



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 40 OF 2018

BETWEEN

REPUBLIC.....APPELLANT

AND

AGRIPINA WANGARI THUO.....1ST RESPONDENT

GEORGE THUO NJUGUNA.....2ND RESPONDENT

FRANCIS NJUGUNA THUO.....3RD RESPONDENT

NICODEMUS GATOHO THUO.....4TH RESPONDENT

MARY NYOKABI KIHATO.....5TH RESPONDENT

(Being an appeal against the original ruling and order (acquittal) dated 7th March 2018

in Criminal Case No. 4948 of 2016 at Thika Magistrates Court before Hon.Bartoo, RM)

JUDGMENT

1. This is an appeal by the State following acquittal of the respondent under **section 210** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. In the petition of appeal dated 21st June 2018, the appellant complains that the trial magistrate erred by failing to consider that the prosecution had established a prima facie case against the respondents, that the trial magistrate erred by failing to comply with **section 214** of the *Criminal Procedure Code* when the fresh plea was taken thereby occasioning a mistrial and that the trial magistrate failed to consider that the prosecution had discharged its burden of establishing a case beyond reasonable doubt.

2. The respondents were charged with the following offences relating to the will of one George Thuo Njuguna (deceased) and the deceased's property;

- a. Count 1: Forgery of a will contrary to **section 310(1)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
- b. Count 2: Uttering a false document contrary to **section 353** as read with **section 350(1)** of the *Penal Code*.
- c. Count 3: Making a false document contrary to **section 357(a)** of the *Penal Code*.
- d. Count 4: Demanding property upon forged testamentary instrument contrary to **section 358** of the *Penal Code*.
- e. Count 5: Conspiracy to commit a felony contrary to **section 348** of the *Penal Code*.
- f. Count 6: Intent to defraud contrary to **section 348** as read with **section 393** of the *Penal Code*.

3. The appellant called 12 witnesses to prove its case and at the close of the prosecution case, the trial magistrate was of the view that there was no prima facie case to put the respondents on their defence. She therefore acquitted all of them. The evidence emerging before the trial court was as follows.

4. Ruth Njeri Mbugua (PW 1) testified that she was the deceased's wife. When the deceased passed away, she was asked to vacate the shop she had been running and which had been given to her by the deceased. She later learnt that the deceased had made a will and when she went through it, she concluded that it had been forged because it lacked certain particulars and that she and her children had not been provided for. Further, some property which the deceased had given to her while he was alive had been given to the 1st accused. She could not tell who forged the will.

5. Jane Wambui Mwaura (PW 2) recalled that she knew the deceased and told the court that the deceased regarded her as his wife and that during his lifetime he had given her some properties which according to the will, had been given to the 1st respondent. She told the court that the will she was shown looked like it had been forged.

6. Paul Mbugua Thuo (PW 3) testified that he was assisting his mother, PW 1, in running the shop which had been given to them by the deceased. He was surprised that his name was not included in the will. Samuel Wanyoike Thuo (PW 4) also testified that he ran a shop left by the deceased and when he saw the will he was not provided for. He felt that the will did not conform to the deceased's wishes.

7. Michael Murei Kathathia (PW 5), a grandson of the deceased, told the court that he had been given a garage by the deceased during his lifetime but when the deceased passed away, he was evicted. He also filed an objection in succession proceedings in the High Court. During cross-examination, he told the court that he could not tell whether the will was a forgery.

8. George Gachimu Gachehi (PW 6), an advocate, testified in relation to property LR No. 14331 which the deceased transferred to one Ruth Njeri. He confirmed that he witnessed the transfer and was satisfied that the transaction was genuine. He was not aware about the will or that it was a forgery.

9. Dr Dan Nyamu Njoka (PW 7) was an estate agent who worked for the deceased managing some of his properties. He recalled that on 3rd June 1996, he was called by the deceased to witness a will. While he did not read the contents, he signed the last page. After the deceased died, he was called by the family in 2011. He was shown a document and confirmed that the signature was his. No issue arose about the authenticity of the will. He could not tell whether the will was forged or the contents thereof.

10. Sarah Chelimo Maina (PW 8), a Registrar of Titles, told the court that there was no forgery in respect to the property known as LR 14382 purchased by Rose Ngugi.

11. Chief Inspector Alex Mwangela (PW 9), the document examiner, was called to present the finding of the examination of a document dated 3rd June 1996 which was said to be a will. According to the Exhibit Memo, the examination was to confirm whether there was any evidence of manipulation of the document. According to the report presented, the will was forged.

12. George Kibera (PW 10) testified that he was requested by C. K. Mwiha, an Advocate, to assist the deceased prepare a will. He recalled that they went through many drafts until a final will was signed. When shown the document Exhibit 4, he told the court that he could not confirm the authenticity of the document presented to him in court nor recall the contents thereof as the deceased's will. He however confirmed that he witnessed the will together with PW 7. He could not tell who forged the will as it was left with the secretary to Mr Mwiha.

13. Adan Ahmed (PW 11), the DCIO Kikuyu, confirmed he received the complaint about a forged will regarding the deceased's estate. As regards the deceased's will, he stated that he collected a copy from the court and based on statements by the complainants that the will had been forged, he decided to pursue the matter. He sent the will to the document examiner who concluded it was a forgery. Corporal Wanyonyi (PW 12) was the arresting officer.

14. As this is a first appeal, I am required to appraise myself of the evidence and reach an independent conclusion bearing in mind that I neither saw nor heard the witnesses testify. In this case the issue was whether, based on the evidence, the prosecution had established a prima facie case, to put the respondents on their defence.

15. What amounts to a *prima facie* case has been set out in several cases, including **Ramanlal Trambaklal Bhatt v R [1957] EA 332**, **Wibiro alias Musa v R [1960]EA 184** and **Anthony Njue Njeru v Republic NRB CA Crim. App. No. 77 of 2006 [2006]eKLR**. It is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

16. The prosecution case is that the respondents forged the document dated 3rd June 2016 which they purported to be the deceased's will and presented it to the High Court, Nairobi by applying for grant of letters of probate thereby denying the deceased's beneficiaries their lawful entitlement. At this stage, I wish to point out that the issue is not whether or not the deceased's bequeathed some of his properties to some or any of the beneficiaries but whether the deceased's intention captured in a will were altered by the respondents. The fact that the deceased left out some beneficiaries may be evidence pointing to forgery but it is not decisive due to the deceased's testamentary freedom.

17. In my view, there were two key witnesses who testified that they witnessed the will, PW 7 and PW 10. When shown the will, they confirmed that the signatures were theirs or at any rate, the signatures were similar to what they signed. They could however not vouch for the contents of the will or state with certainty that it is what was prepared and signed. According to PW 7, the will was in custody of the law firm. PW 11 did not establish whether the document that was left with the firm was that one that was produced by PW 11 or at least exclude the possibility that it was not. The origin and chain of custody of the document that was claimed to be a forgery was not established. No one was called from the law firm to show that what the deceased signed and kept at the law firm was not what was produced.

18. In my view, apart from the finding of forgery, there was no evidence connecting the respondents to the fact of forgery. Once the prosecution failed to point to the respondents or any of them, the other charges could not stand. If the accused elected to keep quiet, a conviction could not ensue. I come to the same conclusion that a prima facie case was not established.

19. The appellant complained that the trial court failed to comply with **section 214** of the **Criminal Procedure Code** which provides as follows:

214 (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

20. It is evident that the right to recall witnesses either to give evidence afresh or to be cross-examined is for the benefit of the accused who is on trial. In this case, the original charges against the 1st and 2nd respondents were amended to include the rest of the respondents after PW 1 to PW 5 had testified. After the court allowed the substituted charges, all the respondents pleaded not guilty and the trial proceeded apace. The respondents elected not recall the witnesses or cross-examine.

21. Counsel for the complainants who was watching brief told the court that he raised the issue with the prosecution but the prosecutor did not raise the issue before the court. Since **section 214(1)** of the **Criminal Procedure Code** is for the protection and benefit of the accused, I do not see how the prosecution case would have been prejudiced. The prosecution could have exercised its right to apply to recall any of the witnesses under **section 150** of the **Criminal Procedure Code** but it did not.

22. For the reasons I have given above, the appeal lacks merit and is dismissed.

DATED and DELIVERED at KIAMBU this 8th day of JANUARY 2020.

D.S. MAJANJA

JUDGE

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the appellant.

Mr Kago instructed by H. Kago and Company Advocates for the complainants.

Mr Kanyi instructed by Kanyi Kiruchi and Company Advocates for the respondents.