



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 16 OF 2020

(From Original Conviction and Sentence in Mumias PMCCRC

No. 825 of 2018, by Hon. TA. Odera, Senior Principal Magistrate, on 11th May 2020)

ESSA JOHN MOMBO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon. TA. Odera, Senior Principal Magistrate, of several counts of forgery and was sentenced to imprisonment for terms ranging from three to five years, running concurrently.
2. He was aggrieved, and lodged the appeal herein, vide a petition of appeal, dated 22nd May 2020, raising six grounds, being that the conviction was against the weight of the evidence, the prosecution failed to call crucial witnesses, the court did not appreciate the standard of proof required in criminal cases, sentences of imprisonment without the option of a fine did not take into account that the appellant was seventy-four years of age, mitigation by the appellant was not considered, and the sentence was harsh.
3. The appeal was canvassed by way of written submissions.
4. In his written submissions, the appellant reduced his grounds of appeal or issues for determination into two, namely, whether the offences of uttering a false document, forgery and obtaining registration by false pretenses were proved; and whether the sentence imposed was harsh and excessive.
5. On the first ground or issue, the appellant argues that no concrete evidence was presented to the effect that South Wanga/Ekero/3910 was subdivided, as no official search certificate nor greencard were produced. It is also argued that PW1 presented hearsay evidence of what her late husband told her, which could not be verified. Her position as a complainant was contested, as no evidence was presented, to show that the property was matrimonial or that succession proceedings had been conducted on the estate of the husband of the PW1. The appellant also raises issue with the claim by PW1 that her late husband could not have thumb printed the document in question, a mutation form, given that he was literate and did not usually sign documents by affixing a thumbprint on them. On the evidence of the document examiner, it is submitted that there was no proof that the appellant authored the documents in controversy.
6. On the sentence, it is submitted that the penalty for forgery and uttering false documents, under section 349 of the Penal Code, Cap 63, Laws of Kenya, was a maximum of three years, and that under that provision there was discretion to impose a fine. It is submitted that those factors were not considered. The mitigation that the appellant was elderly, a diabetic and remorseful was also not considered.
7. On its part, the respondent submits that a certificate of official search was not available because, when PW1 went to the lands registry, South Wanga/Ekero/3910 had ceased to exist, following subdivision, but she got the documents that were used to process the subdivision, and it was after that those documents were found to have been forged. On the issue of the property being matrimonial, it is submitted that PW1 did not claim that it was matrimonial property, and that what was of importance was the fact that it was subdivided and transferred without the authority of the deceased, using his purported signatures, which were forgeries. On whether PW1 was a proper complainant, it is submitted that the complainant in criminal cases was the State, PW1 was just the main witness, and she did not have to have initiated succession proceedings for her to testify. On the thumbprint not being the usual way of the husband of PW1 signing documents, it is submitted that PW1 knew his signature, and the fact that the documents used to subdivide and transfer the land were thumb printed was the red flag. It is submitted that in any event the testimony of PW1 was corroborated by other evidence. On the document examination evidence, it is submitted that the witness did not pinpoint the appellant as the forger, but he proved or established that the signature that was purported to be that of the late husband of PW1 was in fact forged. PW3 made it clear that the appellant presented those forged documents to her and others, the forgeries were in favour of appellant and he stood to benefit the most from the subdivision and transfer of South Wanga/Ekero/3910. It is submitted that the respondent had proved that the documents in question were forged, and were forged by the

appellant for he used them knowing them to be false, to his advantage.

8. On the sentence being excessive and harsh, it is submitted that sections 345 and 353 of the Penal Code for Counts I and II, attracted three years' imprisonment; while Counts III to VIII charged under section 350(1) of the Penal Code, exposed the offender to a maximum of life imprisonment. It is submitted that for the charges under section 350, a sentence of five years' imprisonment was very lenient in the circumstances. It is submitted that the court had discretion and had explained the reasons for the sentences it imposed. The appellant was a repeat offender, and he had previous convictions, with respect to the same property. It is submitted that section 26(3) of the Penal Code allows discretion for imposing a fine as a substitute or in addition to life imprisonment.

9. The court is urged to impose a sentence for Count VIII, for the trial court convicted the appellant of the offence charged under that Count, but did not sentence him. I am also urged to exercise discretion under section 362 of the Criminal Procedure Code, Cap 75, Laws of Kenya, to impose sentence. I am also urged to cancel the subtitles resultant from the impugned subdivision to prevent future misuse, and *Joseph Mureithi Kanyita vs. R* [2016] eKLR (Ngenye-Macharia J) was cited in support.

10. On the first ground, I have perused the trial record. There is evidence that the process of obtaining the subdivision and transfer of the subtitles from South Wanga/Ekero/3910 was attended by fraud and was procured through false documents. The appellant was the central character in the whole enterprise, and he stood to benefit the most from it. The trial court was alive to the fact that the appellant was not shown to have made the documents, but he had possession of them, and he uttered them to his benefit. The burden shifted to him to explain himself, which burden he did not discharge. The circumstantial evidence established, beyond reasonable doubt, in the absence of any plausible explanation, that the appellant forged the documents, and that, therefore, he was properly convicted.

11. On sentence, the appellant had faced two groups of charges, forgery under sections 348 and under section 350. He was convicted under both. Sentences were imposed for the offences under section 348, to three years in prison, and under section 350, to five years in prison. There was no error in sentencing on the part of the trial court. Were the sentences harsh and excessive? I do not think so. The appellant had been convicted previously for offences relating to the same property. Secondly, for the offences under section 350, the maximum is life imprisonment, and five years would be lenient in the circumstances. Should the court have considered to impose a fine instead? There is discretion under section 26(3) of the Penal Code, for the court to do so. The circumstances of the offence and the antecedents of the accused person would influence that. The trial court considered the previous conviction of the appellant of other offences with respect to the same property. Due to that the trial court discounted fine as an appropriate sentence. Should the great age of the appellant have militated against a custodial sentence? Yes, but the fact of the previous offence swayed the trial court against taking it into account. The appellant should not use his great age to get away lightly. At his age, he is expected to set a better example. The circumstances no doubt called for a deterrent sentence. I am not persuaded that the trial court can be faulted for the manner it handled the sentencing of the appellant.

12. The trial court convicted the appellant for the offence charged under Count VIII, but did not sentence him. No explanation is given in the judgment for that. I believe that this was an oversight. The offence charged is defined in section 320 of the Penal Code, that of being in procuring registration by false pretenses. The sentence for it is imprisonment for one year. Taking everything into account, I hereby sentence the appellant to six months for the said offence under Count VIII.

13. The trial court found that the appellant procured registration of property by false pretenses and fraud. The title in question was not cancelled by the trial court. There is a danger that the false document could be misused by unscrupulous persons. I hereby accordingly order cancellation of the said registration and annulment of the said title issued based on that fraudulent registration, being South Wanga/Ekero/4348.

14. Overall, I do not find any merit in the appeal herein. I hereby uphold the conviction of the appellant by the trial court, and affirm the sentences imposed by the trial court. I have also made further orders in terms of paragraphs 12 and 13 of this judgment, sentencing the appellant for the offence for which he was convicted under Count VIII, and ordering cancellation of South Wanga/Ekero/4348. The appeal is dismissed and disposed of in the terms set out here above.

PREPARED, DATED AND SIGNED AT KAKAMEGA ON THE 12TH DAY OF NOVEMBER 2021

W MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF FEBRUARY, 2022

W MUSYOKA

JUDGE

Mr. E. Zalo, Court Assistant.

Mr. Mukisu, instructed by Mukisu & Co. Advocates, for the Appellant.

Ms. Omondi and Mr. Mwangi, instructed by the Director of Public Prosecutions, for the Respondent.