



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 58 OF 2013

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

1. NYAGA NTHIA MBARINJO

2. SHADRACK NGARI PAUL.....RESPONDENTS

(Being an appeal from the original conviction and sentence in CR. 471 of 2011 at Siakago Principal Magistrate's Court by Hon. S.M. Mokuu - SPM on 3rd June, 2013)

JUDGEMENT

1. This is an appeal by the Director of Public Prosecutions (hereinafter referred to as DPP) against the acquittal of the two respondents on charges of forgery contrary to section 349 (being count I), uttering a false document contrary to section 353 as read with section 349 (being count II) and obtaining registration by false pretenses contrary to section 320 (being count III) all of the Penal Code (Cap 63) Laws of Kenya. Both respondents were acquitted on 3rd June 2013 by the court of the Principal Magistrate at Siakago.

2. Ms Muthoni appeared in support of the acquittal for the second respondent. The reason being that the first respondent died during the pendency of this appeal.

3. The evidence led by the prosecution through Jacob Njiru Kithaka (PW 1) was that the suit land reference No. Evurore/Kathera/96 was the property of his deceased father, Musa Kithaka Gitabu, who died in 2004. PW 1 testified that he had filed succession proceedings in respect of the estate of his late father and in the process of doing so, he discovered through his uncle that there was a caution registered against the suit land of his father. He further testified that this suit land had never been purchased by any person. Additionally, he testified that he was not aware that the land had been sold. Finally, he denied knowing the two respondents.

4. The other witness called by the prosecution was Nancy Nyaga (PW 3) who was the Land Registrar, based at Siakago. According to her, the **deceased 1st respondent, who was** the 1st accused in the trial court presented transfer documents in his name to PW 3. She further testified that the transfer form was signed by the transferor (Musa Kithaka Gitabu) and the transferee (the first respondent) and was dated 17th August 1980, which was put in evidence as prosecution exhibit 13. According to exhibit 13, the deceased Musa Kithaka Gitabu transferred the land to the 1st respondent. Her further evidence was that the 2nd respondent was a witness to that transfer transaction.

5. It is also her evidence that this transfer of land had the approval of the Land Control Board, a matter in

respect of which the prosecution produced exhibit No. 14. According to the documents that were filed in the Land Control Board, the application for consent was made by both the transferor and transferee. After being presented with the necessary documents, this witness (PW 3) effected a transfer and issued the title deed on 24th December 2010 in the name of Nyaga Nthia Mbarinjo, who is the first respondent. A week later, the family of the deceased (Musa Kithaka Gitabu), went to the office of PW 3 querying the transfer of the suit land to the 1st respondent.

6. PW 3 questioned the 1st respondent as to why the transfer transaction had taken too long since the transfer took place on 17th September 1980 and the documents for registration in the lands office were being presented in 2010. In response to that query, the 1st respondent told PW 3 that he delayed the transfer transaction because he feared that the deceased land owner might ask for more money in addition to the purchase money that he had already been paid.

7. The complainant (PW 1) reported the matter to the police who commenced investigations. No. 48466 Cpl Magiri Mbaabu took over the investigation of this case from the original investigating officer who was Cpl Muriuki. The police took a number of documents including the questioned land transfer form (exhibit 13), the land certificate, application for consent to the Land Control Board, specimen handwriting of the 2nd respondent among other documents which they sent to the document examiner, No 230925 C.I Jacob Oduor of CID headquarters Nairobi. He examined these documents and found that they land transfer form (exhibit 13) was a forgery. In other words, the transfer was not genuine.

8. The 2nd respondent made an unsworn statement and described himself as a preacher. He testified that he was asked by the 1st respondent to be his witness to the suit land which the 1st respondent bought. He went further to testify that he went to the land registry and signed as a witness before the Land Registrar (PW 3). He denied committing the forgery.

9. The DPP has raised six grounds of appeal. In ground 1, he has faulted the trial court for disregarding the evidence adduced by the prosecution regarding the forgery of signatures by the two respondents. I have considered the evidence in this regard and I find that the known signature of the transferor the deceased (Musa Kithaka Gitabu) was not obtained and submitted to the document examiner. In this regard, the trial court found that the prosecution had failed to produce evidence to show that the transfer form was not genuine, because of their failure to obtain the known handwriting and signature of the deceased transferor. In other words, the prosecution did not produce evidence to show that the deceased Musa Kithaka Gitabu did not sign the transfer form, which was exhibit 13. The failure to do so is a glaring omission on the part of the prosecution, since the deceased transferor was still alive, when this case was being investigated. This omission in itself is fatal to the prosecution case. This finding of fact is borne out by abundant evidence. It is therefore not correct that the trial court disregarded the evidence produced by the prosecution regarding the forged signatures. This ground of appeal is without merit and is hereby dismissed.

10. In ground 2 the DPP has faulted the trial court for ignoring the evidence of the Land Registrar that it was the 1st respondent who presented the document of transfer which was witnessed by the 2nd respondent, which in his view went to show that the two respondents had an opportunity of committing the offences, in respect of which they were acquitted. I have considered the evidence produced in this regard. The prosecution evidence in this regard is that the prosecution did not take the known handwriting and signatures of the deceased transferor in particular the registration form and transfer form both of which purported to show that they were signed by the deceased transferor. These two vital documents were not obtained and submitted to the document examiner for his examination. Failure to do so was fatal to the prosecution case. It is these documents that would have shown that the deceased transferor either sold or did not sell the land to the 1st respondent and therefore signed the forged signature. This was crucial in the light of the evidence of the 1st respondent that the deceased transferor sold land to him for Kshs 35,000/- and in addition to giving him the body of a motor vehicle pick up, as part of the consideration in buying the land. It was the 1st respondent's evidence that the body of a motor vehicle pick up was still in the homestead of the deceased transferor.

11. The evidence of the 1st respondent that he purchased land from the deceased transferor Musa Kithaka Gitabu is supported by that of the 2nd respondent. According to the evidence of the 2nd respondent, the deceased transferor had sold the land to the 1st respondent. He went further to testify that he was a witness when the deceased transferor and the 1st respondent signed the transfer of land form before the Land Registrar (PW 3). In the light of this evidence, this ground of appeal is without merit and is hereby dismissed.

12. In ground 4 the DPP has faulted the trial court in holding that since the transfer was signed by the Land Registrar, it could not have amounted to a forgery. In the light of the evidence I have referred to in the foregoing paragraphs, this ground of appeal is correct, but in itself cannot form the basis of overturning the acquittal. The reason being that the document examiner's evidence clearly showed that the questioned document (exhibit 13) was clearly a forgery.

13. In ground 5 the DPP has faulted the trial court for finding that the evidence of the Land Registrar (PW 3) contradicted the evidence of the document examiner (PW 4). I have considered the evidence in this regard and after scrutinizing the evidence of both PW 3 and 4, I find that there was not such contradiction because the evidence of PW 4 clearly showed that there was a forgery. The evidence of the Land Registrar in that regard was that according to her all the necessary documents were in order. There is no way she could have known that the deceased transferor signed or did not sign the land transfer form exhibit 13. Again in this regard, this ground of appeal also succeeds but it cannot be the basis of overturning the acquittal entered by the trial court. The reason being that the land control forms which purported to show that the deceased transferor appeared before the board and sought consent to transfer the land to the 1st respondent and the land transfer forms exhibit 13, which purported to show that he had signed the transfer were not subjected to examination by the document examiner. As I have already found, this was fatal to the prosecution case and for this reason, this ground of appeal is without merit and is hereby dismissed.

14. In ground 6 the DPP has faulted the trial court in resolving doubts which were totally unclear or non-existent in favour of the respondents. I have re-assessed the evidence in this regard upon which the two respondents were acquitted and I find that the conclusion reached by the trial court was correct. According to the findings of the trial court, the basis of the acquittal was that the prosecution did not subject the signatures and handwriting of the deceased transferor to the document examiner for examination. In this regard, the trial court stated that "*the expert was not questioned to give his opinion pertaining to the transferor's signature.*" It is therefore clear as to why the trial court acquitted the two respondents. And that is that the known signatures and handwriting of the transferor were not obtained and taken to the document examiner for examination. This ground of appeal is without merit and is hereby dismissed.

15. It is in the light of the foregoing glaring omission that the DPP urged the to order a re-trial to remedy this omission. An order for a re-trial is in principle unacceptable. According to the Court of Appeal in ***Fatehali Manji v R (1966) EA 343*** a re-trial will not be ordered for the purpose of of enabling the prosecution to fill gaps in its evidence at the first trial. That court further held that a re-trial will generally be ordered only where the original trial was illegal or defective, which is not the case in the instant appeal.

16. I have re-assessed the evidence of both the prosecution and the defence as I am required to do according to the ***Court of Appeal in Peters v. Sunday Post Ltd (1958) EA 424***. As a result, I have come to the same conclusion as did the trial court that there was ample evidence in support of the acquittal **of the two respondents.**

17. However, there are two matters in relation to this appeal that need to be addressed. First, the 1st respondent according to the DPP died during the pendency of this appeal. In terms of **section 360** the 1st respondent's appeal abated, since he had been acquitted. The provisions of that section state that: "***Every appeal from a subordinate court (except an appeal from a sentence of a fine) shall finally abate on the death of the appellant.***" The reason for this provision is that if a convicted person had paid a fine, the appeal has to be heard and if it succeeds the fine should be ordered refunded to the estate of the deceased

represented by the administrator/administratrix of that estate.

18. The second issue is as to who is in law the appellant in an appeal against an acquittal from a magisterial court to the High Court. Ms Muthoni in this regard submitted that this appeal should have been brought in the name of the Republic not in the name of the DPP. This was in response to the court which brought this issue *sua motu* to the attention of the parties. I agree with the submission of Ms Muthoni that the appeal should have been filed in the name of the Republic as the appellant. This is the correct position in law. This is clear from the citation of the case No. and the parties in the magisterial subordinate court in the instant case, in which it is indicated as follows:

“In the Principal Magistrate's Court at Siakago, Criminal case No 471 of 2011,

RepublicProsecutor versus Nyaga Nthia Mbarinjo.....1st accused and Shadrack Ngari Paul Njeru2nd accused.” This position in law was declared to be so in ***Tenywa Maganda v. Attorney General (1954) 21 EACA 290***, in which it was held that when the right of appeal against an acquittal is conferred on the Attorney General, he exercises that right on behalf of the Crown (now the Republic). The Attorney General did not do it in his own behalf, because the Attorney General was not a party to the criminal proceedings in the magisterial court and cannot therefore be a party in the instant appellate proceedings. The DPP is the chief of public prosecutions. The reason being that the Republic is always the prosecutor in all criminal cases. I hasten to add that this is so even in private prosecutions to the Court of Appeal in ***Riddlesbarger V Robson (1959) EA 841***. It is important to point out the public prosecutorial functions of the Attorney General were transferred and are now vested in the DPP as set out in ***Article 157 of the 2010 Constitution***. That this has been the position in law and practice is clear according to the High Court in ***R v. Wachira (1975) EA 262***, in which the Attorney General appealed against the acquittal of the respondent by a subordinate magisterial court on a point of law. The 2010 Constitution of Kenya has not changed that position. However, I find that the omission to follow the law as pronounced in ***Tenywa v. Attorney General, supra***, was a curable irregularity in terms of section 382 of the Criminal Procedure Code.

JUDGEMENT DELIVERED, DATED and SIGNED in open court at **EMBU** this 25th day of August **2016**.

In the presence of Ms Marete for the Appellant and Ms Muthoni for the second Respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

25/08/2016