



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 209 OF 2001

(From Original Conviction and Sentence in Criminal Case No. 2164 of 1999 of the Principal Magistrate's Court at Nyahururu) – W. N. NYARIMA

JOHN THUO MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, John Thuo Macharia, was charged with seven counts that arose from the procurement of the title in respect of Land Parcel No. NYANDARUA/SILANGA/Plot No. 28 in the name of the Appellant. The Appellant was charged with three counts of forgery contrary to **Section 349** of the Penal Code. He was further charged with three counts of uttering false documents contrary to **Section 353** of the Penal Code. He was finally charged with one count of obtaining registration of land by false pretences contrary to **Section 320** of the Penal Code. After a lengthy trial, the Appellant was convicted as charged on all the offences. He was sentenced to serve one year imprisonment in the first six counts. He was sentenced to serve six months imprisonment in the last count. All the sentences were ordered to run concurrently. The Appellant was aggrieved. He has appealed to this Court against both the conviction and sentence.

In his Memorandum of Appeal, the Appellant has faulted the decision of the trial Magistrate's Court in convicting him when the prosecution had not established beyond reasonable doubt the charges against him; He faulted the trial Magistrate for relying on contradictory and weak evidence to convict him; He further questioned the decision of the trial Magistrate in convicting him based on inconsistent and fabricated evidence; He further faulted the trial Magistrate for failing to consider the fact that an inordinate period of time had elapsed from the time the alleged offence was committed to the time the charges were brought against the Appellant; The Appellant was further aggrieved by the decision of the trial Magistrate as the said Magistrate did not consider the fact there existed an agreement between the Complainant and the Appellant over the subject parcel of land; He further faulted the decision of the trial Magistrate in convicting him based on the evidence of expert opinion, which was uncorroborated. He finally was dissatisfied with his conviction by the trial Magistrate and faulted his decision for so convicting him without considering the evidence adduced by the defence, which was cogent, consistent and overwhelmingly favourable to dislodge the charges laid against him.

At the hearing of this Appeal, the Appellant was represented by Mr. Nyangweso while the State was represented by Mr. Koech. It is imperative that the facts of this case are set out, albeit briefly. PW 2 Kahonge Muthondu was allocated Plot 28 at Silanga Settlement Scheme Ol Kalou by the Settlement Funds Trustees. It was his evidence that sometime in 1971 he decided to go to Tanzania. He left his children at the parcel of land under the care of Hezekia Macharia, the father of the Appellant. Later his

children were removed from the said parcel of land by the father of the Appellant who alleged that he had purchased the parcel of land in question. PW 2 was surprised by the turn of events, as he had not entered into any transaction with either the Appellant or his father. PW 2 later learnt that the Appellant had been registered as the owner of the said parcel of land. It was his further evidence that he did not attend any Land Control Board meeting which sanctioned the transfer of land from himself to the Appellant. He admitted that he had received the sum of Kshs 15,000/= from Hezekiah Macharia for business purposes which he was to repay. He testified that this money was never meant to be a consideration for the sale of his land. He stated that he was to pay back the said Hezekiah Macharia the said sum of Kshs 15,000/= with one hundred percent profit i.e. Kshs 30,000/=. He produced the original letter of allotment that allotted him Plot No. 28 at Silanga Settlement Scheme by the Settlement Fund Trustees. PW 3 David Kahonge Kamau, the nephew of PW 2 testified that he was left behind at the said parcel of land by his uncle PW 2 when he went to Tanzania. After a while, PW 3 his mother and his sister were forced to leave the said parcel of land by the Appellant. PW 4 Maurine Wairimu Kahonge, the daughter of PW 2 testified that she was left at the said parcel of land by his father when he went to Tanzania for business. She testified that at the time, the Appellant's father had a very good relationship with her father to the extent that when her father went to Tanzania, he left her in the custody of the Appellant's father. She however testified that they were asked to leave the parcel of land after they had been shown papers showing that the land in question had been transferred to the Appellant. PW4's complaint to the District Commissioner and the Provincial Commissioner yield no fruit. PW 5 Muthoni Kahonge, the wife of PW 2 testified how she was forcefully removed from the parcel of land in question. She narrated the efforts that she made to have the land returned to her family from the Appellant. She sought assistance from the local District Commissioner to the Provincial Commissioner, Central Province. She further testified how it was discovered at the Provincial Office that no consent to transfer had been granted from the Complainant to the Appellant. PW 6 Ruiga Rugutu the former District Officer One (D.O. 1) based at the Provincial Commissioner's Office testified how he was given the task to deal with the complaint raised by PW 5. On examining the records kept at the Provincial Commissioner's Office, he discovered that no Provincial Land allocation committee meeting had been held on the 28th of January 1972 as alleged by the Appellant. Further the records showed that the Application made by the Applicant when it came up on the 2nd of December 1971, the same was deferred. It was Minute number eleven. The reason for the deference of the Provincial Land Control Board was due to the fact that both the vendor and the purchaser were absent. The Complainant's wife had also written a letter of objection. In any event it was decided that the Appeal to the Provincial Land Control Board was time barred. PW 6 further testified that under the Law there was no way that a consent of the Land Control Board given in 1972 could be given effect to in 1985. He requested the Criminal Investigation Department to investigate the matter, which led to the arrest and subsequent arraignment of the Appellant in Court.

PW 7 Corporal Maxwell Otieno was the Investigation Officer in this case. He testified how he investigated the case and found that indeed the Appellant has committed fraud. He produced all the documents which were relied on in the case as exhibits. The most important and relevant Exhibit number five which was the Minutes of the Land Control Board which showed that the Land Control Board consent had never been granted. PW 8 Washington Ongori Sewa was the District Lands Registrar, Nyahururu between 1979 to 1986. He testified how the Appellant came to the Lands Office with transfer documents purportedly transferring parcel number NYANDARUA/ SILANGA/28 from the Complainant to the Appellant. PW 8 was shown the consent of the Land Control Board and a document from the Director of Lands and Settlement transferring the said parcel of land to the Appellant. He testified that he transferred the said parcel of land from the Complainant to the Appellant, as he believed the documents were genuine. PW 9 James Kamau, the District Settlement Officer, Nyandarua testified how Plot No. 28 Silanga Settlement Scheme was transferred. He testified that the Local Land Control Board has refused consent and upon Appeal to the Provincial Land Control Board the same was granted. He testified that he acted upon the consent from the Provincial Land Control Board believing the same to be genuine. PW 1 Superintendent Emmanuel Karuga, a document examiner attached to the Criminal Investigation Department, Headquarters Nairobi testified how a Mr. Mweu a retired document examiner examined documents which were submitted to him by the Criminal Investigation Department. The said Mr. Mweu confirmed that the purported transfer documents would not have been signed by the Complainant. His conclusion therefore was that the signature on the transfer document was forged. When put on his defence the Appellant explained that the Complainant has sold the said parcel of land to him. He produced an

agreement witnessing the sale of the said parcel of land from the Complainant to him. He produced several exhibits showing the genuineness of the transaction that led to the transfer of the said parcel of land from the Complainant to him. He testified that the Complainant attended the Land Control Board which granted him consent and further executed the transfer forms transferring the said parcel of land from the Complainant to him. He testified that the Complainant had moved out of the land in 1971. He testified that the land in question belonged to him having been genuinely transferred to him by the Complainant.

The High Court as the Appellate Court of the first instance is mandated to look at the evidence adduced before the trial Court afresh, re-evaluate and re assess the same and reach its own independence conclusion whether or not to uphold the conviction of the Appellant. In so deciding the High Court has to put into consideration the grounds of Appeal put forward by the Appellant and also put into mind the fact it did not have an opportunity of seeing the witnesses as they testified before the trial Magistrate's Court and therefore is not expected to give its opinion on the demenours of the witnesses. (See **Pandya – versus- Republic [1957] E. A. 336 Ruwala –versus- Republic [1957] E. A. 570 and Okeno –versus- Republic [1972] E. A. 32.**)

In the instant case the issues for determination by this Court is whether or not the Complainant executed the transfer documents transferring parcel No. 28 Silanga Settlement Scheme to the Appellant. The second issue for consideration by this Court is whether or not the consent of the Land Control Board was granted by the Provincial Land Control Board transferring the said parcel of land from the Complainant to the Appellant. It is not in dispute that the Complainant and the Appellant's father were friends. This friendship seems to have extended to the Appellant. The Complainant left the country in 1971 and went to Tanzania for business. He was given the sum of Kshs 15,000/= by the Appellant's father. The Complainant in his evidence admitted receiving this money, but he stated that the same had been given to him by the Appellant's father as a loan to be repaid with one hundred percent profit. The Complainant was evasive when asked if he had repaid the said sum to the Appellant's father. The Complainant left the said parcel of land under the care of his erstwhile friend. He also left his children in his care. From the evidence it appears that soon after the Complainant had left the country the Appellant developed interest in the said parcel of land. He first forcefully removed the Complainant's family from the said parcel of land. From the evidence, it is clear that the Appellant attempted to have the parcel of land transferred to him but his designs were thwarted by the Complainant's wife who testified before the trial Magistrate's Court. His first attempt to obtain the consent of the Land Control Board from the North Nyandarua Land Control Board was rejected. He was not discouraged. He appealed to the Provincial Land Control Board. His Appeal was similarly rejected. The Provincial Land Control Board ruled that since both the parties were absent and further since the wife of the Complainant had filed an objection, it could not grant the consent. The Provincial Land Control Board further observed that the Application presented to the Appeal's board was timebarred. Upon being frustrated in his endeavours to legally secure the consent of the Land Control Board, it appears that the Appellant put into effect a devious plan whereby he would have the said consent as it were by hook or crook. This plan involved forgery. He purportedly obtained the consent of the Land Control Board from the Provincial Land Control Board. On the face of it, the consent appeared to be genuine. It was acted upon by the District Land Registrar Nyahururu and the District Lands and Settlement Officer, Nyandarua. Unfortunately for the Appellant, this consent was not supported by the minutes of the Provincial Land Control Board. Infact the minutes of the particular date show that the consent was not granted by the said Provincial Land Control Board. It is also instructive that the consent purported by the Appellant to be genuine was issued on the 28th of January 1972 when no such meeting was held by the Provincial Land Control Board as stated by PW 6 Ruiga Rugutu. The Appellant having fraudulently obtained the consent of the Land Control Board put into action the second part of his scheme. He forged the transfer forms to indicate that the Complainant had transferred the said parcel of land to him. This fact is proved by the evidence of PW 1 the document examiner. I am aware that this Court is not bound to accept the evidence of expert opinion. But the circumstances of this case all the evidence point to the fact that the Appellant actually forged the signature of the Complainant to secure the transfer of the said parcel of land. Considered in totality the evidence of PW 1 is most probable true. From the evidence on record, it is my finding that the prosecution's case against the Appellant was watertight. The same was proved beyond reasonable doubt. The explanation given by the Appellant in his defence does not dislodge the consistent and plausible

evidence adduced against him by the prosecution. It appears that the Appellant along the way after his father had given the Complainant the sum of Kshs. 15,000/=, assumed that the said sum of money could be converted to the land which was owned by the Complainant. Unfortunately the method that the Appellant sought to convert the said parcel of land was illegal. I find no merit whatsoever in the ground put forward by the Appellant in support of his Appeal. I therefore dismiss his Appeal on conviction.

On sentence, I have considered the age of the Appellant. This fact does not excuse the Appellant from Criminal Liability. I have also considered all the circumstances of this case. I find that the custodial sentence imposed upon the Appellant was not an appropriate sentence to the Appellant.

I therefore set the same aside and order that a Probation Report be prepared by the Probation Officer Nakuru to be availed to this Court on the 6th of May 2004 for further orders of this Court on sentence. I noted that the Appellant, by an oversight on the part of the trial Magistrate, may actually (after the finding that he had fraudulently obtained the transfer of the said parcel of land to him) benefit from his Criminal actions. This Court will rectify this anomaly. Under the provisions of **Section 177** Criminal Procedure Code. It is hereby ordered that the land certificate issued to the Appellant in respect of NYANDARUA/SILANGA/28 on the 25th of January 1983 is hereby cancelled. If there are any other subsequent transactions the same are ordered cancelled. The said parcel of land shall be registered in the name of the genuine owner **Kahonge Muthundu**, the Complainant.

It is so ordered.

DATED at NAKURU this 27th day of April, 2004.

L. KIMARU

AG. JUDGE