REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 76 OF 2014

VINCENT KIBOR SEUREI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction in Criminal Case

No. 184 of 2006 Republic v Vincent Kibor Seurei in the Resident

Magistrate's Court at Kapsabet by B. Limo, Resident Magistrate

dated 30th April 2014.)

JUDGMENT

1. The appellant was convicted for the offences of making a document without authority contrary to section 357 (a) of the Penal Code; forgery contrary to section 350 (2) of the code; and, uttering a false document contrary to section 353 of the code. He was sentenced to six months' imprisonment on each count; the sentences to run consecutively. The appellant has appealed against the conviction and sentence.

2. The particulars of the first count were that on the 15th September 1976 at Lands Office and District Officer's Office Kapsabet in Nandi District within Rift Valley Province without lawful authority with intent to deceive made a certain document namely application for consent of Land Control Board form 1 for land parcel Nandi/Lolkeringet/140 purporting it to have been made by Land Control Board Lolkeringet Division.

3. Regarding the second count, the particulars were that on the same date he with intent to defraud forged a certain document namely application for consent of Land Control Board form 1 for land parcel number Nandi/Lolkeringet/140. Lands Office in Nandi District within the Rift Valley Province uttered a certain false document namely application for consent of Land Control Board form 1 for land parcel number Nandi/Lolkeringet/140 to the District Chairman of Lands Control Board.

4. On the third count, it was alleged that on the same date at the Lands Office in Nandi District, he uttered a false document namely application for consent of Land Control Board form 1 for land parcel number Nandi/Lolkeringet/140 to the District Chairman of Lands Control Board.

5. There are thirteen *amended grounds* in the petition of appeal. They can be condensed into eight. First,

that the learned trial magistrate erred in convicting and sentencing the appellant for a term of six months on each of the three counts to run consecutively without the option of fine; secondly, that the trial court did not consider the mitigation and particularly the records, age and health of the appellant; thirdly, that the trial court failed to sentence the accused to a non-custodial sentence; fourthly, that the learned trial magistrate misapprehended the evidence; fifthly, that the trial court disregarded the testimony by the appellant; sixthly, that the learned trial magistrate failed to properly analyze the evidence of PW6, the Land Registrar; seventh, that the trial court failed to consider the offences occurred more than thirty years earlier, or to invoke the doctrine of adverse possession, or to find the title was indefeasible; and, eighth, that the trial court misinterpreted the decree or judgment issued by then Eldoret Resident Magistrate in Eldoret RMCC 884 of 1979 which judgment was never appealed against; and, ninth, that the prosecution did not discharge its burden of proof to the required standard.

6. The State has contested the appeal. The case for the State is that the evidence tendered by the six witnesses proved the charge beyond reasonable doubt. The State submitted that the expert evidence of PW4 proved the forgery and corroborated PW1's evidence. the evidence of the Land Registrar (PW6) confirmed that the appellant presented the impugned application for consent and transfer to the Lands office. The learned State Counsel submitted that the defence tendered was unbelievable. On the matter of sentences, I was implored to find that they were quite lenient in the circumstances. In a nutshell, the State submitted that the appeal lacked merit and should be dismissed.

7. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E.A 32, *Kariuki Karanja v Republic* [1986] KLR 190.

8. PW1 testified that the appellant made an application before the Land Control Board to transfer PW1's land to him without consent. He reported the matter to the area Chief and the District Commissioner. The latter told him that there was a signature on the application form (exhibit 1) which seemed to be a forgery. He denied entering into a sale agreement with the accused. He denied that the accused paid the sale proceeds. Regarding an amount of Kshs.4000/- mentioned in his statement to the police, he said the appellant gave it to someone called Kimetto. He conceded that the land issue was deliberated before the chief. He was categorical that he never signed any application to the Land Control Board. He was however aware of some proceedings at the High Court that awarded the land to the appellant. He said the appellant has been staying on his land since 1976.

9. PW2 is a son of PW1. He was born in 1963. He asked his father about the application (exhibit 1). His father denied ever signing the form. That is when they decided to report the matter to the police. He said the application form was obtained at the lands office and prepared by the appellant. He said they had no grudge with the appellant. On cross-examination he said grew up on parcel No. 59 and stayed there for eleven years before he moved to parcel No. 140. The owner of the land was Kimetto. He denied ever being evicted from parcel No. 140. He could not tell whether there was a sale agreement. He said the appellant never bought any land from PW1 for Kshs. 4000/-. He conceded that they lost the land case in High Court at Eldoret.

10. PW4 was Inspector Dominic Ngego Nyamu. He is a fingerprint expert from CID Headquarters. He produced a report prepared by Mr. Joseph Choge, a senior finger prints expert, who had since retired. He compared the left thumbprint impression on exhibit 1 against the finger prints of PW1. He formed the opinion that they were not identical to the finger prints on the application form (exhibit 1).

11. PW5 had taken PW1's fingerprints impressions for examination at Nairobi. The report from finger prints expert showed that the finger prints on exhibit 1 did not match those of PW1. The appellant was arrested.

12. PW6 was the Land Registrar. He said the land was registered in favour of the appellant on the basis of the approval by the Mosop Land Control Board of 15th September 1976. The transfer (exhibit 6) was received at the registry on 23rd October 1982 from Raphael Arap Tarus. It was registered. He also

referred to the decree dated 21st May 1980. He said that in view of the decree, the decree-holder was not required to obtain consent to transfer. He said the consent had earlier been presented to the court.

13. I have then considered the defence proffered by the appellant. The appellant testified as follows in the material part-

> *"Mr. Raphael Arap Tarus came and we went to the lands registry. We met a clerk of the lands registry we gave the documents presented to us. I executed the transfer document. Raphael endorsed [sic] his finger on the application for transfer forms.*
>
> *As regards Exhibit 1 this is the application the clerk of the lands control board at Mosop filled for us. I signed the same, on the other there is a thumb print. After execution of the form Raphael Arap Tarus did not come. The transfer was approved, the application for consent. Raphael Arap Tarus did not come, later Raphael refused to do a transfer and in 1979 I went to court to file a Case No. PMCC 884 of 1979 (exhibit 7). The case was heard and determined. The court ordered the parcel of land to be transferred to me vide a decree dated 21.5.1980.*
>
> *Later a transfer was done. The court executed the part of the Raphael Arap Tarus later took the transfer to Kapsabet Lands Office on 23.10.1980, the title was transferred from Raphael Arap Tarus to myself. Later Raphael entered my land Raphael; [he] was evicted on that parcel No. 140. Raphael was evicted three (3) times. I live on that parcel of land. In 2006 Raphael went to police to allege forgery and uttering a false document. I am not the one who executed [sic] his finger print on the transfer form. I wish to state that the transfer form was done by the court. Raphael later appealed on that matter. The appeal was dismissed."*

14. The key issue to be decided in this appeal is whether the prosecution *established* that the appellant made the application for consent form without authority, forged it or uttered it on 15th September 1976. The answer is in the affirmative. PW1 was emphatic that the appellant made an application before the Land Control Board to transfer PW1's land to him without consent; and, that PW1 never executed the form or thumb printed it. That evidence was corroborated by the testimony of PW4. He produced a report prepared by Mr. Joseph Choge, a senior finger prints expert, who had since retired. He compared the left thumbprint impression on exhibit 1 against the finger prints of PW1. He formed the opinion that they did not match. In short, it was established that PW1 did not finger print the application form. From the evidence of PW6, the Land Registrar, that is the form that was presented by the appellant at the lands registry together with a transfer conveying the land from PW1 to the appellant. It is the same form that PW1 said had been presented to the District Commissioner's office. The appellant denied making, forging or uttering the document. But that defence was unbelievable and shallow. It is completely discounted by the evidence of PW1, PW4 and PW6.

15. I am thus satisfied that the appellant made, or, forged, or, uttered the application for consent of the Land Board Control form 1 land parcel Nandi/Lolkeringet/140 purporting it to have been made by the board, or, to have been executed by PW1. The document was false; the appellant knew it; and he uttered it to defraud. The document was forged because it was made without *authority* and to be used as if it was *genuine*. See *Kimani v Republic* [1984] KLR 671. He uttered the document to the District Chairman of the Land Control Board and to the Registrar of Lands. The appellant was less than candid when he claimed that he saw PW1 finger printing the document.

16. PW1 was not a virtuous virgin either. He readily conceded that there were proceedings before the chief relating to the land. Subsequently, the appellant sued PW1 for recovery of the land. That was in Eldoret Resident Magistrates Court Case 884 of 1979. Judgment and decree were issued in *favour* of the appellant. There was *no* evidence that PW1 appealed against the decree. The transfer at the Lands Registry was partly on the basis of that decree; although the transfer instrument *may* not have been executed strictly in accordance with the court order. The appellant had insisted in his defence that the transfer was executed by the court. The application for consent was in that sense water under the bridge. The offences relating to the application for Land Board Consent dated back nearly thirty years; to be more precise on 15th September 1976. The appellant was in possession of the land. PW1 and PW2 stood, in that

sense, to benefit from the criminal proceedings against the appellant. But that did not justify the offence or offer a defence to the appellant. As I have found, the appellant was culpable.

20. The matters I have raised are however relevant to the *sentence*. The appellant was sentenced to six months' imprisonment on each count; the sentences to run *consecutively*. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559, *Musa Kibet Toroitich v Republic*, Eldoret, High Court Criminal Appeal 192 of 2010 [2015] eKLR.

21. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may…..…(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

19. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

22. Considering the appellant was a first offender; that he was aged *eighty eight years* and ailing; that he transferred the land pursuant to a decree; that he was in possession; and, that the offences took place nearly thirty years earlier, the *custodial* sentence was *harsh* in the circumstances. This is more so because the sentences were to run *consecutively*. I will thus disturb the sentence. See *Orwochi v Republic* [1976-80] 1 KLR 1638 and *Marando v Republic* [1976-80] 1 KLR 1639. I think the principle to be distilled from these cases is that sentencing must take into account the unique circumstances of each case. Fundamentally, a sentence must be *commensurate* with the *moral blameworthiness* of the offender. *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559, *Musa Kibet Toroitich v Republic*, Eldoret, High Court Criminal Appeal 192 of 2010 [2015] eKLR.

23. For all of those reasons the appeal against the conviction is *dismissed*. The appeal on *sentence* is *allowed*. The sentence passed against the appellant is *set aside*. The appellant is sentenced to pay a fine of Kshs 40,000 on *each* of the *three* counts. In default, he shall serve *six months'* imprisonment on each count; the sentences to run *concurrently*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 16th day of July 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Mr. Rioba Omboto for the appellant.

Ms. R. N. Karanja for the State.

Mr. J. Kemboi, Court clerk.