



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 2 & 3 OF 2019

(From original conviction and sentence in Criminal Case No. 415 of 2013 of the Resident Magistrate's Court at Gichugu)

LILIAN KAGENDO MURIITHI...1ST APPELLANT

JOSEPH MURIITHI NJOKA.....2ND APPELLANT

V E R S U S

REPUBLICPROSECUTOR

JUDGMENT

1. There are two appeals before me in this appeal. The 1st one is Appeal No. 2 of 2019 Joseph Muriithi Njoka –v- Republic and the 2nd is No. 3 of 2019 Lilian Kagendo Muriithi –v- Republic. On 12/9/2019 the two appeals were consolidated.

2. The appeals arise from the proceedings in Wang'uru P.M's Court Criminal Case No. 415/13 where appellants were convicted for the offences of conspiracy to defraud contrary to **Section 317 of the Penal Code** and making a false document without authority contrary to **Section 357 (a) of the Penal Code**. They were sentenced to serve One year imprisonment on each count and sentence was ordered to run concurrently.

3. The appellants were aggrieved by both the conviction and sentence and filed this appeal which raises Eleven (11) grounds. The grounds are as follows:-

1. The learned trial Magistrate erred in law and fact in failing to make a finding that no expert report and evidence was produced in respect of one Stephen K. Makori, the then District Commissioner, Gichugu, as to whether he's the one who actually signed the questioned letter of consent of the Land Control Board.

2. The Learned Trial Magistrate erred in law and fact in failing to make a finding that no specimen handwriting and signature of the appellant was procured to be compared with the questioned letter of consent of the Gichugu Land Control Board.

3. The learned trial Magistrate erred in law and fact in failing to make a finding that no statement and specimen handwriting was procured from the clerks of the Gichugu Land Control Board to be compared with the writings on the questioned document being the letter of consent from Gichugu Land Control Board.

4. The learned trial Magistrate erred in law and fact in failing to consider the evidence of Phyllis Wanjiku Mwai a daughter to the 1st accused, while arriving to a conclusion that there was conspiracy to defraud.

5. The learned trial Magistrate erred in law and fact in failing to take into account the dates of the various events which occurred, and the interaction between the complainant and the appellant in relation to the suit land, and failed to make a determination as to whether the appellant was aware of the complainant's dealings with the 1st accused James Munene Muchiri.

6. The learned trial Magistrate erred in law and fact in failing to make a finding that the minutes and agenda of the Gichugu Land Control Board in respect of the suit land were inadmissible in law as they were unsigned, unstamped and uncertified as true copy of the same, yet relied on the said document while convicting the appellant.

7. The Learned trial Magistrate erred in law and fact in failing to consider the defence of the appellant, which defence was not even shaken during cross-examination, and which was candid and truthful.

8. The learned trial Magistrate erred in law and fact in failing to consider the conduct of the 1st accused concerning sale of family land, yet proceeded to acquit the 1st accused and convict the appellant.

9. The learned trial Magistrate erred in law and fact in failing to make a finding that there was a get out clause in the agreement between the 1st accused and the complainant and that the 1st accused person received money from other persons ostensibly to refund the amount received by the 1st accused from the complainant.

10. The learned trial Magistrate erred in law and fact in failing to address the issues raised by the appellant in the final submissions.

11. The conviction was totally against the weight of the evidence adduced and the applicable legal principles.

4. The appellants pray that the appeal be allowed, the conviction be quashed and the sentence be set aside.

5. In submissions filed by Maina Kagio and Company Advocates, he states that the two appellants have filed Eleven grounds which will be argued concurrently. That is to say the two appellants had filed similar grounds of appeal which I have listed above. The brief facts of the case are that the appellants are a husband and wife. Joseph Muriithi Njoka was the 2nd accused while Lilian Kagendo Muriithi was the 3rd accused. On the 1st count they were charged with conspiracy to defraud. It was alleged that between May 2012 and 19/2/2013 jointly with others not before court with intent to defraud Esther Wanjiku Muchira jointly conspired to have land parcel No. Kabare/Njuku/2004 transferred to Lilian Kagendo Muriithi and Phyllis Wanjiku fraudulently instead of the land being transferred to Ester Wanjiku Muchira. With regard to making a document without authority contrary to **Section 357 (a) of the Penal Code** it was alleged that the appellants jointly with others not before the court with intent to defraud without lawful authority or excuse, made a letter of consent for transfer of land purporting it to be a certificate issued by Gichugu Land Control Board.

6. The complainant Esther Wanjiku (PW-1-) had wanted to buy land which had tea bushes. He was introduced to a person who had land with tea bushes. That seller was the 1st accused in this case. The land had prohibition and caution on the title which the seller promised to remove. The complainant entered an agreement with the seller and made some payments which the seller acknowledged totaling to Kshs 997,000/-. The seller did not transfer the land so the complainant served a demand notice. There was a court case Civil Case No. 2/13.

7. The seller agreed to sign Land Control Board Forms and the court ordered that the cautions and restrictions be removed. The complainant went to the Land Office at Kerugoya and obtained a certificate of search. The complainant was given the consent on 2/3/13. The complainant found a certificate of search dated 22/2/13 showing that the land had been transferred to Phillis Wanjiku Mwai and Lilian Kagendo Muriithi though there was a title deed showing that the land belonged to the seller, 1st accused.

8. Later the complainant learnt that there were people who were evicting her. She went to the District Commissioner who referred her to the District Officer for investigations. Later the complainant learnt that 1st accused and the appellant Joseph Muriithi Njoka had a consent to transfer the land which she had bought. The complainant did not get land but the 3rd accused (appellant – Lilian Kagendo Muriithi) got the land transferred in her name and name of Phyllis the daughter of 1st accused. It was later discovered that a fake consent of the Land Control Board was used to transfer the land. The appellants were then arrested and charged.

9. The appellants gave their defence and denied the charges. They also called witnesses.

10. The appeal was canvassed by way of written submissions. For the appellants, the submissions were filed by Mr. Maina Kagio Advocate who argued all the grounds concurrently.

11. For the State submissions were filed by F. S. Ashimosi Assistant Director Public Prosecution. This is a 1st appeal and the 1st duty of this court is to analyse the evidence, evaluate it and then come up with its own independent finding but bear in mind that I had no chance to see the witnesses when they testified and leave room for that. In this regard I rely on the case of **Okeno –v- R (1972) E.A 32**. As a 1st appellate court I have to consider both facts and law. The court is guided by the court of appeal decision in **Kinyanjui vs Republic COA (2004) KLR 364** that sets out duties of the first appellate court which include looking at the evidence afresh re-examining the same and giving an independent conclusion, bearing in mind it does not have the opportunity to see the demeanor of the witnesses. The second duty is to consider the grounds of appeal in reaching its judgement.

12. I will consider the submission. The counsel for the appellant has submitted that for the prosecution to prove conspiracy they ought to have led evidence to prove that the appellant's were aware of the transaction between 1st accused and PW-1:-

13. That conspiracy is a secret plan or agreement between persons for unlawfully or harmful purpose.

i. In the appellant's submission dated 3rd July 2019 and filed on 4th July 2019, the appellants submitted that for conspiracy to defraud to be proved the state ought to have established that the appellants were aware of the transaction between the 1st accused and PW1.

ii. They submitted that the court should seek to find out which consent letter was genuine between PEXH9 with four

transferees or PEXH8(a) with two transferees.

iii. They submitted that the PW6 did not produce the application form for the consent letter of PEXH9 which the complainant claimed was the genuine consent letter, as the application form for consent had a provision for signing by the land owner the 1st accused person and the transferees.

iv. Further, they submitted that the appellant Mr. Joseph Njoka presented the genuine application form for consent to the land control board PEXh 8(b), which was signed by all transferees the 1st accused, his wife the 3rd accused and PW4 the daughter of the 1st accused. He submitted that as he was conversant with the procedure, he represented the transferor and the transferees.

v. The appellants referred to inconsistencies in the testimony of the D.O PW6, (paragraph 2 page 58) that states that the letter of consent was amended to include the complainant, they submitted that this is an indication that PEXh 9 was not genuine.

vi. The appellants submitted that the evidence of the 1st accused to blame his co-accused has no evidential value. They relied on the case of Peter Kinyua Ireri vs Republic Nyeri Court of Appeal Criminal Appeal No. 68 of 2014(2016) eKLR that held the view that evidence incriminating a co-accused was the weakest kind and incapable of supporting a conviction, without corroboration. They also relied on the case of Anyangu & others vs Republic (1968) EA 239 p.240, that held ‘a statement which is not a confession is only evidence against the maker, if it is a confession and it implicates the co accused it may in a joint trial be taken into consideration against the co-accused, it is however not only accomplice evidence but evidence of the weakest kind. They submitted further that according to Anyona Ss/o Omolo & another Vs Republic 1953 20 EACA 318 a statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence which he is tried.

vii. They thus submitted the evidence of the 1st accused was exculpatory and extra judicial as it was not a confession and it should not be relied upon as stated in Joseph Odhiambo vs Republic Criminal Appeal no.4 of 1980, that held exculpatory evidence cannot be used against a co-accused.

viii. They disputed the admission into evidence of the land control board minutes marked PMF1-10, submitted by PW6, as the minutes were not stamped, certified or signed. They argued that the document was a public document as per section 79 of the evidence Act, therefore it ought to have been certified and because it was not it should be rendered as inadmissible evidence as all this led to the questionable authenticity of PEXh9, the letter of consent with 4 transferees.

ix. The appellants also challenged the statement of the investigating officer that the former D.C did not sign the letter of consent PEXh8 (a), as the prosecution did not produce specimen signatures of the deceased District Commissioner, to challenge the authenticity of the document.

x. Lastly they submitted that they were not aware of the complainant’s interest in the land of the 1st accused thus they could not have conspired against what was unknown to them.

xi. The prosecution in their submissions dated 5th November March 2019 and filed on 6th November 2019, submitted that the elements to prove conspiracy to defraud include proof of existence of an agreement and an intention to defraud the public, they relied upon the case of Rebecca Nabutola & 2others vs Republic. They further submitted that the two elements were proved by the forged letter of consent and also by the witness testimonies in the case.

xii. As for the offence of making a document without authority the prosecution relied on the Court of Appeal decision in Criminal Appeal no. 35 of 2017 Joseph Kanyita vs Republic that held that such an offence must be without lawful authority and excuse and with intent to defraud or deceive.

xiii. They submitted that the letter of consent was made by the appellants and presented to the land registrar so as to be issued the title in their favour and to the detriment of the complainant.

xiv. The prosecution prayed for the dismissal of the appeal.

14. The issue which arises for determination is conspiracy to defraud. Section 317 of the Penal Code provides:-

“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 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.”

The Black Law’s Dictionary 9th Edition Page 301 defines conspiracy as –

“An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement’s objective and (in most case) action or conduct that furthers the agreement or a combination for unlawful purpose.” While it defines defraud to mean to cause injury or loss to a person by deceit. – see Page 488.

15. In the case of Rebecca Nabutola & 2 Others –v- R- Cr. Appeal 232/2012 cited by the D.P.P it was held that in order to prove an offence of conspiracy to defraud the elements to be proved are the existence of an agreement and the intention to defraud.

16. The trial Magistrate found that **“In the end, I confidently make a finding that 2nd accused forged the consent (Pexh.8(a) as a result of which, parcel No. Kabare/Njiku/2004 was illegally transferred to the 1st accused’s daughter Phyllis and the wife of the 2nd accused who is the 3rd accused herein. The 3rd accused lied to this court from the evidence on record. She was unable to prove to this court how she acquired title to the said parcel of land from the 1st accused. She therefore conspired with the 2nd accused to defraud not only the complainant but the 1st accused and his family.”**

17. The case of Rebecca Nabutola & 2others vs Republic Nairobi High Court Criminal Appeal 232/2012 quoted *Archibold’s Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell)*, at pages 3025 and 3026, and observed as follows:

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement...

The agreement may be proved in the usual way or by proving circumstances from 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 pursuance of an apparent criminal purpose in common between them.”

18. In order to prove an offence of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud. On the charge of conspiracy to defraud the appellants claim the they were not aware of the complainant’s dealings with the 1st accused, therefore there was no intention to defraud. However, the prosecution case is that the appellants as between themselves and the 1st accused had an agreement for unlawful purpose to deprive the complainant of her entitlement to the title to land.

19. I will first address the issue of inadmissible evidence raised by the appellants as regards this offence. The testimony of the 1st accused was that he entrusted the 2nd appellant to transfer the land to PW1 instead he transferred it to his wife the 1st appellant/3rd accused. On the admissibility of DW1 testimony, the appellants claim it should not have been considered and that it was exculpatory and extrajudicial. The law on the value of statements made against co-accused in a joint trial is well settled. In Anyangu & Others vs. Republic [1968] EA 239, the Court of Appeal for East Africa held as follows at Page 240:

“A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused, it may, in a joint trial be “taken into consideration” against that co-accused. It is however, not only accomplice evidence but evidence of the ‘weakest kind’ (Anyona s/o Omolo and Another VR (1953) 20 EACA 318). A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried.”

20. The testimony of DW1/1st accused cannot be deemed a confession therefore it is exculpatory or extrajudicial. The testimony of defence witness 1 cannot be deemed a confession and is therefore exculpatory or extrajudicial. It is the duty of the court to consider it against the evidence tendered, its veracity will depend on whether there is any other independent and cogent evidence to corroborate it this is because it is accomplice evidence which is of weakest kind. The trial Magistrate did not entirely rely on it to convict. however it is not totally inadmissible. It is the duty of the court to consider it against the evidence tendered its veracity will depend on whether there is any other independent & cogent evidence to corroborate it.

21. On the issue of the admissibility of evidence of the Land Control Board minutes marked as PMF1-10, produced by PW6, the defence submitted they were inadmissible as they were public documents that were unsigned, unstamped and not certified as a true copy of the same. The same is deemed a public document, as per provisions of Section 82 (e) of the Evidence Act prima facie evidence of the minutes ought to have been by certified copies. However, as per the testimony of PW6 she was the maker of the document and did not need to certify it. The Evidence Act section 68 (1) (e) allows for the proof of documents by secondary evidence. For public documents, only a certified copy is admissible. With regard to prove of public documents, Section 81 of the Evidence Act provides that –

“Certified copies of public documents may be produced in proof of the contents of the document or parts of the documents of which they purport to be copies.”

The provision is not couched in mandatory terms. My view is that it leaves room for the court to exercise discretion as to whether to admit the certified copy or not. The intention of Parliament is however clear that certified copies of public documents be produced to prove the contents. In this case there was no prejudice as the maker of the document was before court and identified the document. In any case no objection was raised to the production of the document despite the fact that it was not a certified copy.

22. The effect on the lack of documentary evidence as to the weight of the evidence on the authenticity of PMF1-9 over PMF1-8(a) is therefore based on the testimony of PW6 she chaired the Land Control Board meetings, and the cumulative evidence against the appellants including the statement of the deceased District Commissioner, indicating that the letter of consent PEXH-8b was not issued by the Gichugu Land Control Board.

23. The appellants also raised the ground that the trial magistrate failed to take into account PW4’s testimony and the conduct of the 1st accused concerning the sale of the family land yet acquitted him. They also claim that their defence and prior events were not taken into account. The evidence by PW4 of signing the sale agreement dated 28.03.2013 does indicate that the 1st accused person was involved in the fraudulent process, the qualification made at cross examination that she was signing to get title and not sell the land, did not seem honest, because as at that time the title was already in her name. The said agreement dated 18.03.2013 was acknowledged by DW5, Abel Bundi

Wachira, who indicated that both 1st accused and 2nd appellant were involved in the sale of the land. The conduct of the 1st accused suggests his involvement in the conspiracy. However, PW4 did not sign the application form or letter of consent PEXH 8b and 8a nor did she sign the transfer dated 19.2.2013 (PEXH-7) that defrauded the complainant of her entitlement to the land.

24. The agreement for unlawful purpose is inferred from the testimony of PW1, that the appellant and 1st accused person had sought to keep her out of the Land Control Board Consent, PW6 also testified to the same, and that PEXh 9 was the genuine letter of consent, as she was familiar with the District Commissioner's signature. The intention to defraud the complainant is also inferred by the transfer of the land title from PW4, from the 1st appellant Lilian Kagendo Muriithi and subsequently to DW4 and DW5.

25. The appellants claimed that they had bought land from the 1st accused person before the complainant. However, the letter of consent they relied upon notes it as a gift, it also refers to an undated application form PEXH-8b. They alleged that DW4, Danson Njogu Njiru, bought the land on their behalf in the agreement dated 12.4.2012, yet the 1st accused failed to acknowledge signing the agreement or receiving funds from DW4, the appellant's submitted acknowledgements as proof transfer of funds as between himself and the 1st accused person. Further according to DW4's testimony the sale agreement dated 25th February 2013 between him and the 3rd accused/1st appellant was executed at the office of the CID on 24th April 2013, he testified that the prior transactions were based on trust. The suggestion of an exchange as between DW4 and appellants however seems as an afterthought.

26. The intention to defraud was proved by the evidence that PEXH-8a was not made with lawful authority. The transfer of title to the 1st appellant and PW4 and subsequently to DW4 and DW5 indicate the intention to deprive the complainant of her entitlement to the land.

27. In re-examining the facts and evidence in the case, against the 2nd appellant Joseph Murithi Njoka, there was sufficient evidence for the conviction against him. Therefore, the elements of the offence were proved by the prosecution beyond reasonable doubt.

28. On re-examining the facts and evidence in the case, against the 1st appellant Lilian Kagendo Murithi, who claims she is a victim of circumstance as her husband /2nd appellant was the person who did all the transactions, however she does not deny signing the transfer forms dated 19/2/2013 and the application form for the letter of consent Pexh 8b.

29. It is clear that the element of an agreement between the conspirators can be inferred for an unlawful act with the intention to defraud the complainant. Therefore, the elements of the offence were proved by the prosecution beyond reasonable doubt.

b. Whether the document PEXh 8 (a) was a document made without the lawful authority of the Gichugu Land Control Board.

30. On re-examining the evidence submitted the document in question is the Land Control Board letter of consent PEXH 8 (a), the elements of the offence were proved by the evidence of PW6 and PW7 who submitted the statement of the former District Commissioner (now deceased).

On the issue of lack of expert evidence to prove the signature of the late District Commissioner Mr. Stephen Makori, to ascertain whether the document PEXH 8 (a) was made with the relevant authority, the court relies on the testimony of PW6 who attested that it was not the signature of the deceased District Commissioner, such evidence is admissible as per the provisions of **Section 50 of the Evidence Act** that states:

50. Opinion as to handwriting .

(1) When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible.

(2) For the purposes of subsection (1), and without prejudice to any other means of determining the question, a person is said to be acquainted with the hand-writing of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or **when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him.**

Further PW7 submitted the statement of the deceased District Commissioner under **Section 33 of the Evidence Act**, who disowned the consent letter PEXh 8 (a) as authorized by him. Therefore, the lack of expert witnesses was not necessary to prove that the document was made without lawful authority. The court finds that there was sufficient and admissible evidence to ascertain that the document did not with lawful authority emanate from the Land Control Board's office. It was proved that it was made with intention to defraud and to deceive.

5. FINDING

For the foregoing reasons, the conclusion of this court is that the convictions on both charges were lawful and based on sufficient and admissible evidence. The Appeal on conviction has no merit and is dismissed. The appellants have failed to raise sufficient grounds for interfering with the conviction. On sentencing, both sentences cannot be deemed excessive thus there is no need for this court to interfere with the exercise of discretion by the trial Magistrate on sentencing,

31. I order that the appeal is dismissed.

Dated at Kerugoya this 30th Day of July 2020.

L. W. GITARI

JUDGE