



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 18 OF 2020

COLOMBUS OPIO ADETI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal case No. 527 of 2016 of the Chief Magistrate's Court at Busia by Hon. Lucy Ambasi-Chief Magistrate)

JUDGMENT

1. Colombus Opio Adeti, the appellant herein, was convicted in four counts of forgery contrary to section 350(1) as read with section 350(2) of the Penal Code and in one count of uttering false document contrary to section 353 of the Penal Code and for the offence of forcible detainer contrary to section 91 of the Penal Code.
2. The particulars in count one were that on 6th day of October, 1988 at Nangosia location within Busia County, jointly with others not before court, with intent to defraud, forged a letter of consent S/NO.319692 a central Agricultural Board copy for transfer of LR No.Samia/Luchululo-Bukhulungu/994 and used it for transfer of LR NO. Samia/Luchululo-Bukhulungu/995.
3. The particulars to the alternative charge are that on the 6th day of October 1988, at Hakati District Officer's office, knowingly and fraudulently uttered forged letter of consent S/NO.319692 a Central Agricultural Board copy for transfer of LR NO. Samia/Luchululo-Bukhulungu/994 and used it for transfer of LR Samia/Luchululo-Bukhulungu/995 purporting it to be a genuine letter of consent for the transfer of the said parcel LR No.Samia/Luchululo-Bukhulungu/995.
4. In count two the particulars were that on the 6th day of January 1988, within Busia County with others not before court, with intent to defraud, forged a transfer of land form in respect of LR No.Samia/Luchululo-Bukhulungu/995 and used it in the transfer of the said LR NO. Samia/Luchululo-Bukhulungu/995 purporting it to be a genuine transfer of land form.
5. The particulars to the alternative charge were that on the 6th day of October 1988, at Hakati District officer's office, knowingly and fraudulently uttered forged transfer of land form in respect of LR NO. Samia/Luchululo-Bukhulungu/995 and used it in the transfer of the said LR NO. Samia/Luchululo-Bukhulungu/995 purporting it to be a genuine transfer of the land form.
6. The particulars in count three were that on the 6th day of October 1988, within Busia County, jointly with others not before court, with intent to defraud, forged an application for consent of land control board form used in the transfer of LR No.Samia/Luchululo-Bukhulungu/994 purporting it to be a genuine application form for consent of land control Board for LR NO. Samia/Luchululo-Bukhulungu/995.
7. In the alternative charge the particulars were that on the 6th day of October 1988, at Hakati District officer's office, knowingly and fraudulently uttered a forged application for consent of land control board form used in the transfer of LR NO. Samia/Luchululo-Bukhulungu/994 purporting to be a genuine application for consent of land control Board in respect of LR No.Samia/Luchululo-Bukhulungu/995.
8. The appellant was sentenced to serve one year imprisonment in count five and in count six to serve six months imprisonment. The sentence was ordered to run concurrently. The appellant was aggrieved and filed this appeal.

9. The appellant was represented by the firm of Bogonko, Otanga & Company Advocates. He raised four grounds of appeal as follows:

- a. That the learned trial magistrate erred in law and fact in holding the appellant guilty of the offence uttering a false document in the absence of proof that the alleged document was forged and that the appellant knew it was forged and that he intended to defraud.
- b. That the learned trial magistrate erred in law and in fact in holding the appellant guilty of the offence of forcible detainer when there was ample evidence that the appellant had title to of L.R. Samia/Luchululo-Bukhulungu/1994 and 1995 and that his occupation and use of the same cannot amount to forcible detainer.
- c. That the learned trial magistrate erred in law and in fact in failing to hold that in view of the evidence tendered by the appellant, the prosecution had not proved its case to the required standard.
- d. That the learned trial magistrate erred in law and in fact in failing to consider that in view of the age of the appellant and the circumstances of the case a custodial sentence was extremely harsh.

10. The appeal was opposed by the state through Mr. Mayaba, learned counsel who contended that the prosecution proved its case to the required standards.

11. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

12. Before the record of appeal is prepared, the proceedings must be proofread to ensure the accuracy of the record. This is done by the registry staff who are under the supervision of the executive officer. I am disturbed at the rate at which I have to keep referring to the original trial court record for there are many instances where the typed proceedings do not make sense.

13. The proceedings of 5th August 2019 were before Hon. Temu, however the typed proceedings divides them into two and indicates that part of it was done by Hon. Ambasi. The portion attributed to have been done by Hon. Ambasi has two dates; 20th August 2019 and 16th August 2019. This is a clear manifestation of the fact that we do not have supervision of the registry staff.

14. Whenever a magistrate takes over a matter from another magistrate who has ceased to have conduct of the case, section 200 (3) of the Criminal Procedure Code Provides:

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

This provision is mandatory and has been a subject of many judicial pronouncements. In the case of **David Kimani Njuguna vs. Republic, (Nakuru) Criminal Appeal No. 294 of 2010** after a review of several decisions of the Court of appeal on the subject, the court stated:

All of these decisions declare that the provisions of Section 200 (3) [of the Criminal Procedure Code] are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity.

15. On the 20th August 2019 when Hon. Ambasi took over the matter, she did not comply with the section. Even if we assume this was an oversight, she did not do so when the actual hearing before her took place. The subsequent proceedings was therefore a nullity.

16. On 7th September, 2019 the prosecution substituted the charge sheet with another which had three substantive counts and three alternative counts. There was therefore no counts four, five and six as was captured in the judgment of the learned trial magistrate. The charge of forcible detainer contrary to section 91 of the Penal Code was removed from the charge sheet upon substitution. Conviction for offences not charged is illegal and a breach of the constitutional rights of the appellant. This is against the provisions of Article 50 (2) (a) & (b) of the Constitution that provides:

(2) Every accused person has the right to a fair trial, which includes the right—

a. to be presumed innocent until the contrary is proved

b. to be informed of the charge, with sufficient detail to answer it

17. Section 345 defines forgery as follows:

Forgery is the making of a false document with intent to defraud or to deceive.

18. In count one, the appellant was alleged to have forged a letter of consent S/NO. 319692 a central Agricultural Board copy for transfer of LR No. Samia/Luchululo-Bukhulungu/994 and used it for transfer of LR NO. Samia/Luchululo-Bukhulungu/995.

19. The evidence of Chief Inspector Yego (PW7) was that land parcel No. 995 was registered in the name of Henry Oluoch Ngira. The application was to transfer the land to Columbus Ngira, the appellant herein. He further testified that the consent was issued to the proprietor, Henry Oluoch Ngira. Interestingly, Henry Oluoch Ngira was not called as a witness and neither was he the complainant. On what basis therefore did the learned trial magistrate make a finding that he was not the one who made the application? The chairman of the Land Control in respect of the area where the disputed land is situate was not called as a witness.

20. The evidence of Tom Chepkwesi (PW6), is that the letter of consent originates from the Board and signed by the chairman. It was imperative therefore, for the prosecution to call the Chairman to clarify whether the Board issued the disputed consent or not. This was not done. In any case, if Henry Oluoch Ngira did not complain, then who authorized the complainant to do so on his behalf?

21. The prosecution dismally failed to establish a case against the appellant in count 1.

22. Tom Chepkwesi (PW6) a Land Registrar, in his evidence informed the court that it is the proprietor who applies for consent of the Land Control Board to transfer. No evidence was tendered to show that it was not the proprietor who made the application for transfer. Equally there was no evidence that was adduced to show that the appellant forged a transfer of land form in respect of LR No.Samia/Luchululo-Bukhulungu/995.

23. I therefore find that there was no basis for conviction in respect of counts two and three.

24. The appellant was convicted on a count of uttering false document contrary to section 353 of the Penal Code, in what the learned trial magistrate called alternative to count five. I have already made a finding that we do not have a count five but for the sake of argument let us briefly find out what the offence entails. Section 353 of the Penal Code states:

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.

25. In order for the offence to be proved, the Court of Appeal in the case of **Joseph Mukuha Kimani v Republic [1984] eKLR** by the Court of Appeal (Kneller JA, Chesoni & Nyarangi Ag JJA) stated:

The prosecution must prove that:

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

(b) That the accused knew it was forged; and

c) That the utterer intended to defraud.

In the instant case the prosecution did not prove the ingredients of this offence.

26. When a trial is vitiated for procedural defect, a retrial is ordered if there is overwhelming evidence on record. It would amount to an academic exercise for me to order a retrial for there is no evidence that connect the appellant to the offences.

27. I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 30th Day of July, 2020

KIARIE WAWERU KIARIE

JUDGE