



**Republic v Ogutu & another (Criminal Appeal 41 of 2017)
[2024] KEHC 16741 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 16741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 41 OF 2017**

**NIO ADAGI, J
JULY 25, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

WILLIAM OCHIENG OGUTU 1ST RESPONDENT

WILLY KIMUTAI CHEPKWONY 2ND RESPONDENT

JUDGMENT

1. In a Memorandum of Appeal dated 22/3/2017, the Appellant herein moved to this Court, challenging the judgment and orders of the Chief Magistrate’s Court at Kiambu in criminal case No. 2294 of 2011, delivered on 08/3/2017.
2. The appeal is on the following 12 grounds:
 1. The learned magistrate erred in law and in fact and misdirected himself by not appreciating the evidence presented by the prosecution.
 2. The learned magistrate erred in law and in fact after he abdicated duty and ignored in toto the evidence presented by the prosecution.
 3. The learned magistrate erred in law and in fact and contravened section 169 of the CPC and failed to analyse the evidence of the prosecution a fatal error that led to a gross misdirection.
 4. The learned magistrate erred in law and in fact by finding that the prosecution had not tendered evidence to connect the Respondents with the forgery against the well-known rule of principle offender.
 5. The learned magistrate erred in law and in fact in finding that some of witnesses had not been called and ignored the evidence of all the other prosecution witnesses.



6. The learned magistrate erred in law and in fact when he acquitted the Respondents of the count of Obtaining by false pretence since one of the witnesses had indicated that they had no complain against the Respondents and ignored in total the evidence that the title in question was a forgery and could not pass as a genuine title.
 7. The learned magistrate misdirected himself by ignoring the evidence before him leading to a gross misdirection and failed to appreciate that failure to call one witness is not fatal especially when the title deed in question i.e. IR No. 74968 for parcel number 337/1631 was a forgery according to other prosecution witnesses and the learned magistrate placed reliance on a statement referring to a photocopy which was against the rule of primary evidence.
 8. The learned magistrate erred in law and in fact in failing to make a finding that the Respondents were the doyenne beneficiaries of the illegal and forged title after they received Kshs.45Million.
 9. The learned magistrate erred in law and in fact in inventing contradictions between prosecution witnesses and failed to appreciate the totality of evidence of all the witnesses.
 10. The learned magistrate failed his duty as a finder of fact when he invented non-existing contradictions and wondered who to believe between a land registrar and a clerk in a law firm as to the existence of a title deed at the lands office.
 11. The learned magistrate abdicated duty and grossly mis regarded himself and failed to find that the Respondents purported to obtain a grant for the forged title in 1994 using their company that was not incorporated in 1998 clearly ignoring that a title cannot be issued to a company 4 years before it is incorporated.
 12. The learned magistrate totally failed to consider arguments and authorities contained in the submissions filed by the prosecution.
3. The appeal does not disclose the prayers sought by the Appellant.
 4. However, whether I get into those grounds or not is dependent on the validity of the appeal before me. What is the use of going through all the grounds of appeal herein, and the legal issues involved therein, if the appeal itself is incompetent?
 5. That to me is a preliminary point of great importance in this appeal, which has the potential of disposing off this appeal.
 6. I notice that the appeal is incompetent and defective because of two legal points:
 - a. The Memorandum of appeal does not disclose any prayer sought following the hearing of this appeal.
 - b. The Memorandum of appeal filed in this court dated 23/3/2017 does not pray for the quashing of the judgment and orders of the Chief Magistrate's Court at Kiambu in criminal case No. 2294 of 2011, delivered on 08/3/2017 and for substitution thereof with a conviction as submitted by the Appellant.
 7. In the absence of any prayer on either quashing, substitution, setting aside or variation, allowing the appeal is legally hollow and leaves the judgment and order of the trial court intact. In its submissions on the appeal, the Appellant only prayed that the trial court's judgment be quashed and substituted with a conviction. Submissions do not constitute pleadings or evidence. See the decision in Nairobi Civil



Appeal No. 240 of 2011 Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR where the court held;

Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. Regarding the punitive damages sum of shs.50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st Respondents. We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained"

8. This does not mean that the Court will ignore the submissions. What the Court does is to look at their relevance and take them into consideration, but is not bound by them. (See Mombasa Civ Appeal No. 68 of 2012 Imperial Bank Limited v Bakari Juma Bechpende [2016] eKLR).
9. In brief, this court cannot grant a prayer or an order not prayed for in the Appellant's memorandum of appeal.
10. The brief point, which is trite law, is that just like in any suit, there must be prayer or prayers, for the desired relief or remedy or remedies, and the court cannot grant a relief or remedy that is not prayed for.
11. Accordingly, and for the above reasons, I dismiss the appeal herein.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF JULY, 2024.

NOEL I. ADAGI

JUDGE

