



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.161 OF 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyamira in Criminal Case No.166 of 2002 – K. W. KIARIE ESQ., S.R.M)

SAMWEL BUGENDI AYANGA APPELLANT

VERSUS

REPUBLIC RESPONDENT.

JUDGMENT

The appellant was charged and convicted on five counts by the Principal Magistrate Nyamira. The first and second counts were that of making a document without authority c/s. 357(a) of the Penal Code. It was alleged that he forged an application for consent of Land Control Board in the name of Yusabia Moraa purporting it to be by the Chairman of Ekerenyo Division Land Control Board. In 2nd count he is said to have made a transfer of land from purporting it to have been consented by YUSABIA MORAA.

Counts 3 & 4 were that of uttering false documents c/s.353 of the Penal Code.

The last count was that of obtaining registration by false pretences c/s.320 Penal Code. There are fourteen grounds of appeal but they all revolve to the same issue that the applicant was convicted without sufficient evidence. Mr Gekenye submitted at length and stated that the magistrate relied on documents produced by the documents examiner. There were erasures on the documents and new writings inserted. The learned State Counsel did not support the conviction and sentence and conceded to the appeal.

The whole case hinged on land parcel NORTH MUGIRANGO/ BONYARORANDE/1535. Initially that land was in the name of YUSABIA MORAA NYANDEGI who was the mother of ANDREW NDEMO NYANDEGI (PW1) who apparently was the complainant. MORAA died on 13.3.2000. Apparently there was a sale deal between the appellant and PW1 in 1992 when Moraa was still alive. Appellant was according to PW1 to buy a portion of the land and he paid the purchase price. However he caused the whole land to be transferred into his name. It was alleged he forged an application form to apply for consent to Ekerenyo Land Control Board and then also forged a consent. He then uttered the two documents to Land Officer and then caused the land transferred to him.

As submitted by the counsel for appellant and the State Counsel the whole evidence was full of contradiction and it was unsafe to convict the appellant on it. The application form to the Land Control Board was thumb printed and not signed by the applicant who was Yusabia Moraa. It was not shown that the thumbprint on the form was that of the appellant. It was also not disproved that it was not that of

Moraa. Even if she had died she had an identity card and as such it would not have been difficult to get her thumbprint and compare to the one on the application form. PW5 P. C. CHARLES OKINDO MONGARE in his evidence properly observed that “there was a query to establish whether, the deceased, Yusabia Moraa had applied for consent”. That is the query which should have been resolved with evidence. He said they sent a thumb impression purported to be that of Mora. Apparently there was no report to that. It is therefore not enough to say that Moraa did not thumbprint the form. The transaction was between 1995-97 and by then Moraa was still alive. It is agreed that there was a sale agreement so whatever the acreage she was to transfer same land to the appellant as it is said he had paid. They therefore must have gone before the Land Board

The second document the appellant is said to have forged is the consent. It is said he purported it to have been issued by the Board Chairman. The board Chairman was not called to deny that he issued the consent. Records from that office were never produced. Only one JOSEPH MAKORI (PW3) testified that he was a member of the Board. He was however not the chairman. He was not the custodian of the records in the Division Office. There must have been a clerk to the board. He was not called. PW6 the document examiner did not say it was the appellant who signed the consent.

The transfer of the land and new registration was done by the lands office. Nobody from that office was called to testify and explain how they registered the land and if the documents they used were false. The magistrate in his judgment pointed out that the registration was done with collusion with land offices but this was not borne by any evidence called

I therefore find that the evidence on record was not enough to prove the charges and it was unsafe to base the conviction on it.

I therefore allow the appeal, quash the conviction and set aside the sentence in all the five counts. Appellant be set at liberty unless otherwise lawfully held.

KABURU BAUNI

JUDGE.

22/7/04

Dated and delivered on 22nd July 2004.

KABURU BAUNI

JUDGE.

22/7/04