



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL 216 OF 2010**

**DAVID BARASA NYONGESA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the Chief Magistrate's Court at Kakamega in Criminal Case No. 3125 of 2007  
[J. M. GITHAIGA, PM])*

**JUDGMENT**

The appellant, **DAVID BARASA NYONGESA** was charged and convicted of the offence of obtaining registration of land by false pretence contrary to Section 320 of the Penal Code.

The particulars of the offence were that on the 3<sup>rd</sup> day of October 2007 at Kakamega South District within Western Province willfully procured registration for Land Parcel No. BUNYALA/BUDONGA/721 to himself by false pretences.

The appellant was sentenced to serve one year imprisonment. The appellant and two others were acquitted of three other counts which are not the subject of this appeal.

The appellant was aggrieved by the conviction and sentence and appealed to this court.

The grounds of appeal are as follows:-

- “1. The trial magistrate erred in law and fact in shifting the burden of proof.
2. The trial magistrate erred in law and fact when he found that the prosecution had proved its case in count IV beyond reasonable doubts.
3. The trial magistrate erred in law when he found the appellant guilty on a subsequent count after the main counts had failed.
4. The magistrate's decision was obviously pre-determined and thus indefensible.
5. The above sentence was extremely harsh under the circumstances.
6. The trial magistrate considered extraneous matters.
7. The trial magistrate contradicted himself.”

This being the first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see Okeno v Republic [1972] EA 32*).

The case for the prosecution is that the L.P. No. BUNYALA/BUDONGA/721 was registered in the name of the late NYONGESA WECHULI, the father to the appellant. That the late NYONGESA WECHULI sold the said land to the father of JOSEPH OGWERO CHITECHI and subdivided it into No. BUNYALA/BUDONGA/909 and 910. Later, the appellant was discovered to have been registered as the owner of L.P. NO. BUNYALA/BUDONGA/721.

Investigations were commenced. It was discovered that consent of the land control board from the father of the appellant to the appellant was a forgery. The appellant was arrested and charged.

In his defence the appellant stated that his late father appeared before the NAVAKHOLO Land Control Board when the consent was issued but passed away before he had paid for the registration.

It is apparent from the record that the trial magistrate based the conviction on the evidence that L.P. No. BUNYALA/BUDONGA/721 was subdivided into L.P. Nos. BUNYALA/BUDONGA/909 and 910 then land parcel No. 910 was transferred to NELSON CHITECHI OMWITAKHO by way of sale at Kshs.2,000/=. The trial magistrate also found that the appellant's father passed away on 19.7.2006 and could not have transferred the land to the appellant on 29.7.2007.

PW1, JOSEPH ONGWRO CHITECHI whose father is said to have bought land from the father of the appellant testified that L.P. No. BUNYALA/BUDONGA/721 was sub-divided into L.P. NO. BUNYALA/BUDONGA/909 & 910. That land parcel No. BUNYALA/BUDONGA/910 was the portion that his father bought. PW1 referred to Mutation forms and a survey map but did not have any registration documents for L.P. No. BUNYALA/BUDONGA/910.

According to PW1, a search carried out at the lands office reflected that parcel No. BUNYALA/BUDONGA/721 was transferred to the appellant on 29.9.2007 yet he knew the appellant's father who was his uncle had passed away on 19.7.2006. PW1 identified the sale agreement dated 3.1.1978 showing that his father bought a portion of L.P. No. BUNYALA/BUDONGA/721. He also identified Land Control Board minutes showing that consent was given for the subdivision of L.P. No. BUNYALA/BUDONGA/721 into two portions. PW2 MUSTAFA ORINGA MUKHWANA and PW3 ALBERT KWEYU MUTAKHO HAVE CORROBORATED PW1's evidence in respect of the sale of a portion of L.P. No. BUNYALA/BUDONGA/721 in 1978 to NELSON SHITECHI.

The evidence of PW4, HABIL WAMBASI, PW5 O. MANGO, an advocate, PW6, TOM ONONO, the secretary to the Land Control Board and that of the Investigating Officer, PW7 IP DENNIS EMOITI all point to the land in question having been transferred to the appellant irregularly.

Was the registration of L.P. No. BUNYALA/BUDONGA/721 obtained by the appellant by false pretences? The Land Registrar, PW8 left more questions than answers. He produced the letter of consent from the Land Control Board, a survey map and a green card for L.P. No. BUNYALA/BUDONGA/910 that shows Title Deed for L.P. No. BUNYALA/BUDONGA/910 was issued following the subdivision of Plot No. BUNYALA/BUDONGA/721. He also produced the adjudication register for Land Parcel No. BUNYALA/BUDONGA/721 for the year 1968. The evidence of the Land Register fails to address the question of whether after the sub-division the land parcel reverted to No. 721 and was now registered in the name of the appellant.

During cross-examination, the Land Registrar stated that she did not bring to court the current search certificates for the land in question. The Land Registrar further stated the register for L.P. No. BUNYALA/BUDONGA/721 does not exist as the land was subdivided. This raises doubts as to whether

the appellant procured the registration of L. P. No. BUNYALA/BUDONGA/721 in his name.

The certificate of official search that was produced by the appellant reflects that the proprietor of L.P. No. BUNYALA/BUDONGA/721 as of 27.9.07 was the father of the appellant. I have perused the documents on record, I see no title or any registration document in the name of the appellant for L.P. No. BUNYALA/BUDONGA/721.

With the gaps in the prosecution evidence, the appellant should have been given the benefit of doubt. Consequently, the conviction is quashed and the sentence set aside. The appellant is at liberty unless otherwise lawfully held.

*Dated, delivered and signed at Kakamega this 31<sup>st</sup> day of July, 2012*

**B. THURANIRA JADEN**  
**J U D G E**