



**Republic v Gitau & 2 others (Criminal Appeal 99 of 2023)
[2025] KEHC 4420 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 99 OF 2023
DR KAVEDZA, J
APRIL 8, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

JESSE MBURU GITAU 1ST RESPONDENT

JARED ODUOR OSODO 2ND RESPONDENT

CRISPUS MUNENE 3RD RESPONDENT

*(Being an appeal against the judgement delivered on 6th October 2022
by Hon. Charles Mwaniki (SRM) at Kibera Chief Magistrate's Court
Criminal Case No. 2055 of 2015 Republic vs Jesse Mburu Gitau and 2 others)*

JUDGMENT

1. The respondents were acquitted by the Subordinate Court after the close of the prosecution's case on eight counts, including forgery of a document of title to land (Counts I, VI, VII, and VIII) contrary to Section 350(1) of the *Penal Code*; procuring execution of a document by false pretences (Counts III, IV, and V) contrary Section 355 as read with Section 349; and uttering a false document (Count II) contrary to Section 353. Dissatisfied with the acquittal, the appellant filed an appeal, arguing that the prosecution had established a prima facie case on all counts and that the trial court erred in failing to put the respondents on their defence.
2. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



3. The prosecution availed twelve (12) witnesses in support of their case. PW1, Habib Omar Kongo, the CEO of Aviton Enterprises Limited, testified that the company owned a 24-acre plot in Umoja Estate (Title No. Umoja/Block 83/530), allotted by the Nairobi City Council on 4th September 1992. He adduced various ownership documents including the allotment letter, title deed, lease documents, land fee receipts, and a registrar's memorandum dated 30th November 1995 confirming the title's authenticity. Aviton later applied for subdivision, supported by a demand notice dated 23rd April 1995 and a plan dated 6th April 2001, culminating in approval on 15th May 2001 and issuance of a subdivision certificate and reference number 144024/36. A total of 324 titles were subsequently issued.
4. The subdivision process involved surveyors PW2, Livingstone Gitau, and PW7, Jacob Oyato, and was confirmed by PW5, Isaac Nyaga, a City Council officer. However, in March 2006, PW1 was informed that the Wazee Makadara self-help group presented documents at the chief's office claiming to have purchased the same land. Mr Omar denied selling it and reported the matter to Buru Buru Police Station and later CID HQ. PW12, Sgt Joseph Kiragu, confirmed investigations showed Aviton's legitimate ownership.
5. The respondents had filed a civil suit against Aviton, despite the company having surrendered the former land title (83/580) for a new one (83/530). In 2010, plot number 83/580 suspiciously re-emerged with a new survey map indicating mosque ownership. The self-help group allegedly sold plots (including 83/899) to a church, but Aviton had already transacted with the church through an agreement dated 25th May 2000.
6. PW3, Peter Njoroge, testified that in 2015 he was asked to provide a survey plan and found duplication of plot numbers. PW4, Reverend Simon Muhuku, confirmed that his church, KAG Umoja, purchased the land from Aviton in 2000 and held proper documentation. PW6, George Mugeny, testified that a 1992 survey plan prepared by Jacob Oyato was genuine and had been approved, but another forged version existed.
7. PW8 (Polly Gitimu), PW9 (Baptista Kihungo), and PW10 (Adv. Gildine Karani) all supported the authenticity of Aviton's ownership through official land records and lease documents.
8. A prima facie case has been defined in the case of *Bhat vs Republic* [1957] EA 532 as follows:

“It may not be easy to define what is meant by a prima facie case but at least it must mean one which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”
9. Upon reviewing the record, it is clear that the prosecution's case predominantly relied on circumstantial evidence. Notably, the testimony of PW1, Habib Omar Kongo, confirmed the legitimate ownership of land by Aviton Enterprises. The prosecution further presented evidence regarding the subsequent discovery of fraudulent land transactions allegedly involving the respondents. However, despite the allegations, no direct evidence was tendered to establish that the respondents were responsible for the forgery of documents or that they knowingly used fraudulent documents to obtain property.
10. Concerning the charge of forgery of documents (Counts I, VI, VII, and VIII), although the respondents were implicated in the suspicious re-emergence of plot number 83/580, with a new survey map suggesting mosque ownership, there was an absence of conclusive evidence directly linking the respondents to the forgery of these documents. Furthermore, the documents themselves were not produced in court to substantiate the forgery allegations.



11. Regarding procuring the execution of a document by false pretences (Counts III, IV, and V), the prosecution suggested that the respondents sold land to third parties, including a church. However, the prosecution failed to present direct evidence proving that these transactions were procured by fraudulent means. Although the respondents filed a civil suit concerning the land, the prosecution did not adduce sufficient evidence to prove their fraudulent intent.
12. In relation to uttering a false document (Count II), there is no direct evidence to demonstrate that the respondents knowingly passed off forged documents as genuine.
13. While the evidence tendered by the prosecution supports the authenticity of Aviton's land ownership, it fails to establish a direct link between the respondents and the offences with which they were charged. The trial court's decision to acquit the respondents was grounded on the absence of direct evidence linking them to the alleged crimes.
14. Courts are bound by the principle of deciding cases based solely on the evidence presented, free from fear or favour. In this case, I find that the trial court properly considered the evidence, and its hands were tied in reaching a verdict based on the available facts. The appellant has failed to prove the grounds of appeal and has not demonstrated that it established a prima facie case against the respondents.
15. Consequently, it is my considered finding that the appellant's appeal lacks merit and is hereby dismissed. The ruling of the trial court, dated 6th October 2022, is upheld.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 8TH DAY OF APRIL 2025

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D. KAVEDZA

JUDGE

In the presence of:

Mutuma for the Appellant

Respondents Present

Tonny Court Assistant

