



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 111 OF 2015

REPUBLIC.....APPELLANT

VERSUS

JANE SUSAN MBATHA.....1ST RESPONDENT

ROBERT WAMBUA KIOKO...2ND RESPONDENT

(Being an appeal from the judgement of the Learned Principal Magistrate T.A. Odera in Criminal Case No 307 of 2012 Mavoko delivered on 28th June, 2013)

JUDGEMENT

1. The Respondents, JANE SUSAN MBATHA (DW 3) and ROBERT WAMBUA KIOKO (DW 4), are mother and son and they faced the following charges before the trial court:

Count 1:

Making a Document without Authority Contrary to Section 357(A) of the Penal Code.

1. JANE SUSAN MBATHA KIOKO 2. ROBERT WAMBUA KIOKO on an unknown date between March, 2000 and May, 2000 at an unknown place in the republic of Kenya with intent to defraud, jointly, without lawful authority made a letter purported to be a genuine letter made and signed by BETH NDUKU KAVOLOTO on 2nd March 2000 for transfer of a 20 acre land number MAVOKO TOWN BLOCK 3/2975 to Jane Susan Mbatha Kioko.”

Count 2:

Procuring Execution of a Document by False Pretences Contrary to Section 355 as read with Section 349 of the Penal Code.

JANE SUSAN MBATHA KIOKO on or about 30th May, 2000 at Lukenya Ranching and Farming Society Limited Offices, in Athi River within Machakos County, jointly with others not before court, by means of false and fraudulent representations as to the contents of a forged letter, you caused the management of the said society to change the name on a letter of allotment Number 4078 in respect of a 20 acre land, Plot Number 357 from Beth Nduku Kavoloto to your name.”

Count 3:

Forcible Detainer contrary to Section 91 of the Penal Code.

JANE SUSAN MBATHA KIOKO On diverse dates between 30th May 2000 and 19th July 2012 being in actual possession of a 20 acre land plot number MAVOKO TOWN Block 3/2975, without colour of right, held possession of it, in a manner likely to cause a breach of the peace, against Monica Kanini and Vincent Mutuku Sele, being persons entitled by law to the possession and administration of the said parcel of land.”

2. In support of its case, the prosecution marshalled 7 witnesses while the respondents testified and called 2 witnesses. The respondents were acquitted under section 215 of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. The State now appeals against the decision

on the following grounds of appeal as set out in the undated petition of appeal filed on 13th October, 2014;

1. *The Honourable trial Magistrate erred in failing to find that the burden of proof which is beyond reasonable doubt on the part of the prosecution had been discharged.*
2. *The Honourable trial Magistrate erred in law in finding the accused not guilty on the three counts. Count 1 the offence of making a document without authority contrary to Section 355(a) of the Penal Code, Count 2 Procuring Execution of a document by false pretences contrary to Section 355 as read with Section 349 of the Penal Code and Count 3, forcible detainer.*
3. *The Honourable trial Magistrate erred in law by acquitting the respondent based on the weight of theory put forward by the trial court not canvassed in evidence.*

3. This appeal is by the State against an acquittal by the subordinate court governed by **section 348A** of the **Criminal Procedure Code**. It entitles the Director of Public Prosecutions to appeal to the High Court from the acquittal on a matter of fact and law. Since this is a first appeal, this court is entitled to re-appraise the evidence and reach an independent conclusion as to whether or not to uphold the decision of the trial court bearing in mind that it neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).

4. A summary of the prosecution case was as follows. Pw1, Vincent Mutuku Seke, an accountant testified that the late Beth Nduku Kavoloto was his grandmother who died on 4.6.2003 and left a 20 acre parcel of land in Lukenya. Upon her death letters of administration were issued to him and Monica Kanini and which were confirmed in April, 2004. However in 2010 he was notified of a letter dated 2.3.2000 signed by Beth to allocate the land Number 533 Lukenya to Susan and the same was signed by the deceased but he suspected the signature. He testified that the disputed land was LR Mavoko Town Block 3/2975. In addition, the minutes authorizing the transfer of the land were missing. He reported the matter to the police after being advised to do so where upon Robert Kioko was arrested as investigations revealed him as the author of the letter. He also testified that Susan Kioko was indicated as the owner of the land according to a search at the Machakos Registry. On cross examination, he testified that Susan Kioko was not an administrator of the grant to the estate of the deceased but however the documents indicate that Block 3/2975 was transferred to her.

5. Pw2 was Monica Kanini who testified that the deceased was her mother and had a daughter called Susana Mboya who was married to Maurice Kioko and that the deceased did not give out the 20 acres of land to anybody. She testified that the 1st Respondent was her sister while the 2nd Respondent was her son but was not aware why they had been arrested.

6. Pw3 was Anjela Nzula Seke who testified that the deceased was her mother and was survived by her, her twin sister who was accused 1 and Pw2. She testified that in 2010 she discovered that her mother's properties had been taken and gathered information that Morris Kioko used to visit the Kenani Land Society Offices without notice and when she went to the office she was shown a letter indicating that the deceased had given the 1st Respondent the land. However she recalls that the land was not mentioned at the wedding of 1st Respondent but however she was given 5 acres at Kenani.

7. Pw4 was Samuel Seke Kavoloto who testified that the deceased was his sister and that she had 40 acres of land and 20 acres were given to the 1st Respondent on her wedding day and the remaining 20 acres was to go to Mutuku. However it emerged that the 1st Respondent took the remaining 20 acres. He testified that Mutuku realized that the 1st Respondent had a title deed to the balance of the 2 acres of land which was issued by Lukenya Ranching. On cross-examination, he testified that Mutuku had a letter to the effect that he was given 20 acres of land.

8. Pw5 was Joseph Nzioka Muasya who testified that he managed the Lukenya Ranching society from 2003 to 2012 and which is under liquidation. He testified that the deceased was a member number 533 and the society allocated her 40 acres of land along Kangundo Road and 20 acres near Mua, 5 acres at Kenani. He further testified that the titles came out in 2001. However before the deceased died, she transferred 20 acres of the land in Mua to Susan Mbatha and produced a letter dated 2.3.2000 directing the said transfer and this was the only transfer that was done to Susan and a title was issued in 2010. Further that Vincent came to the office and disputed the said transfer alleging that it was done by mistake. On cross-examination, he testified that he did not receive a letter of administration from Vincent.

9. Pw6 was No 230925 Chief Inspector Jacob Oduor from CID headquarters forensic document section and a document examiner as well as the department head. He testified on the examination carried out on exhibits marked A1 to A3 as the disputed documents, B1 to B5 the specimen handwriting of Jane Susan Mbatha, B6 to 10 the specimen handwriting of Francis Kioko, B11 to B15 the specimen handwriting of Maurice Kioko, B16 to B20, the specimen handwriting of Robert Kioko and C1 to C9 the known handwriting and signatures of Mbatha Nduku Kavoloto. He received the same on 12.9.11 and on 5.1.12 compared and examined the signatures and found no similarities between A1 to A3 and C5 to C7 hence found that the signatures in A1 to A3 were forged. He found similarities between A1 and B1 to B20 and formed an opinion that the handwriting on A1 and B16 to B20 were made by the same author. He testified that he subjected the handwritings to LEICA Microscope and VSC1 and magnifying lenses for better visibility and identification of individual characteristics and compiled a report on 5.1.11 and produced the same. On cross-examination, he testified that the signature on A1 and the known samples were different.

10. Pw7 was No.233636, Inspector Johness Bore the investigating officer who confirmed receiving a report from Vincent Mutuku who was in the company of Monica Kanini. According to the witness the two introduced themselves as the administrators of the Estate of Beth Nduku Kavoloto and that Vincent reported that he found that Land Parcel 357, that is now Mavoko Block 3/2375 which is 20 acres had been illegally transferred to the 1st Respondent and presented a letter that was purportedly drawn by the deceased instructing transfer of the land from the deceased to the 1st Respondent and forwarded the letter to the document examiner. He also testified that the minutes for the board for the transfer were not available and therefore concluded that the management erred in accepting the letter. He testified that he established that no pledge of land was given by the deceased to the 1st Respondent. The court found that the respondents had a case to answer and they were put on their defence.

11. Dw1 was William Mutisya Ndunda, a retired chief who testified that he signed and stamped a letter from the deceased addressed to

Lukenya Society to transfer a piece of land to her daughter. He identified the letter as the Pexh 1.

12. Dw2 was Johnson Munyao Mbindyo who testified of being a treasurer of Lukenya Cooperative Society and that the deceased brought a letter to their office which directed that land be transferred to her daughter and the transfer was effected. The same was stamped by the area chief and was identified as Pexh1.

13. Dw3 was the 1st Respondent who testified that the deceased was her mother and who had given her the land as a wedding gift and by that time Vincent had not been born. She testified that Vincent seeks to disinherit her and that she was issued with an allotment letter for the land and later issued with a title deed. She further testified that there was a 3 year dispute over the land and attempts to resolve it were fruitless as Vincent used to shout a lot and hence the parties were advised to have the same resolved in court. On cross-examination, she testified that the Pexh.1 was not written by her mother but it was signed by her.

14. Dw4 was the 2nd Respondent who testified that he did not sign the letter that is Pexh. 1.

15. Pw5 was recalled and he testified that the allotment letter in respect of Plot No. 357 title No. 3/2975 measuring 20 acres was issued to the deceased and was cancelled by the management committee of Lukenya Ranching Society and the name was replaced with that of Susan Mbatha Jane Kioko.

16. In the judgment, the trial magistrate framed four issues for determination. First, whether the deceased pledged a land gift to 1st Respondent; second, whether the Respondents made the said document without authority; third, whether 1st Respondent procured execution of Pexh.1 by false pretences and fourth; whether she forcefully detained the land. On the first issue the trial magistrate held that the evidence of Pw3 and Pw7 were not true because the evidence of Pw7 was not truthful. However the evidence of Pw2 and Pw4 corroborated the fact that the deceased made a land pledge to the 1st Respondent. Second, she concluded that the opinion of the handwriting expert was not binding on the court and that intention to defraud had not been proved by the prosecution. Thirdly, the trial magistrate concluded that it had not been proved that the Respondents procured execution of Pexh.1 by fraud. Lastly, the trial magistrate held that it had not been proved that 1st Respondent had no color of right to the land and there was no evidence that she acted in any manner likely to cause a breach of peace to Pw1 and Pw2 and there was no allegation of use or threat of use of violence against the complainants. Therefore count 3 was misplaced as no evidence had been adduced to support it and the same failed.

17. Both parties herein filed written submissions to support their respective cases. The Appellant submitted that the report of the expert corroborated the evidence of Pw1 to Pw5 and because the report was not objected to, it can be inferred that the same was true. It argued that the trial court erred in dismissing the report by the expert witness and therefore the court do make a finding that the prosecution proved their case beyond reasonable doubt and that the file be taken to the trial court for purposes of conviction and sentencing.

18. The Respondents submitted on the first count that the document examiner went beyond his scope on giving an opinion and ought to have restricted himself to the similarities in the handwriting, which he did not do. Counsel cited the case of **Samson Tela Akute v R, Criminal Appeal 844 of 2004(unreported)**. The respondents submitted on the 2nd and 3rd counts that the appellant failed to prove the respondents' guilt. They agreed with the findings of the trial magistrate and urged the court to dismiss the appeal.

19. The issues for determination are whether the offences indicated in the charge sheet were proven to the required standard. **Section 357 of the Penal Code** creates an offence known as making a document without authority and it provides as follows;

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

(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or

(b) knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.

20. In order to prove the offence under **section 357 of the Penal Code**, the prosecution must establish, “the making” as provided in **section 357(a)** thereof and the intent to defraud or deceive. The first element is not difficult to prove but the second requires that the, “*intent to defraud or deceive*” be proved. **Section 348 of the Penal Code gives insight to intent to defraud and states that** intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

21. In order to prove, “*intent to defraud*”, the prosecution must establish the underlying conduct that constituting fraud or deceit which can be imputed on the accused. The prosecution was required to lead evidence to show that the respondents had signed the document. **Section 70** of the Evidence Act (Cap 80 laws of Kenya), is clear that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting alleged to be in that person's hand writing must be proved to be in his hand writing. There was no evidence that the respondents signed the Pexh 1 and in the evidence of Pw6, he could not tell who signed the same and thus the court stated as follows;

*The intention to defraud on the part of the accused has not been proved as it has not been proved that the accused made Pexh1. This court shall rely on the cited passage from the judgment in **Hassan Salum v R** that held, as follows:*

..the handwriting expert should have pointed out the particular feature or similarity or dissimilarity between the forged signature on the receipt and the specimen handwriting..”

22. The prosecution in this case ought to have proved the essential elements of making as well as intent to deceive and defraud. In this case, the testimony of Pw2 and Pw4 established that the 1st Respondent was given the land as a gift. The evidence of Pw5 is that the cancellation on the allotment letter was effected by the Lukenya Society hence the court was not able to see how the conduct of the Respondents fall within the definition of *intent to defraud or deceive under Section 357* of the Penal Code.

23. As regards the element of making, the prosecution relied mainly on the evidence of PW 6 and as observed above, there was no evidence that the respondents were responsible for the impugned signature as the same could not be attributed to them.

24. As regards the charge against the 1st respondent, **procuring execution of a document by false pretences contrary to section 355 as read with section 349 of the penal code**, that states that ***“Any person who, by means of any false and fraudulent representations as to the nature, contents or operation of a document or electronic record, procures another to sign or execute the document or electronic record, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had forged the document or electronic record”*** I find that as of necessity the prosecution ought to have demonstrated how the Respondents made a representation and procured the signature or execution of the document. The 1st respondent in her testimony stated that the deceased gave her the land as a wedding gift and by that time Vincent had not been born. She also testified that Vincent seeks to disinherit her and that she was issued with an allotment letter for the land and later issued with a title deed. According to Johnson Munyao Mbindyo, the deceased brought a letter to their office and the same directed that land be transferred to her daughter and the transfer was effected. This was corroborated by the evidence of Pw5 and I find that the offence was not established by the prosecution.

25. As regards the offence of forcible detainer, the operative section of the law states that ***“Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer.”*** I find that the prosecution did not establish the offence. None of the witnesses presented any evidence to court to the effect that the 1st respondent had no color of right to the property; that she acted in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace; or that the complainant or any of the prosecution witnesses were entitled to the said land. The investigating officer who was Pw7 did not present or testify on any record of complaints in this regard for had he done so, then the evidential burden, under **section 111** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, would have shifted to the respondents to explain how and why they acted in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace. Having reached the conclusion, I hold that the prosecution failed to prove its case against the Respondents.

26. In the result it is my finding that the Appellant’s Appeal lacks merit. The same is dismissed. The acquittal by the trial court is upheld.

It is so ordered.

Dated, signed and delivered at Machakos this 24th day of June, 2019.

D.K. KEMEI

JUDGE