



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

HCCRA 36 OF 2018

HARRISON NJARAMBA GITHAIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENTS

(An appeal arising from the judgement of the Resident Magistrate's in Criminal Case No. 1765 of 2015 at Kajiado by Honourable M.Chesang delivered on 3rd October 2018.)

JUDGEMENT

*****Right to a Fair Trial-Legal Representation-Section 200(3)-succeeding magistrates-principles of retrial-witness statements*****

Background

1. The appellant was arraigned before the Chief Magistrate Court at Kajiado in Criminal Case No. 1765 of 2015 facing three counts. Count I: the accused was charged with the offence of forgery of title to land contrary to **section 350(1)** of the penal code. It was alleged that the accused and others who were not before court jointly, with intent to defraud ILHAM LIMITED without lawful authority or excuse forged the title document to land registered as KAJIADO/OLOOLOITIKOSHI/KITENGELA/88 purporting it to be a valid and genuine Title Deed signed and issued in the name of HENRY GIKARU KURIA by, a Registrar of Titles Kajiado.
2. Count II: the accused was charged with the offence of making a false document contrary to **section 347(a)** as read with **section 349** of the Penal Code. It was alleged that the accused made a generic document to be Taxpayer Registration Certificate PIN number A002887265 w without lawful authority or excuse and with intent to defraud the complainant herein.
3. Count III: The accused was further charged with another offence of making a false document contrary to **section 347(a)** as read with **section 349** of the Penal Code. The prosecution alleged that the accused, jointly with others who were not brought before court made a generic document purported to be National Identity Card Number 0354402 issued to HENRY GIKARU KURIA with intent to defraud the complainant herein and without lawful authority or excuse.
4. Count IV: the accused was charged with the offence of obtaining money by false pretences contrary to **section 313** of the Penal Code. The prosecution alleged that the accused and others obtained Kshs.16, 450, 000/= from ILHAM LIMITED with intent to defraud by falsely pretending that they were in a position to sell a parcel of land Kajiado/Olooitikoshi/Kitengela/88 measuring approximately 2.01 hectares at Kitengela within Kajiado County.
5. After a full trial, the accused was found guilty and accordingly convicted of Count I, Count III and Count IV. The Learned Magistrate proceeded to sentence the Appellant as follows: on Count I, the accused was sentenced to serve 15 (fifteen) years' imprisonment, Count III, to serve 3 (three) years' imprisonment and Count IV to serve 3 (three) years' imprisonment, which sentences shall run concurrently. Having dissatisfied with the decision of the learned Magistrate timeously brought this appeal against both conviction and sentence.
6. The Appeal is based on the grounds couched on the face of the petition of appeal dated 15th October and filed on the 17th of the same month and year. The Appellant is of the view that the Learned Trial Magistrate erred in law and fact by relying on biased investigative and/or expert evidence and as a result he came up with a wrong conviction. That the learned magistrate erred in law and fact by not appreciating danger in relying on hearsay evidence which was not corroborated thereby violating the provisions of **section 200** of the CPC.
7. That the learned trial magistrate erred in law and fact in relying on the alleged admission/confession of the appellant when the said admission/confession flawed the Evidence Act and Criminal Procedure Act thus occasioning prejudice on the Appellant. It was stated that the learned magistrate erred in law and fact by denying the appellant fair hearing and displaying bias on the part of the appellant thereby infringing the appellant's right to free and fair hearing.

8. Further grounds are that the learned magistrate erred in law and fact by disregarding the defence of the appellant and by shifting the burden of proof to the appellant as depicted in the judgement and that he relied on insufficient evidence and hence the conviction was erroneous. Lastly, that the Trial Court erred in law and fact by convicting the appellant herein on the basis of contradictory evidence and evidence that did not support the charge.

Prosecution Case on Trial

9. A brief facts of the case at the trial court are as follows: PW1, Mr. Peter Gikonyo testified that he is the owner of the land in dispute. He bought the Land in the year 2012, transfer and registration of the same was done in 2012. He conducted a search and found that the land was registered in the names of Henry Gikaru Kuria, he produced a copy of the search marked as MFI 1. He stated that in enjoyed quiet possession until 2014 when somebody tried to erect a structure on it. He reported the matter to the police and upon calling the owner of the property, two persons claiming to be Henry stood up. After enquiring the authenticity of the ownership, the Henry from America was identified as the bona fide owner and the matter was not pursued. He stated that he is still the owner of the property.

10. The evidence of PW2 is that Abduruship Sheikh Mohammed he purchased the land in question from Mzee Sode and when he conducted a search on the land it was registered in the names of Henry Gikaru Kuria, the land was KJD/OLONTHESTI/KITENGELA/88 which was approximately five acres. He produced the search marked as MF1 6. When he decided to meet the said Henry, he met with the accused who was calling himself Henry Gikaru Kuria. They entered into an agreement whereby PW2 was to buy an acre of the land at Kshs. 3.5 million. He produced the agreement which is herein marked as MFI 9.

11. The agreement was that PW2 was to pay 10% of the total amount within 90 days which he did and he paid the balance by way of instalments through his advocates and the accused's advocates. He stated that the total amount he paid was Kshs. 16, 450, 000/=. It was his testimony that he was shown the accused's ID on the day of the transaction which has the accused's picture. He produced the copy of the ID herein marked as (MFI 10) and the RTGS confirmations marked as MFI 12 (paraphic x). He stated that the transfer took time which prompted him to inquire from his advocate who informed him that there was a problem of spousal consent. He decided to put a structure on the land which was later demolished by people unknown to him.

12. He then met PW1 who informed him that the land belonged to him. They reported the matter to the police and another search was conducted which showed that the land had been transferred to Peter Gichuru Gikonyo. He produced a copy of the search herein marked as MFI-13. PW1 and PW2 therefore sued the accused and the Land Registrar. He stated that he paid the full amount to the accused's advocates.

13. Upon cross examination, PW2 stated that the accused's broker took him to see the land. It is indicated that he used to call acknowledging receipt of the purchase money and inquiring the same. He reiterated that the accused is the one who sold him the land and introduced himself as Henry when they met first met in Rongai and the next when they were signing the agreements. He further stated that his Advocates were Mwuli & Co. Advocates and the payments were made through their Account number.

14. The testimony of PW3 was that he is the one who helped PW2 to search for land to buy and found the land as well as the owner (the DW1). The land was 5 acres. He took PW2 to the land alongside the accused and *koft* after which parties agreed on the purchase price. Further that the accused told him that his name was Kuria.

15. Mr. John Katiku an Advocate of the High Court of Kenya practicing as Musyoka, Wambua and Katuku Advocates testified as PW4. He stated that his firm was instructed to act for Ilham Limited and PW2 instructed them to for him in the purchase of the said land from Henry Gikaru Kuria (accused) who was represented by the firm of Mwititi & Co. Advocates.

16. A search was conducted as well as a sale agreement was prepared by his law firm. The search confirmed a person by the name Henry Gikaru Kuria was the owner of the said parcel of land. They agreed on a purchase price and PW2 paid accordingly. They lodged the application for transfer for valuation which was declined by the registrar stating that the title that lodged was generic. They carried another search on 22nd of November 2013 and the results showed that the property belonged to Peter Gathungu Gikonyo which contradicted the other search that they had obtained earlier. (MFI 22)

17. That is when they wrote to Mwititi & Co. Advocates demanding the purchase price which the PW2 had already paid in full and was not returned. They filed a civil case no. 47/14 seeking an injunction to step injunctions on the land which was issued by the High Court. He further stated that he had the accused's ID card and PIN which was produced by his advocate.

18. PW5, is James Muthini Wambua a retired land registrar since January 2018. He stated that somebody came to the registry with a forged title deed by the name Henry Gikaru Kuria and due to his long experience, at a glance he could detect a forged title deed. He stated that in this case he was to detect that the texture of the material of the title deed was not as the one from government printer, the seal impression does not belong to Kajiado Land Registry since its colour is not the same as the genuine one and the plate is bigger the one at the Registry, the signature of the Land Registrar compared with the one on the land registers is different and the font used is also bigger than the ones from the government printer. He also averred that he checked with the registry to ascertain the real owner of the property and he discovered that the signature which registered the title in the name of the accused (entry no. 5) was not genuine. He therefore stated that the title before court is forged.

19. Nahashin Mwititi an advocate of the High Court of Kenya testified as PW6. He stated that the accused was introduced to his office by Mr. Sonde Ole Kote who was representing the intended purchaser of the property and he came solely for introduction purposes and to pair over the transaction to the advocate for the purchaser. He took particulars of the said two which included certified copies of their national ID cards. He affirmed that he facilitated the transaction and the documents were presented to him by Henry Gikaru Kuria (accused person). He also stated that he never introduced himself as Harrison Njaramba Githanga and he was said the property in question. And that the accused is the one who signed the sale agreement to the transaction.

20. NO. 231663 CID DANIEL GUTU, PW7 a document examiner at DCI Nairobi Headquarters testified that on the 19th of May 2015, he received the title documents in question and he opined that the signatures were made by different authors meaning that they were forged and the registrar of lands did not sign the documents. On comparing the seal impressions, he found that the seal impressions appearing on the documents is forged. He prepared and signed the report herein marked as MFI 33.

21. PW8, No. 83089 PC Bhakith Khaungu the investigating officer in this matter testified that a report was made at Ongata Rongai and DCI Land Fraud involving the said property. This was after a transfer of the said parcel of land had been declined by the registrar on the basis that the title deed was forged. He took the title deed for examination purposes and it was confirmed that it was generic and that is when the accused was arrested. He was identified by PW2 as the man who sold him the land and the police officers also had his photo which he had attached to the transfer document. They also found him with ID No. 6835241 which the registrar of persons confirmed it to belong to the accused who had pretended to be Harrison Gikaru to defraud PW2.

Defence Case on Trial

22. The defence is premised upon two witnesses. DW1, the accused herein denied having committed the offences. He alleged that Learned Counsel Mwiti and Kativhu are the ones aware of what happened to the Shamba as they paid each other. He stated that he was not found through the bank and there was no acknowledgement. Further that the advocates instructed a surveyor to the shamba without him. He questioned why the advocates paid for the shamba before and complained later. He averred that the district surveyor did not see him anywhere. He further alleged that the advocates changed the particulars themselves and that there was no connection between him and the owner of the shamba.

23. He averred that no specimen was taken to compare it with his signature. He stated that photos of people can be found on social media or paparazzi. Further that he only got to know of the offence when he was arrested and brought to court. He also stated that since no green card was produced, there is no original owner of the land. He stated that he only received Kshs. 15 million and not Kshs. 16 million as charged in this case.

24. Upon the cross examination, the accused reiterated that it was his advocate Mwiti and Mr. Katiku who knew about the shamba as they are the ones who exchanged money and that he has never made a report that somebody is selling my shamba. He further stated that he should have signed somewhere to show that he received the money or paid through a bank. He further alleged that the acknowledgements produced in court are forgeries and that exhibit 23 and 34 and all the evidence produced by the document examiner is false.

25. DW2; King Harrison Githaiga he gave the account on how the accused was arrested by the police officers. He defended the accused by saying that the case was trumped up and that he had been held maliciously.

Issues for Determination

26. In the determination of the appeal at hand, this court is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences herein were proved. The issues for determination are as follows:

- a) Whether or not the Trial Court denied the appellant his constitutional right of fair trial.*
- b) Whether or not the Trial Court complied with the provisions of section 200 of the Criminal Procedure Code.*
- c) Whether or not the trial court failed to consider the Appellant's defense.*
- d) Whether or not the investigative Expert evidence was biased.*
- e) Whether or not the accused made an admission during trial process.*

Discussion and Analysis

The Right to Legal Representation

27. The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial.

28. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010. Relevant in this case is article 50(2) (b) (g) (h) cited on the law section above. The same stipulates as follows:

“50(2) every accused person has the right to a fair trial, which includes the right –

(g) To choose, and be represented by an advocate and to be informed of the right promptly.

(h) To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

29. Generally, **article 50(2) (g)** of the Constitution guarantees a fair trial to every accused person which includes the right to be represented by an advocate and to be informed of that right promptly. Perhaps at this juncture, it is noteworthy in the above context to venture into the provisions of the Legal Aid Act, 2016 which came into force on 10th May 2016.

30. The above mentioned act in its preamble states that, its focus is to “give effect to **article 19(2), 48, 50(2) (g) and (h)** of the constitution to facilitate access to justice and social justice.” Section 43 of the Act lays down the duties of the court before which an unrepresented accused person is presented. The same provides as follows:

“A Court before which an unrepresented accused person is presented shall:

a) Promptly inform the accused of his or her right to legal representation;

b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and

c) Inform the service to provide legal aid to the accused person”

31. The key words under article 50(2) (g) and (h) of the Constitution and section 43 is “**to be informed promptly of the right**”. In order to fully comply with the dictates of article 50(2)(g) and (h) and section 43(1) of the Legal Aid Act, trial courts as a matter of constitutional duty and the interest of justice, ought to give the information to the accused person and/or make a preliminary inquiry at the earliest opportunity possible. A determination must be made as to whether or not the accused person would require legal representation before commencing with the hearing of the case.

32. In the African Commission in *Advocats Sans Frontiers (On Behalf of Bwampanye) V Burundi, African Commission On Human Rights, Comm. No. 213/99 (2000)* it was observed that:

“...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case...”

33. In the foregoing, it is my view that the right to a fair trial runs from the beginning till the end of the trial process. If at any stage of the trial process, the accused is denied this right, the same amounts to a serious violation of the Constitution and such proceedings should not be allowed to stand.

34. In light of the foregoing, the counsel for the Appellant contended that the appellant was not accorded a fair trial. Counsel made serious allegations that the court displayed bias against the Appellant which infringed on the appellant’s right to free and fair hearing. It was brought to the attention of the court by the Counsel for the state and that of the Appellant that the court directed the hearing to proceed on the 15th of August 2018 despite the fact that the Appellant was unwell and his advocate was not present in court. In that regard, I have perused the trial proceedings and the proceedings of 26th February, 2018 indicate:

“Accused-my blood pressure and sugar is high. My advocate is not present.”

Proceedings of 21st March, 2018 indicate:

“Accused-my advocate has not come and he is the one with the statements. He was not feeling well. He was sick.”

35. Unfortunately despite the above applications to the court by the Appellant, the court on both occasions made rulings against an adjournment. The state counsel conceded that pursuant to the evidence on record, the court vitiated the Constitutional right of the Appellant under **Article 50(2) (g)** without plausible reasoning by the court to that effect. In that respect, it must be remembered that that **Article 25** provides for non-derogable rights and fundamental freedoms which include inter-alia the right to a fair trial.

36. I’m in agreement with both Counsel’s submission that the denial by the court to grant an adjournment on the 26th of February 2018 and on the 21st of March 2018 was not only procedural but also a violation of the appellant’s right to legal representation. The Appellant made it clear that he was unwell and that his advocate was not present in court which ought to have been taken into consideration.

37. Thus the appellant had exercised his right to have an advocate of his choice. The question to ponder is as to whether a court may exercise discretion to deny the accused person of that right during the trial proceedings. The answer is definitely in the negative. A trial court has no discretion to take away the right to legal representation from the appellant at any stage of the proceedings.

38. In the premises the said violation by the trial court cannot be allowed to stand as the same would cause serious consequences which are too ghastly to contemplate. I therefore find that the violation was detrimental to the Appellant thereby causing miscarriage of justice.

39. Despite the above, the learned Counsels herein submitted on section 200(3) of the Criminal Procedure Code. The said provisions encapsulates the law applicable in instances where a criminal trial is handled by more than one magistrate. It stipulates as follows:

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his

predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

40. On the importance of compliance with the said procedural requirement, my brother *Makau, J.* in the case of **Office of Director of Public Prosecutions vs. Peter Onyango Odongo & 2 others High Court at Siaya Constitutional and Judicial Review Division Petition No. 2 of 2015 (2015) eKLR** rightly so expressed himself while considering whether **Section 200 (3)** of the **Criminal Procedure Code** was unconstitutional. The learned Judge delivered himself thus: -

“Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate’s predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.

It should be noted Section 200 (3) of C. P. C. gives an accused person an opportunity to demand to have any witnesses recalled. Tis Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross – examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross – examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.

Section 200 (3) of C. P. C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010.”

41. In the case of **R V. Wellington Lusiri [2014] e KLR** the Court emphasized the need for succeeding Magistrate to continue with the proceedings under Section 200 by informing the accused of his rights.

42. In view of the fact during trial this case was heard by two succeeding magistrates, i.e. Honourable E.A Mbicha and M. Chesang. The succeeding magistrate was under a mandatory duty to inform the appellant of his right to demand to have witnesses who had already testified ressumoned and recalled.

43. **Section 200(3)** of Criminal Procedure Code protects the right of an accused person to a fair trial guaranteed in terms of article 50 of the Constitution. It follows that the court in handling a matter that falls within the provisions of **section 200(3)** or the duty on the part of the succeeding magistrate is only limited in informing the accused person of that right. It must be borne in mind however that the succeeding magistrate is not bound allow the request which may thereupon be made by the accused person. The Court ought to consider the request in light of the circumstances of the case and upon hearing all parties, the court may accede to the request made by the accused person.

44. I refer to page 13 of the trial proceedings where this matter was canvassed pursuant to the state application. The defense sought matter to start de-novo on the basis that the accused had not been furnished with the charge sheet and witness statements so he was not able to cross examine witnesses. The prosecution objected the same by indicating that during the hearing and the advocate was supplied with witness statements.

45. In light of the foregoing, I stand to be guided by article **50(2) (c) & (j)**. It is provided that an **accused person** has the right to have adequate time and facilities to prepare a defence and to be informed in advance of the evidence the prosecution intends to rely on, and to have access to the evidence. Thus, the prosecution and the court is under a duty to ensure that the accused has been furnished with the charge sheet, witness statement and any other material that the prosecution intends to rely on in canvassing its case.

46. Nowhere does the above-mentioned articles say that witness statements must or maybe furnished to the accused’s advocate. The prosecution’s argument that the accused was represented during the hearing and the advocate was supplied with statements ought not to have sufficed. In my view and in terms of article 50, if statements are issued to the advocate and not to the accused himself, the article has not been satisfied. The article is clear that the statements must be given to the accused person.

47. However, without prejudice to the foregoing position of this court, a perusal of the court record shows the accused himself was furnished with statements on the 30th of June 2016. He confirmed the same on the 18th of August 2016 when the accused elected to proceed without representation. He told the court that he had been given the statements and was ready to proceed. The same was also considered by the succeeding Learned when determining whether or not to accede to the Counsel for Applicant’s request to start the proceeding de-novo. Having taken that into account, I find that the Hon. Trial Court was well within its powers as regards whether to accede to the accused’s request. It is my considered that there was no prejudice occasioned to the appellant on this limb.

48. On the other hand, the counsel for the State, Mr. Meroka is of the view that ground (c) and (d) are conversable issues where a trial is properly constituted. Further that the reading of the whole proceeding intimate to the state having a tight case against the appellant and that this matter should the court permit order it for a re-trial on an expeditious basis.

49. On whether or not the Trial Court relied on biased investigative and/or expert evidence thereby reaching at a wrong verdict, the Counsel for the Appellant contended that the expert evidence of forgery did not produce evidence of specimen of the appellant vis-à-vis alleged to have been forged hence the expert evidence did not support the charges and the subsequent conviction.

50. Owing to the fact that the issue in question touches on the loss of alleged 16 million shillings to which the appellant is strongly believed to be involved, justice can only be served by a substantial determination of the issues raised during the trial of the matter.

51. Having made the above findings, the question to ponder is “what is the course available to the court in these circumstances?” The Court of Appeal in the case of *Ahmed Sumar vs. R (1964) EALR 483* offered the following guidance:

“...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;.....”

52. That decision was echoed in the case of *Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported)* when this Court stated as follows:

‘...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.’

53. In that regard I’m not inclined to set the accused at liberty but rather order for a retrial on the ground of the aforesaid violations alone, before a different magistrate. A determination of the other grounds at this juncture becomes superfluous. The judgement of the trial court is hereby quashed.

54. The appellant to present himself before the court on 28th June 2019.

55. That in the meantime the appellant earlier bond terms continue to be operative until further orders from the trial court.

It so ordered.

Dated, Delivered in open court at Kajiado this 7th day of June 2019.

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R. NYAKUNDI

JUDGE

Representation

Ms. Fundi for the appellant

Nkirote for the state

Appellant in person