



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 28 OF 2014

ESTHER WANJIRU MURAGURI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 577 of 2011 (Hon. W.A. Juma, Chief Magistrate) on 12th March, 2014)

JUDGMENT

The appellant was charged with the offence of making a document without authority contrary to **section 357 (a)** of the **Penal Code** (cap.63). The particulars of the offence were that on or before the 8th day of January, 2008 at unknown place within the Republic of Kenya, with intent to defraud, without lawful authority or excuse, made a certain document namely, a title deed number **Naromoru/Block 2/Muriru/11** purporting it to be a genuine title deed issued by the land registrar of the Nyeri County. She was also charged with a second count of conspiracy to defraud contrary to **section 317** of the **Penal Code** and here the particulars were that on the 8th day of the of January, 2008 at Nyeri lands office in Nyeri County within the Republic of Kenya, jointly with others not before court, she conspired to defraud a parcel of land by falsifying entry on a green card to purport that Esther Wanjiru Muraguri was the registered owner of parcel of land number Naromoru/Block 2/Muriru/11.

The appellant was convicted on the 1st count but acquitted on the 2nd one; she was sentenced to serve 2 years imprisonment. Being dissatisfied with the conviction and sentence, she appealed to this court and in her petition of appeal filed in this court on 15th April, 2014 she raised the following grounds against the decision of the learned magistrate:

1. The learned trial magistrate erred in law and in fact in failing to find that the prosecution had not proved its case beyond reasonable doubt, thereby occasioning miscarriage of justice to the detriment of the appellant;
2. The learned trial magistrate erred in law and in fact in rejecting the appellant's defence without giving any reasons for the rejection;
3. The learned trial magistrate erred in law in basing her judgment on her own opinion rather than on the evidence on record;
4. The learned trial magistrate erred in law and in fact in rejecting the community service report that recommended a non-custodial sentence for the appellant;

5. The learned trial magistrate erred in law and in fact in rejecting the mitigation by the appellant;
6. The learned trial magistrate erred in shifting the burden of proof to the appellant and thereby occasioning a miscarriage of justice; and,
7. The learned magistrate erred in convicting the appellant when the doubts in the prosecution evidence should have been resolved in favour of the appellant.

The evidence on record reveals that the prosecution case stemmed from what appears to have been a manipulation of records in respect of registration of the proprietorship of a parcel of land known as Naromoru/Block 2/Muriru/11. The evidence of **Harrison Nyaga Kariuki (PW1)** was that his late wife, Lucy Gathoni Kariuki, was the registered absolute proprietor of this particular parcel of land; she acquired it by virtue of being a shareholder of Waruini Holdings, a land buying company. Prior to her registration as the owner of this property there was an ownership dispute but which was resolved by the court in her favour. She was subsequently registered as the owner of this particular parcel of land on 10th September, 2007. A copy of the green card showing the nature of the title, the registration section, the approximate area and the history of the registration showed that Lucy Gathoni Kariuki was entered in the register on 10th September, 2007 as the absolute proprietor; she was subsequently issued with the title deed on 25th October, 2007.

Unfortunately, Lucy Gathoni Kariuki, died on 21st August, 2009. Sometime in March 2011, her husband, Harrison Nyaga Kariuki (PW1) who survived her decided to fence the land and therefore he instructed a surveyor to identify or fix the beacons marking out the extent of the land. It is then that a stranger, whom he described as “a broker” approached the surveyor and told him that the land belonged to Esther Wanjiru Muraguri, the appellant herein.

When the surveyor demanded ownership documents, he was shown a title deed dated 8th January, 2008 and a certificate of official search according to which the appellant was indicated as the registered proprietor of the land.

Since he still held the original title deed in the name of his deceased wife, the complainant reported the matter to the police who arrested the appellant and subsequently charged her with the offences under **sections 357(a) and 317 of the Penal Code.**

The complainant denied in cross-examination that his wife could have sold this land to the appellant without his knowledge.

From the complainant’s evidence, it is apparent that there were two title deeds held by two different persons in respect of the same parcel of land. The state believed the title held by the complainant to be the genuine one and for this reason its case against the appellant was premised on what it believed to have been a manipulation of ownership records in respect of the parcel of land in issue and the making of a counterfeit title to show that the appellant was the registered owner of this land. In the process, the appellant is held to have committed crimes for which she was charged.

In support of the prosecution case, **Machora Hezekiah Oira Mogere (PW2)**, the land registrar who was indicated to have signed and issued the title deed to the appellant, testified that the signature purportedly of the land registrar on the title deed held by the appellant was not his. In any event, he left the Nyeri land registry office in the year 2008 and therefore he could not have signed the title in 2010 when this particular title was proved to have been printed by the Government Printer.

Joseph Taura Bao (PW3) the other land registrar who worked at the Nyeri lands office in April 2014 when the police investigations were underway, confirmed that according to the records available, the land parcel in issue was initially duly registered in the name of Lucy Gathoni Kariuki and although the green card showed the latest owner to be the appellant, there were no documents or records to support her registration as the owner of the land; for instance, the purported transfer of the title to her was not even

reflected in the presentation book.

On the other hand, **Beatrice Wairimu Mwai (PW8)**, also a land registrar, testified that she issued the title deed in respect of **Naromoru/Block 2/Muriru/11** to Lucy Gathoni Kariuki on 25th October, 2007. She was then based at Nyeri lands registry as the district land registrar.

The document examiner, **CIP Jacob Oduor (PW4)** testified that he examined a sales agreement purportedly executed between the late Lucy Gathoni Kariuki and the appellant and the land transfer form also purportedly executed by the deceased. These documents purported to show that the deceased, Lucy Gathoni Kariuki had sold and transferred her land to the appellant. Upon examination of these documents, this witness came to the conclusion that the purported signatures of Lucy Muthoni Kariuki on both documents were forged. Some of the background documents he used to verify the deceased's signature were supplied by **Karen Wanjiku (PW7)** an employee of Nyeri Teacher's Sacco of which the deceased was a member and **Solomon Murunga (PW7)** an employee of the Teachers Service Commission which was also the deceased's employer.

The counsel who prepared the sales agreement and the land transfer form **Mr. George Wambugu (PW5)** testified that the seller and the buyer of land parcel **Naromoru/Block 2/Muriru/11** walked into his office and transacted on this property on 9th November, 2007. It was his evidence that he identified them by their national identification cards. Upon preparation of the documents, the parties executed them in his presence. He also testified that he witnessed the appellant pay the deceased the sum of Kshs 960,000/= in full and final settlement of the purchase price on the material date.

One of the police officers who investigated the complaint against the appellant was **Mr Richard Ketton (PW9)**. In the course of his investigations, he engaged the Ministry of lands at Nyeri lands registry to establish the rightful owner of **Naromoru/Block 2/Muriru 2**. He established that the deceased, Lucy Gathoni Kariuki had previously been registered as the proprietor of the land and a title deed issued to her. Subsequently, the land was transferred to the appellant who was also issued with a title deed serialised as number 303541.

The officer presented both the titles to the government printer to confirm their authenticity. This he did vide a letter dated 7th June, 2011 which was admitted in evidence. The government printer respondent through a letter dated 17th June, 2011 confirming that the deceased's title deed originated from the government printer and was therefore genuine. In the same letter, the government printer confirmed that title number 303541, which was the appellant's title, did not originate from the government printer and as far as he was concerned, this particular title deed was not genuine. Similarly, this letter was admitted in evidence as prosecution exhibit No. 12. The Commissioner of Lands, however, confirmed that the title serialised as number 303541 was issued and collected from his office as a blank document.

The appellant gave sworn evidence in her defence. She testified that her sister called Ann Nyambura used to work for the deceased Lucy Gathoni Kariuki. The latter told Nyambura that she had land to sell. When the appellant got this information, she met the deceased and together they proceeded to an advocate's office where the transaction to sell her the land was concluded. The land she purchased was 16 acres and each acre cost Kshs 60,000/=. They both then went to the land control board where they obtained the consent to transfer the land to the appellant's name.

It was her evidence that they went to their advocates office on 9th November, 2011 but that the agreement was made on 9th November, 2007. She testified that she paid the total purchase price on this date. However, she again said that the deceased only picked the money from her advocate on 15th November, 2007 after the land control board had given its consent.

The district officer stationed at Naromoru, **Deborah Gacheri Mwarania (DW2)** testified for the appellant and as the chair of the local land control board, she outlined the process of obtaining the consent for transfer of land. According to her, the person transacting or selling land must be present together with the spouse and their children, if there are any. Prior to appearing before the Land Control Board, the

applicant must have booked for the convening of the meeting of the board a month earlier.

As far as the application allegedly made by the deceased is concerned, she testified that it did not have a reference number which apparently is also the number used for booking of the land control board meeting. The reference number also ought to have been captured on the consent to transfer once it was issued. According to the District Officer, an application for the land board consent is not valid without the reference number.

That is all there was to the evidence at the trial.

This evidence, considered in its entirety, essentially forms the background against which the question whether or not the appellant made a document, which in this case was a title deed, without authority contrary to **section 357 (a)** of the Penal Code. That section provides:

357. Making documents without authority

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

(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or

(b)...

is guilty of a felony and is liable to imprisonment for seven years.

From the very outset, it is understood that prior to the alleged registration of the appellant as the owner of **Naromoru/Block 2/Muriru/11** the deceased Lucy Gathoni Kariuki held a valid title of proprietorship of this land. There was sufficient and uncontroverted evidence from her husband (PW1) that she was vested with the title by the order of the court. The court order was duly entered in the presentation book and the register. The entry was made by the then land registrar, **Beatrice Wairimu Mwai (PW8)** who not only confirmed having made this entry but also confirmed that she issued the deceased with the title deed on 25th October, 2007. She acknowledged the signature on the title deed to be hers.

The government printer also confirmed that he printed the title deed and therefore it was a genuine document as far as he was concerned. The Commissioner of Lands also confirmed having dispatched the title deed though as a blank document to lands office at Nyeri. Further there was no suggestion from the appellant herself that she disputed the validity of the deceased's title. As a matter of fact, she acknowledged in her defence that indeed the deceased was the owner of **Naromoru/Block 2/Muriru/11** except that she had transferred it to her after she (the appellant) allegedly bought it. All this evidence points to the fact that the deceased's title to the property and the title deed she was issued with as prima facie evidence of ownership were valid and beyond reproach.

The only question is whether the appellant's title deed was equally valid and if not, whether the appellant made it without authority.

I must hasten to state that in law, this particular title deed could not have been valid because according to the proviso to **section 32 (1)** of the **Registered Land Act, cap. 300** (repealed), only one title deed could be issued in respect of a particular parcel of land; no two or more people could possibly have separate title deeds over the same parcel of land. For better understanding of this proviso and the import of a title deed it is necessary that I reproduce the entire section here; it states as follows:

32. (1) The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:

Provided that –

(i) only one title deed or certificate shall be issued in respect of each parcel of land or lease;

(ii) no title deed or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-five years.

(2) A title deed or certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register.

(3) When there is more than one proprietor, the proprietors shall agree among themselves as to who shall receive the title deed or the certificate, and failing agreement the title deed or the certificate shall be filed in the registry.

(4) The date of issue of a title deed or certificate of lease shall be noted in the register.

The Registered Land Act is now repealed but it was the law that was in force when the appellant is alleged to have been issued with the title deed and therefore that is the law that is applicable to her case. It is clear that under **section 32 (1) (i)** that only one title deed can be issued at a time.

The meaning noun “title deed” itself was not left to speculation; it was defined in section 3 of the Registered Land Act to mean “*a title deed in the prescribed form issued under section 32;*” this simply means a title is not a title deed until such time it has been issued with such details “*of the matters shown therein, and the land or lease shall be subject to all entries in the register.*” (**section 32(2)**).

It follows that the blank documents printed by the Government printer or dispatched to the registries by the Commissioner for issuance to proprietors of land are not title deeds. This distinction is important because the essence of the charge against the appellant was that she made a title deed and not just a blank document.

Going back to section 32(1)(i), I understand its import to be that it was not possible for the appellant to have been issued with the title deed for **Naromoru/Block 2/Mururi/11** when deceased still held another title deed for the same property.

As far as I understand it, the effect of this law, is that if at there was any regular or valid transaction between the deceased and the appellant over **Naromoru/Block 2/Mururi/11**, then this parcel of land could only be transferred to the appellant and a new title deed issued to her after the surrender of the title deed that was hitherto held by the deceased. And there is no plausible reason, at least I cannot find any from the record, why the deceased’s title deed was not surrendered if at all she sold her land to the appellant. I find the appellant’s explanation that she did not ask for the title deed from the deceased even after she had allegedly paid the full purchase price for the property to have been a mere afterthought and without any substance.

Besides the subservient status to which the appellant’s title has been relegated by law, my evaluation of the evidence also leads me to the same conclusion that the appellant’s title deed was blemished.

The appellant’s evidence which, by and large, was the basis upon which she obtained the title document was controverted and displaced by not only the prosecution evidence but also by the appellant’s own witness. The uncontroverted evidence of the document examiner (PW4) was that the purported signatures appended on the sale agreement and the land transfer form were not the deceased’s but were forged. The logical conclusion from this evidence is that there was no sale agreement between the deceased and the appellant and the deceased never consented to transfer her property to the appellant; indeed, she could not have sought to transfer her land based on a non-existent contract.

The evidence of the District Officer, Naromoru (PW2) who testified for the appellant, cast the appellant’s evidence on how she acquired the title deed in doubt. According to her, there was no evidence that the

appellant ever booked for the convening of the land control board meeting to deliberate on the alleged deceased's application for consent to transfer her land to the appellant. There were no minutes of such a meeting in effect suggesting that that the board never sat and consented to the deceased's application. In any event, the purported application itself did not bear a serial number, an omission which, by itself, would render a consent invalid. I have noted that the application was also not dated and therefore it is not clear when this application was made, if at all. Further she testified that an applicant for the consent of the board must appear before it together with his or her spouse and children. This was not done in this case and it probably couldn't be done because there was no meeting before which they could appear in first place. In a nutshell, the appellant's own witness doubted the authenticity of the consent which the appellant presented as having been given by the land control board.

It must also be noted that the Nyeri Lands Registrar **Joseph Taura Bao (PW3)** testified the registration of the appellant as the owner of **Naromoru/Block 2/Mururi/11** was not supported by any documents; even the purported consent to transfer and the alleged land transfer form for this parcel were not in their records. If these documents had been provided by the appellant, they would have been recorded in the presentation book.

Without these documents, there was no basis for transfer of the deceased's land to the appellant and, more importantly, the appellant could not have been issued with a title deed in respect of the deceased's parcel of land. For the record, **Machora Hezekiah Oira Mogere (PW2)** who is alleged to have issued the title deed testified and denied having signed or issued the title to the appellant. Although he was at the Nyeri lands office in January 2008 when the title deed is alleged to have been issued, the dispatch from the government printer which was admitted in evidence as prosecution exhibit no. 14 showed that the title deed bearing serial number 303541 was sent to the Commissioner of Lands for onward transmission to Nyeri lands office on 2nd August, 2010. Logically therefore, this title could only have been signed and issued on or after the 2nd August, 2010 and not before.

It must also be noted that when the particular title deed which the appellant was in possession of was presented to the government printer, he confirmed that it was not genuine; and I suppose one of the reasons why it was found wanting in this regard was because as much as it bore a serial number which fell within the serial numbers of titles that were dispatched to the Commissioner of Lands in August 2010 it could not have been issued in the year 2008; it was simply not printed or dispatched for issue then.

As the appellant's defence was concerned, it has already been noted that even her own witness doubted the validity of the documents which the appellant relied upon in support of her defence. The appellant's own evidence was also contradictory. According to her testimony she and the deceased seller went to the advocate, apparently to transact on the parcel of land in issue, on 9th November, 2011 yet the agreement of sale is stated to have been made on 9th November, 2007. She also testified that she made the payment of the full purchase price on 9th November, 2007 but that the deceased collected the money from the advocate after the 15th November, 2007. This contradicts the sale agreement which stated that the deceased acknowledged receiving the full purchase price on 9th November, 2007 upon execution of the agreement.

When I consider all this evidence in its entirety, I am persuaded, as the learned magistrate was, that the prosecution proved beyond all reasonable doubt that the appellant made the title deed for land number **Naromoru/Block 2/Mururu/11** purporting it to be a genuine title deed issued by the land registrar of the Nyeri County contrary to **section 357(a)** of the **Penal Code**. In the same breath, I entirely agree with the learned magistrate that the appellant's defence was not sufficient to displace the concrete prosecution evidence against her and to that extent she was correct in dismissing it.

As far as the sentence is concerned, it is not true that the learned magistrate did not consider the appellant's mitigation; she considered it and in fact, it was as a result of the consideration of the appellant's mitigation that she asked for probation report before she could sentence the appellant. No doubt, in asking for this report, the learned magistrate must have been guided by section 216 of the Criminal Procedure Code, cap. 75 according to which the court may, before passing sentence or making

an order against an accused person under section 215 of the Code, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.

The probation report was subsequently filed but for reasons which she gave in her judgment the learned magistrate was not persuaded with the recommendations of the probation officer. She proceeded to mete out a custodial sentence. The learned magistrate cannot be faulted for proceeding the way she did because the court is not necessarily bound by evidence received under section 216 of the Code or restricted by such evidence from meting out a sentence that is otherwise lawful.

Talking of a lawful sentence, the maximum sentence for the offence of which the appellant was convicted is seven years; the learned magistrate sentenced the appellant to two years imprisonment. I do not consider this sentence to be harsh or excessive in the circumstances and for this reason I will not disturb it.

In the final result, I hold that the appellant was properly convicted and sentenced. Her appeal is therefore dismissed.

Signed, dated and delivered in open court this 28th July, 2017

Ngaah Jairus

JUDGE