



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 125 OF 2016**

**PATRICK NJUGUNA RICHU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Patrick Njuguna Richu was charged before the Principal Magistrate's Court Kerugoya Criminal Case No. 498/11 with four counts namely:

- 1) Fraudulent transfer of land C/Sec 320 of the Penal Code***
- 2) Forgery of Judicial documents C/Sec 351 of the Penal Code***
- 3) Forgery of Judicial documents C/Sec 351 of the Penal Code***
- 4) Forgery C/Sec 349 of the Penal Code***

After a full trial, the appellant was convicted and sentenced to pay a fine of Kshs 50,000/- on each count and in default 3 years imprisonment with the sentence to run concurrently.

The appellant was aggrieved with both the conviction and sentence and filed this appeal raising the following grounds:-

- 1. The learned trial Magistrate erred in law and fact in failing to analyze the evidence on record as to whether there was exchange agreement between the complainant Saida Kangangi Mwaniki and the accused in respect of a parcel of land number Inoi/Kimandi/436 and a motor vehicle registration Number KYX 140.***
- 2. The learned trial Magistrate erred in law and fact in failing to make a finding that no known specimen handwriting of Saida Kangangi Mwaniki was used to be compared as against the questioned signature in the exchange agreement, and the ones submitted to the document examiner were taken while the case had already been reported to police.***
- 3. The learned trial Magistrate erred in law and fact in failing to make a finding that no evidence was led as to how the land was transferred from Saida Kangangi Mwaniki to the accused person, yet proceeded to convict the appellant.***
- 4. The learned trial Magistrate erred in law and fact in failing to make a finding that the offence of forgery was not proved at all as against the appellant.***
- 5. The learned trial Magistrate erred in law and fact in failing to make a finding that the complainant was not truthful and candid in her evidence.***
- 6. The conviction was against the weight of evidence adduced.***
- 7. The sentence was harsh and excessive in the circumstances.***

The appellant prays that the appeal be allowed, conviction be quashed, sentence be set aside and the fine paid be returned.

I have considered the appeal, and the submissions. This is a first appeal which is normally a retrial as this court is supposed to consider and evaluate the evidence and come up with its own independent finding. However the court in doing so leaves room for the fact that unlike the

trial court which had the benefit of seeing the witnesses and assess the demenour this court did not have such opportunity and must leave room for that. The appellant has a legitimate expectation that the evidence will be evaluated afresh and an independent finding be reached. This was held in the case of Okeno -v- R(1972) E. A 32. The Court of Appeal in John Oketch Abongo -v- R (2000) eKLR stated as follows:-

***“The duty of the 1<sup>st</sup> appellate court in regard to evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and in appropriate circumstances even to make its own independent findings and conclusion. In doing so however the first appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony .....*”**

#### **Summary of the Evidence**

##### **PW 1 – Saida Kangangi Mwaniki**

She was the registered proprietor of the suit land **Inoi/Kimandi/436** jointly with her father. In 2009, her house burnt down and her title deed was therein. She reported at Wang’uru police station and was issued a police abstract. Upon conducting a search at Land’s registry she discovered that the land had been transferred to Patrick Njuguna Richu the appellant. She first saw him at the proceedings in LDT where he alleged that he bought the suit land in exchange for a vehicle she denied executing the sale agreement in exchange of the land and motor vehicle.

##### **PW 2 – Fredrick Njanja Nduku**

He was given documents being I.D, PIN, succession forms, old Title deed and forms RL 7, of land parcel No. Inoi/Kimandi/436 and 19 in respect of PW 1 to effect transfer of suit land to the appellant. The appellant introduced to him a lady called Saida Kangangi but she was not the complainant in this case. The appellant had also given him the old title deed, death certificate and Succession Cause forms from Nanyuki Law Courts.

##### **PW 3 – C.I Alex Muongera**

He is the document examiner and he received disputed documents together with PW 1 specimen signature. He carried out examination and it was noted that the same were made by different authors, that is the signature of PW-1- and the exchange agreement.

##### **PW 4 – Alice Muthiora**

She is the EO of Nanyuki Law Courts and she produced file **Nanyuki Succession No. 23 of 2004** but stated the same related to the estate of Peter Munyi Muhoho and the petitioner was Charles Kuria Mwangi.

##### **PW 5 – James Gakuya Gachoki**

The appellant informed him he had bought land and wanted someone to lease it. However, he did not lease it since the appellant never showed him where the land was.

##### **PW 6 – Rose Gaturi Kariuki**

She stated that PW 1 wanted to take a loan with the suit land but could not do so since it was registered with her father and herself. Later succession cause was instituted at Nanyuki. She confirmed that PW 1 and the appellant agreed to exchange the suit land with motor vehicle but PW 1 was conned off the vehicle by some brokers.

##### **PW 7 – J. Kilimo**

He is the District Land Registrar Kirinyaga who confirmed that the appellant got registered as proprietor of the suit land pursuant to letters of administration and confirmation of grant from **Nanyuki Succession No. 23 of 2004** and transfer forms RL 7 and 19.

##### **PW 8 – PC John Mwiti**

He is the IO whereby he received complaint from PW 1 and discovered that the land was registered under appellant’s name pursuant to **Nanyuki Succession No. 23 of 2004**. He also confirmed from Nanyuki Law Courts that the file related to different parties.

The appellant informed him he exchanged the suit land with motor vehicle vide sale agreement and upon taking to document examiner found the same to be forgery.

##### **DW 1 – Patrick Njuguna Richu**

He was categorical that he exchanged the suit land with motor vehicle KYX 140 and agreement was done before Kamuga advocate. They went to Land Control Board with PW 1 and the transfer was effected. PW 1 later summoned him to the LDT but they found the land to be

his.

From the evidence tendered by the prosecution it is clear that the complainant (PW-1-) was the registered proprietor of Land Parcel No. Inoi/Kimandi/436. Her testimony was that she never transferred the land to the appellant but only came to know that the appellant was registered when she conducted a search in the lands office. Evidence was tendered by PW-2- Fredrick Njanga Nduku that the appellant is the one who gave him the documents to effect the registration at the Lands office in the year 2004 and the woman the appellant presented as Saida is not the complainant in this case. The Succession Cause quoted Cause No. 34/2004 was false and did not relate to the estate of the deceased father of the complainant.

The appellant was the originator of the documents which were presented in the Land Office to obtain a title deed. I am of the view that the evidence tendered before the trial Magistrate was overwhelming and sufficient to prove the charges against the appellant.

The appellant raised seven grounds of appeal. However having considered the submissions by the appellant's counsel Mr. Maina Kagio, he collapsed the grounds into two namely:-

**(i) Fraudulent transfer of land.**

**(ii) Forgery.**

#### **Fraudulent transfer of Land:**

It is submitted that PW-2- changed his story and said the documents were given to him by the appellant. The evidence appear at Page 16 of the record from line -5-. He stated:-

***“Sometimes in the year 2004 I had gone to the land office and was given some documents by the complainant, a lady who isn't before this court. I took them to Land Registrar so the one Patrick Njuguna Richu would be issued with a title deed.”***

Then at line 12 – ***“The only person I knew was Patrick Njuguna Richu.”***

When the witness was recalled he stated:-

***“Sometimes in 2004 Patrick called me to Kutus. Njuguna showed me Saida Kangangi but she is not the one who testified. He gave me some documents to take to the Lands Office. They are RL6 and 7 off Land parcel No. Inoi/Kimandi/436.”***

When he was cross-examined he stated that the discrepancies were due to the fact that he was unwell. The records shows that the witness was stood down. The record does not show the reason why he was stood down. It was then most likely that he was unwell. The appellant did not challenge the evidence of PW-2- in his unsworn defence. He confirmed that he entered into the exchange agreement and that she came with the title deed. The appellant did not dispute the said exchange agreement which the document examiner confirmed did not bear the signature of the complainant.

The submission that the Land Registrar stated that for the transfer to go through he needed to have consent of the Land Control Board and transfer is true where there is lawful transfer. The transfer here was on the strength of succession cause No. 23/2004 which the prosecution proved were fraudulent and that they originated from the appellant.

The Land Registrar did not avail the transfer documents, only the green card. The testimony by PW-8- the Investigating Officer is credible that the Land Registrar only gave him the green card. The transfer form according to the Investigating Officer were not available at the Lands Office. The green card at entry No. 14 shows that the transfer to the complainant was vide succession cause No. 23/2014. The land was then transferred to the appellant. The said documents could not support a genuine transfer as the documents relates to different parties. The transfer was not done by the complainant. The evidence on record is that it is the appellant who gave the documents to PW-2- who in turn had the transfer effected and a title deed issued. The appellant was the author of the documents. The title deed was never produced in court. The complainant had no knowledge of any transfer and did not take part in any transaction relating to the land. This the prosecution was able to establish. There is the testimony of PW-5- that the appellant wanted to lease land to him but did not know where the land was situated.

**Section 320 of the Penal Code Cap 63 Laws of Kenya** provides:-

***“Any person who willfully procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of misdemeanor and is liable to imprisonment for one year.”***

The appellant is the one who used fake documents which he gave to – PW-2- to procure the registration. The ingredients have been proved. The appellant had only the exchange agreement which the document examiner stated that it did not bear the signature of the complainant. The submission by the appellant cannot hold because the document examiner stated that the process he subjected the examination of the signatures. The report states; Page 85 of the record;

***“I have considered all the possibilities of natural variations resulting from the time span the handwriting was made, age factor, poor eye sight, writing instrument, natural pen failures and the changing writing habits. My considerations in arriving at my opinion are based on peculiar characteristics in the handwriting that provided me with forensic evidence of non common authorship. For each document I have individually considered the character initialization and terminal strokes, the character***

***construction and their arrangements pen fluency, pen pressure, pen speed curvatures, natural pen lift, character, spacing and their baseline alignment ink distribution in their character, writing quality and the general resemblance.”***

The document examiner stated that the specimen signatures were sufficient for his compassion.

***Section 48 (1)(2) of the Evidence Act Cap 80 Laws of Kenya*** provides:

***“When the court has to form an opinion upon a point of foreign law or science of act or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by person specially skilled in such foreign law, science or are on in questions as to identity or genuineness of hand writing or finger or other impressions such persons are called experts.”***

The trial Magistrate did not err in holding that the transfer to the appellant was through the documents which were forged. This is because she based her finding on the evidence of PW-2- who said it is the appellant who gave him the documents including those from the Succession Cause 34/2004 Forms RL7 and 19. The forms were used to put the land in the name of the complainant and then to appellant's name. It was the same process. This was done between 3/2/2005 and 7/2/2005. PW-2- testified that after he received the documents from the appellant within four days he had a title deed which he gave to the appellant. I find that it is the appellant who procured the registration fraudulently and through false pretences.

Where a person uses false documents to procure registration, such registration is null and void as the transaction is fraudulent. A dealing in land which is laced with fraud cannot confer a title. For all intents and purpose that is a fake title deed. Fraud is committed where a person procures or attempts fraudulently to procure, or is privy to the fraudulent procurement of any entry on, erasure from or alteration of the register of title kept at the Land Registry or any charge or certificate, commits an offence. The prosecution produced a green card showing that the appellant was registered using forged court documents. I find that the prosecution proved the 1<sup>st</sup> count beyond any reasonable doubts.

On the 2<sup>nd</sup> count the appellant was convicted of forgery of Judicial document. It was alleged that the appellant forged Grant of Letters of Administration in Succession Cause No. 23/2004 a Judicial document by purporting it to be what it was not.

On the 3<sup>rd</sup> count he was convicted of forging a certificate of confirmation of grant in Succession Cause No. 23/2004 a Judicial document purporting it to be what it was not.

I will consider these counts together. The prosecution as I have observed above, proved that documents in Succession Cause No. 23/2004 from Nanyuki were forged. The appellant was the author of the documents and the prosecution had proved that the documents originated from him. The possession of the documents and using them purporting them to be genuine to effect the transfer leads to the inevitable conclusion that the appellant is the one who forged the documents.

***Section 345 of the Penal Code defines forgery*** as follows:-

***“Forgery is the making of a false document with intent to defraud or deceive.”***

The prosecution proved that the documents in Succession Cause No. 23/2004 were forged. The prosecution discharged the burden to proof counts 2 & 3 to the required standards. The ground must fail.

On the 4<sup>th</sup> Count the appellant was charged with forgery of the signature of Saida Kangangi on the exchange agreement purporting it to have been signed by Saida Kangangi.

The prosecution tendered evidence from the complainant who denied that she signed the document, and the exchange agreement and Forensic Document Examiner found that the signature on the agreement was not made by the complainant.

Though the appellants stated that his specimen signature was not taken and he relied on the case of ***Nahashon Wachira Maina –v- R. C.R. Appeal 27/2003*** where the Court stated that since the specimen handwriting of the appellant was not taken for comparison with the word ‘paid’ on exhibit 2 how could it be said the appellant wrote that word in ***exhibit -2-***, the ground is sham. The authority is persuasive and is distinguishable from the facts before this court. The appellant never disputed the agreement. He admitted in his defence that he entered the agreement for exchange. What was in dispute was whether the complainant had signed the exchange agreement.

The prosecution proved by expert evidence that the complainant had not signed the exchange agreement. The authority cited related to handwriting but in this case what was in issue was the signature of the complainant. Specimen signatures of the complainant were taken and examined by a forensic document examiner who found that they were not made by the complainant. My view is that failure to take the specimen signature of the appellant was not fatal as his signature was on the exchange agreement ***exhibit -6-*** was not in dispute. He was the originator of the document ***exhibit -6-***. Forgery was defined in ***R-v- Dodge and Harris (1971) 2 ALL E.R. 1523*** where it was stated:-

***“A document is false must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: OMAR BIN SALEM V R (1950) 17 EACA 158, and to defraud is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see SAMUEL –V- REPUBLIC.”***

The prosecution proved that the document **exhibit -6-** was a false document made by the appellant to transfer land to himself for economic advantage as submitted by the State Counsel , that is in furtherance of transfer of Land Parcel No. Inoi/Kimandi/436. The 4<sup>th</sup> count was proved beyond any reasonable doubts.

The appellant raised the ground that the sentence was harsh and excessive. No submissions was made on this ground. I will however address the ground in view of the sentence which was passed.

It is trite law that an appellate court will not interfere with the discretion exercised by the trial court when passing sentence unless it is evident that the trial court took into account an irrelevant factor or that a wrong principle was applied or overlooked some material factors or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

**Section 320 of the Penal Code provides:**

*“Any person who willfully 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 misdemeanor and is liable to imprisonment for one year.”*

**Section 351 of the Penal Code provides:**

*“Any person who forges any judicial or official document is liable to imprisonment for seven years.”*

**Section 349 of the Penal Code provides:**

*“Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.”*

The appellant was sentenced to pay fine of Kshs.50,000/= and in default 3 years imprisonment for each count. In respect of count 2 and 3 the penalty is imprisonment for 7 years and therefore the sentence was not excessive. For count 4 the penalty is 3 years therefore the sentence was also not excessive.

On Count No. 1 where the penalty is imprisonment for one year, the sentence of imprisonment of 3 years in default of payment of fine was unlawful. For counts 2, 3, & 4 the default clause was three years if the appellant did not raise the fine of Kshs 50,000/-. This sentence was wrong because where the provision under which the person is charged does not provide for a fine, the default clause is one year imprisonment. **Section 28(2) of the Penal Code** provides:

*“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-“.*

<u>Amount</u> .....	<u>Maximum period</u>
Not exceeding Sh. 500 ... ..	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500 ... ..	1 month
Exceeding Sh. 2,500 but not exceeding Sh. 15,000 ... ..	3 months
Exceeding Sh. 15,000 but not exceeding Sh.50,000 ... ..	6 months
Exceeding Sh. 50,000 .....	12 months .

The trial Magistrate having opted to impose a fine, the maximum term of imprisonment in default should not have exceeded twelve months. Since the default sentence exceeded the sentence provided, this court will interfere with the sentence.

**Section 354 (3) (ii) (iii) C.P.C** provides:-

**(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -**

***ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or Summary allowance of appeal.***

***(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;***

In the circumstances, with regard to the sentence I set aside the sentence of the trial Magistrate and in its place sentence the appellant to pay a fine of Kshs 50,000/- on each count or in default twelve(12) months imprisonment on each count. In conclusion I find that this appeal is without merits and I dismiss it.

**Dated at Kerugoya this 17<sup>th</sup> day of December 2018.**

**L. W. GITARI**

**JUDGE**