



**Gichana & another v Republic (Criminal Appeal 18(E010) of 2022)  
[2024] KEHC 4273 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4273 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL 18(E010) OF 2022  
PN GICHOHI, J  
APRIL 11, 2024**

**BETWEEN**

**PAUSTINA OGAKE GICHANA ..... 1<sup>ST</sup> APPELLANT**

**PETER ASATI MOTURI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of the conviction and sentence of Hon. P.K. Mutai (Senior Resident Magistrate) in Kisii Chief Magistrate's Court Criminal Case No. 1923 of 2019 delivered on 12th May 2022)*

**JUDGMENT**

1. Before the trial court, the Appellants herein were charged with following three offences:

Count One: Intermeddling with the property of the deceased person contrary to Section 45 (1) and (2) (a) of the Law of Succession Act. The particulars of the offence were that on diverse dates between 23/11/2010 and 21/01/2013 at Kisii township within Kisii County, the Appellants jointly with others not before the court, caused subdivision of all that parcel of land known as Central Kitutu Mwamosioma/352 and disposed of portions of the said land, the property of the late Siro Gichana Memba in contravention of the law of succession.

Count Two: Obtaining registration by false pretences contrary to Section 320 of the Penal Code. The particulars of the offence were that on 13/01/2013 at Kisii township within Kisii County, the Appellants jointly obtained registration of title to land for parcel of land namely Central Kitutu Mwamosioma/352 in the name of Paustina Ogake Gichana by falsely pretending that the transfer was legally executed by the late Siro Gichana a fact they knew to be untrue.



Count Three : Conspiracy to defraud contrary to Section 317 as read with Section 38 of the Penal Code.

The particulars of the offence were that on diverse dates between 23/11/2010 and 13/01/2013 at Kisii township within Kisii County with others not before the court, the Appellants conspired to defraud the estate of the late Siro Gichana Memba.

2. Each of them pleaded not guilty to the charges and after a full trial, the trial court acquitted the Appellants on Count Two but convicted them on Count One and Count Three. They were subsequently sentenced to serve a three (3) year probation sentence.
3. The Appellants are aggrieved by the convictions and sentences imposed on them in regard to One and Three. In their Petition of Appeal dated 02/06/2022, the Appellants raised Eight grounds which can be summarised as follows:-
  1. The learned trial magistrate erred in fact and law in convicting the Appellants of the whereas the Prosecution failed to establish the essential ingredients of the offences beyond reasonable doubt.
  2. The learned trial magistrate erred in fact and law when he shifted the burden of proof on Appellants yet the Prosecution's evidence was marred with massive gaps, insufficient and scanty evidence, contradictions and inconsistencies that could not sustain a conviction.
  3. The learned trial magistrate misconstrued the evidence by failing to find that documents marked for identification were not produced and therefore arrived a long decision.
  4. The learned trial magistrate erred in fact and law in that he failed to consider their mitigation and therefore passed a harsh and excessive sentence in the circumstances.
  5. The learned trial magistrate erred in law and in fact by failing to consider their submissions and evidence at trial.
4. In the premises therefore, the Appellants urged the Court to allow the appeal, quash the convictions and set aside the sentences imposed on them.
5. The appeal was disposed of by way of written submissions. In their joint submissions dated 18/02/2023 and filed on 21/02/2023, the Appellants argued that by dint of Section 45 (1) & (2) (a) of the *Law of Succession Act* and the case of Gitau & 2 others vs. Wandai & 5 others (1989) KLR 23, the beneficiaries were introduced to the purchasers by the Appellants and thus benefitted from the sale of the deceased's estate.
6. They reasoned that the beneficiaries intended to defeat the public auction scheduled to dispose of the suit land. On that ground, they submitted that they were not guilty of committing the offence.
7. Citing Section 312 and 320 of the Penal Code as well as the case of Serpepi Sanja Siromo vs. Republic [2020] eKLR, the Appellants submitted that the Prosecution did not prove that they were guilty of committing the offence of obtaining registration by false pretences. That none of the Prosecution witnesses testified that the Appellants made any representations of past or present facts and that the same was false.
8. On the offence of conspiracy to defraud, the Appellant reproduced Section 317 of the Penal Code, the definition of conspiracy as ascribed in the Black's Law Dictionary 9<sup>th</sup> Edition and the decision in the case of Rebecca Mwikali Nabutola & 2 others v Republic [2016]eKLR on the elements to be proved before a conviction on an offence of conspiracy to defraud under Sec. 317 of the Penal Code. They



submitted that witnesses did not adduce any evidence of an express agreement among the Appellant to show that the Appellant committed that offence as the beneficiaries had agreed as to sale of the suit land for purposes of preserving the same. As a consequence, the Appellant submitted that the charge of conspiracy to defraud had to fail.

9. On whether the sentence meted out ought to be set aside, varied and/or quashed, the Appellants submitted in the affirmative. In support that argument, they cited the case of John Newton Odongo & another vs. Republic [2020] eKLR where the Court found no sufficient evidence to convict the accused person and therefore quashed the conviction and set aside the probation sentence thus setting the Appellants at liberty.
10. They also quoted the Court of Appeal decision in Bernard Kimani Gacheru vs. Republic [2002] eKLR on discretion of the of the court on sentencing. Lastly, they prayed that the Appeal be allowed as stated in their Petition of Appeal.
11. On their part, the Respondent's submissions are dated 14/04/2023 and filed on the same day. Learned Counsel for the State submitted that all the ingredients of the charges levelled against the Appellants were proved beyond reasonable doubt.
12. He submitted that in the absence of succession proceedings as to devolve the estate of the suit land to the surviving beneficiaries, the 1<sup>st</sup> Appellant improperly and illegally transferred the suit land to himself on 13/01/201. That the Appellants hatched a plot with Richard Jimi Omura and Teresa Kerubo Osoro to defraud by entering into sale agreements with the said persons yet they lacked capacity.
13. On failure to call witnesses such as the document examiner and the investigating officer, the learned counsel submitted that they had sought adjournment to call them but the application was opposed . That the trial court sustained the objection forcing the Prosecution to close their case. While relying on Section 143 of the *Evidence Act*, he submitted that all witnesses that testified were crucial and their evidence alone was enough to prove the ingredients of the charges that the Appellants were facing.
14. On sentencing, the Prosecution observed the sentence provided in Section 45 (1) and (2) (a) of the *Law of Succession Act* and Section 317 of the Penal Code and submitted that the learned trial magistrate considered the mitigation, sought a pre-sentence report and arrived at a lenient sentence. He therefore submitted that the sentence meted out was fair and reasonable in the circumstances. In view of the foregoing, the Respondent urged this Court to uphold the conviction and affirm the sentence.

### **Analysis And Determination**

15. This being a first appeal, it is this Court's duty to re-consider and to re-evaluate the evidence adduced before the trial court in light of the submissions made before court, before reaching its own independent determination whether or not to uphold this appeal. In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect- (See Okono vs. Republic [1972] EA 32).

### **Respondent's Case**

16. The Respondent called nine (9) witnesses in support of its case. The evidence was that the late Siro Gichana Memba died on 31/01/1994. The land parcel namely Central/Kitutu/ Mwamosioma/352 was registered in his name on 03/08/1987. He was survived by his children namely Shella Boyani (PW1), John Angwenyi Gichana (PW2) and Siro Mark Gichana (PW4).
17. Though registered in her father's name, the suit land was held in trust for the deceased's brothers including Ichwara Gichana father to John Angwenyi Gichana alias John Nyakundi Memba (PW6).



18. A search on the suit property revealed that on 13/01/2011, the suit land was transferred to the 1<sup>st</sup> Appellant who is PW1, PW2, PW4 and PW6's eldest aunt and wife to their uncle. Thereafter, the suit land was subdivided into 12 plots no. 2754 and 2765 and sold to third parties. No succession proceedings had not been carried out.
19. PW1, PW2 and PW4 recalled that sometime back, a loan of Kshs. 2,000,000.00 was secured at Industrial and Commercial Development Corporation (ICDC) by way of a charge over the suit parcel of land. The loan was subsequently defaulted by the borrower and grandfather Dickson Okendu.
20. It was PW2's evidence that since the titles had not been secured for the three (3) families, that is the deceased and his brothers separately, himself (PW2) , the 1<sup>st</sup> Appellant and PW4 were appointed to conduct succession proceedings but that never took place. That the 2<sup>nd</sup> Appellant connected the family to Scooby Enterprises to help save the land from sale by ICDC. That several meetings were held for that purpose leading to that culmination.
21. PW2 and PW4 testified that they currently occupied portions of the said parcel of land but without titles. That PW1 and PW4 did not participate in those meetings but PW4 was aware of the sale and had no objection to it.
22. On 16/12/2010, Evans Mosa Mose (PW3) a private surveyor received the 2<sup>nd</sup> Appellant on the prospects of a new assignment. They proceeded to the 1<sup>st</sup> Appellant's house. In the meeting, the 2<sup>nd</sup> Appellant informed the 1<sup>st</sup> Appellant that he had a discharge of title to pave way for survey of the suit land. At that time, the title was in the name of the deceased. PW3 would later visit the land with George Opiyo for subdivision into twelve (12) portions.
23. PW3 testified that in January 2011, the 2<sup>nd</sup> Appellant took the title and discharged the same to the land Registrar. It was then registered in favour of the 1<sup>st</sup> Appellant. PW3 obtained a search on the suit land which established those facts.
24. Using that search and upon obtaining a letter of consent, PW3 prepared a mutation including the twelve (12) portions. It was endorsed and forwarded to the district surveyor for numbering. The mutation was subsequently registered on 03/02/2011 where five (5) transfers, including that in favour of Scooby Enterprises and the 2<sup>nd</sup> Appellant, were prepared. It was PW3's evidence that the 2<sup>nd</sup> Appellant financed for the surveys.
25. PW5 Jeremiah Onsare Soire, an Advocate of the High Court of Kenya testified that on 23/11/2010, he received instructions to draw a sale agreement in respect to the suit land in the name of the deceased person and charged to ICDC as per the search results. His further instructions were that the heirs of the deceased were intent on disposing of a portion of the suit land measuring 200ft by 135ft to the purchaser Scooby Enterprises Limited in order to stop the intended sale by way of public auction scheduled to take place on 25/11/2010 as per the newspaper advert dated 08/11/2010 which had been placed by ICDC due to the fact that the borrower had defaulted in payment of the loan.
26. Scooby Enterprises Limited therefore offered to buy a portion of the suit land in order to rescue the family land. The purchase price was agreed at Kshs. 6,750,000.00 which first payment was prioritized to offset the outstanding loan amount to ICDC. Under the agreement, a sum of Kshs. 1,870,000.00 would be paid as deposit to ICDC while the balance of Kshs. 4,850,000.00 was to be paid to the heirs upon transfer.
27. During execution of the agreement, the heirs received Kshs. 30,000.00 to facilitate discharge of the property. Thereafter, Kshs. 2,000,000.00 was to be paid to the 1<sup>st</sup> Appellant, Richard Jimi Omurwa and



Teresa Kerubo while the sum of Kshs. 2,850,000.00 would be paid to the 2<sup>nd</sup> Appellant. The agreement was witnessed by PW6, David Barongo Asati and Doctor Anil Taylor.

28. Upon discharging his duties, PW5 informed the court that he was to file succession proceedings but those instructions never materialized. He also could not tell if succession proceedings were ultimately filed.
29. PW6, who lived on the suit land with his wife and children, recalled that a portion of the suit land was sold to an Indian and Dickson Okindo to save it. His testimony was that it was only himself, the Indian and some tenants in occupation of the suit land. He also recalled that the 2<sup>nd</sup> Appellant purchased a portion of the suit land as sold by himself and his brother. His evidence was that no family members complained of being dispossessed.
30. PW7 Milka Chepkorir Sang who was an executive banker at Cooperative Bank testified that he received summons on 01/04/2019 to produce account opening forms and bank statements for account number 0110016385500 for the period 01/02/2013 to 01/05/2013.
31. PW8 Job Ombati an operations manager at Equity Bank was served with summons on 04/02/2019 to supply account opening documents and bank statements for E.K.Koech Enterprises in respect to account number 0510191025505. The 2<sup>nd</sup> Appellant and Thomas Abega were its directors and also the account holders. The account opening forms (Prosecution Exhibit 7) and bank statements (Prosecution Exhibit 8). He testified that on 02/03/2011, a cash deposit transaction of Kshs. 500,000.00 was made but he could not tell if it was in respect to a land transaction. A further Kshs. 1,000,000.00 was deposited by Scooby Enterprises on 28/02/2011.
32. PW9 Samwel Nyaberi, an operations manager at Absa Bank, furnished account opening documents (Prosecution Exhibit 9) and bank statements (Prosecution Exhibit 10) commencing 01/01/2011 to 15/03/2011 in respect to account number 0753969039. The 2<sup>nd</sup> Appellant was the account holder. From the bank statements, there were approximately twenty-five (25) transactions; and in particular, Kshs. 500,000.00 was deposited on 04/03/2011.

### **Appellants' case**

33. DW1 was the 1<sup>st</sup> Appellant (Paustina Ogaki Gichana). She testified that the deceased was her brother-in-law and brother to her husband Peter Onsongo Gichana and Nyakundi Gichana. She confirmed that the suit land was indeed registered in the deceased's name.
34. She recalled that the suit land was used as security in respect to a loan granted by ICDC. Pursuant to a newspaper advertisement (Defence Exhibit 1), the said parcel of land was scheduled to be sold by way of public auction.
35. Her evidence was that as a family, they agreed that it was in their interests to safe the land from that sale. They therefore approached Scooby Enterprises who paid the purchase price over a portion of the land. She produced the chief's letter dated 31/01/2011 ( Defence Exhibit 2 ) showing the beneficiaries of the deceased's estate and the deceased's wife's death certificate( Defence Exhibit 3). She testified that the deceased's mother filed Kisii HC Succession Cause No. 535 of 2019 (Defence Exhibit 4).
36. She relied on a green card (Defence Exhibit 5) showing the history of transactions in respect to the suit land including details that the deceased obtained title to the same on 05/10/1987. She also produced the transfer (Defence Exhibit 7). DW1 then obtained title on 31/01/2011 and the same underwent subdivision on 03/02/2011. The sale agreement (Defence Exhibit 9) was annexed with the vendors and purchaser's identities revealed as stated by PW5.



37. Following settlement of the loan, DW1 obtained a discharge of charge (Defence Exhibit 6) dated 12/12/2010 and receipts for the same (Defence Exhibit 8a – g). Lastly, DW1 denied intermeddling with the estate of the deceased saying that she lacked the ability to sell.
38. On his part, DW2 Peter Asati Moturi (2<sup>nd</sup> Appellant) testified that the family approached him in September 2010, so as to buy land which was about to be auctioned by the ICDC. At the time, the ICDC required a payment of KShs.200,000/= to extend time for them to make payment. He therefore gave them KShs.220,000/= and wrote an agreement (P Exhibit 10) to that effect and the payment was made to the ICDC.
39. He was surprised to see ICDC advertise sale of the suit property by public auction. He approached the family as he did not have money and they agreed to find another person to stop the sale. Scooby Enterprises had shown interest and Dr. Taylor got in touch with Scooby who finally paid for the land on 23.11.2020.
40. Under the terms of the agreement, John Gichana was to be given KShs.1,000,000/=: Mayaka was to be given KShs.500,000/=: he was to get KShs.220,000/= and the balance was to be given to Dickson aka Mageto. The land was at the time no longer part of the Estate of Siro Memba and was therefore not available for distribution. He therefore denied intermeddling with the estate of the deceased arguing that he was only rescuing the suit property from sale by ICDC.
41. From the judgment by the trial court, there is no confusion as regard the fact that the Appellants were acquitted on Count Two which is the charge of obtaining registration by false pretences contrary to section 320 of the Penal Code. Having been acquitted, then the same cannot be a ground of appeal for consideration by this Court. The submissions by the Appellant on that count are therefore a nullity in the circumstances.
42. The only issues that come up for determination are:-
1. Whether the prosecution had discharged its burden to warrant the trial court to convict the Appellants on Count One and Three.
  2. Whether the sentences were harsh.
43. Regarding the burden of proof which is the subject of the first issue, the Court of Appeal in *Mkendeshwa v Republic* [2002] 1 KLR 461, stated :-
- “In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.”
44. Bearing that in mind, Section 45 of the *Law of Succession Act* provides:-
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
  - (2) Any person who contravenes the provisions of this section shall—
    - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment;  
and



- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration. [Emphasis added]

45. To start with, it is true that the Respondent had some documents that were only marked for identification and not produced as exhibits. The effect of failure to produce documents marked for identification was dealt with by the Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR where the Court of Appeal held:-

“Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record, if admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account..... a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value... in our view, the trial judge erred in evaluating the evidence on record and basing his decision on “MFI 2” which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them.”[Emphasis added]

46. However, the evidence herein and the circumstances thereof are different from those in *Kenneth Nyaga Mwige* (supra). The undisputed facts in this case are that the deceased person Siro Gichana Memba died on 31/01/1994 as the registered proprietor of all that parcel of land namely Central Kitutu Mwamosioma/352. It is apparent that vide High Court Succession Cause No. 353 of 1994, Penina Moraa Gichana was appointed as administrator of the of the estate of the deceased Siro Gichana Memba.
47. There is no evidence that the grant was ever confirmed. Penina Moraa Gichana also passed away. There is no indication that any other succession proceedings were taken out in regard to that estate of Siro Gichana Memba.
48. With that evidence, the Appellants cannot seek solace in the fact that some documents were only marked for identification. The non- production of some documents marked for identification and failure to call the investigating officer and the document examiner in this case does not affect the Respondent’s case as far as Count 1 is concerned.



49. In support of their argument that they did not intermeddle with the estate of the deceased in the circumstances herein, the Appellants cited the case of *Gitau and 2 others v Wandai & 5 others* [1989] KLR , 23 where Tanui J (as he then was) held:-

“According to section 45 of the *Law of Succession Act*, Cap 160 intermeddling with the estate of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property.”

50. In the circumstances, they submitted that the prosecution had to show beyond reasonable doubt that the Appellants dispossessed or resulted into wastage of the deceased estate or caused loss or damaged or made it impossible for administrator to administer the deceased estate by a person who is not authorised by the law.
51. They argue that since the property was charged on ICDC and it has possession of the parcel of land, the Appellants could not intermeddle and or transfer the suit property unless the same was discharged.
52. It was on that line of argument that they relied on the the case of *Morris Mwiti Mburugu v Denis Kimanathi M’Mburugu* [2016] eKLR. where Mabeya J, while acknowledging the case law in regard Section 45 of the *Law of Succession Act* had this to say:-

“From the foregoing, it is clear, and I so hold, that where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same.

The question that arises is what will happen in the circumstances where all the beneficiaries participate in a disposition or are in agreement to such disposition and the said disposition is for the benefit of the estate? Will a court of both equity and law strictly apply the provisions of section 45, nullify the transaction and prejudice one of the parties? I think the spirit behind section 45 is that the free property of a deceased person should not be dealt with in a manner that will prejudice any of the beneficiaries or dependants . The court will not allow the provision of the law to be used as a vehicle for fraud. In my view, if the purchaser is shown to be acting in good faith, for the benefit of the estate, in conjunction and concurrence with all the beneficiaries of the estate and that such transaction does not prejudice either the estate or the beneficiaries of the estate, the harshness of the law should to be tampered with the equitable principle set out under Article 159 of *the Constitution*, that substantive justice is the principle behind any application of the law. In this regard, if the dealing with the property of the estate does not prejudice any of the beneficiaries and is supported by or concurred with those section 45 seeks to protect, such transaction should be saved.”

53. The facts behind that reasoning were that:-

“...the beneficiaries of the estate of the deceased were selling some portion of the estate property. The purpose of the sale was to get money to assist in the lodging and prosecution of the succession cause to administer the estate... That without the purchasers money, the beneficiaries may not have been able to mount the present succession cause and the estate would have remained unadministered for a long time to the detriment of both the estate as well as the beneficiaries.”



54. However, in *Martev Guest House Limited v Njenga & 3 others* (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR) (Civ) (28 April 2022) (Judgment), the Court of Appeal had this to say:-

“Pursuant to section 74(3) and (4) of the RLA which the bank exercised its statutory power of sale, there was nothing therein to suggest that the bank was not obligated to comply with the provisions of the *Law of Succession Act*, Cap 160, Laws of Kenya (LSA) in circumstances where the exercise of that power was undertaken after the death of the chargor.

By free property as defined in the LSA was meant the property of which the deceased person was legally and competent to freely dispose of the same during his/her lifetime and in respect of which his/her interest had not been terminated by his/her death. The deceased’s right of redemption did not become extinct upon the death of the deceased. It devolved to the personal representatives. That was why the LSA did not donate power to the estate of a deceased person to deal with property forming that deceased person’s estate, and instead donated that power to an administrator with a will or a personal representative to the intestate estate of a deceased person to deal with a deceased person’s property after the death of such a deceased person.

Section 45(1) of the LSA was explicit that dealings with a deceased person’s property was only permissible to the extent provided for by the provisions of that Act. Among them was provision that only persons holding a grant of representation to a deceased person’s estate had mandate to transact any business with regard to such property and to the extent provided for in section 82 of the LSA on powers donated to a personal representative.

55. In this case, there was no confirmed grant authorising the Appellants to deal with the estate of the deceased whatsoever, regardless of the common reason advanced by the Appellants, that the land was at the risk of being auctioned.

56. The fact of the matter is that the suit property was in the name of the deceased as at the time the advert was put by ICDC to auction suit. For the Appellants to deal with the land whatsoever, they had to be authorised by the law. Indeed Section 45 of the *Law of Succession Act* provides:-

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall-
  - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
  - (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

57. This Court is satisfied that the Appellants herein did intermeddle with the estate of the late Siro Gichana Memba by having the suit property, which was in the name of the deceased herein, sold and transferred. In the circumstances, this Court upholds the conviction on Count One.



58. Regarding the charge of Conspiracy to defraud which is the subject of Count Three section 317 of the Penal Code provides:

“Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.”

59. Further, Black Law Dictionary 10<sup>th</sup> Edition at page 375 defines the word conspiracy as follows:-

“An agreement by two or more persons to commit an unlawful act, coupled with intent to achieve the agreement’s objective , and motive and (in most states) action or conduct that furthers’ the agreement; a combination for an unlawful purpose.”

60. Further still, Archibold; writing on criminal pleadings, evidence and practice, states:-

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons so long as a design rests in intention only, it is not indictable. There must be an agreement; proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

61. As demonstrated by evidence herein by the Respondent’s witnesses and the Appellants themselves, their intention was to save the suit property from auction even though that action was unlawful for reasons that it amounted to intermeddling with the estate of a deceased which is a criminal act. This Court is therefore not persuaded that their intention was to defraud the estate of the deceased. In the circumstances, the conviction on Count Three was not safe. The Appeal on that Count is therefore allowed.

62. The last issue is in regard to sentence which the Appellants refer to as harsh and excessive. In Bernard Kimani Gacheru vs. Republic [2002] eKLR , the Court of Appeal, held that:-

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

63. In regard to the sentence on Count One, the sentence provided for under Section 45 (2) (a) is a fine not exceeding ten thousand shillings or a term of imprisonment not exceeding one year or to both such fine and imprisonment.

64. In this case, the Appellants had no previous records. Their mitigation was that they were elderly and remorseful. The trial court called for a presentence report and considered their mitigation.

65. It is apparent that the sentence of three years’ probation was in view of the fact that they had been convicted of count one and three which sentence was lawful and fair. However, considering that the



appeal has succeeded on Count three, then it is fair that this Court interferes with the sentence by substituting it with the period served.

66. From the foregoing, the Appeal partially succeeds and therefore, the Court makes the following orders:-

1. The conviction on Count One be and is hereby upheld.
2. The Appeal on Count Three be and is hereby allowed, conviction and sentence quashed.
3. The sentence of three years' probation be and is hereby substituted with a probation sentence for the period already served on probation.

**DATED, DELIVERED AND SIGNED (VIRTUALLY) AT KISII THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr. Marita for the Appellants

Mr. Kihara for the Respondent.

Yego /Aphline; Court Assistant

