



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Azori & another (Criminal Appeal E023 of 2021)  
[2024] KEHC 15437 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15437 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E023 OF 2021  
WA OKWANY, J  
DECEMBER 5, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**YOAKIM MOSE AORI ..... 1<sup>ST</sup> RESPONDENT**

**JOHN MOTURI KENGERE ..... 2<sup>ND</sup> RESPONDENT**

*(From the original Ruling in the Chief Magistrate's Court at Nyamira in Criminal Case No. 569 of 2017 delivered by Hon. M.C. Nyigeti, Principal Magistrate on 2nd September 2021)*

**JUDGMENT**

1. The Respondents were jointly charged with the offence of obtaining land registration by false pretences contrary to Section 320 of the *Penal Code*. The particulars of the charge were that on the 7<sup>th</sup> November 1994 at Nyamira Land Registry Office in Nyamira Township within Nyamira County, they jointly fraudulently procured the registration of land parcel No. North Mugirango/Boisanga/1724 by falsely pretending that the land had been transferred to them by the owner Samusi Ongera, a fact they knew not to be the truth.
2. They also faced a second count of intermeddling with the property of a deceased person contrary to Section 45(2) of the *Law of Succession Act*, Cap 160. The particulars of the second count were that on the 7<sup>th</sup> November 1994 at Nyamira Land Registry Office in Nyamira Township within Nyamira County, jointly took possession of Land Parcel North Mugirango/Boisanga/1724, the property of Samusi Ongera (deceased).
3. The Respondents denied both charges and a trial was conducted in which the Prosecution (the Appellant) called a total of five 5 witnesses.



4. PW1 Naomi Cherosia, PW2 Caroline Moraa and PW3 Gladys Kwamboka Okiega testified that their father Samusi Ongera (deceased) died in the year 1990 and that he owned Land Parcel Nos. North Mugirango/Boisanga/1724 (1.8 Ha) and North Mugirango/Boisanga/983 (1.8. Ha). They stated that they were yet to file succession proceedings in respect to the deceased's estate but that that the deceased had, prior to his death, leased LR. No. North Mugirango/Boisanga/1724 (hereinafter "the Suit Land) to the 1<sup>st</sup> Respondent. They testified that in a surprising turn of events, they discovered that the 1<sup>st</sup> Respondent had acquired title to the suit land some time in 1994 under unclear circumstances. They claimed that the area Chief informed them that he had given the deceased's burial permit to the 1<sup>st</sup> Respondent. They placed a caution on the suit land upon realising the strange occurrence on the deceased's property and reported the matter to the police for investigations. They reported the matter to the DCI in Nyamira and wrote to the Land registrar to explain how the transfer was done.
5. They testified that the 1<sup>st</sup> Respondent only handed over the deceased Death Certificate to them at the D.O.'s office after he was threatened with court action and that no succession proceedings had been filed in respect to the deceased's estate as at the year 1994 when the suit land was transferred and that the Respondents.
6. PW4 was the Land Registrar at Nyamira County at the time the suit land was transferred to the Respondents. He testified that all the requisite transfer documents were presented to his office at the time the suit land was transferred to the Respondent but added that he could not trace the said documents, save for the Green Card which indicated that the deceased got registered as the owner of the said land on 14<sup>th</sup> March 1973 and that the same was transferred to the Respondents on 7<sup>th</sup> November /1994. He added that Henry Samusi and Gladys Kwamboka later lodged a caution on the said land. He testified that since the deceased died in 1990, it was not possible for him to sign the transfer documents on 7<sup>th</sup> November 1994. He produced a copy of the Green Card as (P.Exh 9), the Response to the Caution as (P.Exh7) and the Report to the Investigating Officer as P.Exh 11.
7. PW5 No. [particulars withheld] Cpl. Cyrus Owino Owenga testified that police investigations revealed that the Respondents illegally transferred the deceased's land to themselves after processing his Death Certificate without the family's knowledge. He produced the following documents as exhibits: -
  - i. Death Certificate (P.Exh 1),
  - ii. Burial Permit (P.Exh 2),
  - iii. Copy of Certified Title deed (P.Exh 3),
  - iv. Chief's Letter dated 20<sup>th</sup> September 2013(P.Exh 4),
  - v. Grant of Letters of Administration (P.Exh 5),
  - vi. Letter to Land Registrar dated 30<sup>th</sup> March 2017 (P.Exh 6),
  - vii. Search Certificate (P.Exh 8) and
  - viii. Certificate of Confirmation of Grant (P.Exh 10).
8. At the close of the Prosecution's case, the trial court rendered a Ruling in which it found that the Prosecution had not established a *prima facie* case against the Respondents. The trial court consequently acquitted the Respondents under Section 210 of the [Criminal Procedure Code](#) (CPC).
9. Aggrieved by the trial court's decision to acquit the Respondents, the Prosecution (the Appellant herein) filed the instant appeal in which it listed the following grounds of appeal: -



1. That the Learned Trial Magistrate erred in law and fact in acquitting the Respondents on No Case to Answer under Section 210 of the [Criminal Procedure Code](#) when sufficient evidence had been tendered by the Prosecution contrary to the findings of the trial magistrate.
  2. That the Learned Trial Magistrate erred in law and fact in failing to appreciate the law relating to No Case to Answer under Section 210 of the [Criminal Procedure Code](#).
  3. That the Learned Trial Magistrate erred in law and fact by failing to consider the evidence tendered by the Prosecution in showing that the title deed to land parcel North Mugirango/ Boisanga/1724 was acquired after the death of the original registered owner.
  4. That the Learned Trial Magistrate erred in law and fact by totally failing to make a finding that the Respondents' action of taking the possession of the land parcel North Mugirango/ Boisanga/1724 before Succession amounted to intermeddling with the Estate of a deceased person.
  5. That the Learned Trial Magistrate erred in law and fact by ignoring sufficient evidence on record to put the Respondents on their defence.
  6. That the Learned Trial Magistrate erred in law and fact in failing to comprehend the law relating to a case to answer and the standard of proof in establishing a *prima facie* case.
  7. That the Learned Trial Magistrate erred in law and fact in totally failing to analyse the exhibits tendered by the Prosecution in establishing a *prima facie* case and ended up making an erroneous finding of no case to answer by ignoring the evidence on record of a case to answer and ended up erroneously acquitting the Respondents under Section 210 of the Criminal Procedure Code contrary to sufficiency of evidence and record.
10. The Appeal was canvassed by way of written submissions which I have considered. As the first appellate court, I am minded of the court's duty to re-analyse and re-evaluate the entire evidence presented before the trial court with a view to arriving at my own independent findings while bearing in mind the fact that I neither saw nor heard the witnesses testify first-hand. This is the position that was taken in [Njoroge v. Republic](#) (1987) KLR 19 at P. 22:4 where the Court of Appeal held thus:-
- “As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see *Pandya v R*(1957) EA 336, *Ruwalla v R* (1957)EA 570)”
11. I have considered the record of appeal and the parties' respective written submissions. I find that the main issue for determination is whether the Prosecution established a *prima facie* case against the Respondents so as to warrant their being placed on their defence.
12. In [Republic v. Abdi Ibrahim Owi](#) [2013] eKLR, a *prima facie* case was defined as follows: -
- “*prima facie*’ is a Latin word defined by Black’s Law Dictionary 8<sup>th</sup> Edition as, “sufficient to establish a fact or raise presumption unless disapproved or rebutted”. ‘Prima facie’ is defined by the same dictionary as “the establishment of a legally required rebuttable presumption.”



13. In the oft-cited case of *Ramanlal Trambaklal Bhatt v. R* [1957] EA 332 at 335, the court stated as follows: -

“Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution’s case, the case is merely one in which on full consideration might possible be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather, hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question .....there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.

It may not be easy to define what is meant by a, “*prima facie* case”, but at least it must mean one on which a reasonable, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

14. A *prima facie* case means that the evidence presented by the Prosecution must point to the ingredients of the offence in question such that, without an explanation offered by the defence, the court may convict an accused person. In this regard, the evidence presented by the prosecution must on its own be cogent to sustain the charge so that the defence evidence will be to rebut the presumption of guilt or otherwise. A *prima facie* case does not however exist where the evidence presented by the Prosecution is farfetched or hopeless in proving any of the ingredients of the charge. In such a scenario, the court is not required to go into an indepth analysis of the case and may determine that there is no evidence pointing to guilt of the accused and hence find that there is no case to answer.

15. Having regard to the above stated definitions and decisions on what constitutes a *prima facie* case, it is to be noted that the Respondents were charged with two counts under Sections 320 of the Penal Code and Section 45(2) of the [Law of Succession Act](#), Cap 160 which stipulate as follows: -

320. Obtaining registration, etc., by false pretence

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.

45. No intermeddling with property of deceased person

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
2. Any person who contravenes the provisions of this section shall-
  - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.



16. The offence of obtaining registration by false pretence is further defined under 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 be true, is a false pretence.

17. In *Matblida Akinyi Oware v. Republic* (1989) eKLR the Court of Appeal held thus: -

“Devlin, J. in the case of *R. V. Dent*, [1975] 2 All E.R. 806 at page 807 letter H said that “to constitute a false pretence the false statement must be of an existing fact.”

18. Similarly, in *Edgington v. Fitzmaurice* (1885) 29 Ch D 459, Bowen, L.J. it was held thus: -

“In order to sustain his action he must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the Defendants, or that they made it not caring whether it was true or false...[L]astly, when you have proved that the statement was false, you must further shew that the plaintiff has acted upon it and has sustained damage by so doing: you must shew that the statement was either the sole cause of the plaintiff’s act, or materially contributed to his so acting.”

19. The evidence presented in this case was that the Deceased leased his land to the Respondents during his lifetime and that the deceased died in sometime in 1990. The evidence further revealed that the Respondents were registered as the owners of the suit land in 1994. PW1, PW2 and PW3 testified that the Respondents refused to vacate the suit land after the expiry of their lease and that the Respondents claimed that the deceased had sold the said land to them.

20. The Appellant’s case was that the Respondents acquired registration to the suit land by false pretences as the owner of the land had died in 1990, long before the land was allegedly transferred to them in 1994. The Respondent’s case, on the other hand, was that the deceased sold the suit land to them as opposed to the Prosecution’s claim that they had leased the land. My take is that whichever way one looks at the case, the evidence presented by the Prosecution was sufficient to establish a fact or raise presumption that the Respondents obtained registration under questionable circumstances and they were therefore required to disapprove or rebut the Prosecution’s case.

21. My finding is that considering the four (4) year gap between the time that the deceased died and the registration of the Respondents as the owners of the suit land, a genuine question would arise as to how the Respondents were able to secure the transfer and registration of land belonging to a deceased person without first going through succession proceedings. It is this question that leads this court to conclude that the prosecution established a *prima facie* case against the Respondents who should have been called upon to defend themselves by tendering evidence to shed light on how they secured ownership of land that clearly belonged to a deceased person. Needless to say, Section 45 of the *Law of Succession Act* bars any dealings or transactions on the property of a deceased person unless Succession proceedings have been undertaken and concluded.

22. I find that the trial court erred in acquitting the Respondents under Section 210 of the *Criminal Procedure Code* in the face of cogent evidence pointing to possible intermeddling with the estate of a deceased person and the registration of the Respondents as owners of the suit land under unclear circumstances.



23. For the above reasons, I find that the instant appeal is merited and I therefore allow it and set aside the ruling on no case to answer under Section 210 of the [CPC](#) and substitute it with a finding that the Appellant made out a *prima facie* case against the Respondents under Section 211 of the [CPC](#) sufficiently to require them to make a defence. I direct that this file be returned to the trial court for the hearing of the Respondents' (defence) case and determination before another Magistrate other than Hon. Nyigei. The trial court is reminded to inform the Respondents of their rights under Section 211 of the [CPC](#).

24. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**W. A. OKWANY**

**JUDGE**

