



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO.30 OF 2018

REPUBLICAPPELLANT

VERSUS

THOMAS KIPRUTO MARTIM...RESPONDENT

JUDGMENT

1. This is an appeal by the State against the respondent who was acquitted of two counts by the trial court in Sotik Principal Magistrate's Criminal Case No.520 of 2014.

2. Count 1 was for forgery contrary to section 349 of the Penal Code. The particulars of offence being that on or before 15th July 2002 at unknown place within the Republic of Kenya jointly with others not before court with intent to defraud/deceive, without lawful authority or excuse forged a certain document namely a copy of grant title number IR 134631 for LR No.7288/644 purporting it to be a genuine document issued by the Commissioner of Lands.

3. Count 2 was for uttering a false document namely a copy of Grant Title No. IR 134631 for LR. No.7288/644 to P. C. Kelvin Ndosi purporting to be a genuine document issued by the Commissioner of Lands.

4. At the end of the trial, the Learned Magistrate acquitted the respondent in both counts in a judgment delivered on 1st August 2018.

5. Aggrieved by the decision of the trial court, the Director of Public Prosecutions has filed the present appeal on the following grounds:-

1. The learned trial magistrate erred in law and fact in holding that the prosecution had not proved its case beyond reasonable doubt to establish that grant title IR 134631 was a forgery which was contrary to the evidence on record.

2. The learned trial magistrate erred in law and fact by failing to properly evaluate the evidence on record and thus reached a wrong decision.

3. The learned trial magistrate erred in law and fact by averring that there were many unanswered questions and loose ends in the prosecution case without clearly and unambiguously pointing out the said unanswered questions and gaps.

4. The learned trial magistrate erred in law and fact by considering extraneous matters thus reaching a wrong decision.

5. The learned trial magistrate erred in law and fact by accepting the accused defence as the gospel truth whereas faulting the prosecution case which was water tight and thus reached a wrong decision.

6. The learned trial magistrate misapplied the authorities submitted and the applicable law and thus erred in his verdict.

7. The appeal proceeded by way of filing written submissions. Mr. Wawire, for the Republic/Appellant, and Ms Chirchir holding brief for Ms Ngetich for the respondent elected not to highlight the written submissions filed.

8. In the written submissions, the Director of Public Prosecutions for the appellant highlighted the background of the criminal proceedings before the trial magistrate, and the appeal. Counsel merged the grounds of appeal into three (3) grounds.

9. With regard to the ground that the trial court erroneously held that the prosecution had not proved its case beyond reasonable doubt, that the title Grant IR134631 was a forgery contrary to evidence on record, the Director of Public Prosecutions stated that all the elements of

forgery contemplated under section 348 of the Penal Code were satisfied. Counsel said that such elements were reiterated in **Nairobi Cr. Appeal 76 of 1983 – Joseph Muluha Kimani –vs- Republic** cited by the trial court- in which it was stated that the document only needed to be false, for it to be forged. The same position was expounded in the English case of **R –vs- Dodge and Ham’s (1971) All ER 523-** in which it was stated that such document only need to be wholly or a material part thereof needs to be false in purporting to be made by or on account of a person who did not make it or authorize its making. That was proof of count 1.

10. According to the Director of Public Prosecutions, the respondent also knew that the document was forged and uttered the same to defraud after the complainant had already been allocated the plot by the Commissioner of Lands and started developing it, which was proof of courts of uttering a false document. The Director of Public Prosecutions emphasized that all the prosecution witnesses who were Government Officials confirmed that the purported Grant held by the respondent did not have supporting records in the Lands Office and was thus fake, and there was no evidence to shake that version.

11. The Director of Public Prosecution thus faulted the trial court for holding that the prosecution did not prove or establish that the respondent uttered a forged Title IR 134631 purporting it to be a genuine document issued by the Commissioner of Lands, and stated further that the respondent’s evidence that he acquired the title as per procedure was uncorroborated by independent evidence, and thus did not counter the testimony and documentation of the prosecution.

12. With regard to the magistrate considering extraneous matters and reaching an erroneous decision, the Director of Public Prosecutions argued that the trial court framed five (5) issues for determination and gave negative answers to these matters which were not contested and wrongly used the answers as the basis for acquitting the respondent, while the elements of the offence did not in any way relate to the questions framed by the trial court. According to the Director of Public Prosecutions therefore, the trial magistrate misapplied the law by basing the acquittal on extraneous matters.

13. The Director of Public Prosecutions then concluded by urging this court to use its discretion to cancel the Grant Title in the possession of the respondent, and relied on the case of **Joseph Mureithi Kanyita -vs- R (2016) eKLR** where the High Court upheld the exercise of discretionary power of the magistrate court to cancel the title – to prevent its future misuse.

14. In response, counsel for the respondent in the written submissions stated that the prosecution did not tender evidence to prove the charges against the respondent beyond any reasonable doubt as required by the law. On forgery, the prosecution merely tendered evidence that ended up proving that the subject land belonged to the respondent. Counsel relied on section 35 of the Penal Code on the definition of forgery – being the making of a false document with intent to defraud or deceive. According to counsel the prosecution wrongly relied on the comparison of handwriting in photocopies of documents and cited the case of **Samson Tela Akute –vs- Republic (2006) eKLR** – to emphasize that photocopies may be manipulated. In any case, counsel argued, the internal office mistake committed by Sosten Cheruiyot at Sotik Town cannot be connected or linked to respondent. Counsel also relied on the case of **John Ngugi Githumbi -vs- Republic-** in which the court underscored the need for the prosecution to produce evidence linking the respondent to the handwriting in the forged document.

15. With regard to uttering a false document, counsel submitted that the prosecution was required to prove that the document was false, the accused knew it was forged, and that he uttered the same with a view to defraud and relied on the case of **Kilee –vs- Republic (1967) EA 713, page 717** wherein the court held that a false document must tell a lie about itself and not about the maker. Counsel concluded by stating that it was wrong to say that the learned magistrate considered extraneous matters in the judgment.

16. This is an appeal by the State against an acquittal. It is grounded on section 348A of the Criminal Procedure Code (Cap.75) which provides as follows:

“348A when an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney General (now Director of Public Prosecutions) may appeal to the High Court from the acquittal or order on a matter of law”

17. The Director of Public Prosecution has appealed against the acquittal of the respondent by the subordinate court at Sotik and asked for several orders from this court.

18. The respondent was tried and acquitted of two offences. Count 1 was for forgery, and count 2 was for uttering a false document. The two charges related to the same document, a document of title number IR134631 for LR No.7288/644.

19. The Director of Public Prosecution has argued that the trial magistrate relied on extraneous matters to arrive at the acquittal. Having perused the judgment of the trial court, I see no extraneous matters which the magistrate relied upon which influenced the trial court’s decision. The magistrate merely made broad inferences in his reasoning.

20. Proof of a charge is a matter of law. The charge defines the elements of the offence, which have to be proved through evidence beyond any reasonable doubt in criminal cases.

21. The first charge of forgery is defined under section 345 of the Penal code (Cap 63) which states as follows:-

“345. Forgery is the making of a false document with intent to defraud or deceive.”

22. Section 347 of the Penal Code lists down the elements of forgery, all of which entail the making, signing, affixing, altering and transmitting any electronic record of a document. It also includes causing another person to do so. The respondent herein was not alleged to have physically made, signed or changed the title document. All the documents relating to the land in question were executed in the offices at Sotik Township and the Lands Office in Nairobi.

23. Therefore, the proof required of the prosecution allegations against the respondent would have to be based on causing another to commit forgery under the provisions of section 347 (g) which states as follows:-

“347 Any person makes a false document who-

(g) fraudulently causes any person to sign, seal, execute, or alter a document or electronic record or to affix his digital signature on any electronic record knowing that such person by reason of deception practiced upon him, does not know the contents of the documents or the electronic record or the nature of the alteration.”

24. The prosecution contended that two documents were issued to the respondent, one at Sotik town and another at Nairobi Lands Office relating to the subject land. He was charged in relation only to the title document issued at Nairobi Lands Office. Did the respondent fraudulently cause the public or government officers at Sotik and Nairobi to issue false documents? The responsible officer at Sotik was dismissed from service. He was not charged in court nor called as a prosecution witness. The person who testified from Sotik did not say what actually happened that caused the officer at Sotik to issue a document that might not be genuine. In my view, the proof of irregularities in the office at Sotik town does not necessarily prove that a member of the public, like the respondent who was rendered services on that account was part or initiator of the irregularities. In my view, the officer at Sotik should have been charged with the irregularity, or be called as a prosecution witness, to prove any alleged forgery of the respondent at Sotik. Short of that the prosecution failed to prove that the respondent fraudulently caused the officer at Sotik to issue a false document, which was issued to obtain a title in Nairobi.

25. The element of the forgery that the respondent was charged with was with respect to the title issued by the Land Registrar in Nairobi. Though the documents examiner relied on what are described as photocopies of documents to establish that the Land Registrar did not sign the title, in my view, that is a minor irregularity, as there is no dispute that the documents came from a genuine source. However, there is no evidence that the respondent made any of the signatures or made anybody known or unknown to sign the title documents. That gap creates a disconnect between the respondent and the making or forging of the title documents. Mere possession of the document is not proof of forging a document.

26. I now turn to the 2nd charge of uttering a false document the title from Nairobi Lands Office. The respondent does not deny his possession of the document and uttering it to the Public Officer. He did so on his own volition. In my view, in view of the fact that he had possession of the alleged forged document, the burden was on him to explain how, when and where he came to be in possession of that document. He did not do so and therefore, the learned trial magistrate erred in acquitting him for the offence of uttering a false document.

27. For the above reasons therefore, I will allow the appeal in part and uphold the acquittal for forgery but set aside the acquittal for uttering a false document. I will convict the respondent for the offence of uttering a false document.

28. With regard to the title, since this court has found that the title to the land held by the respondent is a false document, it follows that the same cannot genuinely remain in official records and be acted upon. It will be cancelled.

29. I thus allow the appeal in part, and order as follows:-

- 1. The acquittal of the trial court for the offence of forgery is hereby upheld.**
- 2. I set aside the acquittal of the respondent on the charge of uttering a false document contrary to section 353 of the Penal Code, and convict him of the offence.**
- 3. I cancel the title Grant No. IR 134631 for LR NO. 72881/644.**
- 4. The respondent will thus now be in custody until sentence is pronounced, after considering any mitigation.**

Dated and delivered at Bomet this 1st day of October 2019.

GEORGE DULU

JUDGE