



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 91, 92, & 93 of 2010

(From Original Conviction and Sentence in Criminal Case No. 899 of 2007 of the Principal Magistrate's Court at Kwale: A.M. Obura – R.M.)

BAKARI MOHAMED MBUGUNI 1ST APPELLANT

ALFANI BAKARI MWARAMWISHO 2ND APPELLANT

MOHAMED BAKARI MAVUO 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The three Appellants namely **BAKARI MOHAMED MBUGUNI** (hereinafter referred to as the 1st Appellant), **ALFANI BAKARI MWARAMWISHO** (hereinafter referred to as the 2nd Appellant) and **MOHAMED BAKARI MAVUO**, (hereinafter referred to as the 3rd Appellant) had filed appeals against their convictions and sentences by the learned Resident Magistrate sitting at Kwale Law Courts. The 1st Appellant having been released on Presidential Amnesty on

1st June 2010

abandoned his appeal and this was so marked by this court. Thus the hearing of the appeal proceeded for the 2nd and 3rd Appellants only. The Appellants had been charged on four counts as follows

COUNT NO. 1

Making a False Document contrary to Section 347(d) (iii) of the Penal Code

COUNT NO. 2 and 3

Uttering a False Document contrary to Section 353 of the Penal Code as read with S. 349 of the Penal Code.

COUNT NO. 4

Obtaining Registration by False Pretences contrary to Section 320 of the Penal Code.

Mr. Magolo Advocate appeared and argued the appeal on behalf of the 2nd and 3rd Appellants. **MR. ONSERIO**, learned State Counsel who represented the State conceded the appeal.

The basic facts of the case revolved around a dispute between **PW1 FAUD MAHMOOD MOHID** and the Appellants over a parcel of land Kwale/Tiwi/2615. The matter was initially adjudicated over by the Land Tribunal in Kwale vide Case No. 39 of 2001. Later on it was alleged that the Appellants illegally registered a transfer of land between one **BAKARI ATHUMANI MWAKUNYAPA** (deceased) and the 1st and 2nd Appellants for a consideration of Kshs.60,000/-. It was further alleged that the Appellants uttered this land transfer document to a Resident Magistrate S. Maindi (now deceased) for commissioning with full knowledge that it was not a genuine document.

I will now proceed to deal with each count on an individual basis. With respect to Count No. 1 the learned trial magistrate in her judgement acquitted the 1st and 2nd Appellants of this charge. At page 16 line 9 she states

“I find that Count No. 1 was proved beyond reasonable doubt as against the 3rd Accused. No evidence was led to show how the 1st and 2nd Accused made a False Document”

However as submitted by Mr. Magolo learned counsel the charge on Count No. 1 read Making a False Document contrary to S. 347(d)(iii) of the Penal Code. I have carefully read S. 347(d) and find that it merely provides a definition of making a False Document. It does not create any offence. A definitive section cannot form the basis of a charge in law. The offence of Forgery is created by S. 349 Penal Code. No charge under S. 349 was brought against any of the Appellants. The learned trial magistrate erred in convicting the Appellants on a definitive section. No amendment was made to the charge. No offence is created by S. 347(d) of the Penal Code. As such the conviction of the 3rd Appellant on Count No. 1 has no legal basis and cannot be upheld. I therefore quash this conviction.

On Count No. 2 the Appellants were charged with Uttering a False Document to one Ms Sophie Maindi a Resident Magistrate at Kwale Law Courts. It did transpire during the proceedings that Ms Maindi is unfortunately deceased and thus could not testify before the court. On this basis alone the charge ought to have failed. Once again I find that the learned trial

magistrate erred in rendering a conviction on a charge in which the complainant did not testify in court. I therefore quash the Appellant's conviction on Count No. 2.

On the third count the Appellants are alleged to have uttered the same document to **PW2 JOSEPH MWACHANA MWADIME**, a District Lands Registrar at Kwale. At no time did **PW2** claim that any of the Appellants had presented the said document to him. Indeed he states at page 11 line 20

“I did not know the owners of the land until they came to register their transaction. I do not know them facially”

By this **PW2** means that he is unable to identify the Appellants and he does not identify any of them in the lower court. Even if the document in question was uttered to **PW2**, there is no proof that it was any of the Appellants who committed the act of uttering since **PW2** is not able to positively identify any of them. Additionally, I do find the behaviour and actions of **PW2** in this matter to have been very suspicious. **PW2** states that although he was told the owner of the land was deceased he made no effort to confirm this and did not seek any proof of this death before registering the transfer. **PW2** as a Land Registrar was a public officer and was required to exercise due diligence in the performance of his duties. He failed to do so and so was equally complicit in any offences that may have been committed. I do hereby quash the convictions on Count No. 3.

Lastly on Count 4 and having considered carefully the evidence of all the witnesses, it is clear that this was a dispute over land and ought to have been properly handled in a civil court or by way of a succession cause. The police ought not to have preferred criminal charges in what was clearly a civil dispute. The mens rea for the offence of obtaining is the intent to defraud. Was this the intent here? It could be argued that the Appellants merely sought to regularize their ownership of the said land but did not intend to illegally defraud any party of the same. In any event in view of my earlier sentiments that no offence is disclosed on Count No. 1 and the document being the same document referred to in Count No. 1 cannot stand.

Finally I do allow this present appeal in its entirety. The convictions against the 2 Appellants are quashed and the subsequent sentences are hereby set aside. Both 2nd and 3rd Appellants to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and Delivered in Mombasa this 5th day of October 2010.

M. ODERO

JUDGE

Read in the presence of:-

Mr. Magolo for Appellants

Mr. Onserio for State

M. ODERO

JUDGE

5/10/2010