REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 50 of 2012

DESDERIO NKONGE KIRIGU…….....……...APPELLANT

V E R S U S

REPUBLIC ……..RESPONDENT

J U D G M E N T

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The Appellants Desderio Nkonge Kirigu 1st Respondent, John Bosco Njeru, 2nd Appellant and Julius Kinyua Chabari, 3rd Appellant were 3rd, 1st and 2nd accused respectively in lower court. They were charged with 5 counts of offences. In court all 3 Appellants faced conspiracy to Defraud contrary to section 317 of the Penal Code. In count 4 obtaining Registration by false pretences contrary to section 320 of the Penal Code. In Count 5 intermeddling with the property of the deceased person contrary to section 45(1) & (2) (a) of the Penal Code.

After hearing the case the Appellants were acquitted of counts 1 and 2. They were convicted in counts 3, 4 and 5. They were each sentenced to serve 3 years imprisonment in count 3 one years imprisonment in each of count 4 and 5. There was no indication whether the sentences were to run concurrently or consecutively. Being aggrieved by the conviction the Appellants filed their appeals which were consolidated as they arose out of the same trial in the lower court. Their petitions of Appeal were filed by Messrs Muia Mwanzia and Co. Advocates. They are all the same and raise 8 grounds of appeal as follows:

1. **That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant on charges which ingredients thereof were not proved beyond reasonable doubt by the prosecution**.

2. **That the learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant and therefore arriving at a wrong finding in law.**

3. **That the trial magistrate erred in law and fact in relying on extraneous matters in the trail leading him to a wrong conclusion.**

4. **That the learned trial magistrate erred in law and fact in misconstruing the facts of the case before him and therefore arriving at a wrong finding in law.**

5. **The sentence meted out against the accused person was excessive.**

6. **The learned trial magistrate erred in law and fact by usurping the powers of the High Court in relation to the law of succession Act in a matter that was purely civil and or succession cause in nature and not within his ambit.**

7. **The learned trial magistrate erred in law in imposing a sentence without the option of a fine regard being had to the circumstances of the case.**

8. **The evidence adduced at the trial could not support a conviction.**

The brief facts of the case are that the 2nd Appellant was a son of the deceased and the 1st and 3rd Appellants were the executors of his will.

The appeal was argued by Mr. Mwanzia advocate for all three appellants. He urged the appeal together. Counsel urged that the evidence adduced by the prosecution could not sustain a conviction. He urged that the court acquitted the Appellants of the Forgery of wills count (1) and the one of making a False Document (2). He urged that these two counts went to the roof of the trial and having acquitted the Appellants of same, the counts 3, 4 and 5 of conspiracy to defraud, obtaining registration by false pretences and intermeddling of the property of a deceased person could not stand on their own. Counsel urged that since the 1st and 3rd Appellants were appointed executors and the 2nd Appellant was the beneficiary of the deceased's last will, the element of conspiracy, deceit or fraud to defraud the estate of the deceased could not be sustained. Counsel urged that the learned trial magistrate found the will genuine and referred the court to Pg 70 of the proceedings (judgment)

Mr. Mwanzia urged that in his defence the 1st Appellant demonstrated that he as Executor of the will obtained a Grant of Probate of the written will and that in the charge of Obtaining Registration by false pretences could not be sustained. Counsel urged that the 1st Appellant had called the advocate who drew the will and Land Registrar who registered the land who said grant of probate was genuine.

In regard to intermeddling Mr. Mwanzia submitted that S.45 of the Law of Succession Act sets out who can be said to have intermeddled with an estate of a deceased person. Counsel urged that the section does not include persons with Grant of Representation, who under S.3(1) of Law of Succession Act are Administrators, counsel urged that the 1st and 3rd Appellants were Administrators of the deceased will and that they had dealt with the estate as the deceased wished.

Mr. Mwanzia urged that the Appellants ought not to have been charged with these offences, but that the issues raised in the case could best have been dealt with as application for Revocation of Grant as provided under S.48 of Law of Succession Act. He urged court to allow the appeal.

Mr. Moses Mungai urged this appeal on behalf of the state. Mr. Mungai, the learned state counsel suggested that the main issue was whether the will was a forgery. Counsel urged that the court found that the will was drawn by all advocates. He referred to page 69 of Proceedings/judgment. Counsel urged that in the circumstances there was no deceit.

Counsel urged that since the complainants were questioning the will, the best channel they ought to have followed was to apply to revoke the will in the two Succession Causes Nos. 146 of 1996 and 94/2010 in which subject matter was deceased estate.

I have carefully considered this appeal and have carefully analysed and evaluated a fresh all the evidence adduced before the trial in the lower court while giving an allowance for the fact I neither saw nor heard any of the witnesses. I have drawn my own conclusions. I am guided by the court of Appeal case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Criminal Appeal No. 272 of 2005 as follows:-

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs . Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its won conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for ht fact that the trial court has had the advantage of hearing and seeing the witnesses."

The Appellants appeal is not opposed by the State and the reasons given by the State for that decision was mainly because the subject matter of the case being a will, the proper procedure that the complainants in the case should be followed was through a Succession cause.

The learned trial magistrate acquitted the Appellants in counts 1 and 2 of the charge. This was his argument and reasons

"As regards count 1 the evidence of DW4 greatly shakes the prosecutions' case as to the forgery of the will which is the subject matter of this prosecution's case as to the forgery of the will which is the subject matter of the proceedings. DW4 stated that he drafted the will personally and that goes for count 2 herein as regards the making of a false document".

In the circumstances trial magistrate own words, summarized DW4's evidence as follows:

"**The defence called Kiraitu Murungi an advocate of the High Court of Kenya and the current Minister of Energy in Kenya Government. He conceded to have drafted a will on instructions from the deceased Eugenio Njagi Chabari and the same was executed on 14/4/1980 in which A2 and A3 were appointed as executors. He stated that LR. MWIMBI/MURUGI/943 was bequeathed to A1 and that he took steps as an advocate to read out the will to the beneficiaries and thereafter offered to help them. He also stated that he had since resigned from the firm of M/S Kamau Kuria & Kiraitu Advocates and would not comment of what happened thereafter.**"
The learned trial magistrate concluded that the will, the subject matter of this case, was not forged neither was is a document more without authority. That was not sufficient to get the Appellants off the hook. The trial magistrate read certain mischief in the conduct of the Appellants and as a result convicted them of counts 3 and 4.

At page 71 of the proceedings/judgment the learned trial magistrate found paragraph

"**It is trite law that a will or grant of probate does not gant an executor and beneficiary any proprietary rights. The Law of Succession in Kenya in Cap 160 Laws of Kenya require that some other action ought to be taken to capitalize this obligation or bequest so as proper title can pass. There is a requirement that the grant must be confirmed by a court of law where a schedule of properties is then set out detailing who get what in the deceased's estate.**

This is not what happened in this case. The executor simply took the grant and annexed it to the will and moved the District Land Registrar PW10 who then affected the transfer. A2 and A3 were bound by law to know this an conduct themselves diligently but they did not. Even the beneficiary A1 cannot escape blame for being registered as proprietor of LR. MWIMBI/MURUGI/943. The title herein was issued on 16/1/2008 to A1 as one wonders then why an application by way of summons for confirmation of grant of probate of written will was filed date 24/3/2012 and filed in court on 29/3/2010"

The particulars of count 3 of conspiracy to defraud contrary to section 317 of the Penal Code are

"On the 14th day of April 2008 at Meru South District Land Registry in Tharaka Nithi county, jointly with intent to defraud conspired to defraud Eugine Njagi Chabari (deceased) a piece of land Parcl No. Mwimbi/Murugi/943."

The offence the appellants were accused of was Defrauding the deceased persons of his land LR. No. Mwimbi/Murugi/943. the offence is alleged to have been committed on the 14th April 1980 at Meru South Land Registry.

The particulars of count 4 of the offence of obtaining registration by false pretences contrary to section 320 of the penal code were as follows.

"**On 15th day of January, 2008 at Meru South District Registry in Tharaka Nithi County with intent to defraud willfully procured registration of land parcel No. Mwimbi/Murugi/943 for John Bosco Njeru by false fully pretending that you have been given powers to do so through a will by Eugenio Njagi Chabari (deceased)"**

The particulars of count 5 the offence of intermeddling with the property of the deceased person contrary to section 45(1)(2) (a) of the Law of Succession Act were as follows:

"45. (1) Every application to the court under section 26 of the Act shall, where a grant has been applied for or made but not confirmed, be brought by summons in Form 106 in that cause, or, where no grant has been applied for, be brought by petition in Form 96; and the summons or petition and supporting affidavit shall be filed in the registry and copies thereof served upon the personal representative of the deceased:

Provided that, if representation has not been granted to any person, a copy of the petition and supporting affidavit shall be served upon the persons who appear to be entitled to apply for a grant under the Act.

(2) The application shall be supported by evidence on affidavit in Form 15 or 16 stating that no grant of representation to the estate of the deceased has been confirmed and containing, so far as may be within the knowledge of the applicant, the following information and particulars -

(*a*) the date of the death of the deceased and whether he died testate or intestate and, if testate, the date of his last will and whether oral or written;

"On the 15th day of January 2008 at Meru South District Land Registry Tharaka Nithi County while not being the administrators of the estate of Euginio Njagi Chabari (deceased) jointly intermeddled with land parcel No.Mwimbi/Murugi/943 without express authority."

District Land Registrar was PW10. All he said was that a transfer of the suit land was effected on 15.1.2008 pursuant to a court order in the form of a Grant of Probate in High Court Succession Cause No. 146/96. The land was just transferred to the names of the 1st Appellant and one Julius Kinyua Kirigu, and on the same day both transferred same land to the 2nd Appellant. PW10 testified that he relied on the will dated 14th April, 1980 and this Grant of Probate to effect the transfer.

The evidence of PW 10 could not support count 3 because of two reasons. First the registration of the suit land were effected by PW10 at the Meru South Land Registry. Secondly the date of the registration was 15th January 2008. The Appellants are alleged to have conspired against the deceased on 14th April 1980 at Meru South District Land Registry. The evidence on record does not support the particulars of the charge. There is no evidence that the Appellants were ever at Meru South Land Registry on 14th April, 1980.

For the obtaining registration the alleged false pretences were particularized to effect the Appellants pretended they had powers to register the suit land. P.W. 10 was the key witness in respect of this charge. His evidence was that he effected the transfer pursuant to 2 documents, the will dated 14th April 1980 and a Grant of Probate.

The learned trial magistrate was of the opinion that the Appellants should have obtained a confirmed Grant before effecting transfer to give effect to the will. If that is correct then PW 10 should have known that the Appellant had missed one step and ought to have informed them to fulfill the same before registering the land.

What is important however is that presentation of a grant of Probate Pre-maturely is not sufficient proof of lack of authority to register the land. That omission could not have been sufficient to oust a power or authority donated to the 1st and 3rd Appellants under the written will.

In regard to the intermeddling charge, there was no evidence to support the charge as the Appellants 1st and 3rd had a document which, unless proved forged or made without authority, gave them power of execution. Besides the learned trial magistrate concluded that the will was neither forged nor was made without authority. He could not find any proof of intermeddling if the Appellants acted, in retention to the suit property pursuant to directions given in the will.

I have come to the conclusion that the learned trial magistrates finding that the prosecution had proved counts 3,4 and 5 against the Appellants was without proper basis. There was a due process set by law under the law of Succession Act Cap 160, under which a will in a Probate can be tested. That process was not followed in this case. Instead the complainants chose to report the matter to the police. They should follow due process to challenge the authenticity of the will. Indeed the complainants would even have the option of having the will revoked or altered for other reasons including the will being disinherited beneficiaries to the estate of the deceased.

In conclusion I find merit in the Appellants appeal and do allow them. Accordingly I quash the convictions and set aside the sentences imposed against each Appellant in each of the counts they were convicted. If any monies or securities were deposited in order to secure the release of the Appellants on bail, same should be refunded and or restituted to the depositors.

Those are my orders.

SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY 2013.

J. LESIIT

JUDGE