



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 11 OF 2016

REPUBLIC.....APPELLANT

VERSUS

RICHARD CHERUIYOT.....1ST RESPONDENT

ELIJAH KIPKURUI alias WESLEY.....2ND RESPONDENT

ANTHONY KIPNGETICH.....3RD RESPONDENT

REUBEN KIPKOECH.....4TH RESPONDENT

(Being an appeal from the acquittal in Kericho CM's Cr. Case No. 2494 of 2014. Hon. Ndururi- PM)

JUDGMENT

1. On the 22nd day of July, 2016 the learned trial Magistrate acquitted the four Respondents under Section 210 of the CPC after finding that they had no case to answer.
2. In the 1st Count, Richard Cheruiyot Langat, Elijah Kipkirui Sigei alias Wesley Sigei and Anthony Kipngetch Rutto had been charged with the offence of forgery c/s 349 of the Penal Code.
3. The particulars were that on or before the 14th day of April, 2011, at unknown place within the Republic of Kenya, with intent to defraud, forged a certain minutes for a meeting, purporting it to be genuine minutes for a meeting held on the 4th April, 2011 at Chepchillat Residence.
4. Count II – is a charge of forgery c/s 350 of the Penal Code as against one Richard Cheruiyot Langat (1st Respondent).
5. The particulars being that on or before the 4th day of April, 2012, at unknown place within the Republic of Kenya, jointly, with others not before the Court, with intent to defraud, forged a certain title deed for land parcel number Kericho/Silibwet/1428 purporting it to be a genuine title deed issued by the Land Registrar, at Bomet Land Registry.
6. On the Count III, the 1st Respondent, Richard Cheruiyot Langat was charged with forgery c/s 350 of the Penal Code. The particulars being that on the 4th day of April, 2012, at the Bomet Land Registry, within the Bomet County, jointly, with others not before the Court, with intent to defraud, forged a certain white card for land parcel no. Kericho/Silibwet/1428 purporting entry no. 5 and 6 on the white card were genuine entries entered by the Land Registrar at Bomet Land Registry.
7. Count IV is in respect to one Reuben Kipkoech Ngetich 4th Respondent. He was charged with abuse of office contrary to Section 101 (1) as read with Section 36 of the Penal Code.
8. The particulars being that on the 25th day of March 2011, at Bomet Township Chief's office, within the Bomet County, being a person employed in the public service as a Chief Bomet Township, arbitrary wrote a letter dated 25th March, 2011 indicating that **TAPNYOBI MAIGA** was willing to sell land parcel no. Kericho/Silibwet/1428 to Richard Cheruiyot Langat in abuse of authority of your office.
9. Count no. V conspiracy to defraud c/s 317 of the Penal Code. This charge is as against the four respondents namely:
 - i. Richard Cheruiyot Langat

ii. Elijah Kipkirui Sigei

iii. Anthony Kipngetich Rutto

iv. Reuben Kipkoech Ngetich

10. The particulars being that on diverse dates between the 25th of March, 2011 and 14th April, 2012, at Bomet Township, Bomet County, conspired, with intent to defraud, by means of signing a false minutes of a meeting dated 14th April, 2011 and a letter dated 25th March, 2011 thereby falsely pretending that **TAPNYOBI MAIGA** was willing to transfer land parcel number Kericho/Silibwet/1428 to Richard Cheruiyot Langat by way of sale at Kshs. 5,400,000/=.

11. This is the first appellate Court. It has a duty to re-evaluate and re-consider afresh the evidence on record so as to arrive at its own conclusions.

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12. In his Judgment the learned trial Magistrate observed at page 6-7 his judgment that:

“there based a civil case in the High Court between the 1st accused (1st Respondent) and PW1 touching on ownership of the said piece of land and that PW12 in cross-examination had stated that it was possible that the High Court case in Kericho was filed before the accused persons were arraigned in court in the present case. If this is so, the High Court will be required to examine all the evidence that has been presented in this case in order to determine the issue of ownership of the said piece of land. The High Court is higher in the hierarchy of Courts in Kenya. This Court has only two options in this case, to either convict or acquit the accused persons”...

13. It was the learned trial Magistrate finding that the matter revolved around a debt and it would be best resolved in the Civil Case filed to the High Court at Kericho.

14. Being dissatisfied with the ruling and acquittal, the appellant who is republic has lodged this appeal which is premised on the following grounds:

a) That the learned trial Magistrate erred in law and fact by failing to find that the prosecution had discharged its burden of proof as is required in law.

b) That the learned trial Magistrate erred in law and in fact in placing more weight on the defence case and totally failed to evaluate and place any weight on the prosecution overwhelming evidence.

c) That the learned trial Magistrate erred in law and in fact in that in acquitting the Respondents, he relied on extraneous matters, that were not canvassed either in the prosecution's case or the defence case and based his finding on near non-essential matters leaving out credible testimony by PW1 – PW12.

d) That the learned trial Magistrate erred in law and fact by acquitting the Respondent against the weight of the evidence that was sufficient to warrant his conviction.

e) That the learned trial Magistrate having failed to put the Respondents on their defence grossly denied the prosecution an opportunity to further prove their case based on the weight of evidence by the prosecution witnesses.

f) That the learned trial Magistrate erred in law and fact by disregarding the evidence of PW11, an expert witness and in place chose to appear to take witness stand for the defence.

g) That the learned trial Magistrate erred in law and fact and misdirected himself by holding that identification by recognition by PW1 of a brown man who was working at Bomet Land Registry referred to PW8 yet the conditions for identification were not explored by the Court.

15. It is the prayer by the appellant that the ruling/acquittal be set aside and retrial be ordered.

16. It is noted that this matter has been heard by several Magistrates, Hon. Soita Ag. CM as he then was, Hon. Limo RM as he then was and Hon. Ndururi PM as he then was. Indeed, before Limo RM the matter had proceeded to defence and was awaiting judgment when orders from the High Court to place the matter before the Magistrate in charge for further directions were issued.

19. Hon. Ndururi later heard the case *de novo* and later acquitted the Respondents under Section 210 of the CPC. It is further noted that this is a very old case and it is bedeviled with one allegation after another. Against the prosecutors, the magistrates and even the investigating officers.

20. I have perused the evidence on record and in particular that of PW8 the Lands Registrar and the Document examiner PW11 and the other witnesses for the prosecution and I am satisfied that this is a fit case for retrial.

21. Section 348A of the CPC provides:

“When accused person has been acquitted on a trial by the subordinate court or high court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(3) If the appeal under Section 11 is successful, the High Court or the Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused persons appropriately.”

22. In the prosecutions case, the acquittal was under section 210 of the CPC before the accused persons were given the chance to offer their defence. No conviction can be at this stage. The most appropriate order therefore is that of a retrial. It is noted that this a very old matter. It ought to be given the priority it deserves.

23. The acquittal of the four Respondents under Section 210 of the CPC is hereby quashed and or set aside. The case to be mentioned before the Chief Magistrate for further directions.

24. The accused/respondents to present themselves before the Magistrate in charge Kericho Law Courts on 5th December, 2018 for further orders.

DELIVERED, SIGNED AND DATED THIS 29TH DAY OF NOVEMBER, 2018.

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M. MUYA

JUDGE

In the presence of:

1. Learned Counsel for the Prosecution M/s Inguta
2. Learned Counsel for the Defence Mr. Rotich
3. Learned Counsel for the Complainant Koech and Mugumya
3. Court assistant – Wambany