



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 123 OF 2017**

**ELIZABETH ACHIENG NYANYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant **ELIZABETH ACHIENG NYANYA** was charged with Forgery contrary to Section 350 of the Penal Code and was arraigned before the Senior Magistrate Court at Ukwala in Criminal Case No. 260 of 2017. The substance of the charge and every element thereof was read to the accused in a language she understood. She pleaded not guilty to the charges.

2. The facts as per the Charge Sheet are that on the 2<sup>nd</sup> day of January, 2010 in Sega area in Ugenya Sub-County within Siaya County, the accused jointly with others not before court, with intent to defraud, forged a title deed number NORTH UGENYA/ SEGA 1796 purporting it to be what it was in fact not.

3. On Count 2, she was charged with Making a False Document contrary to Section 347 (a) of the Penal Code whose particulars are that on the 2<sup>nd</sup> day of January, 2010 in Sega area in Ugenya Sub-County within Siaya county, jointly with others not before court, made a title deed number NORTH UGEYA / SEGA/ 1796 purporting to be what in fact is not.

4. The alternative charge was Conspiracy to Commit a Felony contrary to Section 393 of the Penal Code whose facts are that on the 2<sup>nd</sup> day of January, 2010 in Sega area in Ugenya Sub County within Siaya County jointly with others not before court, conspired together to commit a felony, namely forgery of a title deed number NORTH UGENYA/ SEGA / 1796.

5. After full trial the Appellant was found guilty, convicted and sentenced on Count 1 to serve 9 months imprisonment and on Count 2 to serve 6 months imprisonment which sentences were held to run consecutively.

6. Aggrieved by the judgment and sentence, the Appellant through her advocates filed a Petition of Appeal on grounds which can be summed up as follows:-

*(a) The key ingredients of the charge were not proved by the prosecution.*

*(b) The accused was convicted based on the wrong provision of law and the conviction and sentence thereof illegal.*

*(c) Compromised the right of the accused by shifting the burden of proof.*

*(d) The prosecution witnesses tendered contradictory evidence at trial.*

*(e) Convicting the appellant on a charge not properly before the trial court.*

*(f) The prosecution failed to prove the charges to the required standard of proof.*

7. This court being a first appellate court is obliged to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis so as to draw its own findings and conclusions then compare its findings vis a vis that of the lower court, bearing in mind the fact that I never saw or heard the witnesses as they testified. See **Okeno v The Republic** [1972] EA32, 36

8. All the above counts were denied by the Appellant.

9. The Prosecution called a total of 5 witnesses.

10. PW1 Christian Odhiambo Oluoch and his brother (PW2) Tonny Omondi testified on oath that they discovered that their deceased mother's land had had been transferred to and registered in the name of the accused Elizabeth Achieng Nyanya which discovery was made on 9.9.2016 when they went to the Ukwala Lands Office.

11. It was PW1's testimony that his mother Lilian Akinyi Omollo died on 29.7.2007 and at the time of his mother's death, the land was still registered in his mother's name and that the transfer and subsequent change to the accused's name was effected on 2/1/2010.

12. It was PW1's further evidence that he and his brother PW2 noted that there was a registration and the registration was done by one Stephen Oluoch (PW3) who is their uncle who admitted to having been in custody of the title deed of their mother up until the time it disappeared in 2010 and that when they asked him about it, he claimed that it had been stolen by the Appellant and they reported the matter to Ukwala police station.

13. PW1 stated that he had never seen the accused or known her to live with their uncle as husband and wife.

14. PW2 stated that he had lived with the appellant in Kakamega when he (PW2) was staying with their uncle and the Appellant would come to visit.

15. PW3 testified that he comes from Segla but lives in Kakamega, that the Appellant was his girlfriend. He further testified that when he discovered that the title deed was stolen, he reported the matter to Siaya Police Station. He further stated that he was then informed that for a transfer to be done, a surveyor must be present and details of the person involved in the transfer are registered and that if one was to acquire property of a deceased person, it must be through succession process.

16. It was the evidence of PW3 that the Green Card from the Register of Lands showed that succession had been done by a trustee and that it was then that he placed a restriction.

17. PW3 further testified that although the Appellant averred to having title to the said land, on being questioned, she could not explain the manner in which she came to acquire the same. He stated that he had 3 title deeds kept in a metal box in his house and would occasionally leave the Appellant in his house as she was his girlfriend. He stated that on noticing that the title was missing he reported the matter to Kakamega Police Station. He also stated that the subject land title in favour of the Appellant had since been revoked/ cancelled and been reverted to the name of Lilian Akinyi Omollo, his deceased sister.

18. PW3 further testified that no succession was ever carried out in relation to his late sister's estate. He further stated that the Appellant was his girlfriend for three months by the time the title deed disappeared.

19. In Cross examination by the appellant PW3 reiterated that he reported the disappearance of the title deed at Kakamega Police Station although on the flip is the OB numbers of Siaya and Ukwala and not Kakamega Police Station.

20. PW4 No. 62892 Corporal David Warutumo testified that he received a report from PW1, PW2 and Krishan Odhiambo Oluoch that a title deed in the name of their deceased mother had been changed and registered in the name of another person without their knowledge and that due process of succession was not followed to enable a transfer in favour of their appellant. They were in the company of PW 3 Stephen Oluoch their uncle. PW4 also stated that as he went on to register the case before the trial court, he realized that the said parcel of land changed ownership even as the case was still going on in court and on going to the office of the District Lands Registrar in September, 2017 to inquire on the same, he was given a Green Card accompanied by a letter from the District Land Registrar (District Land Registrar Ugenya Ugunja Sub-County, Mr Dickson Okore Dolo) dated 8.9.2017 addressed to the DCIO stating that the land parcel earlier registered in 2010 as belonging to the Appellant had thereafter been cancelled by unknown persons and shown as an error and thereafter a restriction entered on 20.7.2017. he stated that the appellant could not have committed the forgery without the assistance of persons working in the Lands Office.

21. PW5 Dickson Okore Dolo who was the Land Registrar Ugenya- Dolo Dickson testified that he had worked since April 2016 in the current office and that the Appellant got registered as owner of the parcel land and title issued by the then Land Registrar in Siaya and from the record it showed that it was acquired through succession.

22. PW5 also stated in testimony that he did not see the RL7-a form confirming ownership to another person upon death of the owner of land and stated that the title deed issued to the Appellant was later on cancelled on a date that was not disclosed though the records showed that the title was cancelled by the former Land Registrar- Mr Akello on 13.10.2015 and that there was a Kenya Gazette Notice to that effect.

23. PW5 stated that the Appellant could not do the said forgery without the assistance of other people preferably officers from lands office.

24. On being placed on her defence, the appellant gave sworn testimony and stated that it was the surveyor Vincent Muchora who was given all the documents necessary to produce title upon directions by PW3 who gave them the title. She stated that she lived with PW3 as husband and wife in Kakamega from 2002 after courting from the year 2000 and that during that time she lived with the deceased sister to PW3 Lilian Akinyi before she died and that she came to live with her two children PW1 and PW2 herein during all school holidays. She produced a photograph showing that PW3 attended her grandmother's funeral in 2003.

25. The two later parted and later the PW3 had the appellant arrested together with her mother from Segla for allegedly threatening to kill PW3. She produced copy of bod and exhibit showing she had been charged at Ukwala Law Courts in 2007 and that after the death of Lilian Akinyi, PW3 asked for the appellant's forgiveness and send people to her home to seek for reconciliation. She accepted. She however had bought land in Kakamega using her own money and had balance left but when they parted, PW3 allegedly took all her documentation so

when they reconciled she asked for the said documents and learnt that he had registered the land in his names after paying the balance of the purchase price, and settled therein her co-wife. The Title was Isukha Shirere/4736 which the PW3 told her he had settled her cowife on it. She produced a search certificate for the said title. PW3 then promised to give the appellant an alternative land in Segwa. She testified that the matter rested until she conceived and gave birth to a son. She produced his birth certificate as an exhibit. PW3 then asked the appellant for her national identity card with a view to taking her to see the land he had allocated her to replace the Kakamega land wherein he had settled her cowife. She went with him and he told her that the land belonged to his sister and when she inquired on what would happen to his sister's children, he told her that they had been allocated land at their father's ancestral home in South Nyanza and explained that he was the one who had given money to his sister to buy that land he allowed the appellant to plough the land together with her friend Judith Adhiambo her babysitter.

26. In 2010 February PW3 called the appellant and asked her to go to the lands office to collect the title deed. He had previously asked her to send kshs 7000 to him to give to the people who were processing the title to the land. She sent Mpesa and the money went to Vincent Muchora.

27. Later in her presence, the secretary to Mr Muchora gave PW3 the title deed. After a short while the two disagreed and he went to Kakamega and lived there. In the same year 2010 the appellant received a letter asking her to go to the Land Disputes Tribunal. She produced proceedings from the Tribunal.

28. Later she was being sought by the Police on account that she had stolen a title deed. She was charged in court with the offences.

29. DW2 Judith Adhiambo testified and corroborated the appellant's evidence that indeed in February 2010 the PW3 and the appellant went to her house and requested her to baby sit for her the baby so that they could go to collect a title deed for the land he had given to the appellant after he had given her land to his elder wife.

30. The appellant also called DW3 and W4 who confirmed accompanying PW3 to her home to seek reconciliation of the appellant and PW3. She further called DW5 the Surveyor Mr Muchora who however denied knowing anything to do with the alleged forged title and only admitted knowing her and her husband and the fact that they were his customers in several land survey matters.

31. From the trial record as reproduced in brief above, Issues raised by the Appellant's counsel in their grounds and which calls for consideration are:-

1. *Whether the charge was defective, convicting her on a non-existent charge not before the court;*
2. *Whether the provisions of Section 134 of the Criminal Procedure Code were offended?*
3. *Who bears the burden of proof and whether the the burden of proof was indeed shifted.*
4. *Was the prosecution evidence adduced at trial contradictory and what's the effect thereof if any?*
5. *Should the appellant be acquitted?*

32. It was submitted that the Appellant could not have caused transfer of the land to her name by solely acting on her own and that in all fairness all the other persons ought to have been brought before court so as to establish the veracity of the whole transaction. That there was need for the former Land Registrar (Peter Akello Nyanya) of Siaya who had since been transferred to Ukwala to be called as a witness and to secure his attendance so that he would shed light on the transfer process and produce documents to support the change of title. That the law ought not to be used to apportion blame rather be used to prove the culpability of a person for as matters stood, it was not clear who caused the changes in title both ways that is to the Appellant and again to the deceased.

33. It was further submitted that Section 350 of the Penal Code under which the Appellant was charged provides that "any person who forges any document of title to land, will, judicial record, power of attorney, bank note....is liable to imprisonment for life, and the court may in addition order that such document be forfeited. While section 345 of the Penal Code provides in definition that forgery is making of a false document with intent to defraud or to deceive.

34. The operative word here is forgery, as the word suggests the name forgery means fake i.e. not real. The Black's Law Dictionary, 9<sup>th</sup> edition defines it as the act of fraudulently making a false document or altering a real one to be used as a genuine.

35. The High Court of India in the case of *Sukanti Choudhury vs State of Orisa* held that the following ingredients are necessary for an offence of this nature to be proved:-

- i. The document must be forged.*
- ii. Accused used the document as genuine.*
- iii. Accused knew or had reason to believe that it was a forged document, and*
- iv. Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.*

36. Thus 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.

37. In the Nigerian case of *Alake vs The State* the court listed the following as the ingredients of the offence of forgery:-

*i. That there is a document or 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.*

38. The trial court properly observed and stated at page 115 of the proceedings and I quote “I find that the prosecution has proved beyond reasonable doubt that the title deed of land parcel NORTH UGENYA/ SEGA/ 1796 was obtained by the accused through forgery”... and in the same breath says “it is however my view that the title deed in the name of ...was not found to be forged as it bore the signature of the land registrar”. Further at page 116 she states “I further find that Count 2 will not stand. This is because the document procured by the accused was a title deed signed by the land registrar and sealed so it cannot be said to be false”

39. On count 2, the Section the Appellant is charged with and found to be guilty of is Section 393 of the Penal Code, which provides “that any person who conspires with **another** to commit a felony,...” the question is where is the **another** to prove that indeed there was conspiracy, which takes us back to the contention on the first paragraph above on analysis that there needed other persons prosecuted in relation to this matter.

40. The Trial Court is attempting to state that procure as under Section 320 and forgery under Section 350 go hand in hand or in the very least mean almost the same thing. Its judgement is that the Appellant is guilty of procuring registrar of Land Parcel No. North Ugenya/ Segal/ 1796 in her name by false pretense.

41. But what is false pretense, I opine that the trial court misdirected itself in correlating the terms false pretense, forgery and procuring. The Penal Code defines “**False pretence.**” to be under **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.**”

42. The prosecution ought to prove the false pretense with intention to defraud for a charge under the connotation false pretense to stand and nowhere in evidence do we establish that the Appellant represented herself in a manner that was not true. Hence the issue of false, forgery or otherwise related ought not to arise in any way and since there has been no evidence adduced to the effect that she misrepresented herself and the evidence of succession or otherwise is itself doubtful as its not known on whose instructions was the purported succession, transfer or transaction carried out and in considering the requirement of proof beyond reasonable doubt, it would be wrong to speculate that the same was at the instance of the Appellant just because her name was on the title for she reiterates having only been a recipient of a title deed in her name yet the main link to the missing piece of evidence was not called to give evidence.

43. In conclusion to the issue of the charge, I find that the charge the Appellant was convicted of was not proved to the required standard of prove beyond any reasonable doubt and was in fact not the charge she took plea on.

44. In those circumstances I find that the appeal has merit and should be allowed.

45. The above goes on to answer issue 2 of the Appeal too, Section 134 of the C.P.C. states that the nature of offence must be clearly stated for one to be convicted of it. Seeing that obtaining registration by false pretense is a substantive charge on its own, the particulars of the charge thereof ought to have been read to the appellant.

46. Onto issue 3, it's settled in law that the onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts. From the evidence, all the Appellant knows is that she has title in her name, it was the appellant's evidence that she did not know when the entry was made and neither did she do any succession hence no basis upon which the accused was convicted under S. 393 of Penal Code. The Appellant testified that she purchased ISUKHA/SHIRERE/4736 and paid consideration and PW3 paid the balance and registered it in his name then proceeded to give her land in Segal after asking her for a copy of her ID card for transfer of UGENYA/ SEGA/ 1796 and that only when PW3 told her, her title was ready did she go to collect it from Siaya. It was also the Appellant's evidence that PW3 told her he had settled her co wife there and offered to give her another land in Segal to compensate for the one she had been buying.

47. Dw2 in the lower court also gave evidence to the effect that PW3 told the Appellant to collect her title. That PW3 also requested money for processing title deed to which the Appellant sent to one Vincent Muchoro whom I opine too that he ought to have been called as a witness or charged together with the Appellant.

48. The foregoing elucidations however were not accorded the serious considerations by the lower court in its judgment and on substituting the charge with another substantive charge, the effect was to shift the burden of proof to the accused thereby requiring her to explain herself or prove that her allegations were true.

49. On issue 4, while some prosecution witnesses alleged that there was succession, others stated that there was no succession done. It is also not clear whether the Appellant and PW3 were mere boyfriend and girlfriend or whether they were husband and wife and it's noteworthy that

they have a child together and lived together as husband and wife and only separated for a while during a misunderstanding. Yet PW3 states that the Appellant was his girlfriend for 3 months. The prosecution witnesses were also not sure of where the report of theft was made, whether it was in Siaya or Kakamega or who discovered the title missing, which are inconsistencies of fact that go to the helm of the case, and which as earlier stated serve to cast doubt as to the events of the transactions; which doubt ought to have been to the benefit of the Appellant herein.

50. **The Upshot** of all the above is that I concur with the Appellant's contention and the concession by the prosecution Counsel for the state in this appeal that the accused now Appellant ought to have been acquitted for there was no proof beyond reasonable doubt that she committed the offence(s) that she was charged with and or convicted of and that therefore the court misdirected itself by attempting to substitute count 1 with a charge that the accused was not charged with. In addition, the charge under Section 320 of the Penal Code cannot be a lesser charge to a charge under Section 350 of the Penal Code.

51. In the end, this appeal must succeed. The same is accordingly allowed. The conviction and sentence of the appellant by the trial court is hereby quashed and set aside and substituted with an order acquitting the appellant of all the charges. She is accordingly set free forthwith unless lawfully held.

52. Any fine or cash bail paid into court to be refunded. Surety if any to be discharged forthwith and security if any deposited to be returned to the sureties.

**Dated, signed and delivered at Siaya this 30<sup>th</sup> day of July 2018**

**R.E.ABURILI**

**JUDGE**