



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 33 OF 2019**

**EVANSON MWANGI KIHUMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant herein (now deceased) was on the 19<sup>th</sup> May, 2016 charged with six (6) counts as follows: -

1) COUNT I

*Conspiracy to defraud contrary to Section 317 of the Penal Code; the particulars being that on diverse days between 9<sup>th</sup> June 2014 and 18<sup>th</sup> November 2014 at Embu Lands Office in Embu West Sub-county within Embu County, with others before court, conspired with intent to defraud Mr. Mbui Kobuthi of land registration Gaturi/Weru/377 valued at 12 million by falsely pretending that he had bought the said land from Paul Njeru Kamara, a fact that he knew to be false.*

2) COUNT II

*Obtaining registration by false pretence contrary to Section 320 of the Penal Code; the particulars being that, on the 18<sup>th</sup> day of December 1968 at the District Registrar's Office in Embu West County within Embu County wilfully procured for himself a land registration No. Gaturi/Weru/377 valued at 12 million belonging to Nyaga Kobuthi by falsely pretending that he had bought it from Paul Njeru Kamara.*

3) COUNT III

*False swearing contrary to Section 114 of the Penal Code; the particulars being that on the 18<sup>th</sup> December 2015 at the offices of Mburu Maina & Co. Advocates Commissioner for Oaths in Nakuru town, within Nakuru County, before Muthoni Muchiri & Co. Advocates, a person authorised to administer oath, swore falsely upon a matter of public concern to the effect that land title deed Gaturi/Weru/377 had gotten burnt in the house fire and that he wanted the Land Registrar to issue him with a new one.*

4) COUNT IV

*Uttering a false document contrary to Section 353 of the Penal Code; the particulars being that on the 10<sup>th</sup> day of October 1981 at the Embu Land Registrar's Office, in Embu West Sub-County within Embu County, knowingly and fraudulently uttered a forged discharge of charge for Gaturi/Weru/377 charge of the KCB bank Kenya.*

5) COUNT V

*Procuring execution of a document by false pretences contrary to Section 355 of the Penal Code; the particulars being that on the 9<sup>th</sup> day June 2014 at Embu Lands Office in Embu West Sub-County, within Embu County, by means of fraudulent false representation as to the content of a discharge of charge of Land Title Gaturi/Weru/377 document, procured the Registrar of Lands to execute the said land discharge of charge document.*

6) COUNT VI

*Forgery contrary to Section 350 of the Penal Code; the particulars being that on the 18<sup>th</sup> December, 1968 at Embu Lands Office in Embu West Sub-County within Embu County, with intent to defraud forged a land transfer form for land Gaturi/Weru/377 purporting it to have been transferred to him by Paul Njeru Kamara.*

2. The prosecution called ten (10) witnesses in support of the charge and at the close of the prosecution's case, the appellant was placed on his defence. He gave a sworn statement and called three witnesses in support of his defence.
3. After analysing the evidence on record, the trial court in its judgment delivered on the 19<sup>th</sup> day of November, 2019 convicted the appellant and sentenced him to pay a fine of Kshs.200,000/= on each court in default to serve 5 years imprisonment on all counts.
4. The appellant having been dissatisfied with the conviction and the sentence appealed to this court but passed on, when the appeal was still pending but his counsel expressed the desire to have the appeal heard and determined, the appellant's death notwithstanding. On her part, counsel for the respondent (Republic) held the view that the appellant having passed on, the appeal abated and there was no need to proceed with the same. Both counsels agreed that the issue as to whether the appeal has abated or not, be one of the issues to be determined in the appeal.
5. In his petition of appeal dated the 29<sup>th</sup> day of November, 2019, the late appellant listed 19 grounds of appeal.
6. When the appeal came up for hearing, the court gave directions on filing of submissions which both counsels complied with, and which, the court has duly considered together with the evidence on record.
7. In the submissions filed on behalf of the appellant, his counsel indicated to this court that he shall be relying fully on the submissions that he filed on the 7<sup>th</sup> November 2017 at the lower court and which he attached to the submissions filed herein.
8. As already pointed out elsewhere in this judgment, the appellant has appealed against both the sentence and the conviction. In his submissions counsel for the appellant set out the following issues for determination;

1) *Whether the appeal is merited with regard to paragraphs 1 through to 15 of the petition of appeal filed on the 2<sup>nd</sup> December 2019.*

2) *Whether the appeal survives the appellant.*

9. I propose to start with the 2<sup>nd</sup> issue as it has the potential of determining the whole appeal depending on the finding that the court will come to.
10. Section 360 of the Criminal Procedure Code is on Abatement of Appeal and it provides;

***Every appeal from a subordinate court (except an appeal from a sentence of fine shall finally abate on the death of the appellant.***

11. Counsel for the appellant relied on Section 360 and more so, on the exception part of that section, the reason being that the amount paid as fine can be claimed by the estate of the deceased person unlike in a custodial sentence which cannot be completed by a substitute person except the offender themselves.
12. On her part, counsel for the respondent submitted that the death of the appellant rendered the appeal nugatory and argued that, this court need not delve into the merits and the demerits of the appeal because the same cannot proceed in the absence of the appellant.
13. The court has considered the submissions of the counsel in regard to this issue. Section 360 of the Criminal Procedure Code is self-explanatory. Whereas it provides that an appeal shall abate upon the death of the appellant, it provides for an exception in a case where the appeal is from a sentence of a fine.
14. This court has perused the judgment by the trial court and it's clear that the appellant was given an option of a fine of Kshs. 200,000/= on each court, making a total of Kshs.1,200,000/=. The record shows that he paid the said amount. His appeal falls within the exception.
15. The first ground of appeal is that the trial magistrate erred in both the law and the facts in convicting the appellant on charges that were grossly defective, inconsistent and whose particulars were not proved or supported by evidence. On the part of the appellant it was submitted that the spirit and the substance of the offences with which the appellant was charged with, fall within the ambit and jurisdiction of the Environment and Land Court than they do, for this honourable court. He further submitted that the matter was being litigated before ELC Court, being **ELC case No. 15 of 2016 Evanson Mwangi Kahumba Vs Evelyn Wamuyu Ngumo & 4 Others** and Silas Muriithi Mbui to which, the complainant (before the trial court) and PW5 (Silas Muriithi Mbui) are parties. He relied on the cases of **Commissioner of Police and Director of Criminal Investigations Department Vs Kenya Commercial Bank and Others, Nairobi Civil Appeal No. 56 of 2012 (eKLR)** where the court held in part;

*.....it is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be 30 in the settlement of what is purely a civil dispute litigated in court.....*

16. **Attorney General Vs Attorney General for and on behalf of Inspector of Police & 3 others Exparte Thomas Ng'ang'a Munene [2014] eKLR** cited with approval the case of **R Vs Chief Magistrate's Court at Mombasa Exparte Ganijee & An. [2002] KLR 703** where the court held in part;

***"It is not the purpose of criminal investigation or a criminal charge or prosecution to help individuals in the development or***

***protraction of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement or championing of a civil case dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put to a halt the criminal process.....”***

17. The respondent on his part submitted that the contention by the appellant that the trial magistrate misconstrued civil action into a criminal action is unfounded and unmerited as there is no evidence of malice, ill-will or ulterior motive on its part. Reliance was made on the cases of **Macharia & another Vs the Attorney General [2001] 449** on the instances when a court can declare a prosecution improper and that of **Kuria & 3 Others Vs Attorney General**.

18. The court has duly considered the submissions on that issue; whereas I concur with the submissions by the counsel for the appellant that no one should be allowed to use the machinery of justice to cause injustice and no one should be allowed to use criminal proceedings to interfere with a fair civil trial, this court is also alive to the provisions of Section 193A of the Criminal Procedure Code. The said section allows the concurrent litigation of civil and criminal proceedings arising from the same issues, it is the prerogative of the police to investigate crime but the process must be exercised responsibly, in accordance with the law of the land and in good faith.

19. In the case of **Kuria & 3 others (supra)** the court held;

***“It is not enough to state that because there is in existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is need to show the process of the court is being abused or misused. There is need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds for supposing that a criminal prosecution is an “abuse of the process”, is a “manipulation”, “amounts to selective prosecution” or such other processes or even the applicants might not get fair trial as protected in the Constitution, it is no mechanical enough that the existence of a civil suit precludes institution of criminal proceedings.”***

20. The court has carefully gone through the evidence on record and in my view, there are no concrete grounds for supposing that the appellant’s prosecution is an abuse of the court process. The land in issue was transferred to him using questionable documents and when he was put on his defence, he was not able to give a satisfactory explanation how those documents got into his possession.

21. On whether the charge sheet was defective, Section 134 of the Criminal Procedure Code provides that;

***“Every charge or information shall contain and shall be sufficient if it contains, a statement of specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.***

22. On behalf of the appellant it was submitted as follows on the various counts; that Count I, the charge is materially defective as the other people who are said to have conspired with the appellant are not named and further that, it is a double charge in that the particulars of the charge disclose a different charge of obtaining by false pretences. Further that, the date of the alleged offence is said to have been between 9<sup>th</sup> June, 2014 and 18<sup>th</sup> November, 2014 whereas the evidence discloses that the appellant acquired the subject land in the year 1968.

23. With regard to Count II, it was submitted that the charge is defective in that, Embu West Sub-County and Embu County did not exist until the advent of the 2010 Constitution and the coming into place of devolution and the creation of counties. The counsel argued that an offence cannot occur in a place that does not exist. Further that, the nature of the instrument that is supposed to have been falsely procured is also not stated.

24. On Count III, it was submitted that the particulars of the charge do not disclose before whom the alleged swearing occurred, the name of the commissioner who drew the instrument and the nature of the document sworn.

25. In Count IV, the contention by the counsel for the appellant is that the charge is incurably defective as Embu West Sub-County did not exist in 1981 and therefore, an offence cannot be said to have taken place in a place that does not exist. Further that, the document presented before the court as a discharge has the endorsement of the chargor and this was approved by the chargor and therefore cannot be said to be a document falsely uttered. That, the same is not dated and further that it is not sequenced to denote the name of the form and the number, and that it does not disclose the name of the chargor.

26. In Count V, it was submitted that there is no indication in the charge, against whom the discharge was drawn or aimed at, and who was the complainant in that charge. That the charge sheet did not indicate what was fraudulent in the contents of the discharge. Further that documents relating to a register for land are executed before an advocate or commissioner for oaths and not by the registrar.

27. On Count VI, it was submitted that the charge does not disclose who the appellant intended to defraud, what he intended to defraud and who the complainant is. That the nature of the forgery was also not disclosed and that land transfer form is not in the nature and substance of the forms encapsulated in Section 350 of the Penal Code.

28. On the part of the respondent, no submissions were made in regard to this ground of appeal.

29. The court has considered the submissions by the counsel for the appellant. The common issue raised in all the counts is that, Embu County did not exist, when the alleged offence is said to have been committed. In this regard, the court takes judicial notice that counties were created in the Constitution 2010 and in my view, it is not material whether a place is referred to, by the new or the old name as long as

sufficient details are given for proper identification of the place where the offence is said to have been committed.

30. On the submission that Count I is a double charge, I have carefully read Section 317 of the Penal Code and it reads;

***Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.***

31. Under that Section, one of the components of the charge of conspiracy to defraud is that the conspiracy must be done with the intent to defraud and therefore it cannot be said to be a double charge. Secondly, the 2<sup>nd</sup> part of the charge “by falsely pretending that you had bought the said land from Paul Njeru Kamara is different from a charge of obtaining by false pretences.

32. With regard to the other limbs of the issue, and in the different counts, I am of the considered view that the particulars contained in the respective charges were sufficient. Section 134 of the Criminal Procedure Code only requires that a statement of the specific offence be given together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The section does not require that all the information be given in the charge sheet.

33. On that issue, the court finds that the charge sheet is not defective.

34. I now turn to the substance of the appeal. In this regard, the evidence available to the court is that of PW1, Priscillah Muthoni Njeru, PW2 and PW3. PW1 and PW3 are both wives of the late Paul Njeru Kamara. PW3, Rosemary Muthanje confirmed that her husband bought the land in issue in 1964 from one Mbui Kobuthi for Kshs. 300/= and they started farming on it until 1965 when she went to teach in Nyeri upon her transfer.

35. According to her, her husband did not sell the land. PW2 on his part, stated that he knows land parcel No. Gaturi/Weru/377 and that it belongs to Mbui Kobuthi. He was the clerk of Mwhirika Committee at the material time and that the land was given to Mbui Kobuthi. Though it was his evidence that Mbui did not sell the land, he was, however, not sure if he did. It was also his evidence that he was a member of the Land Board and he never saw the transfer of Gaturi/Weru/377.

36. In cross examination he stated that he has never seen the title deed for Gaturi/Weru/377 and that he was not aware of the Board transactions of 1965. Further that he did not know whether the Board approved the transfer from Kobuthi to another person.

37. PW3, John Nyaga Njagi testified that the subject land was left to them by Mbui Kobuthi in 1975 to farm which they did until 2014 and for all that period he never saw the appellant

38. According to him, the land was not sold as he could have known about the sale.

39. The son of Mbui Kobuthi testified as PW5. He stated that he knows about land parcel Gaturi/Weru/377 as they used to farm on it but later they allowed their neighbours to farm, one such neighbour being PW4. That in the year 2014, he was called and told that some people were sub-dividing the land. He travelled from Mombasa where he was doing business and applied for a green card for the land and found that Evanson Kihumba has sold the land.

40. He produced a copy of the Green Card showing that his father sold the land on 27/09/1965, to one Paul Njeru Kamara but according to him, his father did not sell the land.

41. PW1, Priscillah Muthoni Njeru also a wife of Paul Njeru Kamara stated that on 18/12/2016, police officers visited her home and showed her some papers to confirm whether the signature was that of her husband and according to her, the signature on the transfer of land forms dated 18/12/1968 does not belong to her late husband as it is different from the one on a cheque drawn by her husband, the one on his employment card and that on the identity card from the Ministry of Health. However, in cross examination, she stated that the transfer documents were signed before she got married and she did not know anything about the land in the transfer forms.

42. PW6, the District lands Registrar stated that according to the records held by the Land's office at Embu, the first registered owner of the land in question was Mbui Kombuthi who transferred the land to Paul Njeru N. Kamara and the parties signed the documents with Nyaga Kobuthi printing whereas Kamara signed. That Nyaga Kobuthi applied for a consent to transfer the land. It was his further evidence that the transactions on the land are in order and that all documents that were presented to them looked genuine.

43. He further stated that the land was transferred to Evanson Mwangi Kihumba on the 18/12/1968 but the application for consent to transfer from Kamara to Kihumba was not signed.

44. The document examiner, fingerprints experts and the investigating officer gave evidence as PW7, PW8 and PW9 respectively. The KCB Bank Manager, Embu branch testified as PW10.

45. When he was called on his defence, the appellant gave sworn statement and called two witnesses. He denied any wrong doing on his part and stated that he bought the land from Paul Njeru Kamara in 1968 and he was issued with a title deed which he used to obtain loans from Banks. That after he retired, he went to Barclays Bank to discharge the charge at Embu and it is after visiting the Land's office that he discovered the land had been sub-divided into several plots and also discovered that one Everyln Wamuyu had sold his land without his authority. He denied ever forging any signature or thumb print of anyone or any document.

46. From the evidence on record, and especially that of PW1, PW2, PW3, PW4 and PW5, land parcel No. Gaturi/Weru/377 belongs to the

deceased Mbui Kobuthi. This evidence was confirmed by PW6 who testified that indeed the said Mbui Kobuthi was the first registered owner of the aforesaid land and was issued with a title deed in the year 1965 which entry is reflected as No. 2 on 14.09.1965. That according to the records held in Embu Lands Office, the land was later transferred to Paul Njeru Kamara who later transferred it to Evanson Mwangi Kihumba, the appellant herein.

47. From the evidence of PW7 and PW8, it is clear that the transfer of the land from the original registered owner Nyaga Kobuthi to Paul Njeru to Kamara was fraudulent and not genuine in that the deceased Nyaga Kibuthi did not sign the transfer of land forms. PW7 also confirmed that the transfer documents were also not genuine as they were made by different authors.

48. The evidence of PW8 also confirmed that the impressions on the transfer forms and that on the change of names declaration documents were not genuine as they were made by a different person yet the said documents ought to have been made by the same person who is Nyaga Kobuthi.

49. It is therefore clear to me that the deceased Nyaga Kobuthi neither sold nor transferred the land to Paul Kamara or any other person for that matter and any purported transfer was fraudulent. It also follows that all the other subject transfers were also fraudulent.

50. Further, according to the evidence tendered by PW7 who examined the transfer of land documents dated the 18.12.1968 between Paul Kamara and Evans Mwangi Kihumba, the appellant herein, the signatures were made by different authors which clearly indicates that even the transfer of the land from Paul Kamara to the appellant herein was not genuine and was fraudulent. They are the same documents that the appellant presented to the lands office so that he could be issued with a title deed for the land in issue.

51. Though the appellant herein was charged alone in the case the subject matter of this appeal, some other suspects were charged with similar charges in another criminal case. The offence of conspiracy to defraud is provided for in Section 317 of the Penal Code in the following terms;

***Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the particular person or not, or to extort any property from any person is guilty of a misdemeanour and is liable to imprisonment for three years.***

52. In **Black Law Dictionary 9<sup>th</sup> Edition** at page 351 Conspiracy is defined as follows;

***“An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreements motive, and (in most cases), action or conduct that furthers the agreement; a combination for unlawful purpose.***

***The agreement may be proved in the usual way or by proving circumstances which the jury may presume it. Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in principle of an apparent criminal purpose in common between them.”***

53. The appellant herein procured registration of the title document into his name by false pretences. The evidence adduced by PW7 confirms that the transfer documents following which, the appellant obtained the title into his name were not genuine.

54. Section 353 of the Penal Code defines the offence of uttering a false document as follows;

***“S353. 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.”*** (emphasis)

55. The word “utter” means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal, or act upon the thing in question.

56. According to the definition above, it is an offence if one knowingly and with intent to defraud utters a false document, that is, uses, deals with, or attempts to use or deal with, or attempts to induce some other person to use, deal with or act upon the document or thing uttered to him. That is, the person to which the document is uttered, is made to take action or steps which save for the thing uttered to him, he would have not taken.

57. In the case of **Samuel Vs Republic [1068] EA 1** the Court of Appeal for Eastern Africa held that “where a person utters a false document intending to deceive a public officer and by that deceit to cause the public officer to take action which he would not otherwise have taken, or to refrain from taking an action which he would otherwise have taken, that intent was fraudulent. The above principle was applied by the successor to that court, the Court of Appeal of Kenya in the case of **Karingo Vs Republic [1982] KLR 213** where the appellant had produced forged receipts to explain his possession of some stolen goods; the court held;

***“A person shall be deemed to have uttered a false document with intent to deceive contrary to Section 353 of the Penal code, where the public officer has upon that document taken action which he would not otherwise have taken or would have refrained from taking had he known the document was false.***

58. By uttering a false document (transfer form), the appellant caused the Land Registrar to register the title deed for the subject land into his own name after he swore falsely that his title deed was burnt in a house fire. The evidence on record also and particularly by PW7 is clear that he made false presentation as to the contents of a discharge of charge when it is clear from the evidence on record that the charge was never discharged.

59. The appellant's evidence and that of his witnesses could not stand in the face of the strong evidence that was adduced by the prosecution witnesses.

60. As to whether the sentence was excessive, it is trite that an appellate court cannot interfere with the exercise of the trial court's discretion in sentencing unless the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material facts or took into account some wrong material or acted on the wrong principle. (see **Bernard Kimani Gacheru Vs Republic [2002] eKLR**).

61. I have considered the sentences imposed upon the appellant, and in my view, the same are not excessive but are within the law. The appellant did not prove that the trial court overlooked some material factor, or took into account some wrong material or acted on the wrong principle.

62. In the circumstances a foregoing, I find that the appeal is devoid of merits and hereby dismiss the same.

63. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF NOVEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....*for the Accused*

.....*for the Respondent*