



**Makwata & another v Republic (Criminal Appeal E045 & E046 of 2019) [2023] KEHC 21012 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21012 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E045 & E046 OF 2019  
WM MUSYOKA, J  
AUGUST 1, 2023**

**BETWEEN**

**SHULA SONGA MAKWATA ..... 1<sup>ST</sup> APPELLANT**

**TONY ASITWA MAKWATA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from judgment of Hon. TA Odera, Senior Principal Magistrate, SPM, in Mumias SRMCCRC No. 80 of 2017, of 2nd December 2021)*

**JUDGMENT**

1. The appeals herein have never been consolidated, but the appellants have always been produced together, and the proceedings have always been conducted jointly. Consequently, I shall determine the 2 appeals together.
2. The appellants, Shula Songa Makwata and Tony Asitwa Makwata, I shall refer to them as the 1<sup>st</sup> and 2<sup>nd</sup> appellants, respectively, for the purpose of this judgment, had been charged before the primary court, with the offence of forgery, contrary to section 345, as read with 349 of the [Penal Code](#), Cap 63, Laws of Kenya. The particulars were on unknown dates before January 3, 1997, at an unknown place, within the Republic of Kenya, with intent to defraud, they jointly forged the signature of John Daniel Makwata Eshibukho, deceased, purporting it to be the genuine signature signed by the said John Daniel Makwata, deceased.
3. The appellants also faced a joint charge of obtaining registration by false pretenses, contrary to section 320 of the [Penal Code](#), the particulars being that on unknown dates before January 3, 1997, at the Kakamega land registry, within Kakamega County, jointly with others, they willfully procured for themselves land title deeds for S/Wanga/Lureko/717 and 1138, by falsely pretending that the 2 parcels of land had been transferred to them by the deceased, a fact that they knew to be false.



4. The faced a third charge of making a false document without authority, contrary to section 357(a) of the *Penal Code*, particulars of which were that on unknown dates before January 3, 1997, at an unknown place, within the Republic of Kenya, with intent to deceive, and without lawful excuse or authority, they jointly made a false document, being a certificate of death serial number 313490, purporting it to be a genuine certificate of death, for the late John Daniel Makwata Eshibukho, issued by the Registrar of Births and Deaths.
5. The fourth, and last, charge, was with respect to intermeddling with the property of a deceased person, contrary to section 45(1) of the *Law of Succession Act*, cap 160, Laws of Kenya, the particulars being that on an unknown date at Lukoye village, Nabongo Location, within Kakamega County, jointly with others not before court, they took possession of a lorry, registration mark and number KDZ 070, Ford, yellow in colour; a tractor registration mark and number KAB 356L, Massey Ferguson, and cane contract number 122 for Mumias Sugar Company, the property of the deceased John Daniel Makwata Eshibukho, without authority.
6. Plea was taken on June 24, 2019, and they pleaded not guilty to the charges, and a trial was conducted. 8 prosecution witnesses testified.
7. PW1, Patrick Anyangu Makwata, was a son of the deceased, and the administrator of his estate, vide Kakamega HCSC No. 14 of 2019. He stated that the deceased died on January 2, 1997. Certificate of death serial number 305059 entry number 3700202/1997 was issued. He conducted a search on S/Wanga/Lureko/717 and 1138, for the purpose of the succession proceedings, and it turned out that the 2 parcels of land had been transferred to the names of the appellants herein and one Barnabas W. Makwata, and title deeds had been issued to them, all on 3<sup>rd</sup> January 1997. He established from the Mumias Sugar Company, that the cane contract had been transferred to the names of the appellants herein and one Barnabas W. Makwata, based on an affidavit of Rhoda Owando and a letter from the Chief. He stated that the certificate of death used to effect the changes to the cane contract at Mumias Sugar Company, were done using a certificate of death other than the one that had been issued to him. He also established that the lorry and the tractor were missing from where they had been parked prior to the death of the deceased. he conducted a search on the tractor, and the results indicated that it was in the name of a Mathew Kiprotich Birir, with effect from October 22, 2019. He explained that S/Wanga/Lureko/717 and 1138 were occupied by his stepsisters S/Wanga/Lureko/717 and 1138, and the appellants were her siblings. He stated that he was not aware of any gift having been made of the 2 parcels of land to the appellants by the deceased during his lifetime. He said that he had involved the appellants in the succession proceedings. He said that he did not have the logbooks for the lorry and the tractor, and did not have evidence that they belonged to the deceased. He said that the deceased died in 1997, and he registered his death on February 12, 1997, and he was issued with a certificate of death on March 4, 1997. He said he also had another certificate of death issued on February 25, 1998. Both had the name of the deceased, except that one had an additional name.
8. PW2, Fanuel Makwata Thuma, was a son of the deceased. He testified that S/Wanga/Lureko/717 was transferred from the name of the deceased a day after his death. He died on January 2, 1997, and the transfer was effected on January 3, 1997. He said that S/Wanga/Lureko/1138 was transferred on January 23, 1997. He said that the transfers were done to persons who were not related to the family, meaning the appellants. He said that the 2 stayed on the land, but they were not related to the family. He said that they were not children of the deceased, although they were related to one of his sisters, from one of the other houses of the deceased. He said that the cane contract also changed hands, and a lorry and a tractor went missing. During cross-examination, he conceded that the appellants were children of one of his stepmothers, but asserted that they were not his brothers, and never stayed on the land. He denied that the deceased had transferred the lands to the appellants in 1996. He stated



- that the deceased attended the land control board and transferred S/Wanga/Lureko/717 and 1138 to the appellants, according to documents shown to him at trial. He said that he was not aware that that transfer also meant that the cane contract was equally transferred to the appellants. He later denied that the deceased attended the land control board and transferred the property to the appellants.
9. PW3, Penina Ambia Makwata, was a daughter of the deceased. She testified that the appellants had transferred the lands to their names. She identified them as her stepbrothers. She said that they later produced minutes to show that the deceased had transferred the lands to them. She said that the 2 appellants were staying on the subject parcels of land with their mother. She said that the appellants were not strangers. She was shown consents from the land control board, showing the deceased gifting the 2 parcels of land to the appellants. She said that the deceased was not the biological father of the appellants, but had had adopted or accepted them as his children, and they had adopted his name.
  10. PW4, Ummi Maloba Musindalo, was another daughter of the deceased. She averred that PW1, as administrator, had informed them that he had found that some of the lands had been transferred to the appellants on January 3, 1997, and when she went to the lands registry at Kakamega, she was shown minutes showing that the deceased had transferred the lands before he died. She said that S/Wanga/Lureko/717 and 1138 were utilized by the mother of the appellants. According to documents that were shown to her in court, it appeared as if the lands were bequeathed by the deceased to the appellant on June 4, 1996. PW5, No. 232056 Assistant Superintendent of Police Geoffrey Chania was a document examiner. He testified that when the signatures of the deceased, on the alleged transfer forms were subjected to forensics, it was established that they were not made by the deceased. PW6, Fred Kataka, was the registrar of births and deaths. He testified that his office did not issue certificate of death number 313490, saying that it was not possible that the certificate of death could be issued twice, having issued the earlier one number 305059. PW7, No. 78788 Police Constable John Kulecho, was the investigating officer.
  11. PW8, David Masila Kimolo, was a land registrar. He had green card for S/Wanga/Lureko/1138, whose first entry had been made on April 6, 1989, showing the owner as Sereman Kwena Nguye. An entry on January 23, 1997, was in favour of the appellants, as a gift from the deceased. A transfer was done as per the records of the lands registry, and title deeds were issued. He had forms of a consent of the land control board, The transfer forms for S/Wanga/Lureko/1138 were signed by the deceased. The green card for S/Wanga/Lureko/717 indicated that it was registered in the name of the deceased on January 6, 1994, and a title deed was issued. Then on January 3, 1997 it was transferred to the appellants, and a title deed was issued. He stated that the consent for transfer of S/Wanga/Lureko/1138 was undated, but was signed on May 28, 1996. During cross-examination, he asserted that the transfers were lawfully done, based on the documents in the hands of the lands registry. He said that the consent of a land control board commences the process, and the death of the proprietor does not vitiate the process. He stated that consent was obtained on June 4, 1996, with respect to S/Wanga/Lureko/1138, while he had no details of when that for S/Wanga/Lureko/717 was obtained. He said that the green card supported the issuance of the consent by the land control board. He said that he could not tell whether the signatures on the consent forms and the minutes had been validly obtained. He said that the consent for S/Wanga/Lureko/1138 did not show the signature of the deceased. He stated that the death of the proprietor was not brought to their attention.
  12. The appellants were put on their defence, in a ruling that was delivered on September 1, 2021. They gave sworn statements, and called witnesses.
  13. DW1, Benard Cheruiyot Kemboi, was the Assistant County Commissioner, and the Chair of the Land Control Board for the area. He had the minutes of June 4, 1996 of the land control board. They showed that consent for transfer of S/Wanga/Lureko/717 was given to the deceased, for transfer of that title



to the appellants as a gift. Board was chaired by Peter Raburu. There was also a consent given to the deceased to transfer the same to the appellants.

14. DW2, John Njenga Karanja, was an archivist, from the National Archives. He had the original minutes of the land control board meeting of June 4, 1996. He stated that consent was given to the deceased to transfer S/Wanga/Lureko/717 to the appellants. There were also minutes showing consent was granted to the deceased to transfer S/Wanga/Lureko/1138 to the said appellants. He said that there was a transfer register for 1996, and it had entries made on January 1, 1996, showing the names of the deceased and the appellants, for approvals in respect of both parcels of land. He said that as the registers he was referring to did not have covers, he could not tell whether the documents came from the Mumias land control board and were received by the National Archives. He said that the minutes did not bear the stamp of the land control board, and the minutes were not the original handwritten notes. He said that the minutes did not also show that the parties appeared before the board that day. He said that the register he produced as evidence was original and it confirmed the land in question, and indicated the parties in attendance.
15. DW3, Shula Songa Makwata, testified next. He was one of the appellants. He denied the charges. He said that the 2 parcels of land, belonged to the deceased before they were transferred to his name. He stated that the deceased visited them, and informed them that he wanted to transfer the 2 parcels of land to them. He stated that the deceased got their national identity cards and brought them forms to sign, which they did. He informed them that at Christmas time of 1996 that he had completed the process. He died on January 2, 1997, and since they knew of the status of the transfers they visited the land registry to get the title deeds. He asserted that he did not transfer the land to himself, the deceased did. He stated that the cane contract details changed with the change of ownership of the land. He denied using certificate of death number 313490 to get the transfer. He said that he did not attend the land control board, and that he was not present when the registration was done. He stated that he processed the transfer a day after the deceased died. He said that they disclosed the fact that the land owner had died. The land registrar confirmed that the process was already complete, hence the transfer. He said that they changed the contract on January 19, 1997. They went to Mumias Sugar Company, and informed them that the land proprietor had died. He said he was unaware that nothing ought to have been done after the death and before succession was done. He further said that he had no contrary evidence that the signatures of the deceased were not forged. He said that the motor vehicles were not registered in the name of the deceased, and he did not know where they were. He did not know who took them. He did not sell them as scrap. He said that they got some money from the cane contract after the change of details, but he did not have the particulars of the amount.
16. DW4, Tony Asitswa Makwata, is one of the appellants. He identified himself as a son of the deceased. He said that the deceased transferred the 2 parcels of land to them. He denied intermeddling with the estate, and forging documents. He said that he never appeared before the land control board. He said that the vehicles were taken away by auctioneers. He said that they later arranged to settle the debts, but they never recovered the vehicles. He denied the charges relating to the forgeries. He denied acquiring the certificate of death number 313490.
17. In its judgment, the trial court found all the appellants guilty as charged.
18. The appellants were aggrieved, and brought the instant appeals. Their grounds of appeal revolved around the evidence being weak, uncorroborated, farfetched, inconsistent, and inadequate; the evidence of the document examiner was not sufficient; evidence on forgery was weak and flimsy; burden of proof was shifted; defence was rejected improperly; and mitigation was not taken into account.



19. Directions were given on December 5, 2022, for disposal of the appeal, by way of written submissions. I have read through the said written submissions, and noted the arguments made.
20. I will start with the forgery charge. As framed, the charge discloses no offence. A signature can only be forged on a document, and the particulars must make reference to the document carrying or bearing the forged signature, for the objective of forgery is to use the false document, bearing the forged signature, for some fraudulent purpose. A forged signature does not hang in the air, it is placed on a document. The charge as framed does not state the document that bore the forged signature. The evidence that was marshaled to prove forgery, sought to establish allegations that were not before the court. The evidence presented by the document examiners was of little utility, as the documents they claimed bore the signature said to be not that of the deceased were not featured in the forgery charge. The trial court ought not have convicted on that bad or defective charge.
21. For avoidance of doubt, this is what the particulars allege:
- “...on an unknown date before January 3, 1997 at an unknown place within the republic of Kenya, with intent to defraud, jointly with another before court forged the signature of John Daniel Makwata Eshibukho (deceased) purporting it to be genuine signature signed by John Daniel Makwata Eshibukgo (deceased).”
22. On the charge of obtaining registration by false pretenses, the prosecution presented a land registrar, who took the position that the registration appeared to be above board, as it was supported by appropriate documentation, necessary for the purposes of such registration. One would have expected that the prosecution would take steps to provide background evidence, from relevant Land Control Board to prove that no consent was obtained, no meetings were held by the board where that issue arose, among others. The Land Control Board is under the control of officials in the national government, and the prosecution should have had no difficulty accessing them, and the relevant documents. That was not done. The land registrar testified that from his end, the transactions looked genuine. There was need to demonstrate that they were not genuine as no consent of the Land Control Board had been obtained, or the same had been obtained fraudulently. That could only be done, by calling officials from the Land Control Board, and getting documents from them. The defence appeared to do a better job. It called an official of the Land Control Board, an Assistant County Commissioner. He came with minutes of the Land Control Board, but was stood down because the same were not originals. The defence then called an archivist from the National Archives, again, to present material from the Land Control Board relating to the material time. It is the prosecution which ought to have provided that information. These State agencies established that there were records relating to the impugned transactions. The records might not have been accurate but they were there. I am not persuaded that the prosecution proved beyond doubt, in view of the evidence from the State officials, that the registration in question was procured by false pretenses. The burden of proof always lies with the prosecution, and the standard of proof always stands at proof beyond reasonable doubt. The testimonies of PW8, DW1 and DW2 created doubts on whether the deceased did not initiate a process to have the property in question transferred to the appellants. The conduct of the appellants, of rushing to have title deeds processed a day after the deceased died, instead of being with the family mourning and working on the next step, was despicable, and portrayed them as individuals who did not care one bit about the deceased. However, that conduct alone is not sufficient to establish that the titles they processed on January 3, 1997 were not supported by the relevant consents from the applicable Land Control Board. Their conduct could raise suspicion, but suspicion alone, without more, cannot be a basis upon which a court of law ought to convict. I agree, the burden of proof was shifted to the appellants, and they went a long way, in terms of calling DW1 and DW2, to discharge that burden,



and I believe they did it well, in terms of creating a doubt on whether the deceased did not initiate the process at the Land Control Board.

23. On the charge of making a document without authority, with regard to certificate of death serial number 313490, the registrar of births and deaths from Trans Nzoia County, where the deceased died, stated that he did not issue the certificate of death in question. The appellants placed fresh information on record, on appeal, to counter that evidence. It takes the form of a letter from the County Coordinator of Civil Registration for Bungoma County, dated November 23, 2022. The letter affirms that certificate of death serial number 313490 emanated from their office, while the other one, whose details are not given in the letter, did not come from their office. This letter raises more questions than answers. The appellants had the opportunity to present this evidence at trial, they did not. They denied knowing anything about the said certificate of death. How can it be that on appeal they take the position that they do know something about it, and where it originated from. Secondly, the information by the County Coordinator of Civil Registration Services has not been subject to cross-examination. The appellants did not ask for a trial on the document, and the said document has to be of no value at all at this stage. Thirdly, the available evidence is that the deceased died at Kitale, Trans Nzoia, at the Kitale Nursing Home to be precise, so what did the Bungoma civil registration services have to do with issuance of a certificate of death for a person who died at Kitale, Trans Nzoia. The appellants offered no explanation, as to how the said certificate of death found its way into records held by the Mumias Sugar Company with regard to the cane contract. I am satisfied that they were properly convicted on that charge.
24. On the fourth count of intermeddling with the estate of a dead person, I note that this was with respect to the 2 motor vehicles, the tractor and the lorry. DW3 claimed that he did not know where the motor vehicles were, adding that they were not even registered in the name of the deceased. DW4 conceded that the vehicles were within the premises that their late mother occupied, and were towed away by auctioneers over some debt, and they were not able to salvage them. The testimony of DW4 pointed to them having custody of the motor vehicles, however, the prosecution did not provide any proof that it was the appellants who disposed of them. Indeed, no evidence was led on what happened to the motor vehicles. No sale transactions between the appellants and the alleged buyers of the vehicles were presented to court. DW4 offered an explanation, the prosecution did not disprove it. The evidence presented by the prosecution on the vehicles did not reach the threshold of proof beyond reasonable doubt, that the appellants disposed of the 2 vehicles, and thereby intermeddled with the estate of the deceased.
25. The case of the cane contract is, however, different. It was changed barely 20 days after the death of the deceased, and the appellants said that they even collected some money, under that contract within that period. Nothing should have been to any property of the deceased, after his death, and prior to succession. The cane contract was not property, but the proceeds of the contract were. To the extent that the contract was changed immediately after the death, and prior to representation being obtained, amounted to intermeddling with the affairs of the estate. The fact that moneys were paid to the appellants, on the basis of that contract, during that period, amounted to intermeddling with estate assets.
26. Overall, I find and hold that the trial court did not have sufficient evidence on counts I and II, upon which it could convict the appellants. Indeed, in respect of the 2, the court shifted the legal burden onto the appellants to prove their innocence. I, however, find that the prosecution provided sufficient evidence to sustain a conviction on count III, and count IV upon the evidential burden being shifted to the appellants, they were unable to explain the circumstances under which they got to use impugned certificate of death to change the cane contract, and their belated attempt to introduce



additional evidence on appeal, only made the matter worse. Still, on the cane contract, the change of the particulars to remove the name of the deceased and to collect moneys under that contract after the deceased died, amounted to intermeddling. I shall allow the appeal on counts I and II, and quash the convictions founded on them, and set aside the sentences. The appeals, on counts III and IV, are dismissed, the convictions on them affirmed, and the sentences confirmed. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA  
THIS.....1<sup>ST</sup> .....DAY OF.....AUGUST..... 2023**

**W MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

**Appearances**

Mr. Kulundu, instructed by Kassim & Nzula, Advocates for the appellants.

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

