



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 56 OF 2019**

**JEREMIAH INDUSWE ONZEE..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(from the original conviction and sentence in Mumias PMC Criminal Case No. 774 of 2016 by Hon. Cheruto C. Kipkorir, SRM, dated 17/5/2019)*

**JUDGMENT**

1. The appellant was convicted in counts 2-6 of various offences of forgery contrary to Section 350 of the Penal Code and in Count 7 of the offence of obtaining registration by false pretence contrary to Section 320 of the Penal Code. He was sentenced to serve three years probation on each of the counts. He was aggrieved by the judgment of the trial magistrate and filed this appeal. The grounds of appeal were consolidated into 4, that:-

*(1) The learned trial magistrate erred in law by concluding that the appellant having benefited from the transaction must have authored the alleged forged documents whereas the circumstantial evidence was not sufficient to establish guilt to the charges preferred.*

*(2) The learned trial magistrate erred in law in finding that charges of forgery had been disclosed against the appellant when neither the document examiner nor the finger print expert connected him with the forgeries.*

*(3) That the learned trial magistrate erred in law by relying on evidence full of contradictions and came to the wrong conclusion that the appellant was the forger of the material documents hence imposing an irregular sentence in all the circumstances of the case.*

*(4) That the learned magistrate erred in law in ordering cancellation of land titles of Land Reference No. North Wanga/Matungu/2618, 2619, 2620 and 2621 pursuant to Section 350 (1) of the Penal Code which was not applicable in all the circumstances of the case.*

2. The grounds of appeal were expounded by the written submissions of his advocates, **R. V. Mugoya & Co. Advocates**. The state did not make any submissions in the case but relied on the record of the trial court.

3. The particulars of the charge in Count 2 were that on unknown date, at unknown place within the Republic of Kenya, jointly with others not before court, with intent to deceive, forged a document namely, Application for Consent of Land Control Board to sub-divide land parcel namely N/wanga/Matungu/1842 in the names of the late Peter Onzee Odhongo purporting it to be a genuine Application for Consent of Land Control Board for sub-division of the said land parcel into four portions, made by the said late Peter Onzee Odhongo and approved by Paul Langat former Chairman Mumias Land Control Board.

4. The particulars of the charge in Count 3 were that on unknown date, at unknown place within the Republic of Kenya, jointly with others not before court, with intent to deceive, forged a document namely, Letter of Consent Serial No. 829126 for sub-division of land parcel N/wanga/Matungu/1842 in the name of the late Peter Onzee Odhongo, purporting it to be a genuine Letter of Consent, issued to the said late Peter Onzee Odhongo by Paul Langat former Chairman Mumias Land Control Board.

5. The particulars of the charge in Count 4 were that on unknown date, at unknown place within the Republic of Kenya, jointly with others not before court, with intent to deceive, forged a document namely, Application for Consent of Land Control Board to transfer land parcel N/wanga/Matungu/2619 in the name of the late Peter Onzee Odhongo to Jeremiah Induswe Onzee, purporting it to be a genuine Application for Consent of Land Control Board, made by the said late Peter Onzee Odhongo and approved by Paul Langat former Chairman Mumias Land Control Board.

6. The particulars of the charge in Count 5 were that on unknown date, at unknown place within the Republic of Kenya, jointly with others not before court, with intent to deceive, forged a document namely, Letter of Consent Serial No. 829126 for transfer of land parcel N/wanga/Matungu/2619 in the name of the late Peter Onzee Odhongo to Jeremiah Induswe Onzee, purporting it to be a genuine Letter of Consent, issued to the said late Peter Onzee Odhongo by Paul Langat former Chairman Mumias Land Control Board.

7. The particulars of the charge in Count 6 were that on unknown date, at unknown place within the Republic of Kenya, jointly with others not before court, with intent to deceive, forged a document namely, Transfer of land for land parcel N/wanga/Matungu/2619 in the name of the late Peter Onzee Odhongo to Jeremiah Induswe Onzee, purporting it to be a genuine Transfer of land, commissioned by Lucy Nanzushi of Lucy Nanzushi and Company Advocates.

8. The particulars of the charge in Count 7 were that on unknown date before 24<sup>th</sup> July, 2014, at Kakamega District Land Registry, in Kakamega District within Kakamega County, wilfully procured for himself a land title deed for land parcel N/wanga/Matungu/1619 measuring approximately Eighteen Point five (7.5 Ha) acres by falsely pretending that the land parcel had been transferred to him by the late Peter Onzee Odhongo as a gift, a fact which he knew to be false.

#### **Case for Prosecution –**

9. The case for the prosecution before the trial court was that the complainant in the case, Hannington Juma Onzee, (PW1), is a brother the appellant. Their father Peter Onzee Odhongo died in the year 2005 and left behind a parcel of land No. North Wanga/Matungu/1842.

10. That in the year 2011, Hannington Juma filed a Succession Cause in respect to his father's land so as to distribute it to his brothers. In the year 2014 he discovered that the subject land had been sub-divided into 4 portions with land references Nos. North Wanga/Matungu/2618, 2619, 2620 and 2621. Land parcel 2619 had been registered in the name of the appellant and title deed issued in his name. The rest of the land parcels were retained in the name of the late Peter Onzee. Hannington Juma reported the matter to the police. Sgt. Rashid Juma PW10 of District Criminal Investigations, Mumias, investigated the case. He obtained a mutation form from the complainant showing that the subject land was sub-divided on 23/6/2013. PW10 obtained documents from the Kakamega Lands Office indicating how the subdivision and transfer were done. The chairman of Mumias Land Control Board denied that he had given consent to the sub-division of the land nor had he approved the transfer of land parcel N/Wanga/Matungu/2619 to the appellant. After investigations PW10 charged the appellant with the offences.

11. The other witnesses who testified in the case were the then chairman of Mumias Land Control Board, Paul Langat PW4, the Kakamega District Surveyor PW5, an advocate practicing at Bungoma town, Lucy Nanzushi PW6, the document examiner PW7 an accountant at Matungu Land Control Board office PW8, the Registrar of Persons, Mumias West Grace Nyongesa PW9, and the Land Registrar from Kakamega Lands Office, John Fundi PW11.

12. The Kakamega District Land Surveyor PW5 testified that a mutation form was received at their office on 7/2/2014 seeking for sub-division of N/Wanga/Matungu/1842. That the mutation was thumb-printed by the proprietor of the land. It was accompanied with a duly approved consent for sub-division of land parcel N/Wanga/Matungu/1842. His office did the sub-division as requested. He produced the mutation form as exhibit, P.Ex 4.

13. The evidence of the Land Registrar PW11 was that according to the records from their office, the subject land N/Wanga/Matungu/1842 was sub-divided into 4 portions upon application by one Peter Onzee. That the request for sub-division was accompanied by an application for consent of Land Control Board seeking for sub-division of land parcel N/Wanga/Matungu/1842 that was thumb-printed by the proprietor of the land. The application for sub-division indicated to have been approved by the chairman of Mumias Land Control Board. The application was also accompanied by a consent of Mumias Land Control Board approving the said sub-division. It was also accompanied with an application for consent of land Control Board to transfer land parcel N/Wanga/Matungu/2619 from Peter Onzee to the appellant. It was also accompanied by consent of Land Control Board approving the transfer of the latter parcel of land from Peter Onzee to the appellant. The request was accompanied by a mutation form duly signed by a Surveyor indicating that the land parcel No. N/Wanga/Matungu/1842 had been sub-divided into the 4 portions. The lands office duly registered the 4 portions as requested. One of the new portions, N/Wanga/Matungu/2619 was registered in the name of the appellant and a title deed issued to him. The other three portions were retained in the name of Peter Onzee. Later on PW11 was informed that the documents they relied on to register the parcels of land were forgeries. He recorded a statement with the police. He produced green cards for the 4 parcels of land as exhibits. He said that they did not know that Peter Onzee was deceased when the land was registered.

14. The then Mumias Land Control Board Chairman, Paul Langat (PW5) in his evidence denied that he approved the subdivision of land parcel N/Wanga/Matungu/1842 nor did he issue a consent to its sub-division. He said that the consents for application for sub-division P.Ex 8 and Consent for sub-division P.Ex 9 (a) are forgeries and were not signed by him. He denied that he signed the application for consent to transfer land parcel N/Wanga/Matungu/2619 from Peter Onzee to the appellant. He denied that he approved the consent P.Ex 9 (b) for that purpose. He said that the two documents were forgeries. He said that the subject land fell within the jurisdiction of Matungu Land Control Board of which he had no jurisdiction over. He produced minutes of 5/6/2013 and 2/10/2013, P.Ex 11 (a) and (b) showing that the said parcels of land were not the subject of their discussion on the dates he was said to have issued the consents.

15. The officer from Matungu Land Control Board office PW8 testified that the said consents were not issued at their office. A letter, P.Ex 21 (b), was written to the investigating officer to that effect.

16. Lucy Nanzushi PW6 testified that she was out of her office between 2012 and 2015 as she had suffered a stroke. That in 2015 the investigating officer brought her a transfer form, P.Ex 16 that was ostensibly signed by her and stamped by her office on 8/6/2014. She denied that she had done so as she had been out of the office during that time. She gave out her specimen signature and her office stamp to the investigating officer.

17. The Registrar of Persons Mumias West PW9, testified that their office received a copy of the mutation from P.Ex 4, copies of identity

cards for Peter Onzee and that of the appellant and specimen thumb-prints of the appellant. They were asked to ascertain whether the finger print impressions on the mutation form P.Ex 4 were identical to those on Peter Onzee's identity card or with the finger print impressions on the appellant's identity card and his specimen finger impressions. That the documents were sent to the National Registration Bureau, Nairobi, where a comparison of the finger print impressions was done. It was found that the finger print impressions on the mutation form were neither identical to the finger print impressions of Peter Onzee nor to those of the appellant. PW9 produced the thumb-print verification report as exhibit, P.Ex 22 (b).

18. The evidence of the forensic examiner PW7 was that he examined and compared the signature on the application for consent of Land Control Board, P.Ex 8, the signature on the Consent of Land Control P.Ex 9 (a), the signature on application for Consent of Land Control Board to transfer land parcel N/Wanga/Matungu/2619 and consent thereof P.Ex 9 (b) and 10, with the specimen signatures of Paul Langat PW4. He formed the opinion that the signatures were made by different authors.

19. The witness further examined the stamp impressions on a certified copy of transfer of land parcel N/Wanga/Matungu/2619 from Peter Onzee to Jeremiah Induswe Onzee P.Ex 16 and compared them with specimen stamp impressions P.Ex 15 taken from the office of Nanzushi & Co. Advocates and formed the opinion that the stamp impressions were made by different instruments. The witness produced his report as exhibit, P.Ex20 (b).

#### **Defence Case –**

20. When placed to his defence, the appellant stated in an unsworn statement that he is a son to the late Peter Onzee. That before his father died he had shared out his land to his sons and given 2 acres to a church. That he, his father, called a surveyor who did sub-division on the land. The church got its title deed. He instructed his sons to register their parcels of land. That when his father died his brother Hannington Juma complained that he, the appellant should not get a big share as he was the last born. His brothers took the land by force. He went to the surveyor who gave him title deed to his parcel of land. He was then accused of forgery. He denied the charges. He said that it is his father who did all the processes and that his brother wants to take his parcel of land.

#### **Submissions –**

21. The advocates for the appellant faulted the finding of the trial magistrate that as the appellant was a beneficiary of the transfer of the land he must have set the chain of the acquisition in motion which pointed to his guilt. Counsel submitted that there was no evidence that the appellant signed any of the forms or that he made any of the documents. That his specimen hand writing was not taken to the document examiner for examination. Therefore that the mere fact that the appellant stood to gain from the forgeries does not prove that he is the one who forged the documents. Counsel relied on the case of **John Mauri Wandithi –Vs- Republic, Nyeri High Court Criminal Case No. 404 of 2002** where Okwengu J. (as she then was) held that even where there is evidence that documents are forged, the prosecution has to further prove that the forgery was done by the accused person.

22. Counsel submitted that as there was no evidence that the consents and the document of transfer were forged, the appellant could not be convicted of the offence of obtaining registration by false pretences.

23. Counsel further submitted that the trial magistrate did not have powers under Section 350 of the Penal Code to cancel the relevant title deeds. That the power provided under the said section is to make an order for forfeiture which does not include or connote cancellation. Counsel urged the court to quash the conviction and the sentence.

#### **Analysis and Determination –**

24. This being a first appeal the duty of the court is to review the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –V- Republic (1972) EA 32** and **Kiilu & Another –Vs- Republic (2005) 1 KLR 174**.

25. Counts 2-6 related to offences of forgery contrary to Section 350 of the Penal Code. The said section provides as follows:-

***“(1) Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life, and the court may in addition order that any such document as aforesaid shall be forfeited.***

***(2) In this section, “document of title to land” includes any deed, map, roll, register or instrument in writing being or containing evidence of the title, or of any part of the title, to any land or to any interest in or arising out of any land, or any authenticated copy thereof.”***

26. Forgery is defined in Section 345 of the Penal Code as follows:-

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

27. In her judgment the trial magistrate cited the case of **Joseph Mureithi Kanyita –V- Republic (2016) eKLR** where G. W. Ngenye-Macharia J. quoted the definition of forgery in **Republic –V- Doge and Harris (1971) 2 AII ER 1523** as follows:-

***“A document is false... if the whole or any material part thereof purports to be made by or on behalf or on account of a***

person who did not make it or authorize its making ... or if, though made by or on behalf of or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, ... is falsely stated therein; and in particular a document is false:- (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it.”

28. The trial magistrate also cited the Court of Appeal decision in **Joseph Mukuhu Kimani –V- Republic, Criminal Appeal No. 76 of 1983 (1984) eKLR** where it was held that in an offence of forgery the prosecution has to prove that:-

- (i) the document was false, in the sense that, it was forged
- (ii) the accused knew it was forged
- (iii) the utterer intended to defraud.

29. The magistrate also cited the case of **Caroline Wanjiku Ngugi –V- Republic (2015) eKLR** where Mativo J. 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, printed or engraved.*

*ii. Material alteration - The person must have taken a genuine document and changed it in some significant way. It is intended to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine content of a 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.”*

30. In **Elizabeth Achieng Nyanya –V- Republic (2018) eKLR**, Aburili J. referred to the Nigerian case of **Alake –V- The State** where the court listed the ingredients of the offence of forgery as follows:-

- (i) That there is a document in writing;
- (ii) That the document or writing is forged;
- (iii) That the forgery is by the accused person;
- (iv) That the accused person knows that the document or writing is false;
- (v) That he intends the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine.

31. The purported forged document in count 2 was an application for consent of Land Control Board to sub-divide land parcel N/Wanga/Matungu/1842. The purported forged document in count 3 was a letter of consent by Mumias Land Control Board for sub-division of the stated parcel of land. The purported forged document in count 4 was an application for consent of Land Control Board to transfer land parcel N/Wanga/Matungu/2619 from Peter Onzee to the appellant. The purported forged document in count 5 was a letter of consent for transfer of the said parcel of land from Peter Onzee to the appellant. The purported forged document in count 6 was a transfer of land form for transfer of land parcel N/Wanga/Matungu/2619 from Peter Onzee to the appellant.

32. The trial court in finding the appellant guilty of counts 2-6 found that the documents therein were forged. That though there was no direct evidence to link the appellant with the forgery of the documents the fact that he benefited from the forgeries pointed to his guilt. That the mutation form was done 8 years after the death of the appellant’s father. That the appellant is the one who was in possession of the application for consent for sub-division and the consent by the board for sub-division. That he would then know how the documents ended up being approved as both were not approved by Mumias Land Control Board. Further that the application for consent to transfer land parcel N/Wanga/Matungu/2619 was also not approved by the said Board. That the transfer was not signed by the advocate PW6. That the

appellant signed the transfer. That if PW6 did not sign it then the appellant knew who signed it. That he did not offer an explanation as to who signed it. That the conclusion was that the appellant was guilty of forging the documents.

33. There was no doubt from the evidence that the documents in respect to counts 2-6 were forged. The Chairman of Mumias Land Control Board Paul Langat (PW4) who was purported to have signed the Land Control Board applications and Consents that formed the basis of counts 2-5, denied that he is the one who did so. He stated that the rubber stamp on the consents was not from their offices. His evidence was supported by the evidence of the document examiner PW7 who examined and compared the approval signatures on the said documents with the specimen signatures provided by PW4 and found that the signatures were made by different authors. Lucy Nanzushi PW6 denied that she is the one who commissioned the transfer form that formed the basis of the charge in count 6. Her evidence was supported by the document examiner who upon comparing the signature on the transfer form with her specimen signatures formed the opinion that they were made by different authors. In view of the above I am in agreement with the trial magistrate that the documents that formed the basis of the charges in counts 2-6 were forgeries. The question was whether the appellant was the one who made the forgeries.

34. The appellant's defence was that the said documents were made by his father before he died. The appellant's father died in the year 2005. The referred to documents were made in the year 2013. The thumb-print on the mutation form was examined by the Registrar of Persons and compared with the thumb-print on identity card of the appellant's father. It was found that the thumb-prints were unidentical. That means that the thumb-print on the mutation form was forged. The forged mutation form was used as the basis of the sub-division of land parcel N/Wanga/Matungu/1842. The application to the Land Control Board for sub-division of the said land and the letter of consent thereof were forged. After sub-division, the application for consent for transfer of the resultant land parcel N/Wanga/Matungu/2619 and the letter of consent thereof were also forged. The transfer form for transfer of the land from the appellant's deceased father to the appellant was also forged. Was the appellant an innocent party in all these forgeries?

35. The appellant was charged "jointly with others not before court". Section 119 of the Evidence Act provides as follows:-

***"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

36. Section 111 (1) of the Evidence Act places the burden of proving any fact especially within the knowledge of a person to such person.

37. As stated, the appellant's father died in the year 2005. The deceased's land was sub-divided in the year 2013 using a forged mutation and forged consents. Part of the deceased's land was transferred to the appellant using forged documents. In the common course of human conduct all these could not have taken place without the knowledge and approval of the appellant. The forgeries can only have taken place with the connivance of the appellant. His explanation that it is his father who did the sub-division before he died cannot be true as the same was done in 2013/2014, many years after his father's death. Similarly his defence that he was just called by the Lands office to collect his title deed cannot have been true. Somebody must have moved the Lands office to prepare the title deed. It is only the appellant who could have done so. The presumption is therefore that the appellant and others not before court forged the documents. I accordingly agree with the trial court that the charges of forgeries in counts 2-6 were proved.

38. The charge in count 7 was obtaining registration by false pretence contrary to Section 320 of the Penal Code. The section provides as follows:-

***"Any person who wilfully 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 misdemeanour and is liable to imprisonment for one year."***

39. False pretence is defined in section 312 of the Penal Code as follows:-

***"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."***

40. The transfer of land form P.Ex. 18 that transferred land parcel No. N/Wanga/Matungu/2619 from the appellant's father to the appellant was purportedly signed by the appellant's father on 8/6/2014. This cannot have been the case as the said person had died in the year 2005. The appellant knew that his father was dead when he (the father) purportedly signed the transfer on 8/6/2014. The appellant therefore made a false representation that the document was signed by his father, who was by then deceased. In the circumstances the appellant procured land title deed by false pretence. The conviction in count 7 is therefore confirmed.

41. The appellant faulted the trial magistrate in cancelling title to the land after convicting the appellant of the offences. In her judgment the trial magistrate relied on the decision of G. W. Ngenye-Macharia in the above cited case of **Joseph Mureithi Kanyita –V- Republic** (Supra) where the learned Judge upheld the trial court's order of cancellation of title after convicting the appellant of the offence of obtaining by false pretence. In that case the Judge held that having held that the registration of the title was unlawful, the most prudent thing to do was to order the cancellation of the title so as to preserve it and revert it to the initial status quo until such a time that a court of higher jurisdiction would rule to the contrary.

42. Sentencing is a discretion of the trial court. The principles upon which an appellate court will exercise its discretion to interfere with a sentence imposed by a trial court are now well settled. These are that an appellate court will not interfere with the exercise of such discretion unless it is shown that in passing the sentence the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is excessive – See **Shadrack Kipkoech Kogo –V- Republic Eldoret Court of Appeal Criminal Appeal No. 253 of 2003**.

43. Section 350 of the Penal Code gives the court the discretion to make an order for forfeiture of the forged document upon conviction of an

accused person of the offence of forgery.

44. The definition of forfeiture in Black's Law Dictionary 9<sup>th</sup> Edition is:-

***“The loss of a right, privilege or property because of a crime, breach of obligation or neglect of duty.”***

45. In **Serah Priscilla Wamaita Njuguna –V- Republic (2015) eKLR** the court upon confirming a conviction of forgery the court proceeded to remedy the criminal conduct of the appellant by making an order for cancellation of the appellant's title and ordering the same to revert to the original deceased owner.

46. The subject title deeds herein were obtained as a result of forgery. The trial court cannot be faulted for exercising its discretion to cancel title deeds that were obtained as a result of illegal transactions. The cancellation was within the mandate of forfeiture.

47. In view of the foregoing, I do not find any merit in the appeal. The conviction entered against the appellant in counts 2-7 is thereby upheld and the appeal dismissed accordingly.

**Delivered, dated and signed at Kakamega this 30<sup>th</sup> day of September, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Athunga holding brief for Mr. Mukoya for Appellant

Mr. Mutua for State/Respondent

Appellant - Present

Court Assistant - Polycap

14 days right of appeal