



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 53 OF 2014**

**JOSHUA WACHIRA MATHERI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence of the Chief Magistrate's Court (J. A. Kasam) at Kerugoya, Criminal Case No. 66 of 2009 consolidated with Criminal Case No. 719 of 2012 delivered on*

*30<sup>th</sup> September, 2014)*

**JUDGMENT**

1. **JOSHUA WACHIRA MATHERI**, the appellant herein was charged together with one Ephantus Muchiri Kagwi with four counts of offences before **Kerugoya Chief Magistrate's Court Criminal Case No. 66 of 2009**. The counts were as follows:

- i. **Conspiracy to defraud contrary to Section 317 of the Penal Code and the particulars were on diverse dates between 3<sup>rd</sup> September, 2003 and 5<sup>th</sup> December, 2005 at Kerugoya township within Kirinyaga county with intent to defraud jointly with others not before court conspired and obtained Kshs.520,000/= from SAMSON MBUI OBADIAH by falsely pretending that they were in a position to sell him a piece of land known as L.R. INOI/KARIKO/1056 a fact they knew to be false.**
- ii. **Obtaining money by false pretenses contrary to Section 313 of the Penal code. The particulars were that on 3<sup>rd</sup> September, 2003 at Kerugoya Township, jointly with others not before court with intent to defraud obtained Kshs.400,000/= from SAMSON MBUI OBADIAH by falsely pretending that they were in a position to sell to him a parcel of land known as L.R. INOI/KARIKO/1056 a fact they knew to be false.**
- iii. **Obtaining money by false pretenses contrary to Section 313 of the Penal Code. The particulars for this count were that on the 5<sup>th</sup> day of December, 2005 at Kerugoya township within Kirinyaga county jointly with others not before court with intent to defraud obtained kshs.120,000/= from the same complainant by falsely pretending that they were in a position to sell him the same piece of land referred above a fact they knew to be false.**
- iv. **Personating contrary to section 382 of the Penal Code. The count was in regard to the appellant alone and the particulars of the charge were that on 3<sup>rd</sup> September, 2013 in Kerugoya Township in Kirinyaga District with intent to defraud, falsely represented himself to be DAVID MURIITHI GAKUU holder of identity card No. 4349218.**
- v. **Forgery contrary to section 349 of Penal Code. This count also faced the appellant alone**

**and the particulars were that on or before 3<sup>rd</sup> September, 2003 on unknown place within Republic of Kenya with intent to defraud made a title deed No. INOI/KARIKO/1056 purporting to be genuine title issued by the Land Registrar Kirinyaga to Samson Mbui Obadiah Koigi.**

2. After the trial the appellant was found guilty of count of 2, 3, 4 and 5 and convicted. He was sentenced to serve prison sentences to run consecutively as follows:

1. **One year in prison for count 2.**
2. **One year in prison for count 3.**
3. **Two years in prison for count 4.**
4. **Two years in prison for count 5.**

The co-accused was acquitted under **Section 215** in respect to count 2 and 3 which faced him.

3. The appellant was dissatisfied with both the conviction and sentence and preferred this appeal. Before I consider the grounds of appeal, I will look at the background of the case and highlight the evidence presented before the trial court in order to re-evaluate them in regard to the petition of appeal herein.

4. Besides the 1<sup>st</sup> count where the appellant was acquitted, the appellant faced 3 main charges of obtaining money from the said complainant on two aforesaid different occasions personating one **DAVID MURIITHI GAKUU** holder of identity card No. 4349210 in order to defraud the complainant and forging a title deed in respect to **INOI/KARIKO/1056** for purposes of defrauding the complainant. The appellant was accused of obtaining a total of Kshs.520,000/= from the complainant (P.W.1 at the trial) by pretending that he was in position to sell him a parcel of land known as **INOI/KARIKO/1056**.

5. The state called a total of five witnesses at the trial in support of their case against the appellant. P.W.1 told the trial court that he was cheated or defrauded by the appellant who according to him pretended to be the owner of **INOI/KARIKO/1056** and even took him and 2 other people who were witnesses to the attendant transaction to the parcel of land and showed him the beacons and even chatted with some casual labourers who were working on the farm as he took them around. The complainant was convinced as he had earlier been shown the official search from the Land Registry and a title certificate all in the name of the appellant who then according to the evidence of the prosecution witness carried himself as DAVID M. GAKUU the registered owner of the parcel of land known as **INOI/KARIKO/1056**. The parcel of land was said to measure 0.41ha and the value attached to it as per their agreement was Kshs.520,000/=. The complainant paid the appellant first installment of Kshs.400,000/= as per Agreement dated 3<sup>rd</sup> September, 2003 which was produced as Exhibit 2 at the trial. The balance was paid later and complainant told the trial court that they went before an advocate where a comprehensive agreement – (P. Exhibit 6) was drawn by John Ndana Advocate. The complainant told the trial court that the appellant then undertook to process the title for him and requested him to hand over the title and transfer documents which he had earlier left with him when the first installment of Kshs.400,000/= was made. The trial court was told that the appellant brought back the title duly processed and in the name of the complainant with the only anomaly being that the acreage shown on the title deed was 0.1 ha instead of 0.41 ha. The title was produced as Exhibit 10.

6. P.W.2 testified that his name was DAVID MURIITHI GAKUU and that he was the actual owner of **INOI/KARIKO/1056** and that he had never sold his parcel to SAMSON MBUI OBADIAH the complainant in the case. He told the trial court that he was summoned to the DCIO Office to record a statement regarding a transaction that affected his parcel of land and that is where he learnt that someone had impersonated him and transferred the parcel to the complainant. According to him he had no surrendered his parcel or the title to anyone.

7. The evidence of P.W.3 the expert witness called to testify told the trial court that the signatures on the two agreements – 1<sup>st</sup> agreement detailing payment of Kshs.400,000/= and dated 3<sup>rd</sup> September, 2003 (P. Exhibit 2) and 2<sup>nd</sup> agreement dated 5<sup>th</sup> December, 2013 (Exhibit 6) a comprehensive agreement drawn by

John Ndana Advocate were executed by the appellant herein. The investigating officer called as P.W.4 and land Registrar both testified before the trial court and gave a detailed account on how the fraud was done and transfer effected to give the complainant the parcel of land known as **INOI/KARIKO/1056** as per Exhibit 10.

8. In his defence, the appellant gave his name as JOSHUA WACHIRA MATHERI. He denied receiving Kshs.520,000/= fraudulently from the complainant saying that the figures were cooked up. He conceded having asked the complainant for a friendly loan of Kshs.100,000/= which was to be paid with interests of Kshs.60,000/= making a total of Kshs.160,000/=. He argued that that formed the basis of their agreement dated 14<sup>th</sup> June, 2005 which was produced as exhibit 9 by the prosecution and wondered why the complainant signed the agreement if he knew he was owed Kshs.520,000/=.

9. The appellant denied giving out someone's property as security and denied using the name of DAVID MURIITHI GAKUU. He contended that the agreements exhibited in court were all forgeries and when cross-examined on the finger prints on the said agreements, he admitted that the police lifted his finger prints when he was arrested to ascertain it corresponded with the thumbprints on the agreements.

10. **Ephantus Muchiri Kagwi**, the co-accused at the trial gave evidence and basically corroborated the evidence of the prosecution with a rider that he was not involved himself in the crime but only witnessed all the agreements and transaction.

11. The trial magistrate evaluated the evidence and found the appellant guilty as aforesaid and sentenced him to a total of 6 years imprisonment for the 4 counts.

12. The appellant in this appeal being dissatisfied raised the following grounds in his petition namely:

- i. ***That he pleaded not guilty.***
- ii. ***That the learned trial magistrate erred in both law and fact in convicting the appellant on insufficient evidence.***
- iii. ***That the learned trial magistrate erred in both law and fact by failing to note that a criminal witness and who was an expert in his respective field was not called to testify.***
- iv. ***That the learned trial magistrate erred in both law and fact by relying on a single prosecution witness.***
- v. ***That the learned trial magistrate erred by relying on a shoddy investigation.***
- vi. ***That the learned magistrate erred in law and fact by relying on legally unauthenticated documents.***
- vii. ***That the appellant's constitutional right was violated as the trial took more than 10 years to be concluded.***
- viii. ***That the learned magistrate erred in law and fact by not considering his defence.***

13. In his oral submissions at the hearing of this appeal, the appellant appearing in person faulted the trial court for admitting Exhibit 3 which was a copy of a false identity card bearing the name David Mureithi Gakuu ID No. 4349218. In his view the copy of the identity card should have been certified or verified by an issuing officer for it to be admitted as evidence. The appellant in the same vein faulted the admission of a transfer form as Exhibit 4 saying that the form was lacking in details to wit the name of transferor and transferee.

14. The prosecution produced Exhibit 3 to show or prove that the appellant's intention from the beginning was to defraud the complainant hence the reason why the complainant told the trial court that the appellant left him with a copy of identity card (Exhibit 3) with the name David Muriithi Gakuu. The investigating officer (P.W.4 Cpl Mohammed Itchake) told the trial court that the identity card was not genuine. He produced the copy of the genuine identity card from the actual David Muriithi Gakuu which was identity card No. 11919317 and produced it as Exhibit 7. The appellant in this case is not contending that the identity card produced as Exhibit 4 is genuine and neither is the respondent. The production of it was not to prove its genuineness but rather to prove the intention and indeed the act of the appellant in committing the offences of obtaining through false pretenses and impersonating. If the production of

Exhibit 3 was to prove its genuineness then the appellant's ground could have stood. But as I have indicated the complainant was given a false identification depicting the appellant as a person he was obviously not and it is on that basis that he received the money from the complainant. I also find that the appellant did not raise any objection to the production of the document at the trial. This ground was apparently taken as an afterthought and cannot stand for the reasons aforesaid.

15. On the question of admission of a transfer form as evidence (Exhibit 4) without handwriting expert to connect him with the thumb print appearing on the form, I do find that indeed there was no evidence from an expert to connect him with the signature and thumb print appearing on the document. I have however, gone through the findings made by the learned trial magistrate in her judgment and I do not find any weight being placed on the said exhibit. I also do not find any objection raised during trial by the appellant on the production of the document. The document or the exhibit did not prejudice the appellant in any way as clearly seen from the judgment and its findings so even if it was to be disregarded by this court, the same would not have made any difference in this appeal.

16. The appellant questioned the weight of evidence that the trial court relied to convict him. It was his contention that the evidence adduced was insufficient. He pointed out that no official from Land Control Board Kirinyaga was called to testify and lend credence to the prosecution case. The respondent in their written submissions have however, countered this contention arguing that the evidence adduced by the prosecution witnesses at the trial was overwhelming.

17. This court has considered it convenient and for easier ease of reference to break down the evidence adduced by the prosecution at the trial according to the counts that faced the appellant and I will begin with the weight of evidence adduced in regard to count II at the trial. The appellant was found guilty on the basis of evidence tendered of obtaining Kshs.400,000/= from Samson Mbui Obadiah the complainant by falsely pretending that he was in a position to sell that parcel of land known as **L.R. INOI/KARIKO/1056**. The respondent has pointed out the evidence of P.W.1 who narrated to the trial on how he met the appellant and how the offer to sell him land in question was made which led to the drawing of the first agreement as aforesaid. That agreement was produced as exhibit 2 at the trial. I have re-evaluated the evidence tendered and have noted that the said agreement is dated 3<sup>rd</sup> September, 2003 and is headed friendly loan agreement and sale. The signature appearing on the agreement was subjected to an expert analysis. The expert was called to testify as P.W.3 – Emmanuel Kenga an Assistant Commander of Police and Forensic document examiner. He told the trial court that he examined the finger print impression on the said agreement or exhibit found it similar to the finger print impression of the appellant that was taken and forwarded together with the exhibit for expert analysis. This in my view was prove beyond any shadow of doubt that the appellant appended his signature and affixed his thumb print impression on the said agreement and did so as DAVID MURIITHI GAKUU when he was not for purposes of defrauding the complainant. I also find that he deliberately left his copy of the identity card to the complainant together with title documents of the land in question with a view to convincing the complainant that the deal was clean in order to foster fraud. I am not persuaded by the arguments advanced by the appellant that there was no one who witnessed this first transaction. The evidence of P.W.1 and D.W.1 disproves this. The agreement was witnessed by EPHANTUS MUCHIRI KAGWI who was a co-accused at the trial and his evidence clearly corroborated the evidence of prosecution witnesses. In the said agreement the appellant clearly acknowledged receipt of Kshs.400,000/= from the complainant and cannot be heard to say there was no proof that the complainant had withdrawn that kind of money. In my view there was sufficient evidence tendered at the trial court and I do agree with the prosecution that on this count the evidence adduced was overwhelming. The guilt of the appellant was proved beyond reasonable doubt and the trial court was correct in its assessment of the evidence and the finding of guilt.

18. The weight of evidence tendered in regard to count 3 which also related to obtaining Kshs.120,000/= from the complainant by false pretenses is similar to the 2<sup>nd</sup> count. The appellant has attacked the weight of the evidence relied upon by the prosecution saying the agreement produced as exhibit 6 showed that the parcel of land known as **INOI/KARIKO/1056** was owned by two people and argued that the same parcel could not have been owned by two individuals at the same time. He submitted that the figures appearing on the agreement were imaginations of the complainant and admitted having obtained only

Kshs.100,000/= from the complainant but only as a friendly loan which was to be repaid with interest of Kshs.60,000/= making up a total of Kshs.160,000/= which is said was supported by exhibit 9 produced by the prosecution. This argument or submission introduces an interesting twist in his appeal as the same is self indictive. In the first place, the agreement produced as exhibit 6 clearly showed that the appellant represented himself falsely as DAVID MURIITHI GAKUU and presented a different identity card NO. 3408576/66 but with the same name. P.W.1 told the trial court that he was surprised by the production of a different identity card but decided to play along. That identity card equally was not genuine. But what is important to note is that the signature impression by the appellant was subjected to expert analysis and the evidence of the aforesaid expert (P.W.3) was produced as Exhibit 10. The evidence confirmed that the signature appearing on the agreement drawn by John Ndana Advocate was appended by the appellant. I have re-evaluated the evidence of P.W.1, P.W.3 and the investigating officer P.W.4 tendered before the trial court and I am convinced beyond reasonable doubt that the learned trial magistrate was correct to find that the appellant was guilty. The fact that the agreement exhibited as exhibit 6 does show as if there were two owners in my view does not negate the fact that the appellant obtained the said money from the complainant by falsely pretending that he was in a position to sell him the said parcel of land. The agreement in my view clearly showed that the appellant in an attempt to defraud the complainant and cover his tracks tried to rope in Joseph Muthii Muriuki as a co-owner of the parcel when he was in fact a witness as per the evidence tendered. The appellant has argued in this appeal that the advocate drawing the agreement should have been called to testify but he did not object to the production of the agreement as an exhibit or demanded that the advocate be called during trial prior to the production of the agreement. He cannot at this stage deny or challenge the contents of the agreement produced as an exhibit at the trial.

19. It is the finding of this court that the evidence tendered by the prosecution against the appellant in respect to count 3 was overwhelming. The prosecution had the discretion to determine which witness was material in their case. This was the position taken by the Court of Appeal in the case of **JEREMIAH MUTHENGI MATHINYO –VS- R [2013] eKLR** where the court in quoting with approval the case of JULIUS KALEWA MUTUNGA –VS- R CRIMINAL APPEAL NO. 31 of 2005 observed as follows:

***“.....As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless for example it is shown that the prosecution was influenced by some oblique motive.”***

I have also had an occasion to consider a decision in the case of **KEVIN JUMA –VS- R [2014] eKLR** where the court found itself in a similar situation like this court in this present appeal. The court found that the evidence against the appellant was so overwhelming that it could not be weakened by the failure of the prosecutor to call another witness who was said to have been an eye witness. The state found it unnecessary to call Ndana Advocate as a witness and they had that discretion.

20. This Court finds that the evidence tendered by the prosecution and in particular the agreement produced as exhibit 6 was a furtherance of exhibit 2. They were both aimed at defrauding the complainant. I find that sufficient evidence was tendered to find the appellant guilty of count 3 and the trial magistrate was correct in her finding.

21. On the question of personation contrary to **Section 382** of the **Penal Code**, the appellant took issue with admission of exhibit 3 – a copy of a false identity card No. 434918 belonging to DAVID MURIITHI GAKUU. But as I have already found above the copy of the identity card was given to the complainant by the appellant. The appellant has not said that he is known by the name appearing on the identity card or the agreements exhibited. I do find that the appellant throughout the transactions represented himself falsely to be another Person when in fact when cornered on 14<sup>th</sup> June, 2005 after being arrested he made a U-turn and signed the agreement (Exhibit 9) as JACK JOSHUA MATHERI which still does not reflect his true actual names – JOSHUA WACHIRA MATHERI. This is quite telling because the appellant in his defence admitted drawing this agreement and even at the hearing of this appeal. It is clear therefore that the appellant’s intention was clearly to defraud otherwise why else would he misrepresent himself as JACK MATHERI when he is known by other names. I find that the trial magistrate correctly assessed the

evidence tendered in respect to count 4. The trial court's finding was correct. The appellant was guilty of the offence as charged.

22. On count 5, the appellant faulted the trial court for finding that he had participated in making a false document or making a forgery contrary to **Section 349** of the **Penal Code**. He submitted that there was no exhibit produced to show or prove that a forgery had been committed and that the trial court erred in her judgment in placing weight on a document that was not produced. Section 345 of the Penal Code defines forgery as:

***“Making of a false document with intent to defraud or to deceive.”***

**Section 349** under which the appellant was charged only deals with the general punishment for forgery. So it does appear that the charge against the appellant was not properly framed but that was not fatal as the same can be rectified by this court under **Section 382** of the **Criminal Procedure Code**. What is important is to consider the weight of the evidence tendered in support of the charge of forgery contrary to Section 345 as read with Section 349 of the Penal Code. The respondent has submitted that although the appellant was not directly involved in the title deed he was nevertheless involved in making it with an intention of defrauding the complainant by presenting a title purporting it was genuine. I have however, re-evaluated the evidence tendered before the trial court and in particular the evidence of MUTHEE JULIUS KILIMO called as P.W.5. He told the trial court that he found that the title deed (Exhibit 10) issued to the complainant was authentic. It was a genuine document according to him save that there were some irregularities on the procedure of issuing it. The same evidence was corroborated by P.W.2 the real David Muriithi Gakuu who told the court that when he got a report concerning the fraudulent transaction, he went to the lands office and conducted an official search which showed that his parcel of land had been transferred to Samson Mbui Obadiah. The land was no longer in his name officially and that explains why he has moved to the civil court to nullify or invalidate the title of the complainant. It is my finding that there was no dispute or contest in so far as the validity of the exhibit 10 – (the title to the complainant) was concerned. What is in contention is the legitimacy of the document and that is an issue that rests squarely in civil court (or Environment and Land Court for that matter). The trial court found in its judgment that there was no direct evidence linking the appellant with the making of the document (Exhibit 10) but fell into error by finding that at the same time the appellant was involved in making the said document with an intention to deceive or defraud P.W.1. This is because there was no direct evidence linking him with the making of the document which was not fake or forgery but genuine save that it was obviously obtained under questionable circumstances. This Court finds that the evidence adduced by the prosecution in regard to count 5 was insufficient and that conviction cannot stand the proper test or standard of law – which is beyond reasonable doubt.

23. On the ground that the appellant's defence was not considered, I do find that from the judgment of the trial court the defence tendered was properly considered. I am also not convinced by the appellant's contention that the investigation of the case at the trial was shoddy. On the contrary, I find that the investigating officer in the case did a splendid job and that explains the basis of the trial court finding and indeed my finding that the evidence against the appellant on the counts I have outlined above was overwhelming.

24. I do not find any basis for the appellant's complaint that the trial took too long. In any event, the last trial court who took over from 2 other magistrates who had left the station clearly gave a good explanation as to why there was apparent delay.

In conclusion upon considering everything raised in this appeal, I am satisfied in view of the aforesaid reason that this appeal lacks merit in respect to count 2, 3 and 4. The same is dismissed in that regard and the sentences meted out against the appellant are upheld. I however, find merit in this appeal only in respect to count V. The conviction is quashed and sentence meted out which is 2 years is set aside. The sentences of the appellant shall therefore remain as follows:

For count 2 - 1 year

Count 3 – 1 year

Count 4 – 2 years

The sentences shall run consecutively as found by the trial court.

***Dated and delivered at Kerugoya this 23<sup>rd</sup> day of March, 2016.***

**R. K. LIMO**

**JUDGE**

23.3.2016

Before Hon. Justice R. Limo J.,

State Counsel

Appellant present

Court Assistant Willy Mwangi

Miss Mwaura holding brief for Sitati for the respondent.

Joshua Wachira Matheri present in person.

**COURT:** Judgment signed, dated and delivered in the open court in the presence of Miss Mwaura holding brief for Sitati for Respondent and Joshua Wachira Matheri the appellant in person.

**R. K. LIMO**

**JUDGE**

23.3.2016