Ngugi v Republic (Criminal Appeal E087 of 2023)
[2024] KEHC 9081 (KLR) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9081 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E087 OF 2023

BM MUSYOKI, J

JULY 22, 2024

BETWEEN

LEONARD JOHN MUNYUA NGUGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against judgment and sentence in Kikuyu Chief Magistrate's Court criminal case number 750 of 2015 (L.K. Nyabando RM) dated 26th May 2023)

JUDGMENT

1. In the lower court, the appellant together with two others were charged with two counts. The first count which was forgery contrary to section 349 of the Penal Code was for the appellant only. The other two persons were charged with obstructing a police officer contrary to section 253 (a) of the Penal Code. The appellant's co-accused persons were acquitted in judgement delivered on 26th May 2023 while the appellant was found guilty and sentenced to a fine of Kshs 200,000.00 and in default thereof serve twelve months in jail.

2. The appellant was aggrieved by the said judgement and sentence and filed a petition dated 21-08-2023 which set out the following grounds which I reproduced in verbatim;

    1. That the trial Magistrate erred in fact and in law in failing to consider the evidence on record hence arriving at an erroneous finding.

    2. That the trial magistrate erred in law and in fact in convicting the appellant and disregarding his testimony and merit of his defence which cast great doubt on the prosecution's case.

    3. That the trial magistrate erred in law and in fact in convicting the appellant based solely on the weak evidence by the prosecution which was not made beyond reasonable doubt.

4. That the trial magistrate erred in fact and law by ignoring the fact that PW1 gave contradicting and inconsistent testimonies when he had no capacity to testify and mental assessment was never conducted on him, this led to miscarriage of justice.

5. That the trial magistrate erred in law and fact by disregarding the reliable testimony of the land officer and the advocates who testified for the defence.

6. That the trial magistrate erred in law and fact in failing to consider the age of PW1 who was a party to the transaction with the appellant.

7. That the trial magistrate erred in law and fact in failing to order testimony of the complainant which created doubt.

8. That the learned trial magistrate erred both in law and in fact in blaming the defence for the delay in the period the case had taken thus locking out a crucial witness when in fact the delay was occasioned by the prosecution.

9. That the learned trial magistrate erred in law and in fact in failing to fully analyse and evaluate the evidence presented by the defence thus reaching a wrong decision.

10. That the learned trial magistrate abdicated his statutory duty in failing to address some substantial issues raised by the accused person regarding the different charge sheet this causing a miscarriage of justice and denying him a fair hearing.

11. That the trial magistrate erred in law and in fact by ignoring the doctrine of sanctity of title to give indefeasibility of title to the registered party by relying on hearsay to convict the appellant.

12. That the honorable magistrate erred in fact and in law in failing to consider that the appellant is a first offender.

13. That the trial magistrate erred in fact and in law in convicting the appellant and imposing a sentence of a fine of Kshs 20,000.00 which is too high.

14. The trial magistrate erred in fact and in law in transferring the case to Senior Resident Magistrate Hon. Magistrate Catherine Mburu for sentencing when the Honourable Magistrate Lilian Nyabado has jurisdiction to mete the sentence.

15. That this Honourable Court does set aside the conviction issued by Hon. Resident Magistrate Lilian Nyabado.

16. That this Honourable Court does quash the sentencing issued by Hon. Senior Resident Magistrate Catherine Mburu.

3. I must admit that I do not really make sense out of ground number 7. To me grounds 15 and 16 are not in real sense grounds of appeal. In the manner they have been couched, they can only qualify to be prayers. The other grounds of appeal can be, in my view, classified as follows.

   a. those related to analysis and consideration of the weight of evidence (grounds numbers 1, 3, 5 and 9);

   b. those claiming that the verdict of conviction was against the weight of evidence (grounds numbers 1, 2 and 11);

   c. those addressing the witnesses' capacity to testify and credibility (grounds numbers 4 and 6);

   d. those complaining of lack of fair trial (grounds numbers 8, 10 and 14); and

e. those covering severity of sentence (rounds number 12 and 13).

4. The prosecution called four witness whose evidence I proceed to summarize hereunder.

5. PW one Ndirangu Karanja (hereinafter be referred to as 'Ndirangu') who is recorded to have then been 93 years old gave a very short testimony. He stated that he resided in Mwimuto and that he knew one Damaris Wangui. In 1996, they went to a plot in Gathiga which he was to buy. He made some payments but later found out that she had sold the same land to one Ngugi. He returned the title deed because he did not want to be involved. He denied ever transferring the land to himself. He told the court that Damaris sold the land to Ngugi and that the title deed was never in his name and that he did not visit the Land Control Board in respect of the land. The witness did not tell the court which parcel number he was talking about.

6. The said witness was cross examined and stated that he knew the appellant as Ngugi and that he did not know his full name. It is indicated that he was shown a statement which he denied recording. To him, the said statement looked like a forgery and that the signature in the statement was not his. He said he knew one Rigicha and Washington Nganga Rigicha. He added that he did not not sell land to the appellant neither did he sign an agreement.

7. The next witness came after 3 years. PW2 was one Washington Nganga Rigicha. He testified on 15-08-2019 and told the court that he was an administrator of the estate of Damaris Wangui Rigicha (hereinafter referred to as 'Damaris') who was his mother. In 2015 as he was establishing what his mother had left, went to one John Karanja Ndirangu who used to hold title deed in trust and they discovered that title deed for Kabete/Karura/1149 was missing. He asked him where the title deed was and he told him that he gave it to the appellant who was a neighbour. He then conducted a search and found that the title was in the names of Moses Thande Munyua. He went on to obtain a greencard which he identified as MFI 1. He then made a report to the police. He asked the son of John who told him he did not know anything. The witness confirmed that his mother sold 1 acre to the appellant which he had no problem with but he added that the matter in court was not in respect of what his mother sold to the appellant.

8. In cross examination, this witness said that he had no transaction with the appellant. He insisted that he was the administrator of the estate of Damaris although he did not have a grant. When he was showed a statement, he denied recording the same. He also stated that he was not present when the transaction was done. He also admitted having been shown some agreements from Ndirangu to Leonard. He maintained in re-examination that Ndirangu's signature was forged.

9. PW3 was one Assistant Superintendent of police Geoffrey Chania who stated that he was working for the National Police Service as a forensic document examiner. After giving the background of qualifications, he produced a report made by one Chief Inspector Daniel Gutu. He testified that on 19-08-2015, the following documents were forwarded to their office for forensic analysis;

   a. an application for consent of the Land Control Board LCR number 50/96 in the names of Ndirangu Karanja of identity card number 3351386/66 which he marked as MFI 2.

   b. Specimen signatures of Ndirangu Karanja which he marked as MFI 3.

   c. Documents marked as C1 C2 which had known signature of Ndirangu Karanja. It is not clear whether this document was marked independently;

   d. A copy of ID card (C2) which he marked as MFI 4. It is not indicated whose identity card it was.

   e. An exhibit memo which he marked as MFI 5.

10. The witness stated that the documents were forwarded by one Ken Mwenge from CID Kikuyu. They were to ascertain whether the signatures pointed in red on MFI 2 was made by the same author when compared to specimen signature on MFI 3 and the one on MFI 4. The witness told the court that upon examination, the signatures were found to have been made by different persons. The signature in MFI 2 did not belong to Ndirangu Karanja hence the said signature was forged. He went on to produce the report as exhibit 6.

11. In a short cross exanimation, the witness admitted that he was not present when the examination and the report were made. He confirmed in re-examination that the results in the report were correct. He stated further that if they had examined copies, the report would indicate so as absence of the original is always noted in the report.

12. Ken Mwenge was the fourth witness. He was the investigations officer. He testified that on 11-07-2015, he was instructed by this boss to listen to one Washington Ngugi who was alleging that their family land had been transferred to a person who was not a family member. The reportee alleged that the suspect was Ndirangu Karanja. The witness visited land parcel number Kabete/Karura/1149 and also the home of Ndirangu. When he asked him how he transferred the land to the appellant, he told him that he wanted to buy it from Washington Ngugi but the process was threatened by the appellant who did not want him as a neighbour. According to this witness, the appellant refunded the money to Ndirangu and Ndirangu gave him the original title. He said that Ndirangu had never had the title registered to him. The witness then took statements from the PW1 and took his specimen signatures and his known signatures. The witness told the court that he was able to get the application for consent purportedly signed by PW1 and greencard from the registry indicating that Ndirangu transferred the land to the appellant. He added that he summoned the appellant who declined to appear. He also stated that the appellant refused to give his specimen signature. He confirmed having prepared MFI 2 and MFI 4 and forwarded them to for examination. He produced a certified copy of the green card as exhibit 1.

13. At this juncture, the prosecution counsel led the witness to mark a letter dated 4-02-2020 which she used as a basis of her application to produce uncertified copy of the consent to transfer. The application was opposed by the defence and the court eventually ruled that the copy could be produced. The application for consent was produced as exhibit 2.

14. PW4 added that the originals of the specimen signatures were lost at DCI Kikuyu. He sought to produce copies of specimen signatures which application was opposed by the defence but the court ruled that the same be produced as exhibit 3 vide its ruling dated 5-03-2020. However, this was never to be because the witness never came back to the witness box. The witness had also produced an identify card as exhibit 4.

15. This witness never completed his evidence. After the the court's ruling dated 5-03-2020, he never showed up in court. The prosecution kept on asking for adjournment owing to the absence of the witness until the court could not grant it any more. The prosecution closed its case on 4-05-2021 without PW4 completing his testimony. PW4 was never cross examined.

16. The appellant was found with a case to answer. He gave sworn statement and called 3 witnesses. In his defence, the appellant told the court that he knew PW1 and that they had an agreement for the sale on 5-12-1995 which was drawn before PW1's lawyer. He conducted a search and confirmed that the land belonged to PW1. He also obtained the consent before he transferred the land to himself. The purchase price was Kshs 500,000.00. He is recorded as having identified a bankers cheque showing that he paid the first installment of Kshs 250,000.00 and an agreement. These documents however were not produced. He said that he paid the 2nd installment on 4-12-1995.

17. The appellant maintained that he and PW1 went to the Land Control Board. He also maintained that PW1 and himself signed transfer forms. He was categorical that PW1 surrendered the title deed to him after he paid full purchase price. The appellant identified a certified copy of consent, certified copy of application for consent, minutes number 50/96 relating to Ndirangu Karanja and transfer forms for Kabete/Karura/1149 and copy of title deed in his name. Again, these documents were also not produced as exhibits.

18. The appellant also claimed that the investigations officer made a request to the lands office and he was supplied with all the documents. He further stated that the agreement was witnessed by one David Karanja an advocate. He claimed that PW1 had told the police that he sold the land to him.

19. In cross examination, he maintained that he had bought some land from the family before. He also stated that they went through succession cause and the court ordered that the land be transferred to him. He said that he never submitted any specimen signature. He also claimed that PW1 memory was fading as he was old. He added that the original owner was Damaris who sold to Ndirangu who in turn sold to him.

20. DW 2 was David Kamangu an advocate practicing in the firm of Kamangu & Co. Advocates. He testified that on 11-01-1996, two people walked into his office. The two were Ndirangu and the appellant. They brought a letter of consent to transfer from Ndirangu to the appellant and on strength of the letter, he drew transfer form dated 11-01-1996. Both men signed the transfer before him and he appended his signature and handed over the documents to them. He produced the transfer document as defence exhibit 4.

21. DW2 was cross examined and maintained that the clients gave him a consent but did not give him the history of the land. He stated that his instructions were limited to doing the transfer instrument on the strength of the consent. He also claimed that he knew the signature of the chairman of the land control board and what was given to him looked a genuine consent.

22. The third witness for the defence was Roselyne Wanjiru Macharia the Kiambu Land Registrar. She produced a certified copy of the greencard as defence exhibit 9, transfer LRA form 39 from administrators to beneficiaries as defence exhibit 10, titled deed for Kabete/Karura/1149 for Damaris Wangui Rigicha as defence exhibit 11, transfer from Damaris to Ndirangu Karanja and application for land control board dated 6-06-1995 as defence exhibit 12, title and transfer from Ndirangu to the appellant as exhibit 13, transfer to Ndirangu dated 14-06-1995 as exhibit 14 and transfer to Moses Thande Munyua as exhibit 15. She added that from their records, the transactions were genuine. The witness was cross examined by the prosecution. She maintained that the documents appeared to her as genuine although she was not a handwriting expert. She stated that parcel number 1149 initially belonged to Damaris Wangui Rigicha.

23. DW4 was James Kouna Ochieng an advocate of the High Court. He produced an affidavit sworn by PW1 before him on 17-05-2016. He stated that PW1 came to his office and instructed him to draw an affidavit indicating that he had sold the land to the appellant and he produced the affidavit as defence exhibit 16. In cross examination, the witness stated that the deponent was accompanied by his daughter and he told him that there were challenges with the sale of the property.

24. The other defence witnesses were the appellant's co-accused persons whose evidence I don't need to reproduce here as they are not part of the appeal. They completed their evidence on 4-12-2022. From that date the defence asked for several adjournments to call the District Commissioner which were granted until 16-02-2023 when the court declined to adjourn the matter further. The defence closed their case.

25. I have taken time to reproduce the above evidence because it is necessary for the purposes of this judgment. As it shall be clear later in the judgment, the magistrate's analysis of the evidence is very material to this appeal. I understand the prosecution's case to have been that the accused forged the signature of PW1 on prosecution exhibit 2 which was an application for consent to transfer land parcel number Kabete/Karura/1149 from PW1 to himself. I understand the appellant as saying that PW1 bought the land from Damaris Wangui Rigicha who sold to PW1 who then sold it to him and who voluntarily signed the application for the consent.

26. I have considered the evidence adduced before the lower court, the exhibits produced, the court's judgment, the petition of appeal and the parties' submissions. In her judgment the Honourable Magistrate while citing an Indian case of Sukanti Choudry vs State of Orisa (the citation was incomplete), correctly enumerated the ingredients of the offence of forgery thus;

    a. The document must be forged;

    b. Accused used the document as genuine;

    c. Accused knew or had reason to believe that it was a forged document; and

    d. The accused used it fraudulently or dishonestly, knowing or having reasons to believe that it is a forged document.

27. Based on the summary of the grounds of appeal I have given above, I have come into conclusion that the issues in this appeal are;

    i. Whether the appellant's constitutional rights were violated and whether the trial was fair.

    ii. Whether there was enough evidence that prosecution exhibit 2 was a forgery.

    iii. If the said exhibit was a forgery, was the same done by the appellant or was the appellant involved or aware of the forgery.

    iv. Whether the sentence was excessive.

28. The first issue revolves around the appellant's arguments that the trial was conducted when there was no complainant, he was denied the right to cross examine PW4, he was blamed for delaying the matter, the magistrate was wrong in transferring the file to honorable Catherine Mburu for sentencing and the magistrate failed to consider the mental capacity of PW1. The respondent has urged me not to consider the first and last arguments as they were not covered as grounds of appeal in the petition. However, since the same are touching on matters of law and *the Constitution*, I will consider them.

29. The appellant has claimed that there was no complainant in the case. It is true that there must be a complaint in criminal trials. However criminal cases are instituted in the name of the state for the benefit of larger public interest. A criminal trial can actually proceed even where it is not clear who the complainant is as long as there is a complaint made to the law enforcement authorities. The record shows that PW2 initiated the complaint with PW1 being the suspect. In the course of investigations, the police officers in their wisdom formed the opinion that the culprit of the events leading to the complaint was the appellant. It is therefore not correct to say that the police acted without a complaint. I find this ground of appeal lacking merit.

30. The appellant has invited me to make a finding on the mental capacity of PW1 to testify. He claims that the court did not make consideration of the witness' mental capacity to testify. He has referred me to Section 125(1) of the *Evidence Act*. Whereas PW1 could have been aged, that alone cannot be a basis for doubting his capacity to understand the questions put to him. The proceedings show that he

gave evidence without any objection from the appellant. In the entire proceedings, the appellant did not take up this point. In my view it is too late for the appellant to raise the same. I am in agreement with the respondent's submissions that this should not be a point for consideration in this appeal. He should have raised it before the trial court.

31. The appellant has complained that the magistrate was wrong in transferring the matter to her colleague for sentencing. I find nothing wrong with the action by the trial magistrate. The law allows a magistrate to transfer a matter before her to any other magistrate with jurisdiction to sentence the accused person. The ruling of the magistrate was sound and well founded in law. I also do not see why I should interfere with the sentence. The maximum term provided for the offence the appellant was facing is three years. The appellant was sentenced to serve one year. The fine does not appear to me to be excessive. I will not disturb that part of the court's decision.

32. On the claim that the appellant was denied the right to cross examined PW4, I find no basis to fault the trial court. The evidence of PW4 is indeed of very low probative value. He absconded the proceedings before he could be cross examined. The appellant claims that denial to cross examine PW4 was a violation of his right under Article 50(k) of *the Constitution*. I have looked at the record and find that the court gave the prosecution several opportunities to complete the evidence of PW4. The court cannot be faulted for failure of witnesses to attend court. The court did the right thing in closing the prosecution's case. In any, event I have read the judgment of the magistrate and have not seen her giving weight to the evidence of the said witness. She principally convicted the appellant on strength of the evidence of PW1 and PW3. I therefor decline to make a finding in a favour of the appellant on this ground. If I were to quash the conviction the same would not be under the ground of violations of his constitutional right. I have not seen how the trial was unfair to the appellant.

33. The appellant also claims that the magistrate blamed him for delaying the matter. With respect, I have not seen anywhere in the proceedings where I can attribute this alleged fault on the magistrate. The court had given all the parties sufficient time to produce and adduce their evidence. The appellant called three witnesses one of whom came to court through witness summons. If the court had intention of denying the appellant opportunity to ventilate his defence, it would not have facilitated him in securing attendance of the land registrar. The court had even issued witness summons to the District Commissioner after the defence made the application.

34. The appellant has invited me to make a finding on the mental capacity of PW1 to testify. He claims that the court did not make consideration of the witness' mental capacity to testify. He has referred me to Section 125(1) of the *Evidence Act*. Whereas the PW1 could have been aged, that alone cannot be a basis for doubting his capacity to understand the questions put to him. The proceedings show that he gave evidence without any objection from the appellant. In the entire proceedings, the appellant did not take up this point. In my view it is too late for the appellant to raise the same. I am in agreement with the respondent's submissions that this should not be a point for consideration in this appeal. He should have raised it before the trial court.

35. The appellant has complained that the magistrate was wrong in transferring the matter to her colleague for sentencing. I find nothing wrong with the action by the trial magistrate. The law allows a magistrate to transfer a matter before her to any other magistrate with jurisdiction to sentence the accused person. The ruling of the magistrate was sound and well founded in law. I also do not see why I should interfere with the sentence. The maximum term provided for the offence the appellant was facing is three years. The appellant was sentenced to serve one year. The fine does not appear to me to be excessive. I will not disturb that part of the court's decision.

36. The document alleged to have been forged was an application for consent of the land control board. In proof of the fact that the document was a forgery, the prosecution produced a report dated 19-08-2015 which according to PW3 stated that Ndirangu's signature was forged since the signature on the said document was not done by the same author as in the specimen signatures and known signatures of the said Ndirangu.

37. I acknowledge that the report was expert evidence. However, expert reports should not be taken as the absolute truth without interrogation and collaboration. It is notable from the proceedings that while giving his testimony, Ndirangu was not led to identify his specimen signature. He did not even state that his specimen signatures were taken. He is actually on record stating that some statements shown to him were forged. It may not be clear which statements were these but that should put some doubt in my mind whether the said witness actually made any statement to the police.

38. It was incumbent of the prosecution to help the case by having the said Ndirangu identify the specimen signatures which were taken from him. More so because PW3 said that the original specimen signatures were misplaced or lost at the DCI office in Kikuyu. The court was not told at what point they got lost. Was it before or after the making of the report? Despite objection from the defence, the court allowed the prosecution to produce copies of the said alleged signatures.

39. Ndirangu was a critical witness in this matter. All that he told the court was that he did not go to the Land Control Board and that he did not sell any land to the appellant. The proceedings do not show him being shown exhibit 2 and denying the signature thereon. The appellant maintained that Ndirangu sold the land to him and executed the application form. This is their word against each other. The court can only make decision on who was telling the truth by applying other evidence produced either in support of the case or in defence. And of course, the prosecution had the heavier duty. In such circumstances, the evidence of both sides must be placed in a truth meter by use of what the parties produced in court including the apparent credibility of the witnesses.

40. Ndirangu is on record denying ever transferring the property from Damaris Wangui to himself yet the Land Registrar produced a transfer, consent to transfer and greencard showing that he did so. What this witness told the court was miles apart from what he told the investigations officer. He told the court that he never dealt with the appellant and that he surrendered the title deed to Damaris. The same witness told the investigations officer that he was refunded his purchase price by the appellant. These two versions are world apart.

41. In view of the above, who was being defrauded in the alleged forgery? Was it the estate of Damaris Wangui or Ndirangu Karanja? It is inconceivable that Ndirangu would after paying for the land just give out his tittle deed to the appellant without resistance. He alleges that he gave the title deed back to Damaris Wangui and at the same time states that he was refunded the money and gave out his title deed.

42. No one bothered to tell the court when Damaris passed on, when PW2 filed succession cause for her estate and what were the details of the succession cause including its assets. This would have clarified on whether she was alive at the time the transfer of the land was done in favour of the appellant. It would also have been critical in assisting the court to find out whether the land was part of the estate of Damaris.

43. The identification of prosecution exhibit 2 and its source are shrouded in controversy. The inconsistent evidence of Ndirangu and which is irreconcilable with that of PW4 and PW2 makes the document examiner report produced by PW3 suspicious. Despite these contradictions, it appears from the magistrate's judgment that she took Ndirangu's evidence as the truth against what the appellant said. There were material contradictions which must be attributed to either his advanced age or his

insincerity. Based on the above, I find that the prosecution did not prove beyond reasonable doubt that its exhibit 2 was a forgery.

44. Even if I found that the exhibit was proved to be a forgery, there is the other question of whether there was enough evidence to tie or associate the appellant to the forgery. I must say that reading the judgment of the magistrate, I did not find difficulty in observing that in several instances the honourable magistrate shifted the burden of proof to the appellant. The only evidence before the court on this issue was that of Ndirangu who I have already found to have been inconsistent and either untruthful or having issues with his memories and PW3.

45. One of the instances where I find the honourable magistrate to have shifted the burden of proof to the appellant is where she held that the appellant did not produce sale agreement between him and Ndirangu to show that he bought the land from him (Ndirangu). It is trite law that an accused person has no duty to prove his innocence. The magistrate was called upon by the law to look at the totality of evidence produced before her in proof of this fact. What would the sale agreement have disapproved in the prosecution's case? In my view, failure by the appellant to produce a sale agreement should not have been used against him as the magistrate did. It was the duty of the prosecution to prove that indeed the accused forged the application form. In Republic vas Silas Magongo Onzere alias Fredrick Namema (2017) eKLR, the court restated the law on burden of proof in criminal matters when it held that;

> 'In our criminal justice system, there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilty rests solely on the prosecution throughout the trial save where there are admissions by the accused person.'

46. Another part I find the magistrate to have shifted the burden of proof is where she found that;

> 'Now what I find peculiar on these set of documents is the fact that D Exhibit 13 (transfer form Damaris Wangui to Ndirangu Karanja) and D Exhibit 14 (transfer from Ndirangu Karanja to Leonard Munyua Ngugi) are accompanied with a copy of letter of consent, application for consent of land control board and a copy of the title deed while D Exhibit 15 is accompanied with an application for registration, valuation, request for stamp duty dated 17-02-2003 alongside the aforementioned documents.
>
> The question that this court grapples with is, how come the defence did not attach proof of stamp duty having been paid in the first two transfers as they did the 3rd transfer? Was there any stamp duty paid in the transaction between Ndirangu and Ngugi? How come no sale agreement or proof of payment was produced to show validity of transaction despite the defence alluding that they did have these documents?'

47. With all due respect to the learned magistrate, the appellant's duty was to create a doubt as to the prosecution's case. The questions she posed were indicative that she expected the appellant to prove his innocence. The documents she referred to were produced by none other than the custodian of lands registration records, who was the only person competent to answer the question of transfer without payment of stamp duty. She testified that all the transactions were genuine meaning that no step was skipped including what the magistrate was wondering about.

48. There is a letter dated 4-02-2020 produced by prosecutions as exhibit 9 which states that 'we are not in a position to certify the application for consent of Land Control Board as our efforts to trace the parcel file have borne no fruits'. The Land Registrar came to court as a defence witness. No question was posed to her in respect of this letter. At the same time, the said Registrar produced an application for consent in respect of the same transaction as part of defence defence exhibit 14. No objection or

issues were raised about this exhibit. There arises a question as to whether the appellant really used prosecution exhibit 2 or defence exhibit 14 to transfer the land to himself. Were the two documents the same? It is obvious from my naked eyes that the LCR No in the two exhibits though similar are not the same. The stroke of the pen in figure '50' is glaringly different. The Registrar did not state that the appellant used prosecution exhibit number 2. This was a criminal case and the appellant could not be convicted on assumption of facts. The prosecution has a duty to tie the appellant to the offence beyond any reasonable doubt. In that case the ingredient of using the document fraudulently was not proved.

49. In some other instances, the trial court considered extraneous matters in connecting the appellant to prosecution exhibit 2. For the magistrate to start questioning how transfers, including the one from Damaris to Ndirangu were done and engaging in citing judicial authorities on the effect of lack of payment of stamp duty, she went outside the issue which was before her. The issue before her was forgery of an application for consent and not any other document. There was no suggestion from any party including the prosecution that any of the other documents including the transfers which are said to have been signed by Ndirangu were not authentic. In any event, I have looked at Defence Exhibit 14 which is transfer from Ndirangu to the appellant. On the said documents there is a figure of Kshs 3,375/= as endorsement of stamp duty payable. The transfer bears a franking stamp which is usually affixed only after stamp duty has been paid. The same goes for the transfer from Damaris to Ndirangu. I am at a loss why the honourable magistrate decided to ignore these glaring and obvious entries. What was before her was a case of forgery of prosecution exhibit 2 and not whether or not stamp duty on transfers were paid.

50. After dealing with the documents mentioned above, the honourable magistrate also embarked on attack of defence Exhibit 16. This is an affidavit produced by an advocate of the High Court of Kenya. She wondered how Ndirangu would walk into an advocate's chamber and swear an affidavit confirming that he sold a parcel of land to Ngugi. By doing so, the magistrate descended in the shoes of Ndirangu who in my view was not a truthful witness as indicated above. According to her, the said issue could have been proved by production of a sale agreement, proof of payment, duly executed transfer documents and all other documents. Curiously these are the same documents she bashed as shown in the previous paragraph. A party is at liberty to make an oath in respect of anything they think fit. In my view, the magistrate left her hallowed seat of an impartial arbiter and knowingly or unknowingly prejudiced the appellant's defence.

51. The transfer produced by DW2 also came under attack by the magistrate with use of not so good words about the advocate. Of this document, the honourable magistrate stated;

> 'I think it would have been prudent for counsel to exercise due diligence and not just act on word of mouth. This otherwise reek of professional negligence on the counsel's part as he owed the parties the fiduciary duty to ascertain validity of documents.

52. The witness is on record saying that his instructions were limited to drawing the instrument of transfer. The magistrate's statement suggests that the counsel had instructions to carry out the whole conveyancing process. Parties are at liberty to limit instructions to their advocates. Advocates can only act to the extent permitted by their clients. If the counsel's instructions were to draw the transfer only, he did not deserve the indictment as the court did. It was unfair of the court towards the advocate to impute that the advocate was negligent. In Sheikh t/a Hasa Hauliers vs Highway Carriers Ltd (1988) eKLR, the Court of Appeal was faced with a situation where the trial judge had made remarks on professionalism of the appellant's advocates. The Court stated that;

> 'It is true that learned judge introduced, some extraneous matters and made derogatory remarks as to his past knowledge of this firm of advocates of its inefficiency in other matters.

> Such innuendo and dilatory remarks are unfortunate. He must have been influenced by those remarks in delivering the ruling. The learned judge should not have made those remarks.'

53. Similarly I find that the magistrate went out of her course by making the remarks about the advocate's professional conduct and she was clearly influenced by them because she connected the conduct of the two advocates who testified to what she saw as a scheme to sanitise what she viewed as an irregular transaction.

54. The magistrate found that the appellant's testimony had material inconsistencies yet she only cited only one incidence which to her showed that the appellant's evidence was inconsistent. In her own words 'for instance, his evidence in chief, he insisted that PW1 was never called to testify, yet the record shows the contrary. I also had advantage of assessing his demeanor during the trial, and he struck me as a person who was not candid as he didn't appear truthful'. An accused person has all the right to attack the prosecution's case whether or not the court believes him. Saying things which were contrary to the prosecution's case cannot be an inconsistency. Inconsistency comes in where the witness says things which contradicts his own previous testimony.

55. One should wonder between PW1 and the appellant, who gave contradictory evidence. I see no inconsistency in the appellant's evidence. The fact that he said PW1 did not testify cannot be an inconsistency in his evidence. I may not know the magic the magistrate used to conclude that the appellant did not appear truthful. How does a truthful person look like? Was he hesitant in answering questions? Was he refusing to cooperate in some aspect? It is important for a judicial officer making such an observation go further and state what actually made them believe that the witness was untruthful. This will give clarity to those reading or acting on the judicial officer's judgment. In my view, I see nothing in this statement by the magistrate other than bias. Her analysis of the evidence is too much on the defence case while giving the prosecution's case less attention.

56. PW4 who did not complete his evidence had alleged that the appellant had refused to give his specimen signatures. If this was so, why did the said officer not go further and obtain the appellant's other known signatures from the lands office or any other source? Police officers have powers to make enquiries from government offices which keep records. There was nothing hard in the police officer even getting some sample signatures from the registrar of persons. The appellant was said to have signed at least three documents which were in the lands registry records. He had signed transfer from Ndirangu to himself, application for consent to transfer from himself to Thande and transfer from himself to Thande. The investigations officer could have easily lifted the appellant's signatures from these documents. He is actually recorded as having said that he obtained exhibit 2 from the lands registry. It is only him who could tell why he selectively picked the said exhibit in exclusion of other material evidence if at all he did so.

57. The investigations officer did not bother to investigate the transfer from Damaris to PW1 which would have settled the question as to whether Ndirangu had transferred the land to himself after buying from Damaris. I find it curious that the evidence which the magistrate made much reference to in convicting the appellant was the same documents the appellant had produced. I must say without any fear of contradiction that this was a very poorly investigated matter. No wonder the prosecution sought twice to withdraw the same under section 87A of the Criminal Procedure Code.

58. In conclusion, I find that based on the inconsistencies highlighted above and shift of focus, it was not satisfactorily proved that the appellant forged the document as charged. It is also doubtful that prosecution exhibit number 2 was a forgery. The conviction was not safe and I proceed to quash it and set aside the sentence. If the appellant had paid the fine, the same shall be refunded to him forthwith.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT