REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 94 OF 2018

BENJAMIN WAMBUA JAMES.....1ST APPELLANT

JOSEPH KAWINZI MUTHIANI.....2ND APPELLANT

ANTHONY MUSAU MUTHUSI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the judgement, conviction and sentence by Hon. D. Orimba, SPM), in Kangundo Senior Principal Magistrate's Court in Criminal Case No. 49 of 2013 delivered on 20.4.2018)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

BENJAMIN WAMBUA JAMES.....1ST ACCUSED

JOSEPH KAWINZI MUTHIANI.....2ND ACCUSED

ANTHONY MUSAU MUTHUSI.....3RD ACCUSED

JUDGEMENT

1. This appeal arose from the judgment of Hon D. Orimba in which he convicted the appellants of making documents without authority c/s 357 of the Penal Code Act and forgery c/s 345 and 349 of the Penal Code Act (PCA) and sentenced to a fine of Kshs 50,000/- each and in default two years imprisonment. The appellants were granted leave to use their cash bail as fine to secure their freedom.

2. The background to the appeal is that it was alleged that the three appellants made documents without authority and also in the alternative committed forgery. Later the charges were amended to three counts of making documents without authority (Counts 1) contrary to Section 357 of the Penal Code, giving false

information to a person employed in the public service (Count 2) contrary to Section 129a of the Penal Code and disobedience of a lawful order (Count 3) contrary to Section 131 of the Penal Code. The appellants pleaded not guilty to the counts and the prosecution called three witnesses to prove its case while the appellants testified in their own defence and also defending each other.

3. Pw1 was Alexander Muoki Nyumu who testified that he received information that Plot 774 Nguluni was on sale and was given a title deed in the names of the three appellants that originally belonged to their late grandfather. It was his testimony that the succession in respect of the estate was still pending and grant was issued to the appellants and upon seeing the title, he reported to the police and investigations revealed that the appellants applied for registration as owners by transmission on 7.9.11 and that the title was previously in the names of Paul Muthiani Musau. It was his testimony that the title was issued on 9.9.2011 but however the same was revoked vide court order in Succession Cause 667 of 1984 that was issued on 28.7.2013.

4. Pw2 was George Njoroge who told the court that he was presented with a transfer by transmission on 7.9.2011 together with inter alia a certificate of confirmation of grant in succession cause 667 of 1984. The said grant listed the appellants as beneficiaries of the suit property and that he was satisfied with the documentation he thus approved and issued the title deed. However the entry was revoked vide court order. He stated that had he seen the order he would not have proceeded. On cross examination, he told the court that he issued the title deed because the documentation that was presented to him at the time were authentic.

5. Pw3 was Erastus Gichuhi who testified that he received a complaint in respect of the suit property that the appellants obtained title to the same and yet the succession cause in respect of the said property had not been determined. He told the court that the letters of administration were revoked and inspite of the same, the appellants went ahead to acquire title deed to the suit land and then proceeded to sub divide the land. On cross examination, he told the court that the appellants disobeyed the court order for revocation of the grant. The prosecution closed their case and the court found that the appellants had a case to answer and they were put on their defence. They opted to give sworn statements without calling witnesses.

6. Dw1 was the 1st appellant who testified that he was given the title deed by the registrar and the grant by the court and that there was no order annulling the grant and that he was not served with the revocation. He testified that if he disobeyed the order he was not aware. On cross examination, he told the court that he was not aware of the revocation of grant. On re-examination, he told the court that by the time the title was issued, there was no order revoking the grant.

7. Dw2 was the 2nd appellant who testified that he obtained title on the basis of grant that was issued and he was to hold the land in trust and further his advocate did not tell him of the revocation order.

8. Dw3 was the 3rd appellant who testified that he and his co-appellants were issued with a grant on 9.11.2004 and that the order for revocation was issued on 8.11.2012 while the title deed was issued on 9.9.2011. On cross examination, he told the court that the last time he was in court was on 9.11.2004 when the grant was confirmed.

9. The trial magistrate found that the prosecution proved the main count. On the alternative count of forgery against the appellants the court found that the prosecution also proved the same and sentenced them to a fine of Kshs 50,000/- or two years imprisonment in default and were allowed to utilize their bail as the fine.

10. The appellants appealed against both conviction and sentence and their eight grounds of appeal in summary are that the case was not proved beyond a reasonable doubt, that the sentence that was passed was irregular and illegal because the offence had not been proven.

11. The appellants then prayed that this court quashes the conviction and set aside the sentence passed on 20.4.2018 and refund the fines paid by the appellants.

12. When this appeal came for hearing the court directed that both parties file written submissions. Counsel for the appellants pointed out to court that the charges were amended and the appellants pleaded to fresh charges and that the trial magistrate observed that the appellants did not make, sign or execute the title deed. Learned counsel submitted that the appellants did not face the alternative charge of forgery and the trial court found that the title deed was not forged and in imputing criminal motive to the fact that the title deed came out in two days, the magistrate was speculating hence erred in convicting the appellants on count one that was never proven. On the issue of proof of the 2nd count, counsel submitted that there was no proof that the appellants were in possession of the knowledge that the impugned grant was revoked. Counsel added that the offence in the 3rd count is akin to that for contempt of court and in placing reliance on the case of **Ochino & Another v Okombo & 4 Others (1989) KLR** submitted that the appellants were not aware of the orders for the same were not served on them. Learned counsel concluded that the evidence on record is insufficient and falls short of the threshold in criminal cases hence the court should quash the conviction in respect of all the counts.

13. Counsel for the state placed reliance on the two charges that the appellants were initially charged with and submitted that the same were proven hence the conviction and sentence of the trial court should not be quashed.

14. On a first appeal such as this one, the appellant is entitled to have the whole evidence submitted to a fresh scrutiny so that the appellate court weighs the conflicting evidence and arrives at its own conclusions (**Okeno v. Republic [1972] EA 32.** In so doing an allowance should be made for the fact the trial court had the advantage of hearing and seeing the witnesses which the appellate court does not (**Peters v. Sunday Post, [1958] EA. 424**). I will therefore re-evaluate the whole of the evidence taking into consideration the points raised by the respective counsels.

15. I considered that the questions raised for this court to answer in were as follows:

i) Whether the appellant was charged under s. 345 of the Penal Code.

ii) Whether the prosecution proved all the ingredients of the offence charged.

iii) Whether the trial magistrate failed to take into consideration that the appellants were charged with offences different from that which they were convicted.

iv) Whether the trial magistrate failed to take the appellant's defence into consideration in his evaluation of the evidence.

v) What orders may the court make?

16. With regard to propriety of the charge, counsel for the appellant pointed out and I observe that the court approached the matter as though the appellant had been charged with forgery under s.345 Penal Code. However, the charge sheet which was dated 31.1.2013 under Police Case file 444/09/2013, and which was received and stamped by the Magistrate on 20.12.2016 showed that the appellants were charged with three counts of making documents without authority contrary to Section 357 of the Penal Code (count 1), giving false information to a person employed in the public service contrary to Section 129a of the Penal Code (count 2) and disobedience of a lawful order contrary to Section 131 of the Penal Code(count 3).

17. It is clear that the appellants faced no charge of forgery under Section 345 of the Penal Code and yet they were convicted of the same meaning that the conviction was improper. It was pertinent to differentiate between the two charge sheets and the offences that the appellants were charged in order to identify the need to comply with the right to fair trial. The conviction for forgery meted on the appellants were not mentioned in the charge sheet and I find that the trial magistrate failed in his duty. He failed to properly scrutinise the charge sheet to ensure that the offence charged was what the conviction was based on.

18. With regard to the second issue, i.e. whether the prosecution proved all the ingredients of the offence; under s. 345 Penal Code, the offence of forgery is constituted by four elements. There must be: i) false making or material alteration or possessing of a document, ii) the document must have been made with the intent to deceive, defraud, or injure and iii) the document must have legal efficacy as provided in s.345 (1), i.e. it must be a will, document of title etc. and iv) the accused must be proved to have participated in the making of the document. I will now consider whether the evidence on record proved these four ingredients of the offence and I shall address all the offences for they seem to have cross-cutting requirements.

19. Regarding the first ingredient, the testimonies of Pw2 are to the effect that the title deed was prepared by his office meaning that there was no participation by the appellant. The testimony of Pw2 was to the effect that proprietorship of the suit land was transferred into the names of the appellants. The certificate of title showed that the date of the transfer was 7.9.2011, almost 7 years after the grant was confirmed and 29 years after the death of Paul Muthiani though the title was initially registered in his names in 2009. Further that the transfer was from the names of the deceased directly into the names of the appellants after grant of letters of administration was made in the deceased's estate. The prosecution produced the instrument of transfer and the same were signed by the appellants as persons entitled on intestacy. The appellants testified that they were issued with a grant and they were not aware that the same was revoked meaning that all along they had been under the impression that all was well. I am not satisfied that the prosecution proved without a shadow of doubt that the appellants issued the title deed; there is nowhere that they put their hand to it. The first count of the offence under Section 357 of the Penal Code, i.e. the making of a document without authority was not proved by the evidence. I also find that by the same evidence the 3rd count under Section 131 of the Penal Code was not proved against the appellants because they were being crucified for a document whose purpose they had not a clue.

20. As to the element of the intent to deceive, defraud, or injure, the appellants testified that they were given the mandate to administer the estate of the deceased. Also that they had no knowledge of the revocation. Based on these circumstances, they signed the transfer forms to the suit land into their names. Clearly, it has not been proven that there was intent to deceive the officials in the Registry of Titles and to defraud the estate of the deceased. The intent to defraud was also disproved from the fact that the transfer was registered on 7.9.11, the title deed issued on 9.9.2011 and the revocation was issued on 8th November, 2012. The evidence adduced by the prosecution as well as the appellants removed all doubt that the appellants were guilty of the offence under Section 129a of the Penal Code.

21. As an appellate court, I did not have the advantage of seeing the demeanour of the witnesses when they testified but the trial magistrate disbelieved the prosecution over the appellant. He also made no comment about the appellants' demeanour and the only aspersion he had was that the transfer was registered on 7.9.11 and the title deed issued on 9.9.2011 a record two days. The person who made the entries, who was the prosecution witness told the court that he issued the title deed because he was satisfied with the documentation that was issued to him hence he registered the transfer and I see no reason to disbelieve him as he had satisfied himself on the documents presented for registration.

22. I have considered the appellant's defence that they were not aware of the revocation and I am satisfied of the same. I find that there was a process under the Law of Succession Act that the matter could be remedied instead of having the appellants being subjected to a criminal trial and in the words of Pw1 he was not aware that the revocation order was served on the appellants and Pw3 told the court that he did not have evidence to prove that the appellants were served.

23. I therefore find that by the testimony of Pw2 the prosecution proved that none of the appellants issued a title deed in their names; none of them gave false information to the Registrar of Titles to transfer the suit land to their names. The trial magistrate therefore improperly found that the appellants committed the offences that they had been charged with.

24. The judgement of the trial court has not analysed the defence the appellants vis-à-vis the evidence adduced by the prosecution. The trial magistrate took issue with the speed that the title was issued and he imputed knowledge of the revocation process on the appellants by virtue of the fact that the appellants

had an advocate on record and in the words of the trial magistrate “no need to serve them with the order… because they were already aware”. I find that there was doubt in the prosecution case that ought to be resolved in favour of the appellant because this being a criminal matter, the standard of proof need not be emphasized. The law has set a standard of proof in criminal cases. This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (**see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918**).

25. I reiterate that, I disagree with the trial magistrate entirely and also find that he improperly evaluated the appellants’ defence before he convicted them.

26. In the result I find that the appeal has merit. The same is allowed. The conviction of the appellants is quashed and the sentence set aside. The fines that had been paid should be released to the appellant.

It is so ordered.

Dated and delivered at Machakos this 11th day of November,2019.

D. K. Kemei

Judge