



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 24 OF 2016

BETWEEN

REPUBLIC APPELLANT

AND

ASHOK KUMAR RAMBHAI PATEL RESPONDENT

(Being an appeal from the original judgment and acquittal of Hon. P. L. Shinyada, SRM dated 3rd August 2016 at the Chief Magistrate's Court at Kisumu in Criminal Case No. 257 of 2014)

JUDGMENT

1. This is an appeal by the State against the acquittal of the respondent, **ASHOK KUMAR RAMBHAI PATEL**, by the Chief Magistrate's Court at Kisumu. In the Subordinate court, the respondent was charged with four counts as follows:

i. In the 1st count the respondent was charged with the offence of obtaining registration by false pretence contrary to **section 320** of the **Penal Code (Chapter 60 of the Laws of Kenya)**. It was stated that 7th February 2012 at Kisumu District Lands Office, the respondent willfully procured for himself a registration of transfer of land title No. KISUMU/MUNICIPALITY BLOCK 7/387 by falsely pretending that the documents presented to the District Land Registrar were genuine and valid for transfer.

ii. In the 2nd and 4th counts the respondent was charged with cheating contrary to **section 315** of the **Penal Code**. That on 31st January 2012 and 28th February 2012 fraudulently tricked Anup Kumar Jayantibhai Patel to deliver to him LR No. KISUMU/MUNICIPALITY/BLOCK 7/387 and KISUMU/MUNICIPALITY/BLOCK 10/498 purporting that certified copies and originals were required by the District Land Registrar respectively.

iii. The 3rd Count was uttering a false document contrary to **section 353** of the **Penal Code**. It was alleged that on 23rd December 2011 the respondent knowingly uttered a death certificate no. BAU 120107 of the late Jayantibhai Rambhai Patel to Fred Okoth Nandwa purporting it to be a genuine and valid document from the registrar of Births and deaths in the United Kingdom.

2. The respondent was acquitted on all the counts. Being dissatisfied with the judgment, the Director of Public Prosecutions ("DPP") lodged this appeal. The scope of this appeal is governed by **section 348A** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which permits the DPP, on behalf of the State, to appeal against an acquittal on matters of law and fact. The section provides thus:

348A (1) When an accused person has been acquitted on a trial held by a subordinate court or High 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 or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or the Court of Appeal, as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.

3. As this is a first appeal, I am required to evaluate the evidence before the trial court and reach an independent decision as to whether or not I should uphold the decision of the trial court. In so doing allowance must be made for the fact that I neither heard or saw the witnesses testify. In order to carry out this mandate it would be appropriate to set out the material evidence as it emerged before the trial court.

4. The late Jayantibhai Rambai Patel (hereinafter “the deceased”) and the respondent were brothers and business partners holding 50% shares in a company known as Format Supermarket Limited situate on LR No. KISUMU/MUNICIPALITY BLOCK 7/387 (“Plot 387”). In December 2006, the business and interest in the land were transferred to the personal names of the deceased and the respondent.

5. The deceased passed away on 29th October 2011 while undergoing treatment in the United Kingdom. Following his demise his son, Anup Kumar Jayntibhai Patel (PW 1) obtained his certificate of death and several copies thereof from the Registrar of Births, Marriages and Deaths in the UK. On 30th October 2011, the respondent travelled from Australia, where he resided, to London to attend his brother’s funeral. During that period resided with his sister, Mrs Nita Kalawadia (“Kalawadia”). PW 1 testified that Kalawadia requested a copy of the deceased’s death certificate in order for her daughter to be allowed to take time off school to attend the funeral. PW 1 gave her a copy of the certificate as he had several and it would seem that Kalawadia gave the copy of the certificate to the respondent.

6. On 23rd November 2011, the respondent left London and travelled back to Kenya without the knowledge of PW 1. While in Kenya, he went to the deceased’s residence in Kisumu and gained access to the deceased’s documents. The caretaker of the residence, Pinky Bhimjiani (PW 3), called PW 1 and informed him that the respondent had accessed the deceased documents. PW 1 and his younger brother, Sachin Kumar Jayntibhai Patel (PW 2) immediately travelled to Kenya as they were suspicious of the respondent’s intentions. By the time they arrived in Kenya on 20th December 2011, the respondent had taken with him documents relating to Land Parcels Nos. KISUMU/ MUNICIPALITY BLOCK 10/498 (“Plot 498”) and KISUMU/ MUNICIPALITY BLOCK 10/499 (“Plot 499”) and registered restrictions on both parcels without their knowledge.

7. On 31st January 2012, the respondent informed PW 1 and PW 2 that since they were required to pay land rates for Plots 498, 499, 387 and 102 they needed to access the lease certificates stored in the deceased’s safe deposit box at the Bank of Baroda Kisumu branch. PW 1 facilitated the access to the deceased deposit box and they removed the lease certificates of the parcels. The lease certificate for Plot 387 was handed over to Suryakhant Patel (“Suryan”) for safe keeping while they went with lease certificates to Plots 498 and 499 to pay the rates and to carry out searches at the Lands Registry at Kisumu. Unknown to PW 1 and PW 2, the respondent later approached Suryan and took the certificate for Plot 387 and used it together with the deceased’s death certificate given to him by Kalawadia to transmit Plot 387 to himself. The respondent also took the original certificate Plot 498 from PW 1 claiming that it was required to conduct a search but he did not return it.

8. When PW 1 and PW 2 decided to investigate what was going on at the Kisumu Land Registry, they discovered that Plot 387 was registered in the respondent’s name as sole proprietor and that restrictions had been placed on Plots 498 and 499. It is at this point that they reported to the Police at Kisumu.

9. According to PW 1 and PW 2, Plot 387 was owned by deceased and the respondent as tenants in

common. They contended that in 2007, the respondent had transferred his interest in Plots 498 and 499 to the deceased and his wife and themselves and they were accordingly registered as tenants in commons. PW 1 and PW 2 testified that the certificate of death used by the respondent to register Plot 387 in his name was not a true copy of the original and as such the registration was obtained fraudulently. The impugned certificate number BAU 120107 showed on its face that it was certified before an advocate, Mochache Mochama (PW 9), who denied ever certifying it. He denied that the stamp impression and the signature thereon were his. The prosecution however did not provide any documents to show how PW 9's stamp impression looked like when the certification is said to have been done.

10. The prosecution also called Rosemary Amanda Bramar (PW 11), an officer from the Registrar of Births, Marriage and Deaths in the United Kingdom. She testified that it was possible for an applicant to be issued with several copies of the original death certificate and anyone could be issued with a certificate so long he could prove that he was related to the deceased. She further testified that the copy used by the respondent seemed to be a copy of an original though it was hard to tell as it was a photocopy. She told the court that it was possible for the respondent to have been issued with another certificate of death even when one had already been issued to PW 1 as it was a public document.

11. A registrar at Kisumu Land Registry, Fred Okoth Nandwa (PW 6), told the court that he received a certificate of death of the deceased No. BAU120107 certified by PW 6 and an original lease certificate for Plot 387. After satisfying himself from the records and certificate of lease that the ownership was a joint tenancy, he proceeded to register the respondent as the sole proprietor by transmission. The fact that Plot 387 was owned by the deceased and respondent jointly was confirmed by George Gachihi (PW 5), the Kisumu Deputy Land Registrar, who testified that the register and title did not indicate shares of ownership.

12. In his sworn defence, the respondent admitted that he registered Plot 387 in his name and had restrictions placed on Plots 498 and 499. He explained that he owned Plot 387 together with the deceased and was thus entitled to have it registered in his name upon his brother's demise. On the issue of the certificate of death, the respondent stated that while he was still in London, PW 1 gave him one of the original copies of the death certificate. When he came to Kenya, he visited PW 9 who certified a copy of the death certificate in his possession. The respondent testified that when the documents were presented to the Lands Registry, his Advocates informed him that the original Certificate was required following a complaint that death certificate no. BAU 120107 was fraudulent. Since he did not have the original, he called a friend in London who assisted him acquire another original Certificate of Death No. BAU 285551 which he presented and was issued with a title to Plot 387 on 31st January 2012.

13. The respondent denied that he transferred his interest in Plots 498 and 499 to PW 1, PW 2 and their parents. He stated that his signature on the transfers was forged as while he was in Australia at the material time. He told the court that he decided to place restrictions on the two plots to protect his interest. He also reported the matter to the police but no steps were taken. He stated that he retained the two certificates of lease because he wanted an explanation as to why his name had been removed yet he had not transferred his share to anyone.

14. On the basis of that evidence, trial magistrate was not satisfied that the prosecution had proved the charges against the respondent beyond reasonable doubt. Accordingly, the learned magistrate acquitted him, prompting the State to lodge this appeal. In its petition dated 16th August 2016, the appellant raised the following 5 grounds of appeal:

1. THAT the learned trial magistrate erred in law and in fact by failing to appreciate arguments and evidence adduced by the prosecution.

2. THAT the learned trial magistrate erred in law and in fact in determining and assuming that the property subject matter in question is one of joint tenancy in total disregard of the provisions of section 32(2) and 101(1) of the Registered Land Act Chapter 300 of the Laws of Kenya (Repealed) where no evidence was advanced to illustrate any joint tenancy,

3. *THAT the learned trial magistrate erred in law and in fact by overlooking and failing to appreciate the prosecution's evidence in relation to the charge sheet.*

4. *THAT the learned trial magistrate erred in law and in fact by disallowing and ignoring the evidence of PW 11, an expert witness the Superintendent Deputy Registrar at Brent Council in London in flagrant breach (of) section 70 and 71 of the Evidence Act Chapter 80 Laws of Kenya, Section 3(1)(c) of the Judicature Act and Article 2 of the Constitution.*

5. *THAT the learned trial magistrate erred in law and in fact in relying on inconsistencies and contradictory evidence of the defence witnesses.*

15. Ms Osoro, learned counsel for the State, urged the court to review the evidence and find that the prosecution had proved its case. She submitted that the evidence of prosecution witnesses proved that the respondent fraudulently secured registration of Plot 387 in his name using a forged certificate of death and the trial magistrate erred in disregarding the evidence of PW 11 who testified that the certificate should not have been photocopied as a person could be provided with as many copies of the Certificate as he asked for. Equally that the ownership was not a joint tenancy and the trial magistrate should never have held it to be so.

16. Mr Menezes, counsel for the respondent, submitted that the verdict of the trial court was justified as there was evidence that the ownership of the parcel was joint tenancy and the other charges were not proved.

17. In any criminal case the burden is always on the prosecution to adduce evidence, which will prove its case beyond reasonable doubt. Thus the real issue in this case is whether the prosecution proved its case to the requisite standard.

18. In Count 1, the respondent was accused of procuring registration of title by falsely pretending that the documents presented to the Land Registrar were genuine and valid for transfer. The gravamen on the appellant's case is the trial magistrate ought to have found as a fact that the property was not registered as a joint tenancy but a tenancy in common. PW 5 testified that the property was registered as a joint tenancy and that in case of the demise of one of the tenants, the surviving tenant was required to present the original leased and death certificate whereupon a new lease would be registered in the name of the surviving tenant. On the issue whether the court could determine the nature of proprietorship, the trial magistrate held as follows;

[I]t is not the duty of this court to determine whether the tenancy was a joint tenancy or a tenancy in common. This would fall under the jurisdiction of the Environment and Land Court If at all the registration was done then on the Land Registrar knows why he decided to register the said parcel of land in the names of the accused and per his explanation he was convinced that the land was a joint tenancy.

19. I agree with the trial magistrate and would add that unless there was a charge of conspiracy against the Land Registrar in the decision to determine that the land was a joint tenancy when it was not, the issue is not germane to these proceedings since the decision is that of the Land Registrar. In any case, that decision is under challenge in separate civil proceedings. What is in issue in Count 1 is whether the respondent willfully procured himself to be registered as proprietor of Plot 387 by pretending that the documents presented were genuine and valid for transfer. The key documents for presentation were the original lease and the death certificate. There is no dispute that the original lease was genuine.

20. From the evidence, PW 1 suggested that the respondent obtained a copy of the original death certificate from Kalawadia while in his defence the respondent stated that he got the original copy from PW 1. It is not possible establish from the two version where the respondent got the copy but what is true is that he presented death certificate No. BAU 120107 to PW 6. The respondent testified that after presenting the certified photocopy to the Lands office, his advocate was informed that the original was required and he thus asked his friend in London to get him one from the Registrar of deaths and he was

issued with certificate no. BAU285551. That it was after he presented the said original certificate that he was issued with a certificate of lease on 7th February 2012. PW6, who was the officer responsible for issuing the certificate of title stated in cross examination that it was not possible to issue the certificate in the absence of the original.

21. Proof of Count 1 and 3 turns on whether the death certificate No. BAU 120107 presented to PW 6 for purposes of registration was genuine. The testimony of PW 11 was that any person was entitled to a certified copy of the death certificate. In this case she was referring to a copy certified by her office. When shown of the death certificate No. BAU 120107 she confirmed the document was issued by her office although it was not certified in accordance with the provisions obtaining in her country.

22. In his testimony, PW 6 did not explain to the court the nature of document required to prove death that would exclude the kind of certified copy that was presented on behalf of the accused. In order to implicate the accused, the prosecution had to prove that the document presented did not comply with the requirements of Kenya laws or procedures regarding the acceptance of certified copies of documents. This was not demonstrated and it was not shown that the certificate No. BAU 120107 was anything other than a death certificate and a true copy of the death certificate.

23. The other issue regarding the genuineness of death certificate No. BAU 120107 is that PW 6 denied that he ever certified the document as a true document of the original. Corporal Lawson Shuma (PW 10), the investigating officer, confirmed that he never followed up to confirm whether indeed the stamp impression on the certificate was that PW 6's stamp or that the signature was his. The fact that the stamp and handwriting purportedly made by PW 6 were never proved to be forgeries.

24. I would also add that PW 6 did not have any problem with death certificate No. BAU 120107 until the issue of forgery was raised. It is only upon receiving the death certificate No. BAU 285551 certified by a notary public in England that he issued the original title. It is worth noting that there is no difference in the content of both certificate BAU 120107 and No. 285551. In light of this evidence, I conclude that the trial magistrate was right when she concluded that Counts 1 and 3 were not proved.

25. In Count 2 and 4, the respondent was accused of cheating. In Count 2, he cheated PW 1 to deliver to him title documents for Plot 387 stating that the same was required by the Land Registrar. However, from the evidence it is clear that the respondent obtained the title from Suryan, who was not called to give evidence, and who was in possession of the documents and not from PW 1.

26. In Count 4, it was alleged that he tricked PW 1 into giving him title to Plot 498 stating that the original was required in order to carry out a search at the land registry. From the evidence tendered by the prosecution it is not clear how the respondent tricked PW 1 into giving him the title. The evidence points to the fact that the respondent requested for the title in order to obtain a search and PW 1 willingly gave it to him and waited outside the Land Registry as the respondent went to the Registrar's office to obtain the search. Although the title to Plot 498 was not returned immediately, the respondent called PW 1 and told him that he had received the searches. PW 1 testified that on 29th February 2012, the respondent gave the searches to Plots 498 and 499 and the title to Plot 498. Although PW 1 suspected that the title given to him was not genuine and reported the matter to the police, it was not investigated by the police nor was the issue put to PW 6 to confirm the position regarding the title.

27. It is clear from the findings I have made that this appeal is for dismissal and it is hereby dismissed.

DATED and DELIVERED at KISUMU this 20th day of July 2017.

D. S. MAJANJA

JUDGE

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the appellant.

Mr Menezes, Advocate for the respondent.