



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.115 OF 2011

(An Appeal arising out of the conviction and sentence of U.P KIDULA - CM delivered on 9th February 2011 in Kibera CM. CR. Case No.545 of 2008)

SERAH PRISCILLA WAMAITHA NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with two counts of **forgery of a document of title to land** contrary to **Section 350 (1)** of the **Penal Code**. The particulars of the first offence were that on or about the 25th May 2007, at an unknown place in Nairobi within Nairobi area, the Appellant, with intent to defraud forged a certain transfer of lease document to read Dagoretti/Kangemi/T. 449 purporting it to be a genuine transfer of lease. The particulars of the second offence were that on or about the 25th May 2007, at an unknown place in Nairobi within Nairobi area, the Appellant, with intent to defraud forged a certain lease document to read Dagoretti/Kangemi/T. 449 purporting it to be a genuine lease.

The Appellant was in addition charged with two counts of **uttering a false document** contrary to **Section 353** of the **Penal Code**. The particulars of the third offence were that on the 25th March 2007 at Ardhi House Nairobi within the Nairobi area, the Appellant, knowingly and fraudulently uttered to Alice Ncabiri Francis a certain forged transfer of lease for title Number Dagoretti/Kangemi/T.449 purporting it to be a genuine transfer of lease for the title Number Dagoretti/Kangemi/T.449. The particulars of the fourth offence were that on the 25th day of March 2007 at Ardhi House Nairobi within the Nairobi area, the Appellant, knowingly and fraudulently uttered to Alice Ncabiri Francis a certain forged lease for title number Dagoretti/Kangemi/T.449 purporting it to be a genuine lease for title number Dagoretti/Kangemi/T.449.

When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charges. After full trial, the Appellant was convicted of the charges. She was sentenced to pay a fine of Kshs.200,000/- for each count. She was further sentenced to serve two (2) years imprisonment on each count. The sentences were ordered to run concurrently. The Appellant was aggrieved by her conviction and sentence and duly filed an appeal before this court.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and

sentence. She was aggrieved that the prosecution did not establish her guilt to the required standard of proof beyond any reasonable doubt. She was aggrieved that she was convicted on the basis of insufficient evidence of the prosecution witnesses. She faulted the trial magistrate for failing to take into consideration that crucial witnesses were not called to testify in the case and therefore prejudiced her case. She also faulted the trial magistrate for failing to make a finding to the effect that the case had not been properly investigated on the basis of the evidence that was adduced in court. The Appellant took issue with the fact that her defence had not been considered before she was convicted. For the above reasons, the Appellant urged the court to allow the appeal, quash her conviction and set aside the sentence that was imposed upon her.

During the hearing of the appeal, the Appellant was represented by Ms. Muhanda. The Appellant presented to court written submission. Ms. Muhanda further made oral submission urging the appeal on the Appellant's behalf. Ms. Muhanda submitted that the Appellant was convicted on the basis of insufficient evidence adduced during trial. According to Ms. Muhanda, crucial witnesses in the case were not called to give evidence. In particular, she pointed that Ms. Judith Mushule who was said to have typed the lease and transfer of lease documents was not called to testify in court. She also pointed out that the Public Trustee said to have executed the two documents was not also called as a witness. Lastly, that Ms. Ann Thangei who attested to the Appellant's signature on the documents was not also called as a witness. To support her submission, Ms. Muhanda relied on the case of **Bukenya & Others versus Uganda (1972) EA 549**.

On the issue of the Appellant having been convicted on the basis of insufficient evidence, it was submitted on behalf of the Appellant that PW7 Antipas Nyanchwa, the document examiner did not specifically confirm that the alleged alterations on the documents were made at the office of the Public Trustee. For the above reasons, Counsel for the Appellant was of the view that the evidence adduced by the Prosecution was insufficient to secure a conviction against the Appellant. On the issue of sentence, Ms. Muhanda submitted that the same was unfair and irregular.

On his part, Mr. Kabaka for the State opposed the appeal. He submitted that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. According to Mr. Kabaka, the witnesses called by the prosecution were sufficient to prove the charge against the Appellant. He submitted that the trial magistrate considered the Appellant's case before making her determination. He urged the court to disallow the appeal and confirm the conviction and sentence of the trial court.

The facts of this case according to the prosecution is as follows; It was alleged that the Appellant forged a Lease and a Transfer of Lease in respect of land parcel known as Dagoretti/Kangemi/T.449 in order to facilitate its transfer from the name of the Public Trustee into the Appellant's name. The Appellant is a grandchild of the late Ritho Mahira, who, prior to his death, was the registered owner of land parcel No. Dagoretti/Kangemi/T.449. The prosecution's case is that following a succession cause filed to distribute the estate of the deceased, land parcel No. Dagoretti/Kangemi/T.449 was inherited by PW5 George Ritho. PW1 William Mwangoko Maloba, a State Counsel in the office of the Public Trustee was involved in the administration of the estate of the deceased. PW1 told the court that in the course of administering the said estate, the Appellant informed him that a lease for land parcel No. Dagoretti/Kangemi/T.460 had been erroneously registered in the name of the Public Trustee as it did not form part of the estate of the deceased. The Appellant told him that the said parcel of land was instead to be transferred to her.

PW1 perused his records and found a letter from the beneficiaries of the estate of the deceased confirming that land parcel No. Dagoretti/Kangemi/T.460 was not part of deceased's estate. The said letter was produced as prosecution **exhibit No. 1**. PW1 told the court that he wrote to the Commissioner of Lands seeking advice on how to deal with the issue. He was advised to transfer the property to the Appellant in the usual manner. The correspondences were produced as prosecution **exhibits Nos. 2 and 3**. The Public Trustee therefore prepared and executed a transfer of lease in respect of land parcel Dagoretti/Kangemi/T.460 in favour of the Appellant. PW1 testified that he attested to the Public Trustee's signature on the document. The duly executed transfer of lease was then handed to the Appellant to facilitate the payment of Stamp Duty. The Transfer of Lease was produced as prosecution **exhibit No. 5**.

PW1 told the court that he later received a letter from the Commissioner of Lands stating that land parcel No. Dagoretti/Kangemi/T.460 fell on a road reserve and therefore title could not be issued. The said letter was produced as prosecution **exhibit No. 6**. This information prompted PW1 to write to the Commissioner of Lands to inquire on the status of land parcel Dagoretti/Kangemi/T.449. A response from the Commissioner indicated that the said land had been registered in the Appellant's name. The letters were produced as prosecution **exhibits Nos. 7 and 8**.

PW2 Alice Ncabiri Francis, a Registrar at the Ministry of Lands testified that she was stationed at the receiving counter on 25th May 2007. She told the court that she received a set of documents which included a Lease and a Transfer of Lease in respect of land parcel No. Dagoretti/Kangemi/T.449 for registration. The documents were accompanied by an application for registration in the name of the Applicant, stamp duty receipt Serial No. 015784 dated 21st May 2007, a copy of P.I.N No. A002884652 and a copy of the Appellant's national identity card number 0561816. PW2 recorded the documents in the presentation book. She recorded the Lease as No. 490 of 25th May 2007 whereas the Transfer of Lease was recorded as No. 491 of 25th May 2007. The lease, transfer of lease, application for registration stamp duty receipt, copy of the Appellant's P.I.N and national identity card were produced as prosecution **exhibits Nos. 4, 5, 10, 11, 12 and 13** respectively.

PW3 Rosina Ndila Mule, an officer at the Ministry of Lands testified on the operations at the Ministry of Lands. She told the court that the lands office is not only involved in the registration of documents but also issuance of title documents. In this case, it registered the documents in respect of land parcel Dagoretti/Kangemi/T.449 presented by the Appellant and issued a new lease in favour of the Appellant.

A report was made to Kabete Police Station. The case was assigned to PW5 SGT Stephen Naibei to investigate the case. On conclusion of the investigations, he formed the opinion that a case had been made for the Appellant to be charged with the present offences. The lease and the transfer of lease in respect of land parcel No. Dagoretti/Kangemi/T.449 presented at the Ministry of Lands was forwarded to a document examiner for examination. PW7 Antipas Nyanjwa, testified that he found evidence of physical erasure and alterations on the documents which in his opinion were made from a different machine/instrument and in a different font type and size.

In her defence, the Appellant denied having forged any document. She explained that what she presented at the Ministry of Lands was a transfer of lease in respect of land parcel No. Dagoretti/Kangemi/T.460 in her favour that she obtained from the Public Trustee. She produced a copy of a transfer of land in respect of land parcel No. Dagoretti/Kangemi/T.460 as Defence **exhibit No. 2**. She told the court that the lease was duly registered in her name and a certificate of lease was issued. DW2 Charles K. Ngetich, a Senior Lands Registration Officer at the Ministry of Lands confirmed that land parcel Dagoretti/Kangemi/T.449 was registered in the Appellant's name on 25th May 2007.

This being a first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (**See Njoroge - Vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

From the evidence on record, it is clear that the purported transfer of lease in respect of land parcel No. Dagoretti/Kangemi/T.449 is a forgery. The evidence of the document examiner is conclusive proof in that regard. The issue for determination by this court therefore is whether the transfer of lease and the lease in respect of land parcel No. Dagoretti/Kangemi/T.449 was forged by the Appellant. According to the evidence of PW5 George Hiro Ritho, the parcel of land registered as Dagoretti/Kangemi/T.449 previously belonged to his father Ritho Mahira. Ritho Mahira died in 1972. The Public Trustee petitioned the court to be issued with a grant of letters of administration. The particular property was registered in the name of the Public Trustee as the administrator of the estate of Ritho Mahira. The succession proceedings were

conducted in **Succession Cause No.118 of 2004**. According to PW5, the family consented to the said property being inherited by him. He testified that the Appellant was the daughter of his step-sister i.e. the daughter of his step-mother. The Appellant is therefore the niece of PW5.

PW5 recalled that the entire family agreed on how the properties that comprised the estate of the deceased were to be distributed. There was no dispute. The family of the step-mother of PW5 also benefitted from the estate. PW5 testified that he was shocked to learn that the suit parcel of land had been transferred to the Appellant. He became aware of this when a tenant who had rented a house built on the suit property was evicted. The tenant reported the case to the police. The police investigated the matter. PW5 was able to prove that he was the owner of the plot.

PW1 William Maloba, a Senior Principal State Counsel attached to the Department of Public Trustee testified that he was approached by the Appellant sometimes in early 2005 with the information that she (Appellant) was a grandchild of the deceased and had been allowed by the family to inherit the suit property. PW1 was convinced by the Appellant that she was indeed a grandchild of the deceased and had the consent of the family to inherit the suit property. He processed the transfer documents that enabled the Appellant to be registered as the owner of the suit property. This was because the suit property had been registered in the name of the Public Trustee after the succession process.

It was only after the Appellant had been registered as the owner of the suit property that PW1 learnt that the Appellant was not entitled to inherit the suit property. Infact the suit property had been allocated to PW5 by members of the family. The officials called by the prosecution testified how they processed the transfer after the same had been lodged by the Appellant. It was clear from the evidence by the prosecution witnesses that the Appellant duped the Public Trustee that she was a beneficiary of the estate of her grandfather while in actual fact this was not the case. The truth of the matter was that the suit parcel of land was inherited by PW5. The schedule in the certificate of confirmation of grant issued in respect of the estate of Ritho Mahira – deceased did not include the Appellant as a beneficiary. In any event, if the Appellant wanted to dispute the distribution, she was at liberty to do so in the succession cause and not by seeking to transfer a property which had already been bequeathed to another beneficiary.

The defence adduced by the Appellant to the effect that the entire transaction was above board on account of the apparent authenticity of the transfer documents does not distract this court from reaching the finding that the Appellant did not have legal authority in the first place to put in motion the registration process. That defence does not hold and it was rightly dismissed by the trial court as sham.

In the premises therefore, this court holds that the prosecution did proof to the required standard of proof beyond any reasonable ground the charges of forgery and uttering under **Sections 350(1) and 353** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and sentences of the Appellant are hereby confirmed. In addition, this court will remedy the harm done to PW5 as a result of the Appellant's criminal conduct. This court declares that the entries made as entry No.2 and 3 in respect of LR. No. Dagoretti/Kangemi/T.449 and Dagoretti/Kangemi/T.460 (the suit parcels of land) are hereby cancelled. The name of the Appellant is forthwith removed in the ownership section of the said titles. The titles shall revert back to the name of the Public Trustee as the administrator of the estate of Ritho Mahira – deceased. The Public Trustee shall prepare transfer documents so as to transfer the suit parcel of land i.e. Dagoretti/Kangemi/T.449 to George Hiro Ritho, the beneficiary of the said property. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2015

L. KIMARU

JUDGE