



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 311 of 2009

JOHN NGUGI GATHUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant obtained leave to amend his appeal. However he has abandoned the fresh amendment and he wishes to argue his original appeal filed on 21st July 2009.

The appellant was charged with the offence of

(1) forgery contrary to Section 349 of Penal Code.

(2) uttering false document

(3) forgery

(4) Uttering false Document

(5) Forgery

(6) Forgery

He pleaded not guilty to all counts and was tried convicted and sentenced.

The prosecution produced PW1 Joseph Orangi Gitonga an officer of the High Court who testified about

the process of the operations in Civil Division of the Court and how vesting orders are issued. And the operations in the year 2000. The last file in that year is No. 2175.

The vesting order No. 3812/00 was made on 23/7/00 and was signed and issued on 23/11/2001. The Applicant in last file was Francis Ihunzu vs Kenyatta National Hospital & 2 others.

The vesting orders are signed by Judge. This particular one signed by Deputy Registrar and it is unusual and is not genuine. It is forged. The order was not sealed. The file Number 3804/2000 was not reached in the year 2000.

PW2 is Ajaa Olubayi Advocate and Commissioner of Oaths. On 16/10/2002 Appellant was brought to his office and introduced as owner of Plot No. 209/73/6 and he did not have Title Deed. PW2 was required to prepare agreement between him and Zuhedi. Appellant said leave had expired. PW2 prepared the agreement. On 3/9/2002 the buyer paid Shs.300,000/= according to PW2. On the appellant signed acknowledgement of Shs. 1,000,000/=.

In July 2003 PW2 was called by police officer and asked to CID headquarters he went there on 15/7/03. He was shown the documents in the case of fake documents made by appellant.

PW3 was Abdul Hameed Shekh Managing Director of Kali Noordin Co Trustee of Sheikh Fazil Trust registered as owner of LR 209/73/6 never sold the property. From lands office it shows the person selling the land was the Appellant.

PW4 was an advocate Murtaza Jevanjee. He was acting for the owner trustees. He looked at volume/Folio 413/35. There was a High Court order in suit No. 3812 of 2000 registered against the file was one John Ngugi Gathumbi. This advocate is the advocate for the Trustees.

PW6 produced some evidence of plot No. 209/73/06 which is very different from 209/73/6. In that suit the deceased was Abdul Rahief Sheikh and beneficiary was John Ngugi Gathumbi Succession 1089/97. In that case parties are James Mwaura Murage.

PW8 police officer who was investigating found plot No. 209/73/6 had been transferred fraudulently to one John Ngugi Gatumbi. He discovered through High Court Order of Justice Khamoni. PW8 made thorough investigations and discovered the Appellant had ID No. 2029162.

After thorough search and investigation he found the number. In his statement of defence sworn by Appellant he asserted he was owner of that parcel of land. He worked for the owner Addul Sheikh. Then he was involved in an accident at work and he suffered spine injuries and Abdul told him he will pay him. He wrote a letter saying he would give him land parcel. That was on 5.1.1982. He produced exhibit 2 and swore affidavit on 12/8/1997. He got the letter from Arthi House. Commissioner of Lands had destroyed all documents relating to that parcel of land. He said he has been paying for the land because he had vesting order. He filed a suit and obtained court order to have the land transferred to his name. He was paying land rates. Some documents got lost. He reported to police of 12/1/97 Deed plan and receipts. He had police copy of that police abstract. The exhibits at the land office shows he is the owner of the land. **“The land is mine”**.

The Appellant filed grounds of appeal all numbering 13. He complained that Trial Magistrate erred in basing her finding on the assumption and hypothesis that Appellant had made the documents alleged to have been forged when no evidence was adduced to suggest such inference.

Trial Magistrate erred in convicting on counts 1, 3, 5 and 6 when no evidence was adduced to suggest that the Appellant either or participated in making false documents.

That the Trial Magistrate erred in convicting Appellant despite glaring inconsistent or variance of the prosecution evidence that did not support the prosecution charges and arrived at wrong decision.

The Trial Magistrate solely relied on the evidence of PW1 in finding that the finding vesting orders were only signed by judges and not registrars when no registrar was called to testify. Photostat copies cannot show existence of a seal. Trial Magistrate erred in basing her decision on photocopies produced by the prosecution and misdirected herself as to their authenticity thereby reading to a wrong decision.

The Trial Magistrate erred in convicting the Appellant on Count II & 4 a charge of uttering a false document when the person the alleged false document was uttered never testified in Court this occasioned grave miscarriage of justice.

The Trial Magistrate in totally ignoring the evidence tendered by the defence and accepting evidence of

prosecution largely comprised of Photostat copies. The Trial Magistrate erred in ignoring the absence of supporting documents by the complainant showing the title deed was issued when the ongoing case ongoing Trial Magistrate shifted the burden of proof to the Appellant.

The Trial Magistrate erred in accepting the prosecution evidence without prior investigations by documents examiner for verification and handwritings. The Trial Magistrate convicted on entirely wrong principles and conclusions of alleged forgery with establishing that ingredients of forgery were wholly exhausted to warrant conviction. Trial Magistrate disregarded Appellant's submissions which disregard occasioned miscarriage of justice and sentence which is excessive and oppressive.

The submissions on the charges of forgery of a certain vesting Order purporting to be genuine vesting order in respect of High Court Civil Case No. 3812/2000 issued by Deputy Registrar of High Court of Kenya on 23/11/2001. Again forgery on 28-2001 forged a certain assigned document purporting it to be genuine document made and signed by Deputy Registrar of High Court. On 22/8/1997 forged a certain grant of letter of Administration No. HCRM 1089 of 1997 issued and signed by Senior Deputy Registrar of High Court.

On 25/8/1997 forged certain certificate Cause No. 1089 of 1997 a grant of confirmation made and issued by Senior Deputy Registrar issued and signed by Registrar.

Forgery is defined under Section 345 of Penal Code

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

“ingredients of forgery making and/or makes”

The submission was that what constitutes a false document or part thereof is affixing the seal or signature knowing that the seal or signature and that he gave no authority to affix it. The falsity consists in the document or part of a document having signed or sealed with name or seal of a person who in fact did not sign or seal it. No evidence was adduced by the prosecution to show that the Appellant either made the documents alleged to have been forged or was party to its making.

There was no document examiner as to the signatories on the documents. All signatories relate to signature of Deputy Registrar none of them was called to testify that signatures were not theirs. Can it be

said that every document of the charge of forgery was established Count 2 and Count 4 relate to uttering false document contrary to Section 353 Penal Code. The documents are said to have been uttered to one John Mwangi Thuita.

On 13/8/2003 at CID Headquarters a statement was recorded by the said John Mwangi Thuita, a land Registrar at the office of Lands who recorded that there was nothing peculiar in the documents he registered. They had been scrutinized by 5 other persons before him to authenticate them. **“a registrar has a statutory duty to register documents if they are registerable which was the case here.”**

That person was never called to give evidence. The documents were said to be uttered. Was the offence of uttering committed? Intent to defraud is another ingredient of forgery. There must be deceit and injury. There was no evidence to establish the establishment of the trust deed.

PW3 did not show Trust Deed registered. The documents were served on 30/9/2005. It submitted that the existence of the trust is doubtful. The evidence was offered by prosecution witness PW1. He said last file for 2000 in his registry was 2175/2000.

Ajaa Dubangi PW2 an advocate who acted for both Appellant and prospective buyer, relied on Mr. Hassan Zubeidi to prepare agreement note. He was never arrested. Abdul Hamed Sheik PW3 who on 15/7/2003 at CID recorded statement. There was a change in name Waheed to Hameed. He did not know when old lease expired for which lease he was seeking renewal he did not have Trust Deed to show trust existed, he did not have any appointment to show him the Managing Trustee of Shekh Fazal Ilahi Noordin Charitable Trust.

There is a correspondence File No. 5324 at the lands office which covered all original correspondence and documents relate to this bond. PW3 testified that there were only two trustees. PW3 and Abdul Waheed Sheikh who is still alive and who ought to have been summoned as witness by prosecution. PW9 Gordon Ochieng in his evidence said on 5/8/2003 in his letter of 1/8/2003 the correspondence file No. 5324 was released to Director of CID as same touched on fraud on fraud on LR 209/73/6.

A skeleton was purportedly constructed on strength of a title issued in the name of the Appellant. But PW8 John Ndiritu, investigating officer testified he has never seen correspondence file No. 5324 and

despite matter being in criminal court anew title was issued to Abdul Waneed Sheikh and Abdul Hameed Sheikh by Commissioner of Lands Judith Marylin Okungu on 27/7/2005 which title was officially received at Lands Office on 30/9/2005. There is a letter dated 18/10/2005 by Judith Marylin Okungu (Commissioner of Lands) which was shown to PW9, Gordon Ochieng. In his cross-examination which letter was photocopied from correspondence file No. 5324 upon order of 18/12/2007 addressed to PW2 (Ajaa Dubai Advocates) which reads "In my opinion you should find the real registered owners of this property if you wish to deal with it in any way. Grant No IR 18339 a valid title issued by the office and the same will be destroyed to prevent any further fraudulent dealings. The defence land officials destroyed critical during the pendency of his criminal case. A skeleton file was presented to court on guise the correspondence file 5324 could not be available when indeed pursuant to this court file order of 18/12/2007 the defence had opportunity to go through this particular file and make copies. This skeleton file had selective letters and did not reveal entire truth of transactions in the matter.

File No. 5324 was forwarded to D.C.I. on 5/8/2008 in relation of plot 209/8/2003 which was in custody of CID Department which PW8 has had no access to he has never seen or heard of. The notice served on Appellant by arresting officer PW10 and produced in court is copy and in his copy which clearly is not.

PW7 (MB Mule) produced certified copy of folio 413 from volume 19 Enter and 37 in folio registered in volume N20 show assignment to Appellant and the vesting registered on 27/11/2001.

These entries do not show the charitable trust anywhere subsequent to 27/11/2001 so that when the new title was purportedly issued on 30/9/2005 corresponding changes were made in Folios at the land office a glaring irregularity. This witness did not record statement.

PW4 Mutaza Jevanjee testified that on 13/3/2002 his clients trustees of Sheikh Fazal Ilahi Noordin charitable Trustee instructed him to ascertain the position of the title to its moveable property LR 209/73/6 as Appellant was claiming to be the owner this testimony of PW3 the alleged Managing Trustee who testified that he became aware someone was trying to sell. PW4 produced affidavit sworn by him on 18/7/03 if he wanted to ascertain ownership of LR 209/73/6 he ought to go to Lands Office to file No. 3511 deed file. There is no evidence that PW4 made search. PW4's evidence had no probative value in this case.

PW5 Joseph Maina Mwaura was merely keep of records. The law of forgery they quoted authority Ex parte Charles Windor 1868 10 Coxcc 118.

Cr. Appeal 96 of 1996 Mary Mangi Meshak vs. R.

Cr. Appeal No. 50 of 1996 Peter Ngugi Thotho vs R.

Counts 1, 3, 5 and 6 are based on presumption that documents there are false documents. This is not case we have demonstrated and we submitted conviction cannot remotely be sustained and we ask for acquittal under Section 210 Criminal Procedure Code count 2 and 4 are based on assumption that accused/appellant uttered the alleged false documents that accused to one John Mwangi Thuita a witness who was never called to testify. We submit sustained as subastrum of the charge is gone. John Mwangi Thuita ought to have come to court to allege that false document was uttered to him. The copies of authorities were supplied.

The Trial Magistrate analysed the evidence of prosecution and the defence. The Appellant said he owned the land after being given by the Abdul Sheikh as compensation on being injured and being confined to wheelchair. He wrote letter dated 5.1.1982 and swore affidavit in 1997. He got vesting order transferred the land to himself. The Trial Court made findings. Sectopm 345 Penal Code defines forgery as the making of false document with intent to defraud. Section 353 description for punishment to uttering false documents. Here there were 4 charges on forgery of vesting order in High Court in HCC No 3812/2000 and a certain assignment document and a certain grant of letters of administration HCC 1089/1997 dated 25/8/1997.

Appellant told the court that he obtained the same from Court. The trial magistrate did not produce the court file or proceedings that led to issuance of that vesting order. It was not his duty to prove his case. The Trial Magistrate said vesting order was a forgery as there was no case 3812/2000.

There was no proof that case No. 3812/2000 was made by Appellant and the same was not signed by Judge. But Deputy Registrar gave evidence. The Trial Magistrate therefore concluded that Appellant forged said vesting orders dated 23.11.2001 may be officials from lands office. The court rejects the defence on count one.

Trial Magistrate concluded and convicted him accordingly on count II the offence of uttering a false document.

On 27.11.2001 Appellant uttered a forged vesting order to John Mwangi Thuita a land Registrar. There was no evidence of uttering before the court. The said John Mwangi Thuita was not in court. He was not a complainant. The court rejected Appellants defence and finds that prosecution has proved against the accused person on count II and convicts him accordingly for offence of uttering false document.

On count III forgery of an assignment the court has seen document dated 28.6.2001 the assignment signed by Deputy Registrar High Court by virtue of court order in Civil Suit 3812/2000. Was it made (signed) by the Appellant? It does not have court seal.

Again the Trial Magistrate expects the Appellant to produce proceedings. That is placing the burden of proof upon Appellant. In the assignment the Appellant, it is alleged purchased the property from a certain charitable trust for Shs,000,000/= whereas in his defence Appellant says he was given the land. There was no comment of other trustees the letter is only a copy. Original not produced as exhibit. The court rejects the defence and finds count III is proved by prosecution. Appellant forged on 28/6/2001 the court convicts accordingly on count III and so regarding count IV there is no doubt it did not have court seal presented to Registrar was a forged document. Court rejects and convicts him.

And on count 5 appellant on 22.8.1997 forged a grant. The Trial court relied on PW6 Joseph Muiru Mwaura case No. 1086/1997 was in respect of James Mwaniki Murage deceased. The documents were not issued by High Court the parties.

The Appellant did not produce the proceedings. On count 6 the court found was forged. The court finds that the prosecution has been able to prove all counts.

The court convicted Appellant on all counts. In the beginning the Appellant was said to be owner of 209/73/6. There was a proposed sale agreement between him and Zubedi. The Appellant never challenged his story. These documents were heaped on him and at no time was evidence of his forgery or uttering any documents proved. For instance when the assignments were signed it is not him who signed or when the vesting order was signed by Deputy Registrar. No one produced evidence that it is him who

made and signed them. His handwriting was not tested, his signature was not rested with those in forged documents. The prosecution just said “**you forged**”.

There appears there were several persons with interest in this land (trust land). No proper investigation was carried out. And then the Trial Magistrate expected the Appellant to bring documents to prove his case. That is not done in criminal procedure.

I am of the convinced opinion that the prosecution did not prove all the counts to required standard that is beyond reasonable doubt. I quash conviction and set aside sentence. The Appellant shall be set free forthwith unless he is otherwise lawfully detained.

Dated and delivered at Nairobi this 11th day of October 2010.

J. N. KHAMINWA

JUDGE