



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU & PALL J.J. & BOSIRE AG. JA)

CRIMINAL APPEAL NO. 50 OF 1996

BETWEEN

PETER NGUGI THOTHO..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a conviction, judgment, decree, order, or as the case may be) of the High Court of Kenya at Nairobi (Mr. Justice S.O. Oguk) dated 29th July 1996

IN

H.C.CR. A. NOS. 707 & 708 OF 1996

JUDGMENT OF THE COURT

The appellant, Peter Ngugi Thotho was charged, tried, convicted and sentenced by the senior principal magistrate at Thika, jointly with one Benard Jacob Musembi, whose appeal is not before us the same having abated for non-payment of the requisite fee, with making a false document contrary to section 347(a) of the penal code and uttering a false document contrary to section 353 of the same code; and separately of one count of uttering a false document, one count of fraudulent procurement of false registration of title contrary to section 155(2)(a) as read with section 143(1) of the Registration Land Act, Cap 300, Laws of Kenya, and one other count of false swearing contrary to section 114 of the penal code. His first appeal to the superior court was dismissed and he has come to this court on second appeal. There are only two grounds of appeal, but in our view determination of the appeal depends on whether or not evidence was adduced to show that the document he is alleged to have made was false and whether he made it alone or in conjunction with any other person.

Making a false document is defined under section 347 of the penal code under which the appellant was charged in the first count. The paragraph of that section which is relevant to this appeal is 347(a), which reads as follows:

‘Any person makes a false document who –

0. Makes a document purporting to be what in fact it is not;”

The whole of section 347, above, is a definition section and does not at all create any offence. The particulars of the first count aforesaid are stated in the charge sheet as follows:

‘(1) Peter Ngugi Thotho (2) Bernard Jacob Musemi On the 28th day of October, 1993 at Nairobi within Nairobi Area, jointly with intent to deceive or defraud made a false document namely mutation form in respect of land parcel Ndaragu/Kamunyaka/97 purporting it to be a genuine mutation form made by Gatome and Associates Surveyors.”

Clearly the prosecution intended and, looking through the proceedings, called evidence in an attempt to prove the charge of forgery contrary to section 349 of the penal code. It is also clear from the proceedings of the trial and the first appellate courts that the appellant and his counsel understood that the charge the prosecution had set to prove was one of forgery. In those circumstances, notwithstanding that the appellant through his counsel on record now contends that he was unsure of the charge against him in that first count because a definition rather than a penal section was stated, we are of the view that that mistake did not occasion any discernible prejudice against the appellant. Nor can it be said that the mistake rendered the particular count fatally defective. It is a mistake which is curable under section 382 of the Criminal Procedure Code.

The offence of forgery is defined in section 345 of the penal code as the making of a false document with intent to defraud or to deceive. The definition has been judicially considered by courts in various common law jurisdictions. However, the most apt and persuasive judicial pronouncement, in our view, was that of Blackburn, J. in the old English Case of Ex Parte Charles Windsor (1865) 10 Cox C.C. 118.

This is what he said at p.123:

“Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery, because it is reduced into writing. The guilt of the thing which he has done is by no means more than that. He has not made any statement that is purported to be made by the authority of any person on behalf of that person.”

The facts upon which the appellant’s prosecution was based are straightforward. The appellant is the administrator of the estate of his deceased father, Thotho Munika, who died and was survived by two of his three wives. The deceased owned a piece of agricultural land known as Ndarugu/Kamunayaka/97 which upon his death it was resolved by clan elders would be divided into three unequal portions with a view to each widow or their respective houses receiving one portion. The appellant’s mother’s house was to receive the portion which would be in the middle. It is not clear from the evidence on record whether or not the appellant was granted letters of administration of his deceased father’s estate with consent of the surviving beneficiaries. What is clear, however is that after he received the confirmed grant he took steps to partition the above property into the agreed three portions. The respective shares of each house were shown in the schedule of the confirmed grant.

The procedure to be followed in land partition was explained to the trial court. The proprietor of the parcel of land to be partitioned first applies and obtains the appropriate Land Control Board consent to sub-divide the land. Thereafter, he either causes the Land Registrar or personally obtains and completes part 1 of a document called mutation form. Included in part I of that form is a space for the drawing of a sketch showing the manner the proposed partition is to be done and the respective acre ages of the resultant sub-division. It is the sketch and the acre ages which guide a licensed surveyor to demarcate the sub-divisions on the ground of the parcel of land concerned. The surveyor then draws another sketch on another page of the form, but to scale, showing the exact measurements of each sub-division as they are on the ground. It is that sketch which the Land Registrar uses to effect registration of the respective sub-divisions.

It was the prosecution case at the trial that the appellant and his co-accused, without any survey being conducted on the subject parcel of land, prepared and caused to be signed by a firm of licensed surveyors known as Gatome and Associates, the mutation form which was tendered in evidence as exhibit 1. Thereafter they jointly submitted it to the District Surveyor’s Office, at Kiambu, knowingly and fraudulently intending it to be acted upon as a genuine document prepared for registration. The appellant was also alleged to have separately presented the said document at the District Land Registrar’s Office, at

Kiambu, purporting it to be a genuine mutation form, which form was then used to fraudulently procure the registration of one of the sub-divisions as parcel No. Ndarugu/Kamunyaka/863, in the name of one Arthur Njuguna Muhenia. Evidence was adduced to show that that sub-division represented the portion which according to the elder's resolution and with proper acreage was intended to be given to the appellant's step-mother known as Miriam Ngonyo Thotho. However, the appellant transposed the positions of the portion which was meant to go to the said Miriam Ngonyo Thotho and that of his own mother's house. He did so because he wanted to sell the latter's portion to Arthur Njuguna Muhenia, whom as we stated earlier was registered as owner of it on the basis of the aforesaid mutation form, with a view to consolidating it with his own which abutted it.

Arthur Njuguna Muhenia was registered as the sole proprietor of Ndarugu/Kamunyaka/863, on 27th July 1994. However, Miriam Ngonyo Thotho not being aware of the transfer moved to Resident Magistrate's Court, at Thika, in its succession cause No. 165 of 1990 under which the appellant had obtained a confirmed grant of letters of administration, for principally an order of injunction restraining the appellant from surveying and demarcating land parcel No. Ndarugu/Kamunyaka/97. The appellant was served with the application and thereafter, on 15th September, 1994, swore an affidavit he deposed, inter alia, that the parcel of land known as Ndarugu/Kamunyaka/97, had been surveyed, sub-divided and separate title numbers given to the resultant sub-divisions. It was the prosecution case at the trial that no survey was actually conducted as deposed by the appellant. Consequently the appellant had sworn falsely. That formed the basis of the last count against the appellant.

The subject mutation form is duly and properly signed by the appellant at page two thereof as the proprietor. It bears the date 15th June, 1993. At page three of it is a sketch of the sub-divisional units of parcel No. Ndarugu/Kamunyaka/97, their respective acreages and their assigned registration numbers. It is certified by a person described as the Land Registrar, Kiambu the date of certification shown as 19th June, 1993. At the bottom appears a date, namely 28th October, 1993 on the left side, and on the right hand side it has two signatures by the same person. The first one is against a certificate which reads to the effect that he certifies that all the survey work respecting the partition was done by his assistant one L.M. M'Tobui. The second signature shows that the signatory was a surveyor from Gatome and Associates, Licensed Land Surveyors. The last page of the form has the signature of the appellant signifying that as the proprietor of the subject parcel of land he was present during the survey work. Below that signature the surveyor has appended his signature twice, on the first part against a request to the Director of Surveys to amend the registry map to conform with the partition, and the second against a certificate that he had carried out the survey alleged in the form and asking him to register the mutation form. Both signatures like the earlier two were allegedly appended on 28th October, 1993.

It is the above form the appellant and his co-accused are alleged to have made. In his evidence James Mwangi Gatome (P.W.1) admitted he is the one who signed the mutation form as a licensed surveyor. He is indeed a licensed surveyor. He also testified that he neither instructed any of his assistants to go and survey the land nor did he personally do it. He signed the form on the belief and assumption that his assistant called Laban Muthuri M'Tobui (p.w.3) had carried out the survey work. P.W.3. also denied he carried out the survey. P.W.3's evidence was that he requested the appellant's co-accused to carry out the survey. That accused who was himself a surveyor, went away and returned with the mutation form duly completed and said he had carried out the survey work. The witness testified further that he checked the work against a certain map and found that that accused had carried out the survey work. He testified that he found measurements on the mutation form to be correct. How he was able to verify that we cannot possibly tell. It was after he verified the correctness of the measurements on the mutation form that he caused it to be signed by Mr. Gatome, the surveyor.

But there are other witnesses who testified that no survey was carried out and if it was, it was not completed. John Kariba Gatuga (p.w.5) testified that it was carried out half way but the exercise was further frustrated by Miriam Gakonyo Thotho. Elijah Chege Njuguna (p.w.6), the Chief of Ndarugu Location where the land was situated, testified that no survey was carried out earlier than November, 1994. Miriam also denied any survey was carried out on the subject land. Joseph Cieni Mumo (p.w.9), an assistant chief, also denied any survey work was carried out.

There is, however, evidence on record that a survey was done, either partially or fully, but Miriam Gakonyo Thotho later uprooted the beacons. The evidence is indeterminate as to the exact date or time the survey was done. Miriam was prosecuted and convicted with an offence relating to the tempering with boundary marks.

On the basis of the foregoing evidence and other evidence we have not fully set out, the trial Magistrate, Mr. J.M. W. Mugo, Senior Principal Magistrate, held, inter alia, that no effective survey was carried out; that the proper person who was supposed to fix the boundaries but did not do so was the Land Registrar, in terms of the provisions of the Registered Land Act; that the surveyor blindly signed the mutation form and that rendered the document false; that although the second accused was a surveyor, because he was not authorised to carry out any survey work in a private capacity, even if he might have surveyed the subject land, whatever he did was a nullity and that rendered the document invalid, and consequently the affidavit which the appellant swore on 1st September, 1994 relating to the survey was false. She then proceeded to find the appellant and his co-accused guilty as charged, convicted them and meted out various sentences on each count.

The first appellate court, in effect came to the same conclusions but went further to state that the appellate used the firm of Gatome and Associates as a conduit to further a premeditated illegality, conspired with his co-accused to prepare a false mutation form, and that the appellant abused his fiduciary position when he transposed the positions of his mother's portion and that of his step mother, Miriam. The court then proceeded to affirm the appellant's conviction and sentences in the respective counts he faced.

We earlier on stated that the determination of this appeal largely depends on the decision whether or not evidence was adduced by the prosecution to show that the mutation form was false and whether the appellant alone or jointly with any other person made it. There is no dispute that the subject mutation form was signed by Mr. Gatome as the document purports. There is no dispute that the part of the mutation form which is alleged to be false is that part which is signed by Mr. Gatome. If we borrow the words of Blackburn, J. earlier on quoted it is not the making of a document which purports to be what it is which makes it false. The basis of complaint regarding the subject mutation form is that it was prepared without a proper or any survey being done. It was not the appellant who purported to have carried out a survey even assuming for a moment that no survey was carried out. Rather it was Mr. Gatome who actually appended his signatures on the form. He told a lie. But as Blackburn, J. put it, such a lie does not make the entire document false and therefore a forgery.

Moreover, considering that the evidence which was adduced before the trial court was conflicting with regard to the question whether or not a survey was carried out on the subject land, this having been a criminal matter, the conflict should have been resolved in favour of the appellant. We observe that both the trial and the first appellate courts did not, as Mr. Njore for the appellant rightly pointed out, address their minds to the elements of the respective counts the accused persons faced. Their respective findings on whether or not the mutation form was a false document were based on factors which in law are irrelevant considering the fact that the allegations against the appellant and his co-accused centered on the contention that the mutation form was not actually such but an instrument which purported to be one. In our view the evidence adduced was at variance with the particulars of the charge herein before reproduced.

In the above circumstances we come to the conclusion that the mutation form the appellant is alleged to have made was not a false document within the meaning of the phrase false document contained in section 347(a) of the penal code. We also are of the view that no evidence was adduced to show that the appellant prepared the part which purports to have been prepared and signed by Mr. Gatome, but Mr. Gatome himself did so. If there was any falsity in that part of the document it was clearly attributable to Mr. Gatome and not the appellant. In those circumstances the appellant was improperly found guilty and convicted on the first count which as we stated earlier is in effect a forgery offence. Nothing in our view turns on the transposition of two of the sub-divisions of the subject land.

The remaining counts were based on the assumption that the mutation form was a false document. Considering the conclusion we have come to above that it is not a false document, none of the convictions

in those counts can be properly sustained their substratum having gone.

In the result we allow the appeal, quash the appellant's conviction in each of the four counts and set aside the respective sentences which were meted out to him. If he is still serving the sentences, he must be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi and delivered this 15th day of October 1997.

J.E. GICHERU

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR