



**Republic v Songoro & 2 others (Criminal Appeal 173 of 2018)
[2023] KEHC 18309 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 173 OF 2018
WM MUSYOKA, J
JUNE 2, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

ERNEST TWABALABA SONGORO 1ST RESPONDENT

EUNICE KHATAVA KHISA 2ND RESPONDENT

MATANGWE SIKOYO 3RD RESPONDENT

(Appeal from judgment and decree of Hon. FM Nyakundi, Resident Magistrate, in Mumias SRMCCRC No. 783 of 2016, of 9th November 2018)

JUDGMENT

1. The respondents, Ernest Twabalaba Songoro alias Ernest Abwalaba Songoro, Eunice Khatava Khisa and Matangwe Sikoyo Enos had been charged before the primary court, on 2 counts, of the offence of forgery, contrary to section 350 of the *Penal Code*, Cap 63, Laws of Kenya, and 1 count each of obtaining registration by false pretences, contrary to section 320 of the *Penal Code*.
2. The particulars of the 2 forgery charges were that on unknown dates before December 9, 2009, jointly with others not before the court, with intent to deceive, they forged 2 documents, namely a mutation serial number 325553 and a letter of consent to subdivide land serial number 358569 for subdivision of East/Wanga/Mung'ang'a/222 in the names of Melissa Akumu Songoro, purporting the 2 documents to be genuine. On the obtaining registration charges, it was alleged that on unknown dates in the course of 2010 and 2011, at the Kakamega land district registry, within Kakamega district, they willfully procured for themselves land title deeds for East/Wanga/Mung'ang'a/1349, 1351 and 1352, respectively, by falsely pretending that the land parcels had been transferred to them by Melissa Akumu Songoro as gifts, facts that they knew were false. The respondents denied the charges, on July 26, 2016, and a trial ensued, where 7 witnesses testified.



3. PW1, Melissa Songoro, testified that her late husband was the registered proprietor of East/Wanga/Mung'ang'a/222, which measured 16½ acres, of which he had not sold a portion. She said that her late husband had not given a portion of the land to his children prior to his demise. She stated that the 1st respondent had initiated succession proceedings to the estate of her late husband. She asserted that she never sold the land to anyone, and that she did not sign the mutation form and the letter of consent the subject of the proceedings. She said that she did not visit the office of the surveyor or land officer in Kakamega for the purpose of the alleged sale, and said that she only visited those offices after she heard that the land had been sold. She further stated that when she went there she was not in the company of the 1st respondent, but of other individuals. She asserted that it was the respondents who sold the land to their co-accused. She stated that she never had the property registered in her name, and that it was in the name of the deceased. She said that she did not sign any documents, and she did not authorize its subdivision.
4. PW2, Benard Makati Songoro, a son of PW1, testified that he did a search on East/Wanga/Mung'ang'a/222, and established that it had been subdivided into East/Wanga/Mung'ang'a/1349, 1350, 1352 and 1353. When they confronted lands officers, they were informed that the subdivision was done without the land having been subjected to succession proceedings. They were advised to establish the surveyor who did the work. They established that the land was visited on December 9, 2007 by a surveyor, and people met there, who signed documents purporting that it was PW1 signing. After that they went and reported the matter at the police station. He asserted that although the green card showed that succession proceedings were conducted, all that was false. PW3, Geneveva Ashiali Madata, was a daughter of PW1. She testified that her father had not sold nor subdivided the land before he died. Her case was that the same was sold and subdivided after he died.
5. PW4, Philip Kirui, was a government surveyor, stationed at Kakamega. He said that East/Wanga/Mung'ang'a/222 was subdivided into 4 subplots, being East/Wanga/Mung'ang'a/1349, 1350, 1351 and 1352. He said that the land was surveyed at the behest of the owners, and belongs to the owners. He said he could not tell how the subdivision came about. PW5 was a registrar of persons, Grace Nyongesa. She said that she worked for registrar of persons since 2012. Her evidence was comparing the fingerprints on the mutation forms with those held by her office. She said that it was purported that both were impressed by PW1, but she found the imprints or impressions to be different. She said the prints on the mutation form did not belong to PW1. She said that she did not have the fingerprint forms for the respondents, and that she did not know who was responsible for the fingerprints on the mutation form.
6. PW6 was a son-in-law of PW1, Gabriel Induswe. He accompanied PW1 to the lands' office, after it came to light that the land had been subdivided. They were told to get green card for the property, from which they noted that subdivision had been done in 2007. The documents did not show involvement of the family in the transactions, and so they decided to come to court. He stated that although the records at lands indicated that succession had been done over the property, none had in fact been done.
7. PW7, Sergeant Rashid Juma, No 5277, was the investigating officer. He stated that the complaint filed by PW1, was that the accused persons had transferred East/Wanga/Mung'ang'a/222 to her name, and thereafter subdivided the same into 4 portions, which they then sold. He stated that he got the mutation form from the surveyor, which indicated how the land had been subdivided into 4 portions. It was purported that the mutation form bore the thumbprint of PW1. He arrested her, interrogated her and obtained sample thumbprints from her, which he forwarded to the registrar of persons for comparison. The report he got was that the thumbprints on the mutation forms were not hers. He next obtained a letter of consent from the local Land Control Board, and upon investigation he established that the said consent was not genuine for the Land Control Board did not sit on the date when it was



- alleged that the consent was given. He next saw the land registrar. He stated that he established that succession was done at the High Court, and the beneficiaries were the respondents, with East/Wanga/Mung'ang'a/222 going to the appellant. He produced the mutation form and the letter of consent as exhibits. He asserted that the 2 were forgeries. He said that the thumbprints on the mutation form belonged to an unknown person.
8. The respondents were put on their defence. The 1st respondent made a sworn statement. He testified that his late father had subdivided the land and given it to him before he died. He said that the deceased had gone to the Mumias Land Control Board, and obtained the consent of the board to subdivide the land, and he produced documents which he said supported that. He said that the land, East/Wanga/Mung'ang'a/222, was initially subdivided into East/Wanga/Mung'ang'a/910, 911 and 912, at that time, but his father died before stamp duty was paid. The said numbers were later changed to East/Wanga/Mung'ang'a/1349, 1350, 1351 and 1352. He said no succession was done to the estate of his late father, for what happened was that a special land control board consent was given for the subdivision based on the earlier consent.
 9. DW2 was Eunice Khatava Khisa, the 2nd respondent and daughter-in-law of PW1. She said that she sold her share of the land, so that she could buy land elsewhere as she was not on good terms with PW1. She stated that her thumbprint was not taken to Nairobi. DW3, Matangwe Enos Sikoyo, the 3rd respondent, said the land was sold to him by his co-accused. He said he knew nothing of a succession cause.
 10. DW4 was John Njenga, an officer from the Kenya National Archives. He produced a file regarding East/Wanga/Mung'ang'a/222, which showed that consent had been given on an application dated December 28, 1990, for subdivision of East/Wanga/Mung'ang'a/222, and was given to the owner, Bonfas Songoro. He stated that he did not know whether the said records were forged.
 11. In its judgment, the trial court found the appellant had not established a case against the respondents, and acquitted them.
 12. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the trial court failed to find that the prosecution had proved its case against the respondents beyond reasonable doubt, the trial court failed to critically analyze the evidence adduced and the exhibits, the trial court failed to consider the corroborative material tendered by the appellant, the trial court erred in not finding the respondents guilty of the crimes that they were accused of, and that there was miscarriage of justice.
 13. Directions were given on October 15, 2019, for disposal of the appeal, by way of written submissions. In the course of preparing judgment the court noted that the typed record was not making sense, yet the handwritten notes of the trial court were not legible, whereupon it was directed that the file be returned to the trial court for the typewriting of the proceedings to be done afresh. That was eventually done, and the trial court records were returned herein by a letter dated November 29, 2021. I have read through the said proceedings, and I have still encountered difficulty. There could be a problem with either the way the witnesses testified, or the proceedings were recorded by the court, or typed by the person who reduced them to typescript. Anyhow, the appellant did not file any written submissions to argue his appeal, for I have not come across any. The respondents did file written submissions, dated November 11, 2019. No points of law are argued in the written submissions, all there is an analysis of the cases presented by both sides at the trial. There is attached an incomplete copy of the decision in *Peter Mwaniki Mbugua & another vs. Republic* [2019] eKLR.
 14. The respondents had also filed grounds of opposition to the petition of appeal, dated September 27, 2019, and a replying affidavit, sworn on September 24, 2019. The filing of these processes is unknown



in criminal appeal practice, for respondents in appeals are not required to file any responses to the appeal, unless they are cross-appealing. I shall have no regard to the filings dated September 24 and 27, 2019. If any document were to be filed to a petition of appeal, it would be an answer to the petition, for that is the established way of dealing with petitions. However, the rules of procedure do not provide for filing of answers or responses to petitions of appeal. Regarding the replying affidavit, I would state that replying affidavit is only filed to answer or reply to an affidavit filed by the other party. The appellant has not filed any affidavit in these appeal proceedings, to necessitate the filing of a replying affidavit. In any case, affidavits carry evidence, and at appeal, the appellate court only considers the evidence that was presented before and recorded by the trial court. These documents were filed in abuse of court process, and I hereby strike them out.

15. The principal case herein is that the 1st and 2nd respondents caused East/Wanga/Mung'ang'a/222 to be subdivided, and subtitles created, which they then sold to the 3rd respondent. The offences charged relate to those processes of subdivision and creation of new titles. There are the charges relating to the mutation form and the letter of consent which facilitated the subdivision of East/Wanga/Mung'ang'a/222, and those for obtaining registration of land by false pretences, with respect to East/Wanga/Mung'ang'a/1349, 1351 and 1352.
16. Mutation forms are used at the stage of subdivision, and are generated by a surveyor, for they crucially carry a sketch of the subdivision proposed. The surveyor involved in the transaction in 2009 was MM Lusimba. He would have been the proper person to call to shed light on what transpired, in terms of who was involved in the execution of the mutation form. The surveyor who testified was Peter Kirui. He did refer to a certain late Maurice Mwamba, who I suppose could be MM Lusimba. As PW4 was not privy to the events of 2009/2010, he could only say that the subdivision was done by the owners of the property. So, from the surveyor's side of things, it is not clear who was involved in the mutation process in 2009/2010.
17. That then leaves us with the position taken by PW1, that she did not sign the document, and the thumbprint was not hers. To prove that, the appellant relied on PW5, who provided documents on the fingerprints of PW1, as analyzed by their experts, who returned a report that the fingerprints on the mutation forms were not of PW1. That should be ideal to bring that matter to a close. So, PW1 did not sign that document, who did? The fingerprints for the respondents were not presented to the experts for analysis, and, therefore, there is no material to connect them to the same.
18. The charges the 1st and 2nd respondents faced was that they forged the document. Forgery is about making a false document. It is about making a document from scratch, or altering it to serve some purpose other than that originally intended, or signing it in a misleading way. The mutation form is a document generated by the proprietor of the property sought to be mutated or subdivided. In the instant case, the allegation is that the mutation form in question was made by PW1, as she was the one who allegedly executed it. She denies it. The evidence by PW5 is that the person who signed it was not PW1, and is unknown. Consequently, PW1 did not make the document. So who did? MM Lusimba, the District Surveyor who appended his signature and rubberstamp on it on December 9, 2009, could have helped to unravel the mystery, but, unfortunately, from the evidence of PW4, he was dead. If PW1 did not make the document from scratch or did not sign it, then it was forged.
19. So, who made this document from scratch, if it was not PW1? Who appended their fingerprint impressions on it as proprietor? No evidence was tendered on who made the document from scratch, and none was led on who appended their fingerprints on it, purporting them to be those of PW1. Was it the 1st and 2nd respondents? There is no evidence.



20. The only reason why the 1st and 2nd respondents are being held accountable is because the subdivision proposed in that impugned mutation form was subsequently relied on to subdivide the property, and for issuance of subtitles, which were subsequently, allegedly, sold to the 3rd respondent. The 1st and 2nd respondents appear, from the material on record, to be the beneficiaries of the sales of the subtitles created from the property the subject of the impugned mutation form. The presumption is that they must have uttered the document to the land control board, and got the land control board to give consent for the subdivisions, and then onwards to have the land registrar register the subdivisions and transfer those sold to the 3rd respondent to his name. But, is there any evidence that the mutation form was uttered anywhere by the 1st and 2nd respondents? I have not seen any such utterance. The prosecution appears to rely on presumption here to advance its case. The presumption would be that to have sold the titles created from that process meant that those who benefited from the sale uttered the documents to those responsible, and if they did then they must have made them. The law works on concrete evidence and not suppositions.
21. The other critical consideration is whether the subtitles created from that process have been nullified. That is to say East/Wanga/Mung'ang'a/1349, 1350, 1351 and 1352. They have not been nullified, and are still, in the records of the lands' registry, valid titles. That then would mean that any criminal charge relating to their creation cannot stand. The foundation of any criminal charges around mutation forms, consents, subdivisions and transfers can only arise after the titles have been nullified, for there can be no criminal conduct around those issues, if the titles that resulted from those processes are still valid in law. Is there evidence that East/Wanga/Mung'ang'a/1349, 1350, 1351 and 1352 were ever nullified and reverted to East/Wanga/Mung'ang'a/222? I have seen none from the trial record. The land registrar did not testify, and no records were presented from his office on that. A person cannot be found liable for forgery, if the final document that resulted from the alleged forgery, is still held to be genuine and valid in law. It would appear that the appellant put the cart before the horse. The forgery charges should have been brought only after the nullification of the titles.
22. The same argument should apply to the charge on forgery of the consent of the land control board. The titles that were created from that process have not been nullified, on grounds that the consent of the land control board was obtained by fraud. It would only be upon such a nullification, that a basis would be provided for audit of the process leading up to the registration of the titles, which would then open way for prosecution of anyone found culpable.
23. Related to the above, is the issue of there having been proceedings that the late father of the 1st respondent, who was also the late husband of PW1, had initiated for subdivision of the same property. That came out clearly from the defence evidence. Records were produced from the National Archives, being minutes of the Mumias Land Control Board, confirmed on 30th January 1991, where the late Bonfas Songoro Shikutsi presented East/Wanga/Mung'ang'a/222 before the Board for subdivision. The consent was given on December 23, 1990.
24. On the charge of obtaining registration by false pretences, what I have discussed above would also apply. More crucially, the registration in this case is of land. Registration of land happens at the lands' registry. Curiously, no witness was presented from the lands registry to testify on what transpired, leading up to the registration of East/Wanga/Mung'ang'a/1349, 1350, 1351 and 1352, which would have provided the background to the charges. The land registrar would have shed light on exactly who had approached him to have the titles registered, what documents were presented or uttered for that purpose, so that if the impugned mutation and consent of the land control board were uttered, then there would be basis for holding that the respondents, if found to have been the ones who obtained that registration, liable for the offences charged. Without testimony from the land registrar, there is a huge gap in the prosecution's case, which could only be resolved in favour of the respondents. The



investigating officer could not rely on what he was informed by the land registrar or established from that office, unless there was a report he was relying on, duly presented in court as an exhibit. Whatever he might have gathered from the lands office, or was told to him by the land registrar, only amounted to hearsay, and only the land registrar, or officials from his office, could speak to those issues.

25. I note from the record, that there is active litigation going on in other courts over the same property, significantly in Bungoma ELC No. 286 of 2013. Injunctions were granted in that matter, and orders given for release of documents to the 3rd respondent by the police. It is not a good policy to have parallel proceedings going on between different courts over the same issues. PW1 was before the trial court, pursuing the matter of East/Wanga/Mung'ang'a/222; while she was still in Bungoma ELC No. 286 of 2013, pursuing the same subject against the same 3 respondents. The risk that one runs, with that sort of approach, is ending up with conflicting decisions from the different courts over the same issue. I note that Bungoma ELC No. 286 of 2013 was initiated in 2013, while the criminal matter herein was initiated in 2016.
26. I have said enough to demonstrate that there was not adequate material before the trial court, to sustain a conviction of the respondents, for the offences that they faced. Consequently, I find no merit in the appeal herein, and I hereby dismiss the same.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....2ND
.....DAY OFJUNE..... 2023**

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Kagai, instructed by the Director of Public Prosecutions, for the appellant.

Mr. Munyendo, Advocate for the respondents.

