



Gitonga & 2 others v Director of Public Prosecutions (Criminal Appeal E044, E045 & E046 of 2023 (Consolidated)) [2024] KEHC 5595 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E044, E045 & E046 OF 2023 (CONSOLIDATED)**

TW CHERERE, J

MAY 9, 2024

BETWEEN

ALFRED KOOME GITONGA 1ST APPELLANT

PHINEUS MUGAMBI GICHURU 2ND APPELLANT

JOY MUKAMI MBAE 3RD APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(An appeal from the conviction and sentence in Nkubu Criminal Case No. E288 of 2021 by Hon. E.Ayuka (DRM) on 21st March, 2023)

JUDGMENT

1. Alfred Koome Gitonga Phineus Mugambi Gichuru Joy Mukami Mbae (1st, 2nd and 3rd Appellants respectively) together with two others were jointly charged with one count of obtaining KES. 800,000/- by false pretences contrary to section 312 as read with Section 313 of the [Penal Code](#) Cap 63 Laws of Kenya (the Act).
2. 1st and 2nd Appellants were jointly charged with two counts of making documents namely title deed for Igoji/Gikui/1318 and KRA Pin certificate No. A0082xxxxxZ contrary to section 357(a) of the Act.
3. Appellants and two others were also jointly charged with two counts of uttering a false title deed for Igoji/Gikui/1318 and KRA Pin certificate No. A0082xxxxxZ to John Muthomi advocate contrary to section 353 as read with section 349 the [Act](#).
4. Appellants and two others were additionally jointly charged with Conspiracy to defraud contrary to Section 317 of the same Act.



The prosecution's case

5. The prosecution called 4 witnesses in support of the case. Charity Makena stated that Martin Mutugi who was the 5th Accused introduced him to Mugambi Kiautha who was the 1st Accused who said he was selling land Igoji/Gikui/1318. That she negotiated the price on phone with the 2nd Appellant and agreed at KES. 800,000/-. That at a later date, she met the Appellants and the two others and 2nd Appellant introduced himself as son of Accused 1, 1st Appellant as his brother and 3rd Appellant as 1st Appellant's wife. That she proceeded to the office of an advocate with the 3rd Appellant and 1st Accused where a sale was drawn and executed by 3rd Appellant among others subsequent to which she handed over KES. 800,000/- to the 3rd Appellant. The witness later realized that the land did not belong to Accused 1 and she reported the matter to police and Accused 1 and 5 and the Appellants were subsequently arrested and charged. The 1st witness' son Julius Mugambi Kiugu who was with her throughout the transactions gave similar evidence to his mother identified Accused 1 as the vendor and Accused 5 as the one that that introduced them to Accused 1.
6. Upon receiving complainant's report, CPL Musa Aol managed to arrest the 1st Accused Mugambi Kiautha who had presented himself as A. Mathenge J.Maingi and upon investigating the case found that that Accused 1 was not the owner of land Igoji/Gikui/1318 that he sold to complainant and that he had used a false title deed, ID card and pin certificate with the names of the owner one . Mathenge J.Maingi. The officer stated that Accused 1 implicated the 2nd Appellant, who in turn implicated 1st Appellant and 3rd Appellant and all were arrested and charged.
7. John Muthomi advocate recalled that he drafted a sale agreement for land Igoji/Gikui/1318 between complainant and Accused 1 who presented to him a title deed, search certificate, ID Card and Pin certificate in the name of A. Mathenge J.Maingi. The witness denied that the 1st and 2nd Appellant appeared before him but identified the 3rd Appellant as one of the witnesses to the sale agreement.

C – Defence case

8. In their sworn defences, 1st, 2nd and 3rd Appellants denied having been involved in any land transaction with the complainant.
9. By a judgment dated 1st March, 2023, Appellants were convicted of all the counts they were charged with. On 21st March, 2023, Appellants were sentenced to concurrent sentences as follows:
 - i. 2 years imprisonment for obtaining money by false pretences contrary to section 312 as read with Section 313 of the *Penal Code*
 - ii. 4 years imprisonment each in two counts of making a document, contrary to section 357(a) of the *Act*.
 - iii. 2 years imprisonment each in two counts of uttering a false document contrary to section 353 as read with section 349 the *Act*.
 - iv. 2 years imprisonment for conspiracy to defraud contrary to Section 317 of the same *Act*.

The Appeal

10. The conviction and sentences provoked this appeals in which 1st and 2nd Appellants mainly contend that the prosecution case was not proved against them. The 3rd Appellant on the other hand prays that her sentence be commuted to start from the date of her arrest.



Analysis and Determination

11. On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit. (See *Kariuki Karanja v Republic* [1986] KLR 190).
12. I have considered the appeals in the light of the evidence on record, the grounds of appeal and submissions filed by the 1st and 2nd Appellant and the DPP.
13. The only evidence against the 1st and 2nd Appellants was that 2nd Appellant negotiated the sale price with the complainant on phone and that 1st Appellant was introduced as son of the vendor and brother to the 1st Appellant. The 1st and 2nd Appellant denied the complainant's evidence.
14. From the totality of the evidence, it is undoubted that 1st and 2nd Appellant's neither sold any land to complainant, made any false documents nor uttered any of the sale documents to complainant or to the advocate that drafted the sale agreement. It was also in evidence that they were not present during execution of the sale agreement nor did they receive any money from the complainant.
15. The degree of proof in criminal cases was properly established in the classicus English case of *Woolmington v. DPP* 1935 A C 462. Similarly, in *Bakare v. State* 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
16. That proof in criminal cases lies with the prosecution was reiterated by the Court of Appeal in *Joseph Kimanzi Munywoki v Republic* [2006] eKLR where the court stated as follows:

It is trite that in a criminal case it is for the prosecution to prove that the accused is guilty, such proof being beyond all reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence, and if in respect of any matter the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self-defence or accident.
17. From the totality of the evidence tendered against the 1st and 2nd Applicant and their respective defences, there was no iota of evidence that they acted in agreement or consent with the other Accused persons to commit the offences they were convicted of. Their defences raised reasonable doubt and the benefit of doubt ought to have been given to them.
18. There is however evidence that the 3rd Appellant not only signed the sale agreement but also received the sale proceeds on behalf of Accused 1. There was however no evidence that she made or uttered any false document.
19. In the end, it is hereby ordered:
 1. The convictions of the 1st and 2nd Appellants were unsafe



2. The convictions against 1st and 2nd Appellants are quashed and all the sentences against them set aside
3. Unless otherwise lawfully held, 1st and 2nd Appellants shall be set at liberty
4. On the other hand, the conviction of the 3rd Appellant on the 3rd and 4th counts were unsafe
5. The convictions against 3rd Appellant on the 3rd and 4th counts are quashed and the sentences set aside
6. The conviction of the 3rd Appellant on the 1st and 8th counts are upheld
7. The 2-year imprisonment term imposed against the 3rd Appellant on the 1st and 8th counts shall in terms of Section 333(2) of the *Criminal Procedure Code* commence on 07th July, 2021 when she was arrested. The sentences shall run concurrently as ordered by the trial court.

DELIVERED AT MERU THIS 09TH DAY OF MAY 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

1st Appellant - Present in person

2nd Appellant - Present in person

3rd Appellant - Present in person

For DPP - Ms. Rotich (PC-1)

