



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 82 OF 2018

TIMOTHY MUIMI MUTE MI.....1ST APPELLANT

ERIC JOHN MUTE MI.....2ND APPELLANT

DOUGLAS KYALO MUTE MI.....3RD APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Kitui Chief Magistrate's Court Criminal Case No.620 of 2011 by Hon. M. Murage (CM) on 28/9/2018)

J U D G M E N T

1. Timothy Muimi Mutemi (1st Appellant), Eric John Mutemi (2nd Appellant), and Douglas Kyalo Mutemi (3rd Appellant) respectively, were charged with three counts as follows:-

COUNT 1

Forgery, Contrary to Section 349 of the Penal Code. Particulars being that on the 29th day of June, 2010, at Kitui District Lands Office in Kitui County, with intent to deceive that being Directors of DATER ENTERPRISES LIMITED, jointly forged a certain document namely, a Land Transfer Form for Land Parcel Number Nzambani /Maluma/838 purporting it to be genuine Land Lands Transfer Form prepared and signed by Mutemi Kamwaki.

COUNT 2

Uttering a Document with Intent to Defraud Contrary to Section 357(b) of the Penal Code. Particulars being that on the 29th day of June, 2010, at Kitui District Lands Office in Kitui County, jointly, knowingly uttered a certain document namely, a Lands Transfer Form to Lands Registrar Mr. Joel Muimi Mwinzi which had been made without authority.

COUNT 3

Malicious Damage to Property Contrary to Section 339(1) of the Penal Code. Particulars being that on the 17th day of September 2011 at 8.30 am at Kiini Village, Maluma Sub-Location in Kitui County, jointly with others wilfully and unlawfully damaged 130 mango trees valued at Ksh.975,000/=, 179 Mikao (*daibargio mexalonlyaion*) trees valued at Ksh.19,800/=, five pawpaw trees valued at Ksh.2,000/=, one Avacado tree valued at Ksh.400/=, one lemon tree valued at Ksh.1,200/=, 29 Jatropa trees valued at Ksh.27,840/=, two Jacaranda trees valued at Ksh.1280/=, one guava tree valued at Ksh.2000/=, five Sienna siemea trees valued at Ksh. 3,200/=, one sausage tree valued at Ksh.400/=, five banana stems valued at Ksh.30,000/=, 163 cassava plants valued at Ksh.15,648/=, one passion plant valued at Ksh.400/=, one cowshed valued at Ksh. 65,000/=, one granary valued at Ksh.75,000/=, one permanent pit latrine valued at Ksh.45,000/=, one bathroom valued at Ksh.25,000/=, and one wooden fence valued at Ksh.25,000/=, all valued at Ksh.1,578,168/= ,the property of Agnes Mumbano Kinako.

2. They were taken through full trial, convicted and sentenced as follows:

COUNT 1 and 3; Each Appellant was fined **Kshs. 100,000/=** and in default to **Serve twelve (12) months imprisonment.**

COUNT 2; Each Appellant was fined **Kshs. 90,000/=** and in default to serve **twelve (12) months imprisonment.**

3. Aggrieved, they appeal on grounds as follows:-

I. THAT the Learned Trial Magistrate erred and misdirected herself in law and in fact in convicting the Appellants on the basis of evidence which was insufficient to support the charges.

II. THAT the Learned Trial Magistrate erred and misdirected herself in law by shifting the burden of proof from the prosecution to the Appellants when it was clear that the prosecution had miserably failed to prove the charges levelled against the Appellants.

III. THAT the Learned Trial Magistrate erred and misdirected herself in law and fact when she relied on the Complainants suspicions to form her basis of conviction.

IV. THAT the Learned Trial Magistrate erred and misdirected herself in law and fact when she held the Appellants jointly forged the signature of the late Mutemi Kamwaki when it was clear from the document that the execution of the signature by the deceased was witnessed by an advocate and it was not possible for three people to jointly forge one signature.

V. THAT the Learned Magistrate erred and misdirected herself in law and fact in holding that the Appellants jointly uttered a forged document namely transfer of land to one Joel Muimi Mwinzi a Registrar at Kitui Lands Office when it was clear that the said Registrar did not testify and no evidence was tendered in support of this charge.

VI. THAT the Learned Magistrate erred and misdirected herself in law and fact when she held that the Appellant damaged property belonging to the Complainant valued at Kshs.1,578,000/= when no evidence of ownership or existence of the property was tendered by the prosecution and also when the investigating officer was categorical that he did not investigate the malicious damage charge.

VII. THAT the Learned Magistrate erred and misdirected herself when she relied on crop damage report made 10 months before the alleged incident took place. She further erred in relying heavily on photographic evidence where no certificate in support of the photographic prints was produced by the scene of crime officer.

VIII. THAT the Learned Trial Magistrate erred and misdirected herself in delivering a Judgement which was wholly against the weight of evidence.

IX. THAT the Learned Trial Magistrate erred in delivering a Judgement which negated all constitutional requirements of fair trial.

4. Facts of the case were that on the **17/9/2011**, PW1, **Agnes Mumbau Kinako** got information regarding destruction that was being done on a parcel of land that she had developed having been given by her **late father, Kamwaki** as a gift. She moved to the land, **title Nzambani/Maluma/828**, where she found the Appellants, her younger brothers and others damaging various trees that she had planted and structures that she had constructed thereon. She reported the matter to the police who visited the scene and effected arrest of the suspects. Investigations carried out established that the subject land had been transferred from their father to Dater Enterprises Ltd. at a time when the deceased was ill. Documents used to facilitate the transfer were subjected to examination by the document examiner and the signatures thereon stated not to be for the deceased, hence the charges.

5. Upon being put on their defence the Appellants denied the charges. The 1st Appellant stated that the land in issue belonged to their father **Mutemi Kamwaki** but the title was in Standard Bank where the deceased had loans. That in **2007** their father dissolved the sole proprietorship and the three of them joined him by contributing **Kshs. 300,000/= each**, hence forming the company. The loan was settled and the title transferred to their company Dater Enterprises Ltd, where his co-accused worked. He admitted having been part of the process as a director but denied having signed any documents. That in 2008 the complainant who lived in Nairobi requested their father to allow her to use the land and he permitted her to use it for one year. On **30/7/2011** the company gave her a Notice to leave and she said her crops were on the land. That on the **17/9/2011** he went to the farm with workers and was later joined by the 2nd and 3rd Appellants. Thereafter, the complainant's husband arrived with people who arrested them.

6. The 2nd Appellant stated that after the Charge was discharged, the property was transferred to the company. That following advice from their advocate, **Gakoi Maina**, they needed a consent therefore their father gave him a Power of Attorney which enabled the three of them to appear before the Land Control Board. Denying having forged signatures he stated that their father signed the documents. He denied the allegation that there was development on the land and stated that they intended to erect a greenhouse on the land but the complainant requested to be allowed to cultivate the land and they allowed her to use it for one year, and that is when they served her with a Notice to cease cultivating. That they went to the land on the **17/9/2011** when the company they had consulted, Amiran Kenya was to visit the site only to be arrested.

7. The 3rd Appellant confirmed what his co-accused stated and added that he attended the Land Control Board where the consent was obtained and having appeared before the advocate. He denied having committed the offences alleged.

8. The appeal was canvassed by way of written submissions. It was urged for the Appellants that there was no evidence linking them with either forging or uttering the transfer documents before the Land Registrar. That the Investigating Officer failed to take their handwriting samples for comparison with the alleged signatures; the trial Magistrate drew inferences without factual basis as the evidence adduced exonerated the Appellants from any wrongdoing and no evidence was adduced as to how three people could jointly forge a signature.

Further, that no evidence was adduced of the Land Registrar, therefore, there was no complainant to the charge of uttering a forged document and even forgery.

9. On the charge of malicious damage to property, it was contended that there was neither proof of ownership or evidence of existence of the alleged damage. That no investigations in that regard were carried out, photographs adduced were inadmissible as they were without a certificate of photographic print under **Section 78 of the Evidence Act** and the judgment was wholly against the weight of evidence.

10. The Respondent (State) urged that the fact of damage caused was assessed and photos produced. That the trial court overlooked the issue of scrutiny and verification of known signature of Mutemi Kamwaki. That since the title was charged with the Bank the prosecution ought to have availed a witness from the bank to ascertain who made the discharge and probably to ascertain who made the signature on the discharge with the one on the transfer form. That samples of the Appellants' signatures were not taken to ascertain who uttered the false document and, that the court ought to have interrogated the witness to ascertain the year and month when the report in respect of the damage was made.

11. This being a first appellate court, I am duty bound to re- evaluate the evidence that was adduced before the trial court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (See **Okeno vs. Republic (1972) EA 32**).

12. In the case of **Odhiambo Vs. Republic (2008) KLR 565** it was held that:

“The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-asses it and reach its own determination based on evidence”.

13. It was alleged that the Appellants having represented themselves as Director of Dater Enterprises Ltd forged a Land Transfer form for Land Parcel Number Nzambani/Maluma/839 (Subject Land) purporting it to have been signed by Mutemi Kamwaki.

14. Section 345 of the Penal Code defines forgery as;

“the Making of a false document with intent to defraud”

This means that there must exist the making or material alteration of a writing on a document that has the ability to deceive and is of apparent legal efficacy with the intent to defraud.

15. PW1 **Agnes Mumbau Kinako**, a sister of the Appellants claimed ownership of the subject land by virtue of having been given as a gift in 1989 by their late father and having developed and used it for over 23 years prior to the incident of destruction occasioned on the subject land. She carried out a search and discovered that the land had been transferred to Dater Enterprises Ltd. on 12.9.2009 at a time when their father was ill and admitted in hospital prior to his demise. She obtained a Power of Attorney purportedly donated to the 2nd Appellant and a Transfer form having signatures that she believed differed from their father's known signature, therefore she reported the matter to the Directorate of Criminal Investigations.

16. The impugned transfer form for the subject land together with a Power of Attorney purportedly signed by **Mutemi Kamwaki** were subjected to forensic examination. PW11 **NO. 231371 John Muinde**, the forensic document examiner, examined the documents. He compared the signatures appended on the Transfer of land form (A1) (dated 29th June 2010) purported to have been appended by Mutemi Kamwaki who was identified by **Eric John Mutemi (2nd Appellant)** and the signature on the Special Power of Attorney (A2) where Eric John Mutemi was nominated as the lawful Attorney and agent with full power and authority in respect of the subject land, (**title No. Nzambani/Maluma 838**) dated 28th day of **August 2009**; with known signatures of Mutemi Kamwaki appended on documents that he had signed previously (B1-B3).

17. In the course of examination he carried out the procedure through magnification procedures and he found dissimilarities in terms of initials and terminal strokes, ink construction of characters, alignment of curves and loop characteristics, movement of the pen and patterns and even through the look of the eye reached a finding that the signatures had not been made by the same author.

18. It was argued by the Appellants that the documents were signed by the author in their presence and that of their advocate. In the case of **Republic Vs. David Ruo Nyambura & 4 others (2001)Eklr** it was stated that:

“It is our cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution through out to prove the guilt of an accused.”

19. In discharge of its legal onus, the prosecution adduced evidence that established the fact of the signatures on the impugned documents having been dissimilar to some of previous known signatures of the purported author.

20. The Appellants argue that there was no evidence linking them to either forging the signatures of their father as found by the trial Magistrate who however, relied on suspicion and drew an inference without any legal or factual basis.

21. In the case of **Alexander Muteti Mutinda & Another V. Republic (2015) eKLR** it was held that:

“As regards the evidence of the document examiner, this court holds that that evidence did indeed establish that the two (2) documents were forgeries... It was not necessary for the prosecution to establish who actually made the documents if it managed to establish that the Appellants presented the said documents..The Appellants were beneficiaries of the said forgeries”.

22. The basis of the argument is that the deceased transferred the title to the company owned by himself and the Appellants therefore there was no forgery. The Title deed adduced in evidence was for Dater Enterprises Limited which was stated to own Title Number Nzambani/Maluma/838 measuring 12.6 Ha. The purported notice to vacate the land addressed to PW1 was on the letter head of Dater Enterprises Ltd. The transfer of land form dated 31st May 2010 was to transfer the subject land to Dater Enterprises Limited.

23. The Appellants adduced in evidence a certificate of incorporation that was not certified, NO. C147373 for Dater Enterprises Company Limited that was incorporated on the Fourteenth day of November 2007. The CID department queried existence of Dater Enterprises Company Limited and the Registration of Company by a letter Dated 7th October 2011 confirmed the company (Dater Enterprises Company Limited) having been registered but no annual returns having been filed since incorporation. This particular company had its Directors as **Erick John Mutemi, Mutemi Kamwoki, Douglas Kyalo Mutemi and Timothy Muimi Mutemi.**

24. No evidence was provided for existence of Dater Enterprises Limited. The explanation that a rectification was to be made without a resolution of Directors to that effect does not hold any water. Therefore causing a transfer of the subject land to a non-existent company was done with the intention to deceive. The act had the legal effect that made records to be changed at the Lands Registry. In that regard there was no misdirection on the part of the trial court. Appellants herein were the beneficiaries of the forged signatures having actively participated in the land being transferred to a non existence company that they purported to own and on that basis using the same name (Dater Enterprises Ltd) to notify PW1 to vacate the land.

25. **On the 2nd Count**, the Appellants were alleged to have uttered the Land transfer form to the District Land Registrar, Joel Muimi Mwinzi on the 29th of June 2019.

26. **Section 357 (b) of the Penal Code provides thus:**

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

(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”.

27. It was important for the prosecution to prove that:

-The document was uttered by the Appellants

-They did it with full knowledge that it was made without authority

And, with intent to fraud.

28. To prove that a document was uttered there must be evidence of the person to whom it was presented. The alleged individual was not called as a witness. The question is whether such a person existed? In that respect, the charge could not have been sustained.

29. With regard to Count 3, the Appellants were indicted for Malicious damage to property.

Section 339 (1) of the Penal Code provides thus:

“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years”.

The prosecution was required to prove:

i. The right of possession of the property

ii. That damage was occasioned on the property

iii. The act of destruction was done wilfully and unlawfully.

30. PW1, the complainant was given a parcel of land by her father who died on 23/11/2010. Her evidence was that she was given the subject land as a gift in the presence of her mother (*now deceased*) and her uncle **BenjaminKavidi** in **1989**. And following the good gesture by her parents, she organised a thanksgiving party where the 1st Appellant (who prepared the programme for the day) was the master of ceremony. Her siblings and even the area chief were in attendance. She proceeded to develop the land. In his defence the 1st Appellant stated that in 2008 his father told him that the complainant requested him to use the land in rainy seasons only. But subsequently their father transferred the land to the company. And on 30/7/2011 the company gave the complainant a notice to vacate but she said she had crops

growing on the land. The 2nd Appellant stated that after the company obtained the title, they allowed the complainant to continue farming for a period of one (1) year. Thereafter, on 30/7/2011 they gave her a notice to vacate.

31. What can be discerned from the evidence adduced is that the complainant was put in possession of the subject land by her late father. Evidence of photocopies purporting to be from Standard Chartered Bank and National Bank respectively were adduced in evidence. What was not clear is how the photocopies that were not certified were admissible, But, according to the Banking arrangement, Mutemi Kamwaki applied for an overdraft of Kshs.150,000/= in September 1992. The security to be provided was SB funds in the sum of Kshs. 50,000/= and RLA charge for the sum of Kshs. 100,000/=. On the 9th January 2004, he got an overdraft of Kshs. 150,000/= and the security given was; Fixed deposit in the sum of Kshs. 103,253.35 and RLA charge for Kshs. 100,000/= over LR Nzambani /Maluma 838. The due date was 20/6/2004. On 23/7/2004, he obtained a further overdraft of Kshs. 150,000/= that was to be due on the 24/4/2005.

32. This evidence that remained unchallenged established the fact that although the father of the complainant put her in possession of the land, he continued to hold its title which he did not transfer to the complainant. Seemingly, the complainant did not query anything to do with documents in respect of the land until she was given notice to vacate it.

33. What is however apparent and not in dispute is the fact of the complainant having been licensed by her father to occupy the land. The licence was created orally and no specific duration was given. She took possession of land and altered its state. It is argued by the appellants that the land was used for growing subsistence crops - maize, cowpeas, pigeon peas and beans. What was on it included natural vegetation and grass for grazing purposes.

34. It is also urged by the Appellants that there was no destruction whatsoever. To prove the damage occasioned on the properties the prosecution adduced in evidence photographs. PW9 Corporal Mugwimi of scene of crimes gazetted as NO. 4562 of 7/7/2003 moved to the scene on 18/9/2011 and took photographs of the whole land and structures thereon. He noted a damaged wooden fence that led to the compound, a damaged bathroom, toilet, granary and various mango trees and other trees. He processed the photographs which he adduced in evidence without any objection being raised by the Appellants.

35. It is now the contention of the Appellants that the witness did not produce a certificate of photographic print or enlargement as envisaged by Section 78 of the Evidence Act. The alluded to provision of law provides thus:

“(1) In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein”.

This is in regard to photographic evidence – admissibility of Certificate pursuant to the Legal Notice.

36. In the Case of the **State V. Nelson Otieno Odira & Another (2014) eKLR** an objection was raised to production of photographs taken by the Investigation Officer and the provisions of **Section 78 of the Evidence Act** were called into question. **Majanja J** had this to state:

“The general principle of evidence is that the maker of the document is the person to prove the contents of the documents. Sections 64 and 65 of the Evidence Act provide that a document may be proved by either primary or secondary evidence. Section 66 of the Evidence Act provides for instances where secondary evidence may be given for example by way of proof of certified copies. A reading of section 78 shows that the exception in relation to photographic evidence is specific to the terms thereof. The purpose of section 78 of the Act is to enable the court admit photographic evidence without calling the maker if certain requirements of the Act have been met. The section is not authority or it does not provide authority for the Director of Public Prosecution to permit only certain officers to take photographs and produce them in evidence. Section 78 deals with production of photographic evidence in court and provides photographs taken by officers may be produced without calling the officer taking the photographs if the conditions specified in the section are met. Hence the requirement of subsection (2) and (3) of the Act which tend to buttress the issue of authenticity of the photographs.

5. In any other case, any officer who has taken a photograph may testify as to its veracity and contents as the same is primary evidence and subjected to testing by cross-examination by the accused’s counsel. (emphasis added)”

37. This is a case where PW9 adduced the photographs in evidence as the maker without any objection. He was subjected to cross-examination.

38. Other than PW9, who adduced in evidence images of the damaged property. PW8 **Titus Veka Kaluku**, a Senior Superintendent with the Ministry of Agriculture, Katulani, upon receipt of the complaint moved to the scene on the **19th September 2011**. He carried out an assessment of the damage done on the stated date but prepared the report thereafter. Per his findings, various trees, plants, a cowshed, granary, toilet, bathroom and wooden fence had been destroyed. The contention is that the report was made ten (10) months earlier than the alleged date of the damage. The witness testified in person and clarified the error noted.

39. PW3 **NO. 2002048389 Corporal Stanley Kilemi** moved to the scene at 9.00a.m on the 19/9/2011 and found people in the act of cutting the grafted mangoes, pawpaw trees and other fruits. Evidence tendered did prove that damage was occasioned on the properties. Implements that were being used namely mattocks, soil augur and pangas (4) were adduced in evidence.

40. Defence Exhibit 13 is a letter dated the **30th July 2011** addressed to the complainant and signed by the three (3) Appellants. They required her to stop cultivating the subject land and gave her 30 days within which to harvest her crops. They noted that the former owner Mr. Mutemi Kamwaki had allowed her to cultivate that land for the purpose of helping her family which in their opinion, she had reasonably

done. That Dater Enterprises Ltd wished to undertake major development on the said piece of land and would do so without any further notice and that the company would not be responsible for any damage and loss occasioned by her directly or indirectly. The complainant received the letter which prompted her to establish if indeed the land was in the name of Dater Enterprises Ltd. In the process she caused a caution to be lodged on the title.

41. On the fateful date she got a call from PW2 **Robert Mutisya Sanduka** who notified her of the destruction that was ongoing. By the time she reached the scene she found the Appellants and four (4) other individuals going on with the destruction using mattocks and pangas and they were arrested.

42. PW3 who moved to the scene with the complainant testified to having found seven (7) people in the act. Three (3) of them who stood aside that he identified as the Appellants said they were the owners of the land and even showed them a copy of the title deed. All of them were arrested and jointly charged. Some of them pleaded guilty to the charge as the trial progressed.

43. It is argued that if infact the trial court was categorical that the evidence showed that the Appellants were only standing it meant that there was no evidence of any wrong doing on their part. **Section 20 (1) and (3) of the Penal Code provides thus:**

“(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b).....

(c).....

(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counseling or procuring its commission.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission”.

The Appellants herein were the primary participants in the commission of the offence that was actually committed therefore they were principal offenders.

44. They notified the complainant of their intent to do the damage. And, they proceeded to take the Law into their hands irrespective of the fact that the act of destruction was against the law, therefore the act done was wilful and unlawful.

45. From the foregoing the appeal succeeds partially. On count two (2), I quash the **conviction** and **set aside the sentence meted out. The fine, if paid shall be released to the Appellants.**

46. However, on the 1st and 3rd count, **I uphold the conviction and sentences meted out, save that the sentences will run consecutively.**

47. It is so ordered.

Dated, Signed and delivered at Kitui this 27th day of September, 2019

L.N. MUTENDE

JUDGE