictitious. He personally knew the accused. He presumed that the form was proper though the transferors did not appear before him as is the custom. It is the accused himself who presented **PMFI 1** to the advocate.

[30]. **PW9, Julius Parmuala**, testified and confirmed what **PW2, 3, 4** and **5** had said.

[31]. **PW10 P.C Nicholas Njoroge**, the investigating officer. He detailed how he investigated the matter. The documents he collected. **PMFI 1**, **PMFI 9** green card for parcel 131 in the name of the accused ID no. 22960812, **PMFI 10** green card for parcel no. 571 in the name of George Tompoi Katamoki ID.NO. 9659148 from the records from the registrar of persons show that ID NO. 22960872 belongs to Godfrey Gitau Nganga and no. 9659148 belongs to George Sironka Katamoki as shown by **P Exh 12** and **13**.

[32]. He confirmed that the ranch officials had denied having signed the transfer forms and indeed it was true that they did not sign. He took specimen signatures to have them examined by the document examiner as against the transfer form **PMFI1** and the document examiner confirmed it. He confirmed that it is the accused who presented the form **PMFI 1** to the advocate who witnessed the signature. He also produced the register of members. The register shows **PW1** to be member no. 529. Register **P Exh 7**. The accused is member no 175.

[33]. He established that the accused holds two parcels.131 which belongs to the complainant and the accused was then arrested and charged.

[34]. **PW11 Philip Munywoki Mengi**, the lands registrar confirmed that he had supplied the investigating officer with the documents he had requested; members list **P Exh 15**, green cards and transfer forms **P Exh 9, 10** and **11**. He confirmed that 2 parcels had been given to the accused. He denied that the documents meant for transfer for 571 were used for 131.

[35]. **DW1**, the accused was called upon to defend himself. He gave sworn statement. He introduced himself as George Sironka Katamoki a.k.a. George Tompoi Katamoki. He denied having signed **P Exh 1**. The transfer form. He insisted he is member no. 131. He denied having gone to the advocate's office to sign the document. He stated that he saw the document in court.

[36]. On cross examination, He stated that both 131 and 571 are his. That that it is a ploy to take his land 131.he did not produce title. He stated that his ID is 9659148 not 22960872 that the officials entered wrong numbers.

[37]. **DW2, Joseph Lelu Katamoki**, stated that they as members they were not signing transfer forms. All the officials did was to take the ID no. and they were never involved with the details.

[38]. **DW3, Joseph Lelu Musunku** reiterated **DW2**. Both of them said they have title deeds.

[39]. **DW4, Stephen Njiiri Muigai**, he stated that on 8/9/2008 he was with the accused planting maize. They met at 8.00 a.m and left at 5.00 p.m. It is therefore not possible that the accused could have been elsewhere.

[40]. On cross examination, he could remember the events of 8/9/2008 but not his birth date.

APPELLANT'S SUBMISSION

[41]. The Appellant submitted that the trial magistrate erred in failing to give the accused the benefit of doubt when it is very clear there was no proof beyond reasonable doubt that he signed the transfer form in issue. **PW6** stated that though as per his inspection the signatures of the transferors on the transfer form are not made by the same person as the specimen signatures presented to him as belonging to the ranch officials (the transferors) he cannot say those alleged signatures on the transfer forms were put by the accused. He did not have specimen signature of the accused to compare with the ones on the transfer forms. He was only in court to say that ranch officials may not have signed the transfer form in question.

[42]. The Appellant submitted that despite evidence in favour of the appellant, the magistrate in his judgment changes to say that the group officials could have signed, the land officials did not sign, yet this narrative by the magistrate did not come from any of the witnesses including the document examiner himself. That this shows that the judicial officer had already made up his mind against the appellant regardless of where the evidence in court pointed. If the magistrate can form an opinion on his own that the land officer did not sign when there is no evidence to that effect before him why can't he extend the same courtesy to the appellant who every witness who came before court said they say it was the appellant/accused who put the disputed signatures on the transfer forms.

[43]. The Appellant submitted that the magistrate went on to support his condemnation of the appellant on the ground of evidence of **PW8** who says the accused presented the transfer forms to him on 8/9/2008 despite evidence of **DW2** and **DW3** who stated that they were with the accused more than 50kms from Narok Town at the time he was allegedly in Mr. Onduso's office.

[44]. The Appellant submitted that the magistrate disregarded the evidence of the two defence witnesses **DW2** and **DW3** because of the test by the prosecutor about their dates of birth. That the magistrate failed to appreciate that the two defence witnesses have never known their

dates of birth as nobody kept those records. They could not be expected to remember something they do not know. No wonder the registrar of deaths and births captured their dates 00/00/1980 etc. as is ordinarily the case where a person seeking to be registered does not know his/her exact date of birth. To have disregarded this evidence on such a reason was wrong on the part of the magistrate. if at all advocate Onduso witnessed the disputed form without the presence of his client(ranch officials) then he was acting unethically

[45]. The Appellant submitted that a benefit of doubt as to whether the appellant really visited Mr. Onduso on the 8/9/2008 to present the disputed transfer forms ought to have been given to the appellant.

[46]. The Appellant submitted that the appellant was entitled to the land parcel known as CISMARA/OLOMBOKISH/131.

[47]. The Appellant submitted that the secretary to the ranch Dixon Tontol stated that the appellant had no access whatsoever to the records of the ranch. Therefore, the appellant could not have forged the list of members and their respective parcels of land.

[48]. The Appellant submitted that before court there is no document showing the complainant- Benson Saitabul as the beneficiary to this particular parcel of land. Though the issue was extensively canvassed before the trial court, the magistrate did not address the issue which therefore shows that the judicial officer had a predetermined mind against the appellant.

[49]. The Appellant submitted that the holding by the trial magistrate that no member could get two parcels of land is not supported by the evidence tendered. That the testimony of **PW7** clearly shows a member could get more than one parcel. The magistrate cannot therefore be right in using the fact that the accused has two parcel in his name as the basis for saying he forged the transfer form for parcel no.131.

[50]. The Appellant submitted that the prosecution never discharged its burden to explain why they only brought one transfer form before court while there were many others lying at the land registry which could have been used for comparison purposes. Despite this issue being raised the magistrate failed to address it and erred to that effect.

[51]. The Appellant submitted that it is clear from both prosecution and defence witnesses the mode of operations as to how the transfers of the various parcels of land was to be done was left to the group officials and their advocate Mr. Onduso. The magistrate in contradicting the testimony of prosecution own witnesses erred in a grave manner. He enumerates in his judgment what is expected for a transfer to happen but disregards what the witness said actually took place.

[52]. The Appellant submitted that the transfer form has to show a transferor and a transferee but that can be done by third parties and not necessarily the people indicated on the form as having signed. The magistrate erred in condemning the accused while the accused managed to show he was elsewhere when he is supposed to have been signing the transfer forms.

[53]. The Appellant submitted that the magistrate already having formed a negative perception of the appellant, he is imposed a sentence too high in monetary terms such that appellant could not raise the same. Appellant was to go to custody which was likely to make him cede the land which he had acquired legally in line with how Olombokish Ranch was giving out to its members. The magistrate erred in this one and the sentence ought to be vacated.

RESPONDENT'S SUBMISSION

[54]. The Respondent submitted that it is not true that no member of the ranch in issue used to sign the transfer forms in order for him or her to be issued with a title. Several prosecution witnesses testified that they had to sign transfer forms before presenting it to land office and be issued with title deeds. **PW7** the secretary of the group ranch stated that members were required to complete transfers forms before an advocate. Then they take the completed forms to the group officials for signing so that the transfer can take place. He went on to state that the members went with signed transfer forms to the land registrar to extract a title deed.

[55]. The Respondent submitted that the prosecution proved beyond reasonable doubt that the one that signed the transfer form in question are not the prosecution witnesses. This was brought out in evidence by the document examiner.

[56]. The Respondent submitted that the defence of appellant was considered by the trial magistrate court but that defence did not challenge prosecution's evidence.

[57]. The Respondent submitted that the appellant obtained registration of parcel number 131 by false pretences and forgery and was asked by the group officials to surrender it back.

[58]. The Respondent submitted that each member was entitled to one share. **PW2** stated that the group land could only be given one share and not two shares could be allocated to a member. a complaint was only brought in respect to transfer form produced as **P Exh 1** and there was no need for the court to ask for other transfer forms that did not relate to this case

[59]. The Respondent submitted that because of the appellant's conduct of disregarding the legal way of transferring land, he committed several offences culminating to his trial. The trial court followed the law to the letter.

[60]. The Respondent submitted that the trial court meted a sentence that was legal and according to the law.

[61]. The Respondent submitted that it is not the advocate who was on trial but the appellant.

[62]. The Respondent submitted that the court is vested with powers to hear cases where land registration was obtained by false pretense

where a document is made without authority, where there is forgery and uttering false document. All these offences are contained in the penal code, the court has jurisdiction to hear and determine the matter.

[63]. The Respondent submitted that the conviction was safe as against the appellant. They urged this court to uphold it as well as the sentence. They objected to the appellant's prayers that fines paid be reimbursed to him, that title in issue to remain in his name and that costs be paid to him from state coffers.

ANALYSIS AND DETERMINATION

[64]. As a first appellate court, this court is obligated to evaluate the evidence afresh and make own findings and conclusions, except, bearing in mind the court did not have the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. Republic [1972] E.A 32.**

[65]. The broad issues arising from the record, written submissions of both parties and the evidence adduced before the trial Court for determination are;

i. Whether the prosecution proved its case to the desired threshold;

ii. Whether the trial court ignored the appellant's defence and

iii. Whether the sentences was harsh.

Elements of crime

A. COUNT 1: Obtaining land registration by false pretence contrary to Section 320 of the Penal Code.

[66]. Section 320 of the Penal Code provides;

“Any person who willfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanor and is liable to imprisonment for one year.”

[67]. False pretence has been defined in Section 312 of the Penal Code:

“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.”

[68]. Accordingly, the prosecution must prove beyond reasonable doubt that (i) the appellant made a representation on matters of fact about the past or present; (ii) the representation must be false-appellant knew it was false or did not believe it was true; (iii) it was made with the intent of defraud; and (iv) the complainant acted on it his disadvantage.

[69]. In the Nigerian case of **Dr. Edwin U. Onwudiwe v Federal Republic of Nigeria SC. 41/2003**, the Supreme Court of Nigeria observed that in order to prove the offence, there must be a pretence; that the pretence should have emanated from the accused person; that it was false; that the accused person knew of its falsity or did not believe in its truth; that there was an intention to defraud; that the thing is capable of being stolen and that the accused person induced the owner to transfer his whole interest in the property.

[70]. The prosecution case was that he procured registration of land parcel No. CISMARA/OLMBOKISH/131, into his name through false pretences. The appellant denied the charge. The prosecution relied on the fact that it is not possible that the accused has a title for land which he did not sign a transfer form. That document was presented to the land registry for registration as confirmed by PW11.

[71]. The trial court agreed with the prosecution and found as a fact that the green card was in the name of appellant and that the appellant has not said that he went to sign for the title before the officials. Where could he have gotten the transfer form that gave him the title for no. 131?

[72]. The law requires that there be representation and that the person making the representation knows it to be false or does not believe to be true. I have carefully gone through the trial court's record and the exhibits produced. **PW8** testified that the appellant presented before him the fictitious transfer form. He witnessed the signatures purported to be of the group ranch officials presuming they were genuine and that the form was proper. Although DW4 claimed that he was with the appellant from morning to evening at the shamba on 8/9/2008 planting maize-the day the appellant is said to have appeared before PW8, the evidence of PW8 completely routed this alibi defence. There is nothing that makes the court not to believe the evidence by PW8 especially that; (i) the transfer form was produced as PExh.1 and it bears the date of attestation by PW8 in the presence of the appellant; (ii) PW11 testified that the same form is the one that the appellant presented to the land registry for purposes of registration; and (iii) acting on the transfer form, the land registrar registered the land into the name of the appellant. **PW11** confirmed that is registered in the name of the appellant. This form is the basis of the title he held and claimed to be his.

[73]. Evidence by officials of the Ranch was that they did not sign the transfer form. Their claim was verified by the expert evidence by PW6 that they were not the authors of the signatures on the transfer form. PW11 also testified that the land registrar did not sign the transfer form. Circumstantial as well as direct evidence by PW8 and PW11 place the transfer form in the possession of the appellant. Evidence show that the said land belonged to the complainant and not the appellant.

[74]. In sum, the evidence adduced show that the appellant made representation in writing to the land registrar by presenting a transfer form purportedly duly signed by the officials of the Olombokish Group Ranch, transferring land parcel No. CISMARA/OLMBOKISH/131 into the appellant's name. The presentation in the said transfer form was of past or present facts which was false- the appellant knew or did not believe to be true. He therefore, procured registration of the said land into his name by false pretence.

[75]. Accordingly, the prosecution proved beyond reasonable doubt the offence of obtaining registration by false pretences.

B. COUNT 11: Making a document without authority contrary to Section 357(a) of the Penal Code.

[76]. The offence of making a document without authority is set out in Section 357(a) as follows:

“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 procurement or otherwise, any document or electronic record or writing.

Is guilty of a felony and is liable to imprisonment for seven years”.

[77]. From the definition, 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.

[78]. It was without doubt that the Appellant was in possession of a transfer form as well as a title deed in respect of land parcel 131. The Ranch officials and the land officials did not sign the transfer form. Yet, the form was presented for registration with signatures on it. I have already made a finding that the appellant made a presentation in writing in the transfer form produced as evidence in court and presented it for registration to the land registry. The Ranch officials confirmed that it is the transferee who ordinarily presents the transfer form to the land registry for registration. Circumstantial evidence point to one inference that the appellant signed the transfer form- **P Exh 1** in this case. The document examiner found the signatures of the transferors to have been forged. In light of the evidence, the forgery of the signatures meant that the transfer form was not a genuine document. Evidence herein lead to the inference that the Appellant was either involved in the forgery or he procured the making of the signatures.

[79]. The appellant did not state that he signed the transfer form for purposes of the title before the officials. In the absence of any explanation as to where he got the transfer that resulted in title deed for no.131, the appellant procured it illegally. The evidence show that the ID number in the green card for the land belongs to a different individual. He has not presented the title deed with the same error for rectification. The appellant through deceit procured the registration of the land into his name. The intention was to defraud the land. Accordingly, I find: -

i. THAT, the making, signing or execution of the transfer form herein was by the accused,

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

iii. THAT, the making, signing and execution was with the intention to defraud or deceive.

[80]. I accordingly find that the offence under Section 357(a) of the Penal Code was proved beyond reasonable doubt.

C. COUNT III: Forgery contrary to Section 349 of the Penal Code

[81]. Section 349 of Penal Code where the punishment for offence of forgery is given thus:

“Any person who forges any document or electronic record 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”.

[82]. The Court of Appeal in Joseph Mukuha Kimani v Republic (Criminal Appeal No. 76 of 83) [1984] eKLR held:

“The prosecution must prove that:

(a) The document was false; in the sense that, it was forged

(b) The accused knew it was forged

(c) The utterer intended to defraud.

In the case of KILEE v REPUBLIC [1967] EA 713 at p 717, it was said that, the false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: OMAR BIN SALEM v R[1950] 17 EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see SAMUELS v REPUBLIC[1968] 1.”

[83]. Mativo J in *Caroline Wanjiku Ngugi v Republic*[2015] eKLR held that:

“Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus the elements of forgery are:-

i. False making of – The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. “Writing” includes anything handwritten, type written, computer generated or engraved.

ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine contents of the document.

iii. Ability to defraud – The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.

iv. Legal efficacy – the document or writing has to have some legal significance.

v. Intent to defraud – the specific state of mind for forgery does not require intent to steal but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer.”

[84]. This definition sets out as its first element the need to prove that the person charged was indeed the one who put ink to paper and created the document deemed a forgery. This is further reaffirmed in *R v Gambling [1974] 3 All ER 479* where the court held that:

“...‘forgery is the making of a false document in order that it may be used as genuine.’ This definition involves two considerations: first, that the relevant document should be false; and secondly, that it was made in order that it might be used as genuine. [...]

Given [...] that each application was ‘false’ was it made ‘in order that it might be used as genuine’? Indeed, what do these words involve in the context of the present case? Clearly they require proof of an intent on the part of the maker of the false document that it shall in fact be used as genuine. We think that they also involve that the untrue statement in the document must be the reason or one of the reasons which results in the document being accepted as genuine when it is thereafter used by the maker. It is this concept which we think is sought to be expressed in the aphorism – as to the usefulness of which views may differ strongly – that the document must not only tell a lie, it must tell a lie about itself. [...] If this is correct, then it seems to us to follow that in cases such as the present in which the falsity of a document arises from the use of a fictitious name or signature, or both, then that document is a forgery only if, as counsel for the appellant contended, having regard to all the circumstances of the transaction, the identity of the maker of the document is a material factor. [...]

In many cases the materiality of the identity of the maker would be so obvious that evidence would be unnecessary: for example, when the document is a cheque or a bill of exchange and the purported signature of the drawer, or endorser, or the acceptor has been written by the someone other than the person whose signature it purports to be. In other cases, such as the present, evidence would be required, and the materiality or otherwise of the identity of the maker of the document must be a matter for the [court].”

[85]. Evidence show that the maker of the transfer form was **DW1**, the Appellant. **PW8** witnessed the signatures of the transferee and transferors after the Appellant (the transferee) presented to him a transfer form duly signed by transferors. **PW8** also said that when he witnessed the transfer form, the Appellant signed his bit, the part for the transferors had already been signed.

[86]. The transferors, **PW4**, **7** and **9** denied ever signing the document. **PW6**, a Document Examiner corroborated that evidence. The appellant denied having signed the form but **PW8** before whom it was signed categorically stated that the accused who was well known to him presented it to him.

[87]. The document which is the subject matter of count III was a transfer form. It is alleged in the particulars of the charge that the Appellant forged the signatures of James Ole Mpoke, (**PW4**) Dixon Ntontoi (**PW7**) and Julius Parmuala (**PW9**) in the case, on a transfer form purporting it to be a genuine and valid transfer form signed by James Ole Mpoke, Dixon Ntontoi and Julius Parmuala.

[88]. The prosecution argued that the transfer form was not signed by the ranch officials. It relied on the evidence of **PW 6**, the documents examiner, who compared known signature of **PW4**, **7** and **9** and the signature in the transfer form **P Exh 1**. **PW6** concluded that the signatures were by different people.

[89]. The question to ask oneself is whether the prosecution has adduced evidence to establish that the Appellant used the transfer form to deceive and or defraud.

[90]. Bearing in mind the document in issue is a transfer form, and it has legal efficacy. A transfer form is defined as:

‘A written instrument, which has been signed and delivered by, which one individual, the transferor, conveys title to real property to another individual, the transferee; a conveyance of land, from one individual to another.’

[91]. The transfer form was a document presented by the Appellant to the Land registrar, the **PW11** for registration and witnessed by the advocate, **PW8**. It has legal efficacy, as to a future conduct of the party or parties. It is a document that could be used to induce any dealing on land at the Land Registry. It was used to transfer land in issue. The fact that the transfer form had signatures of the transferors (**PW4, 7** and **9**), it had legal efficacy to transfer or transact in land. The intention to defraud or deceive, or induce a course of action is present. The charge of forgery contrary to Section 349 of the Penal Code was therefore proved.

D. Uttering false document contrary to Section 353 of the Penal Code.

[92]. Section 353 of the Penal Code provides as follows;

Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.

[93]. As regards the offence of uttering a false document, the same is defined under Section 357(b) of the Penal Code as;

“Any person who, with intent to defraud or to deceive

(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”.

[94]. I cannot belabor in restating the fact that the Appellant in presenting the transfer form to **PW11**(the land registrar) knew the same was not genuine and he did so with the intention of deceiving so that he could procure registration of a title deed in his name. However, a key element herein is the proof that the document was made by another person. In this case, I have found that it is either the Appellant who made the false transfer form or aided in the making of the same. I accordingly find that his conviction in this count was safe.

Whether the sentence meted out was manifestly harsh and excessive.

[95]. The learned trial magistrate sentenced the appellant to a fine of Kshs.100, 000/ or in default to serve a term of twelve (12) months imprisonment in each count; which he contends is harsh and excessive.

[96]. The law provides for a sentences as follows;

[97]. Conviction on the offence of Obtaining land registration by false pretences contrary to Section 320 of the Penal Code one is liable to imprisonment of one year.

[98]. Conviction on the offence of making a document without authority contrary to Section 357(a) of the Penal Code is liable to imprisonment for seven years.

[99]. Conviction on the offence of forgery contrary to Section 349 of Penal Code one is liable to imprisonment for three years.

[100]. Conviction on the offence of uttering false document contrary to Section 353 of the Penal Code one is liable to imprisonment for seven years.

[101]. It is trite law that an appellate court will not interfere with the discretion exercised by the trial court when passing sentence unless it is evident that the trial court acted upon a wrong principle of law or overlooked some material factors;

[102]. The record shows that the sentence is within the parameters as provided by the law; in the circumstances of this case it cannot be a valid contention that the fine of Kshs.100,000/- and the default term of twelve(12) months for such a prevalent offence that calls for a deterrent sentence was wrong in principle or manifestly excessive; there are therefore no valid reasons advanced by the appellant that warrants interference with the sentence; the sentence is legal and appropriate to the offences. It is not harsh or excessive.

[103]. Having considered the appeal and reevaluated the evidence, I come to the conclusion that the prosecution proved its case against the appellant on the four counts beyond reasonable doubt.

[104]. For the above reasons, I find that the appellant’s appeal lacks merit and is dismissed. Conviction and sentence is hereby upheld. Appeal 14 days.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29TH DAY OF JULY, 2021

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F. M. GIKONYO

JUDGE

In the presence of:

1. Gachoka Mwangi for appellant
2. Ms. Torosi for Respondent
3. Mr. Kasaso – CA

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F. M. GIKONYO

JUDGE