



REPUBLIC OF KENYA



**Ndege v Republic (Criminal Appeal E031 of 2023)
[2024] KEHC 10862 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E031 OF 2023
LM NJUGUNA, J
SEPTEMBER 18, 2024**

BETWEEN

DAVIDSON NTHIGA NDEGE APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the Judgment of Hon. S.K Ngii, PM in Siakago
Criminal Case No. 977 of 2019 Delivered on 11th July 2023)*

JUDGMENT

1. The appellant has filed a petition of appeal dated 23rd October 2023 seeking that the appeal be allowed, conviction and sentence be quashed and/or set aside and the fine paid by the appellant be refunded. The grounds for appeal are that the learned trial magistrate erred in law and facts:
 - a. When he found that the complainant (PW1) had changed his name from Nthiga Njiru to Dominic Mubunjia Njiru when there was no supportive evidence;
 - b. By finding that the complainant (PW1) was allocated parcel number Mbeti/Gachoka/977 in 1975 when he was in fact born on 11th June 1978;
 - c. By making a determination in favour of the complainant and prosecution based on evidence that was full of glaring gaps and inconsistencies;
 - d. By dismissing the defense submission that failure by the prosecution to call the Land Registrar and Land Adjudication Officer as witnesses was fatal to the prosecution case;
 - e. By shifting the burden of proof to the appellant to prove his innocence.
 - f. By disregarding the evidence adduced by the appellant and his witnesses and totally disregarding the written submissions by the defense;



- g. By convicting the appellant on insufficient evidence and concluding that the prosecution had proved its case beyond reasonable doubt; and
 - h. By imposing a sentence that is excessive in the circumstances.
2. The appellant was charged with 5 counts as follows:
- a. The 1st count was unauthorized administration of oaths contrary to section 103 of the Penal Code. The particulars were that on 13th July 2018 at Embu Chief Magistrate’s Court in Embu West sub-county within Embu County, the appellant took a solemn declaration by affidavit touching on a matter of correction of name in respect of land parcel number Mbeti/Gachoka/577 without any authority to do so.
 - b. The 2nd count was procuring execution of document by false pretences contrary to section 355 of the Penal Code. The particulars are that on 20th July 2018 at Gachoka sublocation assistant chief’s office in Mbeere south subcounty within Embu County, by means of false and fraudulent representation as to the application for correction of names document, the appellant procured Jane Mbuya Njeru, the area assistant Chief of Gachoka sublocation to sign the document.
 - c. The 3rd count was procuring execution of document by false pretences contrary to section 355 of the Penal Code. The particulars are that on 20th July 2018 at Rwika Center Mbeti south sublocation chief’s office in Mbeere south subcounty within Embu County, by means of false and fraudulent representation as to the application for correction of names document, the appellant procured Jane K. Kaina, Chief of Mbeti sublocation to sign the document.
 - d. The 4th count was giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code. Particulars were that on 20th July 2018 at Kiritiri Police Station DCI offices in Mbeere South subcounty within Embu County, the appellant informed 82517 CPL Joshua Cherotich, a person employed in the public service as DCI Investigator that the appellant, holder of ID No. 12881243 is also known by the name Nthiga Njiru, the name which was used to register land parcel number Mbeti/Gachoka/577, information the appellant knew to be false, causing the said 82517 CPL Joshua Cherotich to write for the appellant a letter which assisted him to obtain registration of the said land which ought not to have been done if the true facts were presented.
 - e. The 5th count was obtaining registration of land by false pretences contrary to section 320 of the Penal Code. Particulars are that on 2nd October 2019 at Siakago lands Registry in Mbeere North subcounty within Embu County, the appellant willfully procured registration of land Parcel number Mbeti/Gachoka/577 by falsely pretending that the said land was allocated to him by his clan.
3. When he was arraigned, the appellant pleaded not guilty on all the counts and a plea of not guilty was duly entered. The matter proceeded to trial.
4. PW1 was Dominic Mubunjia Njiru who stated that he is also known as Nthiga Njiru and that his father gave him land parcel numbers Mbeti/Kirima/937 and Mbeti/Gachoka/577 which were both registered in the names of Nthiga Njiru. That the parcels of land were registered in his name in 1975 when he was 4 months’ old. That he went to work in Mombasa and in 2017, his father died and he buried him on parcel number Mbeti/Kirima/937 and he also built a home on the said land. That in 2019, he returned home to find the appellant, his cousin occupying his land parcel number Mbeti/Gachoka/577 and it seemed like the appellant was surveying the land.



5. He stated that upon inquiry, the appellant produced a certificate of official search indicating his name as the proprietor and that he had done correction of the name on the title. That he reported the matter to the police who referred him to the area chief. That the area chief told him that the appellant had approached her to sign some documents but later she realized that she had made a mistake and so she wrote a letter to assist him place a caution on the land. That the land registrar told him that the land was not registrable and so he reported the matter to the DCI Kiritiri who summoned him and the appellant but the appellant insisted that the land belonged to him.
6. On cross-examination, he stated that they have the same grandfather and the appellant's father is known as Ndege Mubunjia while his father's name is Njiru Mubunjia. That his national ID which bears his name as Nthiga Njiru shows that he was born on 11th June 1978 but he was born on 11th June 1975. That he did not show the police his birth certificate but he changed his name from Nthiga Njiru to Dominic Mubunjia Njiru while in primary school after he was compelled by his father to do so. He disputed the contents of the greencard that show that the land was first registered in the name of one Josephat Njiru Irago. He stated that he had documents to prove that the land belonged to him but he had not brought them to court. That the land was first registered in his name in 1975. That the land registrar declined to register the caution but he did not give any reason for this.
7. PW2 was Jossica Shuka Njiru, PW1's mother, who stated that her son's birth name was Nthiga Njiru but when he went to school his name was changed to Dominic Mubunjia Njiru who was born in 1975. That the clan gave the land to her husband who then registered it to PW1 in 1975 when he was just 4 months old. That following the death of PW1's father, the land was taken by one Nthiga Ndege and she advised her son to move hastily to recover it. That the appellant's father and the complainant's father are step brothers. On cross-examination, she stated that she has 7 children but the complainant is her only son and is the youngest. That PW1 changed his name from Nthiga njiru to Dominic Mubunjia Njiru when he was in school. That the land was registered in the name of PW1 but he had never used it.
8. PW3, Silvano Nthiga Ngari stated that PW1 is his cousin in that his mother and PW1's father are siblings. That PW1's father told him that parcel number Mbeti/Gachoka/577 belonged to PW1 and after his death, PW2 told him to call PW1 and show him the land. That in October 2019, PW1 went home and when he took him to see the land, they found the appellant surveying the land, claiming ownership of it. That they reported the intrusion to the chief then the DCI after which PW1 attempted to place a caution on the land unsuccessfully. On cross-examination, he stated that he did not know PW1's birth names or date of birth. That when PW1's father showed him the land, he did not show him any related documentation. That when the matter was reported at DCI offices, the appellant brought his ownership documents but PW1 did not bring any proof of ownership.
9. PW4 was Njuki Nduvure who stated that the appellant's father and PW1's father were both given land by the clan. That PW1's father gave the land to PW1. This witness was stood down for further pretrial by the prosecution.
10. PW5 was Jane Mbuya Njeru, assistant chief of Gachoka sublocation. She stated that the appellant visited her office with a signed form of correction of names from the ministry of lands and that the form was to show his name as Nthiga Njiru and that they refer to one and the same person. That upon interrogating the appellant, he told her that his birth name was different from his current name since he changed his name along the way. That she conducted her own investigations and found that the appellant had misled her and he had proceeded to apply for land control board consent. That she unsuccessfully filed objections to issuance of the consent. She stated that the clan elders said that the land belonged to PW1's father but the appellant had taken it through fraudulent means. On cross-examination, she stated that she did not have any document to prove that Nthiga Njiru was PW1's



other name. That when she realized that she had made a mistake to sign the forms, she notified the land control board but the consent was issued anyway.

11. PW6 was CPL Joshua Cherotich of DCIO Kirinyaga, who stated that he was in the office when the appellant went to report that when he was a minor, he went by a different name and the clan had given him land parcel number Mbeti/Gachoka/577. He sought assistance to have the title document changed to his current name since the land was registered to him using his birth name. That later on, the appellant returned to report that his father had died and PW6 wrote a letter for him.
12. That the assistant chief called to inform him that the appellant's father was alive and the land control board consent was denied. However, the consent was granted at another sitting and the appellant managed to change his name on the title document. He stated that PW1 reported the issue and they arrested the appellant and recorded witness statements. On cross-examination, he stated that the appellant lied that he was PW1 yet he was not. That he did not investigate the complaint brought by PW1.
13. PW7 was Elias Njagi Wakongo who stated that he knew PW1's father and after his death, a certain young man asked him to show him the suit land. That PW1's father got the land from the Mbadi clan. On cross-examination, he stated that he did not know the title number for the suit land and that he knows PW1 but not his names. That the land is idle and it has bushes.
14. PW8 was Sgt. Paul Seda of DCI Mbeere North who stated that CIP Oludhe called to tell him that 2 people were claiming ownership of the land parcel number Mbeti/Gachoka/577. That he took over investigations and found out that the appellant had taken PW1's land by pretending to be him and he claimed that the land was given to him when he was 4 months old. The documents used by the appellant to falsify the records were presented to him and he arrested the appellant. He stated that the appellant had managed to have the title document registered in his name under the pretence that he was Nthiga Njiru. He produced all the documents used by the appellant to procure the title document in his name and the historical documents relating to the land.
15. On cross-examination, he stated that he did not believe that the appellant was also known as Nthiga Njiru. That he does not oversee land registration and he did not record statements from the Land registrar or land adjudication officer. That according to the greencard, the appellant is the registered owner of the land pursuant to the land control board consent issued to the appellant. That he was unaware of any civil proceedings relating to the offences herein. That the appellant lied on oath at Embu Law Courts and he impersonated another person but he was not charged with impersonation.
16. At the close of the prosecution's case, the accused person was placed on his defense.
17. DW1, the appellant, stated that when he was young, his father told him that the Mbandi clan had given him land parcel number Mbeti/Gachoka/577 and it was registered in his name Nthiga Njiru. That his ID bears the name Ndege but Njiru is his name as given by the clan. That his father showed him the land in 1992 while in the company of Eliud Katumo and Julius Kinyua Nyaga. That in 2018, he decided to take ownership of the land but first he pursued correction of the names on the title document from Nthiga Njiru to Davidson Nthiga Ndege, which names refer to one and the same person.
18. That he made this declaration at Embu Law Courts and he got other supporting documents from DCIO which enabled him to get consent to correct the name on the title document. He stated that when PW1 started claiming that the land was his, he could not prove that through documentation, neither was he in occupation of the land. That he acted lawfully and procedurally and that PW1's claims are unsubstantiated. On cross-examination, he stated that he does not remember his date on birth but his ID shows that he was born on 03rd June 1975, a date he came up with himself. That he



was 10 years old when the land was given to him by his father, whose name is Njiru Ndege. That he undertook the name correction after the death of PW1's father.

19. DW2 was Julius Kinyua Nyaga who stated that he knows DW1 and that in 1992, he accompanied PW1's father to show him the land parcel number Mbeti/Gachoka/577. That the appellant's father asked how the name on the title can be corrected and the clan elders advised that the appellant would correct the name when he comes of age. That when the appellant initiated correction of names, he witnessed the forms for him. On cross-examination, he stated that he did not know that the appellant's father was known as Njiru but he knew him as Ndege. That he does not know of any other person in their clan going by the name of Nthiga Njiru.
20. After the close of the defense case, the trial court considered the evidence and found the appellant guilty of the 1st, 2nd, 4th and 5th counts and was sentenced to a fine of Kshs.15,000/= in default, 3 months' imprisonment for each of the counts. The appellant was acquitted of the 3rd count.
21. The court directed that the parties file written submissions but only the appellant complied.
22. It was the appellant's submission that PW1 was not born at the time when the land was given to the appellant in 1975 since PW1's ID shows that he was born in 1978. That PW1's mother stated that she did not know when her son was born but it was before 1978, and no documentary proof was produced to show that the complainant was born in 1978. He stated that there was also no documentary proof to show that the complainant changed his name from Nthiga Njiru to Dominic Mubunjia Njiru and that PW1 stated that he did not show the police his birth certificate. That the title document for the land does not contain the name of the complainant. It was his submission that on the 4th count, the prosecution evidence did not meet the requirements of section 320 of the Penal Code since the Land Registrar was not called to testify on the procedure for land registration. That all in all, the prosecution failed to prove its case beyond reasonable doubt and he urged the court to allow the appeal.
23. From the foregoing, the issues for determination are:
 - a. Whether or not the prosecution proved the case against the appellant beyond reasonable doubt;
 - b. Whether the sentences were excessive.
24. The role of this first appellate court is to reexamine the evidence adduced at trial and make an independent finding. In the case of David Njuguna Wairimu vs. Republic [2010] eKLR, the Court of Appeal held as follows:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”
25. In order to determine the first issue, I shall analyse the evidence wholesomely in order to determine whether all the counts were proved to the required standard. The prosecution stated that the appellant procured an affidavit of names dated 13th July 2018 at Embu Chief magistrate's court with the intention of correcting his names as indicated on the land title document for parcel number Mbeti/



Gachoka/577. The contents of the affidavit of names were that the appellant is known as Davidson Nthiga Ndege but his other name is Nthiga Njiru, which was used to register him as the proprietor of the named property. He deposed that both names refer to the same person that is himself. The affidavit was intended to be presented before the land registrar to aid in correction of the name on the title document for the land. The appellant pursued this correction of names and he also got a letter dated 06th November 2019 from the area chief Mbeere South location, verifying that he was the owner of the title document in the name of Nthiga Njiru.

26. The complainant reported the appellant's efforts to correct the name on the title document and he urged that he was the owner of the land, having received the same from his father in 1975. He stated that his birth name was Nthiga Njiru, a name which he changed to Dominic Njiru Mubunjia at the behest of his father. He stated that he was working in Mombasa when his mother notified him to move with speed to save the said land from the hands of the appellant who was working towards taking it.
27. That he returned home fast but by the time he went to the land, he found that the appellant had already obtained title documents in his name. The complainant's efforts to stop the land control board from issuing a consent for change of name and the chief's intervention also were not fruitful. The complainant even tried to register a caution on the property but it was rejected and the land registrar noted that the document was not registrable. He then reported the matter to the police but the appellant had also reported the matter.
28. The appellants main contention herein is that the trial court believed the complainant's evidence without questioning how the complainant changed his name and the discrepancies in his date of birth. Both the appellants and the complainant contended that their names initially were Nthiga Njiru before being changed to their current names. PW1 stated that he was born in 1975 but his ID erroneously stated that he was born in 1978. DW1 stated that he was born in 1975. Both of them stated that their fathers gave them the same piece of land which they had received from the clan and they registered it in the name of Nthiga Njiru.
29. PW1 produced his father's death certificate showing that he died on 28th January 2017. The appellant began pursuing this correction of names in 2018 after the death of PW1's father. PW1 stated that the land had been idle since 1975 when it was registered in the name of Nthiga Njiru since he was living and working in Mombasa. In my view, it is suspect that the appellant claims to have known about the land sometime in 1992 when his father showed it to him, but only started the process of correction of names after the death of PW1's father.
30. This leads me to the conclusion that the appellant knew that the land belonged to the complainant under circumstances identical to the ones he has presented to the court when he obtained the affidavit of names. Section 103 of the Penal Code provides:

“ Any person who administers an oath, or takes solemn declaration or affirmation or affidavit, touching any matter with respect to which he has not by law any authority to do so is guilty of a misdemeanour and is liable to imprisonment for one year”

The appellant's actions when he approached the court to commission the falsified affidavit, amounted to the 1st count he is facing.

31. PW3 stated that she wrote a letter for the appellant to aid him in correction of the names as he had alleged to her. It is after she had given him the letter that she discovered she had made a mistake but the land control board ignored her when she tried to stop the consent from being issued. As I have stated earlier, the appellant knew fully well that his version of events was false but he proceeded to procure



execution of the application for correction of names from PW3. The appellant is held liable of the offence stated under Section 355 of the Penal Code thus:

“Any person who, by means of any false and fraudulent representations as to the nature, contents or operation of a document or electronic record, procures another to sign or execute the document or electronic record, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had forged the document or electronic record.”

32. On the same day when the appellant procured execution of the document from PW3, he went to the DCI offices in Mbeere South subcounty and presented the falsified affidavit he had obtained from Embu Law Courts and misled PW6 into writing for him a letter to the land registrar requesting for copies of land documents showing the history of the impugned land. That after he had assisted the appellant, PW3 called to inform him that the appellant had misled her and that the land in question appear to belong to someone else. That he carried out investigations and made his own findings which led to the arrest of the appellant. The appellant’s act of misleading PW6 into aiding his illegal actions amounted to the offence envisioned under section 129(a) of the Penal Code which provides:

“Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service -

- (a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him;
- is guilty of a misdemeanour and is liable to imprisonment for three years.”

33. The sum total of the actions of the appellant is that he used the falsified documents to procure a title document in his name under the pretext that he is also known as Nthiga Njiru. As mentioned hereinbefore, the appellant knew that the complainant was away and he proceeded to obtain correction of names in the title documents by use of falsified documents obtained illegally. This amounts to the offence stated under section 320 of the Penal Code which provides:

“Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.”

34. At the point of sentencing, the appellant’s mitigation was that he was a first offender, 47-years old whose wife left him and that he was remorseful for the offence he had been convicted of. He prayed for a non-custodial sentence. The trial court exercised a great deal of leniency and sentenced the appellant to pay a fine of Kshs.15,000/= in default of which he would be imprisoned for a term of 3 months for each of the 4 counts he was convicted of. Looking at the sentences prescribed by the various provisions of the Penal Code that the appellant offended, I find that the court was lenient and just and there is no basis to disturb those findings.

35. In the end, having considered the evidence adduced at trial and the relevant law, I find that the appeal lacks merit and the same is hereby dismissed.

36. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2024.



L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

