



**Kaara & 2 others v Republic (Criminal Appeal 49, 50 & 51 of 2019  
(Consolidated)) [2023] KEHC 22751 (KLR) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 22751 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL 49, 50 & 51 OF 2019 (CONSOLIDATED)**

**RM MWONGO, J**

**MAY 8, 2023**

**BETWEEN**

**LAWRENCE GITARI KAARA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CRIMINAL APPEAL 50 OF 2019**

**BETWEEN**

**VANADES KABUTU KANAI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CRIMINAL APPEAL 51 OF 2019**

**BETWEEN**

**SHADRACK SAMUEL WACHIRA KATHURI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being appeals against the Judgment of Hon. M. Nasimiyu delivered  
on 17th October, 2019 in Gichugu PMCRC No 313 of 2015)*



## JUDGMENT

### Background

1. Lawrence Gitari (“Lawrence”), Vanades Kibutu (“Vanades”) and Shadrack Kathuri (“Shadrack”), are the three appellants. They were jointly charged in the lower court, together with one Amos Rukenya Murigu (“Amos”), with various offences with the intent to deprive the estate of Joseph Kiura Magondu (“Magondu”) of Land Parcel No Kabare/ Mutige /535 (hereinafter “the Land”). The particulars of the charges are as follows.
2. In Count 1, Lawrence and Shadrack were charged with forgery contrary to section 345 as read with section 349 of the *Penal Code*, in that on 5<sup>th</sup> October 2012 they, jointly with others not before the court, forged a Sale Agreement for the Land purporting it to be a genuine document signed by Magondu. They were convicted and sentenced to 2 years’ imprisonment each.
3. In Count 2, Lawrence and Amos were charged with forgery contrary to section 345 as read with section 349 of the *Penal Code*, in that on 31<sup>st</sup> January, 2013 they, jointly with others not before the court, forged a Land Transfer form for the Land purporting it to be a genuine document signed by Magondu. Lawrence was convicted and sentenced to serve 2 years’ imprisonment. Amos was found not guilty and acquitted.
4. In Count 3, Lawrence was charged with the offence of making a false document without authority contrary to section 337(a) of the *Penal Code*. The particulars were that on 30<sup>th</sup> January, 2013, jointly with others not before the court, and with intent to defraud and without lawful excuse, he made a Letter of Consent for the Land purporting it to be a genuine document issued by the Chairman, Gichugu Lands Control Board. He was acquitted on this count.
5. In Count 4, Lawrence and Vanades were charged with conspiracy to commit a misdemeanour contrary to section 394 as read with section 36 of the Penal Code. The particulars were that on 3<sup>rd</sup> December, 2013, at Kerugoya Lands office together with others not before the court, they conspired to obtain land registration by false pretences by wilfully procuring the registration of the Land in the names of Vanades. They were convicted on this count and sentenced to 18 months’ imprisonment each.
6. In Count 5, Vanades was charged with obtaining land registration by false pretence contrary to section 320 of the *Penal Code*. The particulars were that on 3<sup>rd</sup> December, 2013, at the Kerugoya Lands Office, he wilfully procured for himself the registration of the Land by falsely pretending that the same had been transferred to him by Magondu. He was convicted and sentenced to one year’s imprisonment.
7. Dissatisfied with the convictions and sentences, Lawrence, Shadrack and Vanades, each filed separate appeals, registered as Nos 49, 50 and 51 of 2019, respectively. I have consolidated the three appeals herein.

### The Appeals

8. The appeal by Lawrence raises the following grounds:
  - i. That the trial magistrate erred in law and facts by admitting a doubtful written evidence adduced by the prosecution witness.
  - ii. That the trial magistrate erred in law and facts by failing to consider contradictions and inconsistencies inherent in the prosecution case.



- iii. That the trial magistrate erred in law and facts by relying on shoddy and unfounded investigation conducted by the investigation officer.
  - iv. That the trial magistrate erred in law and facts by failing to consider the case was not proved beyond reasonable doubt as required in criminal proceedings.
  - v. That the trial magistrate erred in law and fact by failing to consider that crucial witnesses were never availed in court to testify.
  - vi. That the trial magistrate erred in law and facts by failing to consider that the specimen signature relied on by document examiner was not authentic as the source was not confirmed and nobody testified to confirm the signature came from them.
  - vii. That the trial magistrate erred in law and facts by failing to give the appellant a fair hearing, the appellant was not allowed to call his witnesses.
  - viii. That the trial magistrate erred in law and fact by failing to consider my defence.
9. Counsel's submissions clustered grounds 1-6 together and grounds 7-8 together.
10. The appeal by Vanades raises the following grounds:
- i. The learned trial magistrate erred in law and fact in finding that the ingredients of the offence of conspiracy and obtaining land registration by false pretense had been proved whereas not and no evidence to the effect was adduced.
  - ii. The learned trial magistrate erred in law and fact proceeding and passing a conviction and sentence on a fatally defective charge sheet in that it enjoined both a substantive charge and a conspiracy charge against the appellant without conducting any justification and/or election.
  - iii. The learned trial magistrate erred in law and fact in failing to take into account that the appellant was indeed a victim in the events leading to the charge despite the weight of evidence.
  - iv. The learned trial magistrate erred in law and fact in dismissing and not taking to account the appellant defense thus shifting the burden of proof to the accused which is against the criminal justice principles.
  - v. The learned trial magistrate erred in law and fact on reasons that judgment did comply with provisions of Section 169 of the Criminal Procedure Code.
  - vi. The learned trial magistrate erred in law and fact by offending the provisions of Sections 136 (1), 199 and 200 (3) of the *Criminal Procedure Code* thus rendering the entire trial an illegality.
  - vii. The learned trial magistrate erred in law and fact in rendering sentence that was manifestly excessive, harsh and illegal in that it was an omnibus sentence contrary to sentencing guidelines.
  - viii. The learned trial magistrate erred in law and fact when he relied solely on the evidence of the document examiner as the basis of conviction which evidence failed any distinguish the basis of his opinion rendering the evidence non credible.
  - ix. The learned trial magistrate erred in law and fact in failing to weigh the handwriting expert evidence generally adopting the same thus failing to come at her own conclusion thereby offending law of evidence on dealing with expert evidence.
  - x. The conviction was against the weight of evidence adduced.



11. In his brief submissions, counsel for Vanades reiterated all the grounds of appeal and urged the court to re-evaluate all the evidence and make a complete and comprehensive appreciation of the case.
12. The appeal by Shadrack raises the following grounds:
  - i. That the trial magistrate erred in law and facts by not considering that accused was not a party to the alleged agreement.
  - ii. That the trial magistrate erred in law and facts by failing to consider contradictions and inconsistencies inherent in prosecution case.
  - iii. That the trial magistrate erred in law and facts by relying on shoddy and unfounded investigation conducted by investigation officer.
  - iv. That the trial magistrate erred in law and facts by failing to consider the case was not proved beyond reasonable doubt as required in criminal proceedings.
  - v. That the trial magistrate erred in law and facts by failing to consider that crucial witnesses were never availed in court to testify.
  - vi. That the trial magistrate erred in law and facts by failing to consider that the specimen signature relied on by document examiner was not authentic as the source was not confirmed and nobody testified to confirm the signature came from them.
  - vii. That the trial magistrate erred in law and facts by failing to give the appellant a fair hearing, the appellant was not allowed to call his witnesses.
  - viii. That the trial magistrate erred in law and facts by failing to consider my defense.
13. In his brief submissions, Shadrack asserted that he did not participate in the subject agreement; that there were glaring contradictions in the prosecution case; that some crucial witnesses were not called; that he was never mentioned by any witness negatively; that the trial magistrate declined to allow him to call witnesses due to her impending transfer; and that his defence was not considered.
14. The evidence on record at the trial court was as follows.
15. PW 1 John Magondu Kiura - He informed the Court that the parcel of Land Kabare/Mutige/535 belonged to his father Joseph Kiura Magondu and that sometime in the year 2008 and 2010 the father instructed him to do a search of the said Land and upon doing so, he discovered that there was a restriction by Lawrence Gitari Kaara (the 1st Appellant) and when he made a second search, he noticed the restriction had been vacated.
16. He stated that on 31<sup>st</sup> December, 2012 when he carried yet another search, he was shocked to discover the land had been registered to Vanades Kabutu (the 2<sup>nd</sup> Appellant) and that he reported the matter to the Chief who then referred him to the District Officer who summoned Lawrence.
17. Further he stated that he was then told to report the case to the Director of Criminal Investigations to whom he submitted his father's will and a Co-operative Bank Savings Card to ascertain the signature specimen to which the DCI were able to ascertain the transactions by the Appellants were fraudulent.
18. He testified that his father died on 20<sup>th</sup> February, 2013.
19. PW 2 Dominic Munyis - He is son of the deceased's second wife who is also deceased. He testified that he lived on the suit land until his father died. He stated that in 2013 the 1<sup>st</sup> accused claimed ownership



- of the land. He testified that he was with PW-1 when they reported the matter to the Police after discovering the anomaly caused to their parcel of Land.
20. PW 3 Simon Ngare Githogo - Recalled that on 30<sup>th</sup> June 2008, he was called by the owner of the Land Joseph Kiura Magondu to witness the execution of his will before all his children; that he then allocated his children each an acre and that the suit property was given to his two young sons namely Dominic Munyis and Shadrack and that he witnesses the deceased sign the Will.
  21. PW 4 Milka Njoki Kiura - Testified that she got to know that the 2<sup>nd</sup> Appellant was registered in the suit property when they commenced succession process and was informed that her brother had already reported the matter to the police. She testified that the 2<sup>nd</sup> accused is her son.
  22. PW 5 Julius Munene Kibuchi - He confirmed that the suit property belonged to Joseph Kiura Magondu as he recalled having been leased it in 2012 and was shocked to be informed it had been sold but the search indicated the deceased was still the lawful owner. The 1<sup>st</sup> accused informed him that he had bought the land. He registered a restriction on the suit land.
  23. PW 6 Grace Wanjiku Muriuki - She stated that being a clerical Officer at the office of the District Commissioner was summoned by the Police on 13<sup>th</sup> March 2013 to confirm whether a letter of Consent in respect to the suite property originated from their office. She testified that the handwriting on the consent was not hers or any of her colleagues who worked with her.
  24. She pointed out that the stamp on the consent was different from that in their Office and that the serial number on the question letter of consent was in use in the year 2012 and not 2013 as in 2013 they had new booklet.
  25. That all consent are endorsed with the signature of the District Officer who also writes a code at the top of the Consent letter of which the one in question did not have.
  26. PW 7 Esterina Wambui Kungu – the Assistant County Commissioner, testified that she never signed the Consent letter in question and that parcel Number Kabare/Mutiqe/535 was not in the agenda for the Land Control Board on the 30<sup>th</sup> January 2013.
  27. She testified that she did not sign the letter requesting restriction against the suite property and that the investigating officers who lifted her signature specimen confirmed that she did not sign the restriction letter.
  28. PW 8 Lucy Mbugua - Being a clerical officer at the County Commissioner’s office also testified that the consent letter did not originate from their offices as it did not have the requisite serial number.
  29. PW 9 Susan Wambugu - Being the forensic document examiner and having examined the specimens presented to her confirmed that: the signature on the Land transfer and that on the will and Cooperative Bank Saving Card were not made by the same person. The questioned signature of the Assistant County Commissioner Kirinyaga East Chairperson of the Land Control Board and the question of letter of Consent dated 30<sup>th</sup> January, 2016 and the question letter dated 4<sup>th</sup> September, 2013 advising the registrar to remove the restriction was not made by the same person.
  30. That the questioned stamp impression on the letter of consent did not match with specimen stamp impression for the chairperson of the Land Control Board Gichugu meaning they were made with different instruments.
  31. PW 10 Julius Kilimo - Land Registrar testified that the suit land belonged to the deceased who, on 11<sup>th</sup> June 1999, applied to include grace Wairimu Kirira (deceased 2<sup>nd</sup> wife) and they became joint owners. On 3<sup>rd</sup> December 2013 the suit property was transferred to the 2<sup>nd</sup> Appellant (Vanades Kabuta). He



- confirmed that the disputed consent letter was used to effect the transfer and confirmed that the certificate of official search originated from his office.
32. PW11 PC Michel Waweru - formerly of Kianyaga police station, testified that on 26th March 2014 he was requested by the DCIO Inspector Yegonto to translate the Will of the deceased dated 30<sup>th</sup> June, 2008 which was written in Kikuyu language. He told the court that he translated the will from Kikuyu to English. He produced the translated Will and a certificate of translation as exhibits. He testified in cross examination that he is a Kikuyu.
  33. PW12 Peterson Muchiri Nguku - He is the chief of Kirima location. He testified that in the year 2013 the deceased's children complained to him that the suit land had been sold. He told the court that when it was confirmed that the land was still in the names of the deceased, he advised the children to file a succession case. He testified that he later learnt that the land had been transferred to the 3<sup>rd</sup> accused (2<sup>nd</sup> appellant). He testified in cross-examination that when the deceased died, Mary Muthoni disappeared and has never been seen again.
  34. PW13 CIP Wilson Yegon- the investigating officer- He testified that the deceased's children complained that the deceased's land had been fraudulently transferred to one Vanades Kabutu.
  35. He stated that the land registrar sent him the questioned transfer document allegedly signed by the deceased in favour of the 4<sup>th</sup> accused, the questioned consent dated 30/1/2010 and an application for consent dated 2/1/2013. He also testified that the complainants also mentioned the 1<sup>st</sup> accused/ appellant as one of the alleged purchasers. He stated that there was an agreement (the questioned agreement) where the 1<sup>st</sup> accused was a purchaser and the vendors were the deceased and one Mary Muthoni. The agreement is witnessed by the 2<sup>nd</sup> accused – Shadrack Samuel.

#### **Defence case**

36. DW 1- Lawrence Gitari - He testified that he entered into a sale agreement with the deceased Joseph Kiura Mgondu. He told the court that the sellers were the deceased and his wife Mary Muthoni Mureithi. He stated they had a meeting at the chief's office and that the chief ( PW12) confirmed that he bought the land. He contended that the transaction was genuine and therefore he did not commit any offence.
37. DW2- Vanades Kabutu - He testified that in October 2012, his mother (PW4) and his grandmother Mary Muthoni told him and the 1<sup>st</sup> defendant (appellant) that they wanted to sell the suit land to them. He testified that they told him to sign a document to enable them give the 1<sup>st</sup> accused land to which he complied. He stated that he signed the questioned sale agreement.
38. DW3- Shadrack Samuel Wachira - He testified that he bought the land from the 1<sup>st</sup> accused. He testified that when the 1<sup>st</sup> accused approached him, he had had a sale agreement, title deed of the suit land and death certificate of the deceased. He confirmed that PW5 had leased the land. That they went to the office of the chief and PW5 was refunded Kshs 70,000/= which was paid from the deposit he had paid the 1<sup>st</sup> accused. Later, the 1<sup>st</sup> accused brought him a transfer form which he signed. He testified that the 1<sup>st</sup> accused later brought him a title deed. He stated further that he is not the one who processed the transfer.
39. DW 4 – Amos Rukenya Murigu - He testified that he drafted the sale agreement. He stated that he was approached at his practice office in Kerugoya by 1<sup>st</sup> accused, Mary Muthoni and Shadrack Wachira (2<sup>nd</sup> accused) to prepare the agreement. He told the court that the deceased was also present and confirmed that the transaction was genuine He testified that he met the deceased outside because both his legs were amputated. That after confirming with the deceased, he prepared the agreement. He however



contended that he did not prepare the transfer document. He did not know where Vanades got the transfer from.

40. The duty of this court as the first appellate court is to subject the entire evidence to a fresh analysis and evaluation and draw my own conclusions. this was held in *Okeno v Republic* 1972 EA 32 where the Court of Appeal set out the duties of the first appellant court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. Republic* (1957) EA. 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

41. As such I am required to set out and analyse the evidence on record, in light of the findings and decision of the lower court. The lower court identified the issues for determination as follows:
- a. Whether Lawrence and Shadrack, the 1<sup>st</sup> and 2<sup>nd</sup> accused, jointly forged the Agreement for Sale
  - b. Whether Lawrence and Amos, the 1<sup>st</sup> and 4<sup>th</sup> accused, forged the transfer of land form
  - c. Whether Lawrence, the 1<sup>st</sup> accused, made the Land Control Board consent without authority;
  - d. Whether Lawrence and Vanades, the 1<sup>st</sup> and 3<sup>rd</sup> accused conspired to obtain registration of the Land by false pretense
  - e. Whether Vanades, the 3<sup>rd</sup> accused, obtained Land Registration No Kabare/ Mutige/535 by false pretense
42. I think those are the issues that are still in focus in this appeal, and I will make my analyses using the same.

### **Whether the Sale Agreement was forged by Lawrence and Shadrack**

43. Lawrence and Shadrack were charged with forging the sale agreement for the Land contrary to Section 345 as read with Section 349 of the [Penal Code](#).
44. Section 345 of the [Penal Code](#) defines forgery as follows:

“Forgery is the making of a false document with intent to defraud or deceive.”

45. Mativo J (as he then was) in [Caroline Wanjiku Ngugi v Republic](#) [2015] eKLR held that:

“Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus the elements of forgery are:-

- i. False making of – The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. “Writing” includes anything handwritten, type written, computer generated or engraved.



- ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine contents of the document.
  - iii. Ability to defraud – The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.
  - iv. Legal efficacy – the document or writing has to have some legal significance.
  - v. Intent to defraud – the specific state of mind for forgery does not require intent to steal but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer.”
46. PW1 testified that the signature on the sale agreement did not match the one he knew to be his father’s, which was also in the Will of his father.
47. Further PW9, Susan Wambugu the forensic expert testified that she was given the sale agreement Document C (MFI 9) and documents G1 and G2 containing the known signatures of Joseph Kiura Magondu, the deceased. PW9 stated that she compared the signature of on document C with the known signature of the deceased, and her finding was that the two were not made by the same author.
48. DW 1- Lawrence Gitari testified that he entered into a sale agreement with the deceased Joseph Kiura Magondu. He told the court that the sellers were the deceased and his wife Mary Muthoni Mureithi. He stated they had a meeting at the chief’s office and that the chief (PW12) confirmed that he bought the land. He contended that the transaction was genuine and therefore he did not commit any offence.
49. DW2- Shadrack did not dispute the sale agreement which he signed as a witness. he said that he was asked to sign by his mother Milka Njoki who was with his grandmother Mary Muthoni. All he was told was that they wanted to sell land to the 1<sup>st</sup> accused. Sharack’s knowledge of what was going on was apparently quite limited and somewhat naïve.
50. DW 4 – Amos Rukenya Murigu testified that he drafted the sale agreement. He stated that he was approached at his practice office in Kerugoya by 1<sup>st</sup> accused, Mary Muthoni and Shadrack Wachira (2<sup>nd</sup> accused) to prepare the agreement. He told the court that the deceased was also present and confirmed that the transaction was genuine He testified that he met the deceased outside because both his legs were amputated. That after confirming with the deceased, he prepared the agreement. He however contended that he did not prepare the transfer document. He did not know where Vanades got the transfer from
51. The trial court found that the prosecution witnesses including expert witnesses tendered evidence which showed that the deceased did not sign the sale agreement. it held that the sale agreement was false and was intended to defraud the deceased family of the suit land.
52. I have no reason to disagree with the findings of the trial court on this issue, and the appeal on this point fails

### **Whether the Transfer of Land Form was forged by Lawrence and Amos**

53. Lawrence and Amos were charged with forging the transfer form for the Land. The charge alleges that they forged the transfer form purporting it to be a genuine document signed by the owner, Joseph Magondu. Amos has not appealed and is not party herein.



54. Lawrence argues three points on this issue: First that there are inconsistencies in identification of the known signature of the deceased in the will produced as PW 10; That the investigation by the IO was speculative; and that the trial court blindly accepted the document examiner's evidence.
55. On the issue of identification of the known signature of the deceased, the appellant argues that PW 1 testified that he took cooperative bank savings card A.C NO 01A1816970006 and a will which contained the known signature of the deceased to the DCIO for investigation. On cross-examination, he went on to contradict himself by stating that he was not sure if the signature on the will belonged to his father.
56. Further, that PW1 and PW3 testified that all the children were present when the will was prepared, PW2 and PW4 contradicted PW1 and PW3's statement by stating that they were not present when the will was prepared and signed by the deceased. The above inconsistencies and contradictions raise doubt as to the credibility of the known signature of the deceased in the will.
57. On the issue of speculative investigation by the IO, Lawrence argues that in his cross-examination, the IO stated that he did not take the appellant's signature. The appellant signature was crucial so as to determine whether he was the one who forged the signature of the deceased. This means that the ingredients of the offence of forgery and conspiracy to commit a misdemeanour were not met. The prosecution did not provide evidence to prove that the appellant and his co-accused falsified the deceased's signature in the transfer form and the agreement for sale.
58. Further, that the investigator failed to call Mary Muthoni, a crucial witness to the case. She was the wife to the deceased as well as the vendor of the agreement of sale which means that she has information that could have shed more light on whether the deceased signed the said documents. The lack of her evidence created a gap in the prosecution case. Therefore, the learned magistrate erred by establishing that the prosecution had proved their case beyond reasonable doubt.
59. On this, it is trite law that there is no requirement of a prosecutor to call a multiplicity of witnesses, whose role may end up being to merely repeat other testimony. The case of *Keter v Republic* [200711 EA135] is sufficient in this regard. There the Court held that the prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond reasonable doubt.
60. On the evidence of the forensic document examiner, Lawrence submitted that PW9 testified on behalf of CIP Alex Matthew Mwongera, the author of the report of the examination of documents. In his report marked as PMFI 23, the examiner gives his opinion that the submitted known signature of the deceased marked as G1 and G2 and the questioned signature marked as A1 and C in the transfer of land form, letter of consent and agreement of sale were not made by the same author.
61. He argues the court erred by failing to examine document examiner's opinion and blindly accepting the examiner's finding as its own. He argues that a handwriting expert is only supposed to point out and elaborate on the similarities and dissimilarities in handwriting as was held in the case of *Hassan Salum v Republic* (1964) EA 126, where it was stated:

“In saying that he (the expert) had no doubt that the forged signature had been written by the Appellant, he was going far beyond the proper limits. I think the true answer was given by the expert in *Bishop of Lincoln Case* (1921) 90 where LJPC 174 that it is not possible to say definitely that anybody wrote a particular thing. I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person.



62. He also relied on the case of *Ashira v Republic* Criminal Appeal No 15 of 1986 where the Court of Appeal of Nairobi stated that:
- “The expert is therefore faced with trying to analyse forged writing as well as disguised writing. In cases where there is a problem about the writing the duty of the court to satisfy itself after examination whether the expert’s opinion can be accepted and cannot blindly accept such opinion”
63. The evidence of the prosecution was that PW 1(John Magondu Kiura) informed the Court that the parcel of Land Kabare/Mutige/535 belonged to his father Joseph Kiura Magondu and that sometime in the year 2008 and 2010 the father instructed him to do a search of the said Land and upon doing so, he discovered that there was a restriction by the 1st Appellant (Lawrence Gitari Kaara) and when he re-submitted for a second search, he noticed the restriction had been vacated.
64. That on 31<sup>st</sup> December 2012 when he carried yet another search, he was shocked to discover the land had been registered to 2<sup>nd</sup> Appellant (Vanades Kabutu) and that he reported the matter to the Chief who then referred him to the District Officer who summoned 1st Appellant.
65. PW 3 (Simon Ngare Githogo) testified that on 30<sup>th</sup> June 2008, he was called by the owner of the land Joseph Kiura Magondu to witness the execution of his will before all his children of which he allocated his children each an acre and that the suite property was given to his two young sons namely Dominic Munyis and Shadrack and that he witnesses the deceased sign the Will.
66. Further, PW -5 Julius Munene Kibuchi. He confirmed that the suit property belonged to Joseph Kiura Magondu as he recalled having been leased it in 2012 and was shocked to be informed it had been sold but the search indicated the deceased was still the lawful owner. The 1<sup>st</sup> accused informed him that he had bought the land He registered a restriction on the suit land.
67. I have also perused the evidence of PW9, the expert document examiner. She testified, without objection, on behalf of Mr Alex Mwongera of the same office. She stated that she knew Mr Mwongera’s signature and was presenting the forensic documents reports on his behalf. In cross examination she admitted that she was merely producing his written reports on his behalf, as she was not the author.
68. DW 1 Lawrence admitted in his testimony that, he entered into the sale agreement for purchase of the Land, that he went to the Chief’s (PW12’s) office and confirmed that he bought the Land; that the transaction was genuine so far as he was concerned.
69. In my view, all the evidence must be taken together as a whole: that is, the prosecution evidence and the response to it. As for the forensic evidence, there is nothing to suggest that the forensic examiner went far beyond the required parameters of analysis on his part, as argued by Lawrence. He submitted, relying on the Hassan Salum case that the expert can only properly say that he does not believe that a particular writing was by a particular person; and, relying on Ashira Case that the trial court cannot blindly accept the expert’s opinion without satisfying itself after examination, as stated by the Court of Appeal.
70. In my view, what the expert was expected to do, was to state whether the signatures appeared to have been made by the same or different authors. That is precisely what the document examiner’s report did. The defence was not able, in cross examination, to debunk any aspect of the document examiner’s findings.
71. As such the prosecution through the expert witnesses was able to prove that:



- a. There was indeed a false document presented at the Registrar of Lands office as was witnessed by PW 10. That the same was fictitious and presented with intent to pass it on as having been made by Joseph Kiura Magondu who was the true owner.
  - b. That the appellant knew it was forged as has been witnessed by prosecution witnesses PW6, 7, 8, and 9; and that,
  - c. That the Appellants were the ones who uttered the documents with intent to defraud which caused PW 1 and PW 2 to report to the police resulting in their being arrested.
72. Accordingly, the appeal on this aspect also fails.

**Whether the Land Control Board Consent (LCB) Form was made without consent (by Lawrence)**

73. In Count III, Lawrence was charged with making the LCB Consent without authority contrary to section 357(a) of the Penal Code.
74. The trial court found that the prosecution failed to prove the offence against Lawrence. The state has not cross-appealed on this issue to assert any error on the part of the trial court.
75. In my view, in the absence of a cross appeal, the parties are bound by their pleadings, Accordingly, no further findings are necessary on this issue by this court.

**Whether Lawrence and Vanades, the 1<sup>st</sup> and 3<sup>rd</sup> accused conspired to obtain registration of the Land by false pretences**

76. The trial court found against both Lawrence and Vanades on this issue. The charge was that the two conspired to commit a misdemeanour contrary section 394 as read with section 36 of the Penal Code, in that they obtained and procured land registration of Land parcel No Kabare/ Mutige 535 by false pretence.
77. In the written submissions on behalf of Lawrence, as earlier noted, the grounds were clustered and thus no specific submission on this point is identifiable beyond the submissions on forgery already dealt with.
78. Counsel for Vanades argued that the evidence availed against him did not reach the threshold required by law. He asked this Court to carefully examine all the evidence and come to its own conclusions.
79. The real question under this issue is whether the two accused, Lawrence and Vanades, conspired to obtain registration.
80. In Archibold on criminal pleadings, evidence and practice, it is observed that:

“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.”



81. In *Gichanga v Republic* [1993] KLR 143 the Court of Appeal held that;
- “With respect to the offences of conspiracy, the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money”.
82. To prove a conspiracy, the prosecution has to establish that the defendants, together with others, agreed and had a common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court (see *Republic v Anne Atieno Abdul & Others* [2017] eKLR). Further in *Halsbury’s Laws of England Vol. 25* it is observed that;
- “It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose.”
83. The evidence of Lawrence was that he entered into a sale agreement with the deceased. However, the alleged signature of the deceased on the agreement was a false one as testified by PW1 and PW2, his sons. Further, Lawrence did not have possession of the land n. On his part, Vanades stated that he bought the land in question from Lawrence, who had approached him, got a sale agreement, title deed and death certificate of the deceased; that Lawrence later brought him the transfer form which he signed. All this was despite substantial and uncontroverted evidence that there was a will made by the deceased which gave the subject land parcel to his children.
84. There was no evidence by the defendants that the deceased was present when the alleged agreement was entered. Indeed, Amos Rukenya (DW4), the advocate who allegedly drew the sale agreement, asserted that although he drew the agreement, he did not know where Vanades got the transfer form from. came from. There was, however, no evidence by any of the defendants that any consideration was paid for the said land, other than a deposit DExb 3 for 150,000/-. He admitted that he was to pay a balance after transfer, but he did not demonstrate the payment.
85. Accordingly, it may be deduced conclusively, that the alleged sale did not crystallise at all, and in light of the existence of the will, is unlikely to have taken place. Accordingly, the actions of both Lawrence and Vanades can be no more than a common act to acquire possession of the land.
86. I thus agree with the trial court that Lawrence and Vanades were, in the circumstances, acting in common to obtain the suit land without showing the purchase and transfer event as having occurred in a good faith transaction.

**Whether Vanades, the 3<sup>rd</sup> accused, obtained Land Registration No Kabare/ Mutige/535 by false pretences**

87. Section 320 of the *Penal Code* provides that:
- “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.”



88. False pretence is defined in Section 312 of the Penal Code as follows:-

“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to true, is a false pretence”

89. In his submissions, counsel for Vanades argued that in order to prove the charge of obtaining by false pretence the following had to be proved: That there is a pretence; that the pretence emanated from the accused; that it was false; that the accused person knew of its falsity; that there was intention to defraud; that the thing is capable of being stolen; that the accused person induced the owner to transfer his whole interest in the property.

90. Counsel referred the Court to Rose Mararo v R HCCRA No 147 of 2011. In that case, it was noted that:

“It is clear from the wording of Section 320 cited above, the accused person must: -

- a. wilfully procure for himself or any other person any registration, licence or certificate under any law;
- b. by false pretence.

The operative word under Section 312 is "representation" which is applicable in the following circumstances: -

- i. A representation by words, writing or conduct.
- ii. A representation in either past or present.
- iii. A representation that is false.
- iv. A representation made knowing it to be false or believed not to be true.”

.....

The offence of obtaining by false pretence means knowingly obtaining another person's property by means of a misrepresentation of fact with intent to defraud. For the offence of obtaining by false pretences to be committed, the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen.

Perhaps the most explicit exposition of the ingredients of the offence of obtaining by false pretences is to be found in the decision rendered by the Nigerian Supreme Court in the case of *Dr. Edwin U. Onwudiwe v Federal Republic of Nigeria*[7] where the court stated in order to succeed in a charge of obtaining by false pretences, the prosecution must prove:-

- a) that there is a pretence;
- b) that the pretence emanated from the accused person;
- c) that it was false;
- d) that the accused person knew of its falsity or did not believe in its truth;



- e) that there was an intention to defraud;
- f) that the thing is capable of being stolen;
- g) that the accused person induced the owner to transfer his whole interest in the property."

The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest belief in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence. The above adequately presents the law as in the Penal Code."

91. Did the accused have an intention to defraud and was the thing is capable of being stolen?
92. The subject matter here, is land. It cannot seriously be argued that land is not a thing capable of being stolen. Land is represented in terms of its ownership, by a title, and in terms of value by money. Thus, if a title can be stolen or transferred without the consent of the owner, it is a thing capable of being stolen or otherwise acquired.
93. Vanades argued that there was no direct evidence that disclosed pretence or wilful intention on his part.
94. As earlier stated, the advocate who allegedly drew the sale agreement was unable to say from where the transfer form for the suit-land emanated from. In addition, no mention was made or evidence availed by any party of consideration paid for the said land. Vanades' own evidence was that
95. Clearly therefore, the presentation of the transfer documents to the Registrar of Lands was not an act of intentional good faith.
96. I agree with the trial court's finding concerning Vanades when it so eloquently summarised the evidence on this issue stating:
- “ [Vanades].....knew that the land belonged to the deceased and not the 1<sup>st</sup> accused. At the time he was signing the transfer document which was backdated, he was aware that the owner of the land was deceased, but signed it anyway. He actively participated in the transfer of the land to his name...
- ....He wilfully and knowingly used a false transfer to procure registration of the suit property in his name. H falsely represented that the land was transferred to him by the deceased....”
97. I fully agree with the trial court in its finding above. Where an accused person says he signed a sale agreement with the lawyer, yet that lawyer disowns the consequent transfer and asserts that he did not prepare it; where the accused is aware of the death certificate of the deceased owner; where there is no clarity as to where the transfer emanated: all these are signs of a conspiracy to obtain registration by false pretenses.
98. In the event, there is no basis to interfere with the trial court's finding that Lawrence and Vanades acted in common to improperly deprive the deceased's children of the suit land.

## Conclusions

99. From all the foregoing discussions, and summarising the findings I have made, I reach the following conclusions, and determine as follows



- a. In respect of the appeal by Lawrence Gitari Kaara, I find no reason to interfere with the decision of the trial court. The appeal fails and the conviction and sentence are upheld;
- b. In respect of the appeal by Vanades Kabutu Kanai, I find that the appellant was properly convicted and the appeal fails. The conviction and sentence are upheld.
- c. Equally, the appeal by Shadrack Samuel Wachira Kathuri fails and is dismissed in its entirety. the conviction and sentence shall stand.

Orders Accordingly.

**DELIVERED AT KERUGOYA ON THIS 8<sup>TH</sup> DAY OF MAY 2023**

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**RICHARD MWONGO**

**JUDGE**

**In the presence of:**

1. Mrs. Makworo for the 1<sup>st</sup> Appellant
2. Vanades Kabutu Kanai the 2<sup>nd</sup> Appellant in person
3. Shadrack Samuel Wachira Kathuri the 3rd Appellant in person
4. Lawrence Gitari Kaara, 1<sup>st</sup> Appellant in person
- 5 Mr. Mamba for the state
- Mr. Murage Court Assistant

