



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 102 OF 2012**

**ALICE WACHUKA KINYANJUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from original conviction and sentence in the Nyeri Chief Magistrates' Court Criminal Case No. 1223 of 2011 (Hon. M. Nyakundi, SRM) on 13<sup>th</sup> August, 2013)*

**JUDGMENT**

The appellant was charged alongside one **Jamleck Kiragu Michuki** with the offence of making a document without authority contrary to **section 357 (a)** of the **Penal Code, cap 63**. According to the particulars of offence, on or before 11<sup>th</sup> day of August, 1992 at an unknown place within the Republic of Kenya jointly with others not before court with intent to defraud and without lawful authority or excuse, the appellant made a certain document namely a land title deed **No. Gakawa/Kahurura/Block 2/Temu/9** purporting it to be a genuine title made and issued by the Nyeri Ministry of Lands. I suppose the state must have meant the Lands Registry at Nyeri, for we have never had a ministry by that name.

The two of them were also charged with one other count of obtaining by false pretences contrary to **section 313** of the **Penal Code**; here, the particulars were that on the 21<sup>st</sup> day of December, 2011 at Nyeri township in Nyeri county within central province jointly with others not before court with intent to defraud, the appellant obtained from Douglas Githenya Njogu the sum of Kshs 700,000/= by falsely pretending that she was in a position to sell a parcel of land **No. Gakawa/Kahurura/Block 2/Temu/9** to Douglas Githenya Njogu a fact she knew to be false.

The appellant was charged with a third count of uttering a false document contrary to **section 353** of the **Penal Code** and here the particulars were that on the 21<sup>st</sup> day of December, 2011 at Nyeri township in Nyeri county within central province, the appellant knowingly and fraudulently uttered a certain document namely, land title deed **No. Gakawa/Kahurura/Block 2/Temu/9** purporting it to be a genuine land title deed issued by the Ministry of Lands.

The learned magistrate convicted the appellant and her co-accused on all the three counts; the appellant was sentenced to serve six years' imprisonment for the first count, two years' imprisonment for the second count, and six years' imprisonment for the third count; the sentences were to run consecutively. The appellant's co-accused was not sentenced apparently because at the time the judgment was delivered and the sentenced pronounced, he had jumped bail and absconded. The appellant appealed against conviction and sentence.

The amended Grounds of appeal which are included in the submissions filed by the appellant on 2<sup>nd</sup>

February, 2016 are as follows:

1. The learned magistrate erred in law and in fact in convicting the appellant on doubtful evidence;
2. The learned magistrate erred in law and in fact convicting the appellant on charges that were not proved; and,
3. The learned magistrate erred in failing to analyse the prosecution evidence against the appellant.

The record shows that the prosecution called six witnesses among them was the complainant **Susan Nyaguthie Nguchu (PW1)** who testified that she owned a plot at Nanyuki which she identified as plot number **Gakawa/Kahurura/Block2/9**; she testified that she had lived on this property for the past 30 years. On 28<sup>th</sup> December, 2011, three men visited her at home. One of them, a Mr Gatheru informed her that her land had been sold and he showed her copies of the title deed, the seller's identity card, the PIN number and a sales agreement. The complainant told them that she had not sold her property; Indeed, she showed them her documents of ownership of the property including the original title deed, identity card and the PIN.

Sometimes later, the same people called her and informed her that they had found the person who sold them the plot; they told her that they were at the Criminal Investigations Department (CID) office. She went there and found the appellant who is alleged to have sold them the property.

**John Mweiga Gatune (PW2)** testified that on 18<sup>th</sup> December, 2012, he received a call from one Macharia who told him that he had information that this witness wanted to purchase a parcel of land. The two then met at Nanyuki where the said Macharia informed him that he had been authorised to sell a certain parcel of land on behalf of its owner; he, however, did not like it when he saw it apparently because he preferred one next to a road.

On 19<sup>th</sup> December, 2012, **Douglas Githenya (PW4)** who was a friend of his told him that he required a plot to buy. This witness showed him the plot he had been shown by Mr Macharia; he also directed him to Mr Macharia. The following day, Mr Macharia introduced them to one Kamau who was alleged to be the owner of the property. The said Kamau told them that the property was registered in the name of his mother. When **Douglas (PW4)** conducted a search on the property at the lands registry, he established that the land was registered in the name of **Susan Nyaguthie Ngunyu(PW1)**.

On 21<sup>st</sup> December, 2011 this witness together with **Douglas (PW4)** met the appellant who misrepresented herself as **Susan Nyaguthie** and a person she identified as her husband. She told them that the title deed of the land was with her advocate. They then negotiated the purchase price and settled at Kshs. 1.2 Million out of which Kshs 700,000 was to be paid immediately as the deposit. In order to formalise the agreement, the parties proceeded to the office of **Mr Muhoho, advocate(PW3)** to have the agreement drawn and executed; it was subsequently executed between the appellant, as the vendor and **Douglas Githenya (PW4) as the purchaser** at the advocate's office on 21<sup>st</sup> December, 2011.

Parties went to the land control board 23<sup>rd</sup> November, 2011 apparently for its consent transfer the land; however, the board was not in session on that date as the district officer, who was its chairman was away. On 27<sup>th</sup> December, 2011, **Douglas (PW4)** visited the plot; he met the property's caretaker who informed him that he was not aware that the property had been sold. The caretaker took him together with **Douglas (PW4)** to the owner of the plot. They found her at Tetu in Nyeri. She informed them that she had never sold her land to anyone. The purchaser realised that he had probably been defrauded and therefore he proceeded to the Criminal Investigations Department offices at Nyeri accompanied by the owner of the property to report the matter.

In order to have the appellant arrested, **Mr Gatune (PW3)** tricked the appellant to meet them at Equity bank in Nyeri where she was to be paid the balance of the purchase price. They went to bank accompanied by a police officer who arrested the appellant and her purported husband.

The third prosecution witness was **Muhoho Muchiri (PW3)**, is an advocate of the High Court of Kenya. On 21<sup>st</sup> December, 2012, he was in his office when he was informed by his secretary that there were people at the reception who wanted a sales agreement drawn for them. When they were finally ushered into his office, the appellant introduced herself as the seller or the vendor of the property while the purchaser was one **Douglas Githenya Njogu (PW4)**. The appellant reminded the advocate that she had been in his office earlier and deposited there the title deed of the property she was selling.

Counsel recalled that indeed the appellant had been in his office earlier and had deposited a title in his office in May, 2011 as security for a loan she had borrowed from one Joseph Nderitu. Counsel drew the sales agreement according to which the purchase price for the property was Kshs 1.2 million; out of this sum, the sum of **Kshs 700,000/=** was paid immediately upon execution of the agreement while the balance of Kshs 500,000/= was to be paid upon the transfer of the property to the purchaser's name.

Out of the Kshs 700,000/= the appellant received, she paid **John Nderitu** the sum of Kshs 120,000/= that she owed him; with this payment, counsel released the title back to her.

On 27<sup>th</sup> December, 2012, this witness met his friend whom he informed that he had purchased a plot in town. When he showed him the documents which he had received from the vendor, which included her identification card, his friend doubted whether the purported seller was the property's owner because he happened to know him. He offered to take him to the owner; they finally met her with the help of one Ngunju, who was said to be her brother. The owner showed them her documents of ownership of the property. Together they proceeded to lodge a complaint at Nyeri police station. Later they tracked the appellant at Equity bank where she had come for payment of the balance of the purchase price. Both the appellant and her co-accused were arrested by the police.

**Benjamin Nyongesa (PW5)** investigated the complainant's complaint. In his investigations, he established that the legal owner of land parcel no. **Gakawa/Kahurura/Block 2/Temu 9** was the complainant and that the appellant whose true identity was Alice Wacuka had passed off as, Susan Nyaguthii Ngunju, for fraudulent purposes. He collected the agreement that the appellant had signed and also the specimen signatures both for the appellant and her co-accused for forensic analysis.

The document examiner, **Daniel Ruto (PW6)** testified that on 21<sup>st</sup> March, 2012 some documents were brought to him for examination by corporal Nyongesa; they included the sale agreement together and the specimen signatures of the appellant and one Jamleck Kiragu Gichuki. In his opinion, the specimen signature by the appellant was in every respect similar to the signature on the sale agreement where the appellant is alleged to have signed; in other words, he established that the appellant signed the sale agreement as the seller of the land referred to as **Gakawa/Kahurura/Block 2/Temu/209**.

He also compared the specimen signature of Jamleck Kiragu Gichuki, the appellant's co-accused with that on sale agreement; he established that the author of the specimen signature was not same author who signed the sale agreement.

The appellant chose to give sworn testimony when she was put on her defence; she testified that she was aged 51 and that she was a farmer who lived at Gatundu. She also said that she was arrested with a certain lady and she sought to know why she had been released. That is all she said in her defence.

**Section 357(a)** of the **Penal Code** which formed the basis of the first count against the appellant and her co-accused provides as follows: -

**357. Making documents without authority**

***Any person who, with intent to defraud or to deceive—***

***(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or***

**(b)...**

***is guilty of a felony and is liable to imprisonment for seven years.***

The document the appellant and her co-accused are alleged to have made is title deed in respect of land referred to as **Gakawa/Kahurura/Block 2/Temu/209**. The title document was produced in court, not by the investigator, but by Mr. Muhoho Gichimu (PW3), the advocate, in whose office the title had been deposited to secure payment of money that the appellant had borrowed from one Joel Nderitu.

Apart from what **Douglas Githenya (PW3)** told the investigations officer that he had a copy of the title deed, the officer (PW5) did not make any other reference to this document in his evidence. According to him, the only documents he forwarded to the document examiner for handwriting analysis were the sale agreement and the specimen signatures of the appellant and her co-accused person.

Indeed, looking at the exhibit memo form which was produced by the document examiner in court, the only documents that were forwarded to him for examination were the sale agreement, a document on which was written the known handwriting of the appellant, and the specimen signatures of the appellant and her co-accused. According to that exhibit memo the document examiner was to ascertain whether the signature on the sale agreement was by either of the accused persons one of whom was of course, the appellant herein.

What came out clearly from the evidence of the investigations officer and the document examiner is that there was no verification of whether the document alleged to have been made by the appellant and her co-accused was actually made and without authority. There was no evidence to support the allegation that the document had been made by either the appellant or her co-accused. Simply put, there was no evidence to support the first count of making a document without authority contrary to **section 357(a)** of the **Penal Code**. By convicting the appellant on this count, it is apparent that the learned magistrate misdirected himself both on evidence and in law and to this extent conviction cannot be sustained.

The second count with which the appellant was charged is based on **section 313** of the **Penal Code**; it reads as follows:

***313. Obtaining by false pretences***

***Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.***

In support of this charge, the would-be buyer of the land in question, Douglas Githenya testified that on 21<sup>st</sup> December 2011, he withdrew Kshs 200,000/= from Equity bank at Nyeri and paid the appellant. Later in his evidence, he said that he made a down payment of Kenya shillings 700,000/= at the advocate's office where the agreement was executed. It is not clear from his evidence where he got the additional Kshs 500,000/= as to pay this sum when he only withdrew Kshs 200,000/= from his bank account; however, the agreement which the appellant signed shows that she acknowledged receiving the amount of Kshs 700,000/= at the execution of the agreement. Again Mr Muhoho the advocate who drew the agreement and witnessed the payment of the deposit of the purchase price testified that he witnessed the payment of Kshs 700,000/= being made to the appellant upon execution of the agreement. This evidence was not challenged or controverted. I have no reason to doubt the learned magistrate's finding that this money was paid and therefore this particular charge was proved beyond all reasonable doubt'; accordingly, the appellant was properly convicted on this count.

The final count with which the appellant was charged was based on **section 353** of the Penal Code; that section provides as follows:

***353. Uttering false documents***

***Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.***

I have already held that the document which the appellant is alleged to have uttered was not subjected to any form of forensic investigation; in the absence of verification of its validity, it cannot be concluded that the document was false and that the appellant uttered it. Just like in count one, this particular count was not supported by any evidence and it was unsafe for the learned magistrate to convict the appellant in the absence of proof that the title deed in respect of land parcel **Gakawa/Kahurura/Block 2/Temu/209** was a false document.

For the reasons I have given, I will allow the appellant's appeal in part and quash the convictions on count one and count three and set aside the respective sentences thereof. I reject the appeal in respect of the second count for which I have held the appellant was properly convicted. She was sentenced to serve 2 years' imprisonment in respect of this particular count. The record shows that she was convicted on 13<sup>th</sup> August, 2013. If this was the only charge for which she was convicted and sentenced she would have served and completed the sentence by now, considering that she was not admitted to bail pending the hearing and determination of her appeal. Having allowed her appeal on the first and third counts, I hereby order that she should be set at liberty unless she is lawfully held.

**Signed, dated and read in open court this day of 11<sup>th</sup> November, 2016.**

Ngaah Jairus

**JUDGE**