



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL CASE 404 OF 2002

JOHN MARUI WANDITHI APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

John Marui Wandithi hereinafter referred to as the appellant is aggrieved by his conviction by the Senior Resident Magistrate Nyeri on 5 counts of forgery contrary to section 349 of the Penal Code and 3 counts of uttering a false document contrary to section 353 of the Penal Code. The Appellant was charged jointly together with one Francis Mugwe Waititu (hereinafter referred to as the Co-Accused) who was acquitted of all counts.

The evidence that was adduced before the trial magistrate was briefly as follows:

The appellant entered into an agreement with one Kamunya Karigo for sale of his land known as 683 Mahiga Munyage. However members of Kamunya Karigo's family who included his sons James Ndungu Kamunya (P.W.2), Garishon Kingori Kamunya (P.W.3) and daughter in law Janet Wanjiru Nderitu (P.W.4) objected to the sale and sought the intervention of the area chief. The chief stopped the transaction and advised that the amount of Kshs.25,000/= paid by the Appellant be refunded to him, however the Appellant refused to accept refund of the money.

Sometime in 1999, whilst the matter was thus pending Kamunya Karigo died. On 29th December 2000, succession cause No. 463 of 2000 in respect of the estate of Kamunya Karigo was filed at Nyeri High Court registry and received by John Bosco (P.W.9) a clerk in the Registry. Amongst the documents submitted was a Petition naming the Appellant as the Petitioner. There was also a letter purported to be written and signed by Simon Mathenge Nderitu the Chief of Mahiga location identifying the appellant as the one to file the petition. There was also Form No. 38 purported to be a consent to the making of the grant, thumb-printed by P.W.1 and signed by David Ndungu Kamunya, as well as a Form of renunciation of right to apply for letters of administration purported to be signed by P.W.1 and David Ndungu Kamunya.

P.W.2 got wind of the succession cause and proceeded to the High Court Registry where the Appellant's Co-Accused was identified to him as the person who had filed the succession cause. He reported the matter to the CID and the appellants Co-Accused was arrested as neither P.W.1 nor P.W.2 nor any of the immediate family members had signed the documents or were aware of the succession cause. Inspector Peter Muriithi Kaguamba (P.W.10) who was

investigating the case interrogated Chief Simon Mathenge Ndeirtu (P.W.6) but he denied having written

or signed the letter.

The documents were forwarded to the document examiner and the Principal Registrar of persons for examination of the handwriting, signature, rubber stamp and thumbprint together with specimens from P.W.1, 2 and 5.

P.W.11 Oscar Opiyo a finger print officer found that the finger prints on the document were not identical to those on the specimen of P.W.1, P.W.12 Emmanuel Kenga the document examiner found that the specimen writings and signatures of P.W.2 and P.W.5 did not agree with those on the document, nor did the specimen of the chief's rubber stamp agree with that on the letter.

Following interrogation of the Appellants Co-Accused the appellant was arrested and the two were jointly charged with forging and uttering the documents.

In his defence the Appellant explained that he entered into a sale agreement with Kamunya Karigo for sale of his land Mahiga Munyange 683 at a price of 15,000/= which he paid in full. Kamunya Karigo who was ailing instructed his family to assist in effecting the transfer. When Karigo died the appellant talked to the deceased's wife and son and they agreed to assist him file a succession cause. One of the sons Gerishon Kamunya brought the letter from the chief and the death certificate. The documents were brought to the Appellant by one Kingori all having been duly signed and the Appellant took

then to the High Court. The appellant denied having forged any document. He blamed Kingori.

From the above it is evident that the letter purported to have been written and signed by Simon Mathenge Ndeirtu the chief of Mahiga location was neither written nor signed by him and was therefore a forgery. The evidence of the Document examiner (P.W.12) and that of P.W.5 was conclusive in this regard.

Likewise it is evident that Form No. 38 consent purported to have been signed by P.W.2 and thumb-printed by P.W.1 was a forgery. The evidence of P.W.11, P.W.12, P.W.1 and P.W.2 was sufficient to prove this.

Similarly the Form of renunciation of right to apply for letters of administration purported to have been signed by David Ndungu Kamunya and thumb-printed by Hannah Waitete Kamunya were also forgeries as they were not signed by the person purported to have signed them.

Although there was sufficient proof that the documents were forged, the prosecution did not go further to prove that the forgery was actually done by the appellant. Neither the document examiner nor the fingerprint expert connected the appellant with the forgeries. In fact the specimen writings and signature of the appellant were not submitted to the documents examiner for examination. The trial magistrate appears to have relied on the mere fact that the appellant stood to gain by the forgeries but this was not sufficient to prove that

he is the one who actually forged the documents. The trial magistrate therefore erred in convicting the appellant of the forgery charges.

As regards the 3 counts of uttering the forged documents. It is evident that the appellant was one of those who presented the documents to P.W.9. The question is whether the appellant knew that the documents were false and fraudulently uttered them.

The appellant maintained that the documents were brought to him by Kingori having been duly signed and that he did not know that the documents were forgeries. I have considered this defence, but find that the same cannot hold. The only person who stood to gain by the perpetration of this forgery was the appellant. The family of Kamunya Karigo had objected to his purchasing the land and it is inconceivable that they would have consented to have the land transferred to the Appellant through succession. I find that the appellant knew that the documents were forged and knowingly and fraudulently uttered the

forged documents to John Bosco. I find that the appellant was properly convicted in respect of counts VI, VII & VIII which were the uttering charges.

With regard to the sentence, the same was extremely lenient but since there was no request for enhancement I shall not interfere with the same. The trial magistrate however erred in ordering the sentences to be consecutive as the offences were all part of the same transaction.

The upshot of the above is that I do allow the appellant's appeal against conviction in respect of counts 1, 2, 3, 4 & 5. I quash these convictions and set aside the sentences in respect of the same.

I dismiss the appeal against conviction in respect of counts 6, 7 & 8. I set aside the order for the sentences imposed to run consecutively and order that the same shall run concurrently.

Those shall be the orders of this court.

Dated signed and delivered this 15th day of September 2005.

H. M. OKWENGU

JUDGE