



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 93 OF 2011

JOHNSON WACHIRA KIMARU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 282 of 2010 (Hon. Cheruiyot, Resident Magistrate) on 8th June, 2011)

JUDGMENT

The appellant was charged with two counts of forgery contrary to **section 350(2)** of the **Penal Code, cap.63** and obtaining registration of land by false pretences contrary to **section 320** of the same code. In the 1st count, it was alleged that on or about the 17th day of March 1997 at unknown place within the Republic of Kenya, jointly with others not before court, the appellant forged a certain document, namely title deed No. Gatarakwa/Gatarakwa/Block III/543 in the name of Johnson Wachira Mukiri purporting it to be a genuine title deed issued and signed by Joseph Sebastian Mukiri, a land registrar in Nyeri.

According to the particulars of the 2nd count, on or about the 17th day of March 1997 at unknown place within the Republic of Kenya jointly with others not before court with intent to defraud obtained land registration number Gatarakwa/Gatarakwa/Block II/543 by falsely pretending that he had acquired the said land legally from the late Beth Wangechi Kimaru a fact he knew to be false.

The appellant entered a plea of not guilty to both counts. Upon the conclusion of his trial he was acquitted of the 1st count but convicted of the 2nd one. He was fined the sum of Kshs. 20,000/= or to serve 9 months in prison in default of fine.

He appealed against the conviction and in his petition of appeal dated 4th of June 2011 and filed in court on 7th of June 2011 he raised only 3 grounds of appeal; these are that, first, the learned magistrate erred in law and in fact for failing to find that the prosecution had totally failed to prove its case beyond reasonable doubt as required by law; second, the learned trial magistrate erred in law for totally failing to take into account the appellant's evidence and that of his witnesses in his judgment; and, finally, the learned trial magistrate erred in law for relying on mere suspicion to convict the appellant.

In order to appreciate whether there is any merit in the appellant's grounds of appeal, and whether the learned magistrate was correct in convicting him on the 2nd count, it is necessary to look at the evidence on record. And this being the 1st appellate court, it is not necessarily bound by the findings of fact of the trial court although it is important to bear in mind that this latter court had the advantage of seeing and hearing the witnesses.

The appellant's brother John Benson Ndung'u (PW1) recalled that in 1997 his late mother, Betty Wanyeki Kimaru told him that their land, **Title No. Gatarakwa/Gatarakwa/Block II/543** had been transferred, apparently without her knowledge. He therefore reported the matter to the chief but it would appear that the case was taken up by the Land Disputes Tribunal which, according to his evidence, resolved the dispute in favour of his mother. As I understand his evidence, the Tribunal further ruled that the land was to be subdivided into three portions each of which was to be registered in the names of himself, his brother, the appellant; and their sister, Miriam Wanjiru Kimaru. It was also his evidence that the award by the tribunal was filed in court and adopted as its own judgment.

John Ngunijiri Ndirangu (PW5), who participated in the tribunal proceedings, apparently as a village elder, alluded to the findings of the tribunal that the land was to be shared out as indicated in Ndungu's testimony. Similarly, **Charles Kabetha Kimaru (PW6)**, a step brother to the appellant, testified that he attended the Disputes Tribunal held a session on 12th January, 2001 in which the dispute between the appellant and the late Beth Wangechi Kimaru was resolved to the effect that the land should be shared out amongst the appellant, his brother and sister.

Ndung'u (PW1) testified further that the judgment of the court was not executed; instead, the appellant claimed that the entire parcel of land was his. And it was during the succession proceedings in respect to their mother's estate that the appellant produced a certificate of official

search from the lands registry showing that he was the registered proprietor of the land in issue.

At this point, the police took up the matter and upon investigations it was established that the title which the appellant held was forged. Based on outcome of the police investigations, the appellant was charged, as noted, with the two counts of forgery and obtaining registration by false pretences.

Joseph Sebastian Gitonga Mukiri (PW2) testified that he was an employee of the Ministry of Lands and Settlement between 1972 and 2000 and at one point during his service to the Government, he was the Assistant Land Registrar at the Nyeri lands registry.

His evidence was that on 1st of December 2009 he was summoned to the provincial Criminal Investigation Department headquarters at Nyeri where he was shown a title deed in respect of the land referred to as **Title No. Gatarakwa/Gatarakwa/Block II/543**; the deed showed that the land was registered in the name of the appellant and his attention was drawn to the authorising signature of the title appearing on the 1st, 2nd and 3rd pages of that title. According to him the signatures looked like his though they weren't. In any case, signature authorising the current proprietorship was also missing.

It was his evidence that, ordinarily when the title to land changes from one person to another, the land registrar has the duty to sign apparently as a means of endorsing the change in proprietorship of the land. In the absence of the signature, so he testified, the transaction is incomplete but failure to sign in itself does not make the title 'fake'. He admitted that the title deed in issue was issued when he was the authorising officer at the Nyeri lands registry.

On her part, **Beatrice Wairimu Mwai(PW3)**, a land registrar based at Nyeri land registry at the material time, testified that on 19th of June 2007, she issued an official search in respect of **Title No. Gatarakwa/Gatarakwa/Block II/543** to the late Beth Wangechi Kimaru who was indicated in that search as the proprietor of the land. On 28th October, 2009, she issued another search on the same parcel of land to the appellant; this time round, the appellant was shown as the land's registered proprietor. She realised later on the same day that the registration of the appellant as the owner of the land was erroneous because the entry in respect of his ownership of the land on the green card had not been endorsed by the land registrar; in other words, the entry had not been signed for. She then reported the matter to provincial criminal investigation officer's office.

The document examiner, Assistant Commissioner of police, **Emanuel Kenga(PW4)** compared the signatures on the title deed and the specimen signatures of **Joseph Sebastian Gitonga Mukiri (PW2)** and established that the two sets of signatures were inconsistent. He produced his report to this effect.

Lydiah Wanja Mukuha (PW7) testified that she was a civil servant attached to the District Officer's office at Mweiga and confirmed that the appellant had booked for Land Control Board meeting minuted as No.17/1 of 1996. According to the records from the District Officer's office, the meeting was deferred. She confirmed that no application for consent was ever made.

Finally, the investigations officer **Corporal Zablon Wambani (PW8)** testified that the complaint against the appellant was reported by **Ndung'u (PW1)**. He also established **Beatrice Wairimu Mwai (PW3)** had earlier reported the same complaint to the police. In the course of his investigations he recovered the original title deed of **Title No. Gatarakwa/Gatarakwa/Block II/543** from the appellant. The officer also established that the transfer of the title to the appellant had not been entered in the presentation book at the lands registry. The green card showed that the land had initially been registered in the name of the Government of Kenya but subsequently transferred to Beth wangechi Kimaru on 16th June, 1987. An entry itemized as No.4 on the card showed that the land had been transferred to the appellant on 17th March, 1997 but that the entry had not been endorsed by the Land Registrar.

The investigations officer interrogated **Joseph Sebastian Gitonga Mukiri (PW2)**; he denied having signed the title deed which the appellant held. He confirmed that in the face of this denial he subjected the Gitonga's specimen signatures and the signatures on the title document to the document examiner whose evidence, as noted earlier, was that the specimen signatures were inconsistent with the signatures on the title document.

The officer reiterated the evidence of **Lydiah Wanja Mukuha (PW7)** that a meeting of the Land Control Board had been booked for 2nd January, 1996 but nothing was deliberated upon on that date because the records showed that the meeting was deferred. The investigations officer also established that the tribunal award which the complainant had made reference to earlier in his testimony was adopted in the **Chief Magistrates Court Case No.17 of 2001**. He corroborated the complainant's evidence that the land in issue was to be shared between the accused, the complainant and their sister. Each of them was to get two acres.

When the appellant was put on his defence, he opted to give a sworn testimony and testified that indeed the late Beth Wangechi Kimaru was his mother and that she passed away in 2003. According to the appellant, he purchased certain shares from Gatarakwa Farmers Company out of which he apparently, bought the land in issue. He produced the receipts in acknowledgment of payment for the shares but were all in his late mother's name. His explanation for this was that he intended to buy more land than what the company allocated to an individual hence the use of his mother's name. When he obtained the title in his mother's name he decided to change it into his own name and for this reason they proceeded to the land control board at Mweiga. It was his evidence that the Board sat on 2nd January, 1996 but no deliberations were made on that date apparently because the District Officer, who ordinarily chaired land control board meetings, was absent. He then proceeded to Naromoru because the same District Officer served this area.

During his cross-examination he admitted that the title was originally in his mother's name and that he was directed to go to Naromoru for the land board's consent to transfer the land to his name. His evidence was that the transfer was approved.

His sister, **Miriam wanjiru Kimaru (DW2)** testified and supported his evidence that their late mother transferred the land to the appellant voluntarily since the appellant had bought the land in the first place. She also testified that the first time they attended the land control board

meeting, they were told to go back with their siblings. However, the rest of her siblings did not attend any subsequent board meeting.

Simon Wahome Gachiri(DW3) also testified in defence of the appellant and stated that he and the appellant bought shares together from Gatarakwa Farmers Company; however, he could not tell whether the appellant had been sent by his mother to buy the shares or he was using his own money; he also had no idea in whose name the title of the land in question had been registered.

With this Gachiri's testimony the appellant rested his case.

Of concern to this Court is the second count for which the appellant was convicted. **Section 320** of the **Penal Code** which is the legal basis of this count states as follows:

320. Obtaining registration, etc., by false pretence

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.

The case against the appellant is that he obtained the registration of **Title No. Gatarakwa/Gatarakwa/Block II/543** in his name and held himself out as the owner of the parcel of land registered under this title when he knew that he was not its owner. In the words of section 320 of the Penal Code, he procured the registration of this title as the registered owner of the land it represents by falsely pretending that the land had been legally or lawfully transferred to him.

When I consider the charge and information constituting the prosecution case against the appellant, I am persuaded that, in the light of section 320 of the Penal Code, all the prosecution had to prove was that the transfer and subsequent registration of the appellant as the proprietor of **Title No. Gatarakwa/Gatarakwa/Block II/543** was illegal and that despite such tainted registration, the appellant had held himself out as having been properly registered and therefore he was the absolute proprietor of this particular parcel of land.

I am satisfied that the prosecution met this threshold; its evidence, which I find uncontroverted, was that the registration of the appellant as the proprietor of was tainted by illegalities which were no doubt deliberately orchestrated at the appellant's behest for the sole purpose of misrepresenting himself as the registered owner of **Title No. Gatarakwa/Gatarakwa/Block II/543**. A clear example of these illegalities is when the appellant himself booked a land control board meeting ostensibly to have the land transferred from his late mothers name to his name.

If it was the appellant's mother's intention to transfer the land to him as a gift, as the appellant appeared to suggest, then it was his mother who ought to have sought to secure this meeting, since as the registered proprietor, it was logical that she was the applicant who ought to have been seeking the consent for the transfer of the land to the appellant.

Be that as it may, even if the appellant was to be given the benefit of doubt that he secured the meeting of the Land Control Board, **Lydiah Wanja Mukuha (PW7)** confirmed that no meeting took place though it was initially minuted; in any case, according to her evidence, there was no application for consent to transfer the land to the appellant; at least, there wasn't any in the records of the relevant Board.

The appellant himself confirmed in his testimony that the consent was not obtained from Mweiga Land Control Board and that he was referred to Naromoru where he was presumably given the consent. However, there was no any evidence that any consent had been given whether by Mweiga Land Control Board or by the Naromoru Board or that any other board, for that matter, deliberated on the transfer of the land in issue from the late Beth Wangechi Kimaru to the appellant.

My humble view is that the moment the prosecution led evidence to the effect that no land control board meeting on transfer of the land from Beth Wangechi Kimaru to the appellant had been held and, more importantly, there was neither the application for consent to transfer nor was any given, the evidential burden shifted to the appellant to demonstrate that indeed an application for such a consent had been made and that the relevant control board had not only been convened but also that the consent to the transfer the land to the appellant had been granted. Without discharging this burden, the prosecution case in this respect was neither shaken nor controverted.

It follows that, and here I agree with the evidence of the complainant that Beth Wangechi Kimaru may not have been aware that a board meeting was scheduled to deliberate on the transfer of her land to the appellant. At the very least, she did not consent, and there was no evidence to the contrary, to the purported transfer. If there was any consent nothing would have been easier than the appellant producing it at his trial.

The prosecution also presented evidence that there was no application for transfer of land that was presented at the land registry. The presentation book in which such application ought to have been recorded did not reveal such an application. The logical conclusion that can be made from the absence of the registration of the application to transfer or the transfer form itself at the lands registry is that the late Beth Wangechi Kimaru neither signed any transfer form nor presented any application of transfer of her land to the appellant.

No wonder therefore the purported transfer of land from Beth wangechi Kimaru to the appellant entered on the register, as entry no. 4 was not countersigned by any land registrar. It is also not surprising that the signatures on the title deed were found to have been forged.

Notwithstanding all these omissions and illegalities, the appellant held on the title deed that purported to depict him as the new owner of **Title No. Gatarakwa/Gatarakwa/Block II/543**. He defended his registration mainly for the reason that the land had been his all along. As far as I understand his defence, it did not matter that he may have misrepresented himself as the owner of the land through manipulating the process by which he acquired the title deed since the land was his from the very beginning.

I agree with the learned magistrate that there was no much substance in the appellant's defence. First, there was no evidence that this land ever belonged to him. The receipts he himself produced to demonstrate how the land was acquired were in the late Beth Wangechi Kimaru's name. His allegation that he purchased the land in her name was wanting in the sense that there was no evidence to support it. In any event, even if it was to be assumed that the land was the appellant's but was registered in the deceased's name it could only be transferred back to his name through legally accepted means. It did not follow that since, in the appellant's view, albeit mistaken, the land belonged to him it was open to him to procure for himself the registration of Title No. **Gatarakwa/Gatarakwa/Block II/543** as its owner by falsely pretending that the land had legally been transferred to him by the late Kimaru.

In these circumstances I am satisfied, as the learned magistrate was that the prosecution proved its case against the appellant beyond reasonable doubt. It follows that his appeal against conviction fails. The sentence was not questioned and therefore I have no reason to delve into it. The appeal is dismissed.

Signed, dated and delivered in open court this 21st March, 2018

Ngaah Jairus

JUDGE