



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 164 of 2006

HARON GIKONYO KAMAU APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

Coram

Mwera, J.

Ms Oundo for the State

Onsongo for the appellant

CC. Raymond.

In the lower court at Nyando the appellant faced a charge under section 349 P.C in that on unknown dates between December 2001 and August 2004 in Muhoroni, Nyando jointly with others not before court with intent to defraud forged a log-book No. C. 375674 for a tractor registration No. KUC 152 (FORD) purporting it had been transferred to his names by Mumias Sugar Company Ltd. After trial the lower court convicted and fined the appellant Ksh 10,000/= in default to serve eight (8) months imprisonment. He paid the fine.

A 9-point appeal was lodged by Mr. Onsongo following the lower court decision, which points were argued generally before this court.

Counsel submitted that under section 349 P.C. the prosecution must prove that the document forged is not the one that ought to be. The prosecution did not prove that the log-book before court was not a genuine one and so did not prove its case. Referring to the evidence of PW4 the court was told that one J. K. Gikonyo, now deceased, the father of the appellant collected two log-books including the subject one no. C.375674 from the seller of 2 tractors, including registration no. KUC 152. Under section 9 (2) of the Traffic Act the seller, Mumias Sugar Co. Ltd. was obliged to transmit in a prescribed form the details of the transferee of tractor no. KUC 152 to the registrar of motor vehicle in order to note the transfer and endorse the name of the new owner on the log-book – C.375674. The sugar company did not do such a thing and thus without saying and proving who did that and when, it was in error to convict the appellant of forgery.

Mr. Onsongo continued that the deceased Gikonyo bought the two tractors from the sugar company but No. KUC 152 was for the appellant. His father handed its log-book to him and he started the process to get his name into it. It was not forgery. At no time did tractor No. KUC 152 belong to the deceased Gikonyo and the appellant was not interfering with ownership under section 8 of the Traffic Act. He held the actual log-book.

Ms. Oundo, the learned Senior State Counsel posited that the deceased Gikonyo bought tractor No. KUC 152 – his own property. He died before distributing his property. But then the appellant began moves to have the tractor registered in his name. There was no evidence that his late father (Gikonyo) bought that tractor on his behalf. That PW2, the widow of the deceased produced a list of the assets of the estate of Gikonyo. This tractor was earmarked for sale and

distribution of the proceeds. The appellant committed the offence under section 349 P.C. Mr. Onsongo maintained his stand adding that the inventory of assets was PW2's own proposal on distribution thereof. So far for the submissions. Let us now turn to the evidence before the learned trial magistrate.

Stephen Asela Asachi (PW1) of the Kenya Revenue Authority (KRA), Roads Transport Department told the lower court that his duties included keeping motor vehicle records and seeing to registration and successive transfers of motor vehicles. Tractor No. KUC 152 was registered in the names of Mumias Sugar Company Ltd. There had not been any other owner of this tractor since 28/5/80 (Exh. P1). PW1 showed the court FORM C used in a case of transfer of ownership of the given motor vehicle. Kenya Revenue Authority verifies and approves the transfer then that is endorsed on the log-book.

On 9.1.99 the appellant and Mumias Sugar Company Ltd. applied that the subject tractor was being transferred. That application was yet to reach PW1's office. He also referred to a copy of a log-book for that tractor No. KUC 152. It showed that its registered owner was the said sugar company:

“The name Harun Gikonyo Kamau's name is also inserted there but there is no official stamp from KRA and there is no date.”

The witness said that there was a Kenya Revenue Authority stamp, though not very clear over the sugar company's name but no such stamp appeared against the appellant's name. In that case Kenya Revenue Authority did not sanction the **“transfer”**. PW1 went on to list the documents that must be submitted to Kenya Revenue Authority, along with FORM C (for transfer of ownership) duly signed by the seller (transferor).

Monica Muthoni Kamau (PW2), the widow of the late John Kamau Gikonyo knew the appellant – a co-wife's son. Gikonyo died in 2001 and in KSU HC SUCC. C. 125/03 was to be found an inventory of his property – land and vehicles – (Exh. P4 [marked as Exh P]). The deceased bought tractor No. KUC 152 from Mumias Sugar Company. It was in a good working condition. He died before he gave out (distributed) his property. After Gikonyo's death PW2 noticed that this tractor was no longer in its parking place. It had been moved some distance. PW2 caused police to be called and she reported the interference with the tractor which the court had directed that it be sold and proceeds shared. PW2's co-wife Martha did not know who moved the tractor but when the appellant came there he removed a log-book from his pocket and showed the police, claiming that the tractor was his property. She insisted that it was not. Then C.I.D Officers came into the matter and towed the tractor away. As the elder wife of Gikonyo, PW2 maintained that the deceased never gave that tractor to the appellant. The assets remained undistributed and it was his co-wife who filed the succession cause – the appellant's mother. In it, Exh. P4 (Exh. P1) was her proposal on how to share the assets.

David Mwangi Kamau (PW3), knew the appellant – a step brother. The late Gikonyo's estate included tractor no. KUC 152 FORD. He bought it from Mumias Sugar Company in 1985. PW3 was present. After Gikonyo died family wrangles erupted over his property. The matter went to court at Kisumu and it was ordered that while Martha, the younger widow would keep original documents to all the assets, PW2 could retain copies thereof including that of a log-book for tractor KUC 154 – before court. Then PW3 heard that the appellant had processed the log-book between the seller and Nairobi to be in his own name. This tractor never changed ownership. He knew the log-book of this tractor which was before court (MF1 – P5).

Emily Otieno (PW4) an employee of Mumias Sugar Company Ltd. testified next. She was the company's legal officer and in-charge of its documents. Her employer once owned tractor no. KUC 152 FORD which was disposed of after advertising it for sale. She produced a delivery book releasing log-books:

“In serial No. 5 one J. K. Gikonyo appear (sic) as the person who bought the tractor. He collected two log-books in respect of two vehicles.”

She added in cross – examination:

“ The company issued a blank transfer form alongside the log-book and this is the practice of the company.”

C. I. Christopher Kiplimo (PW5) formerly of Nyando C.I.D. Office said the following: Monica (PW2) visited his office on 12.8.2004 complaining that her co-wife had taken one of their late husband's property, a tractor. After PW5 listened to the report, investigations got underway ending with the appellant producing log-book to the tractor showing him as the owner. To be satisfied whether the transfer was regular, PW5 inquired from Kenya Revenue Authority and he was informed that tractor no. KUC 152 was still in the name of Mumias Sugar Company Ltd. It had been bought by the deceased Gikonyo, father of the appellant. PW5 learned that he brought it home and it was his property until he died. But then the appellant interfered with its documents with a view to deny the other “house” rights in this tractor and got registered over it. That was forgery. The original documents had been in possession of the appellant's mother, and yet

the log-book (Exh P5) – a copy obtained from Kenya Revenue Authority had the appellant’s name. PW5 produced Exh. P3 to the effect that the first owner of the subject tractor was Mumias Sugar Company then the appellant. The appellant was then charged.

According to PW5 the log-book was forged by inserting the name of the appellant while the transfer form bore a forged rubber stamp of Mumias Sugar Company. That company denied the rubber stamp, so C. I. Kiplimo established during investigations. He knew how transfer of motor vehicles is done. The owner of the motor vehicle signs a transfer form and forwards it to Kenya Revenue Authority along with the log-book. Kenya Revenue Authority verifies, then effects changes in the log-book.

The appellant gave a short unsworn statement in defence. **“When I bought the tractor, I filled the transfer form together with the log-book and was prepared to take it to the registrar of motor vehicles.”**

In this court’s view the appellant with others forged his name in the log-book after doing the same on FORM C. The entries were false with intention to defraud. The procedure as per PW1 (Asiachi, KRA) and C. I. Kiplimo (PW5) is that it is the seller who fills the transfer form (FORM C) and with other due documents submits it to Kenya Revenue Authority along with the log-book. When Kenya Revenue Authority is satisfied that all is in order, it endorses on the log-book and stamps the same. That never happened here yet the appellant was in possession of the log-book bearing his name as the transferee. No Kenya Revenue Authority stamp or date. There was no sanction by Kenya Revenue Authority that the tractor be transferred to the appellant. According to PW1 this tractor still remained in the name of Mumias Sugar Company. So all in all, the appellant forged both the FORM C, a blank form which the seller gave to the deceased Gikonyo. Gikonyo bought 2 tractors including KUC 152 from Mumias Sugar Company. Emily (PW4) had records to that effect. It was not the appellant as he claimed in his defence before the learned trial magistrate. He showed no evidence of such a purchase. Then before this court Mr. Onsongo argued that the late Gikonyo went bidding and buying this tractor on behalf of the appellant. The two positions are totally different. PW3 was present when his late father bought two tractors. There is no mention that he bought No. KUC 152 on behalf of the appellant. He must have accessed the original documents in the custody of his mother, Martha, and the two hatched a scheme to deny the other house (of Monica) of its right and interest in tractor KUC 152 by forging due documents to make it appear as if it was properly transferred to the appellant. It was never so transferred.

As the lower court found, the appellant was guilty of the offence charged and this court is disinclined to disturb those findings.

This appeal is dismissed.

Judgment accordingly.

Delivered on 15.12.2008.

J. W. MWERA

JUDGE

JWM/hao