



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. E032 OF 2021

3RD ACCUSED HESBON ONGETTA
MOMANYIAPPELLANT

VS

REPUBLIC
RESPONDENT

JUDGMENT

(Being an Appeal from the Judgment of the Hon. J. Omburah (SPM) at the Chief Magistrate's Court Milimani Criminal Case No. 255 of 2013 delivered on 22nd March 2021)

BACK GROUND

1. 1st Accused Joshua Maina Kabuthia alias Michael, 2nd Accused Maina Karanja & 3rd Accused Hesbon Ongetta Momanyi were jointly charged with 10 assorted offences of conspiracy to defraud contrary to Section 317 of Penal Code; Forgery c/s 350 (1) of Penal Code; making a document with intent defraud c/s 357 (a) Penal Code; Uttering a Document with intent to defraud c/s 353 of Penal

Code & Obtaining money by false pretenses c/s 313 of Penal Code.

TRIAL COURT EVIDENCE

The evidence before Trial Court Hon. T. Murigi CM was as follows;

2. PW1 Esther Njambi Kangethe, resident of Zimmerman asked the painter in her house to find out if there was land to buy. The painter, Chalo brought her one John Kamau, who told her that owner of Land parcel No 116/276 authorized him to sell the land. The owner was Julius Irungu Waiharo.
3. PW1 met John Kamau, Chalo (Painter) Sammy Machogu, Mugo & Kihoro and she was shown New Roysambu Housing Coop Society Ltd Receipts No 1721 of 30/3/76 & No 2139 of 4/3/76 issued to Julius Irungu Kihoro & ID all produced Exh 3A & 3B & 4 respectively. The sale purchase price was Ksh 2.5 m and he needed to consult family first. Later, PW1, Julius Kihoro, Maina Karanja went to the Society's offices and confirmed Julius Kihoro was owner of the suit property for sale. PW1 went to Ardhi House 4th Floor and the Allotment Letter & Share Certificate were confirmed to belong to Julius Kihoro.

4. PW1 went to Registration of Persons Bureau and confirmed Copy of ID No 1865472 belonged to Julius Kihoro. Thereafter, the seller, Julius Kihoro said that his family agreed to purchase price of Ksh 2m. PW1 paid Ksh 58,000/- to Land Office -Receipt Exh 15.
5. Julius Kihoro took PW1 to Advocate OH Momanyi and each paid Ksh 25,000/- and Sale Agreement was drawn - Exh 16.
6. PW1 paid total of Ksh 1,875,000/- through Bank Transfer Equity bank Moi Avenue Branch OH Momanyi & Co Adv Acc No 0240291466290; Ksh 58,000/- Land Rates and Ksh 50,000/- to Julius Kihoro. 2 Agreements for Sale were drawn 1st Agreement for Ksh 2,000,000/- and 2nd Agreement for Ksh 800,000/-. PW1 took the Agreement, Allotment & Certificate to Lands Office many times but not transfer was done. PW1 was told to go with the seller & was to bring letter from the Society. Julius Kihoro had disappeared for 3 months.
7. PW1 went to Advocate Momanyi who stated Julius Kihoro was suffering diabetes.
8. PW1 went to Lands Office found one Phyllis who demanded the letter and she met Michael Kinuthia and Maina 2nd Accused person. They told her to go

to Advocate Momanyi to get the letter which he gave her dated 4/9/2012 to take to Roysambu Housing Exh 12. The 1st & 2nd Accused persons demanded Ksh 200,000/- to issue her with Title. PW1 paid Ksh 100,000/- and then Ksh 70,000/- They gave her Certificate of Lease for NBI/Block 116/276 of 7/10/1999 Exh 13 & Lease document registered on 8/9/1999 Exh 14.

9. PW1 went with 1st Accused person to Lands Office, paid Ksh 45,000/- Valuation Fees & Ksh 32,040/- Stamp Duty. Thereafter, PW1 met Phyllis who told her the documents were fake and she was to bring the seller. The Lease & title Deed were fake.

After 1 year, PW1 met the real Kihoro genuine owner of the Suit property and they went to the Chief who was not in . The ID cards were identical. They extorted more funds from her; she paid Ksh 50,000/- to 1st & 2nd Accused persons; PW1 deposited Ksh 150,000/- in 2nd Accused person's Account No 004500001546 Equity Bank Githurai Branch and later Ksh 50,000/- on 18/9/2012 and Ksh 100,000/- on 21/9/2012 and they wrote Agreements to that effect. PW1 was to pay further Ksh 400,000/- but had no funds.

10. PW1 reported the matter at Kasarani Police Station, the Accused persons were summoned but no action was taken. Later, 2nd Accused paid her Ksh 200,000 vide cheque and agreed to pay Ksh 270,000/- later.
11. PW1 reported the matter to Nairobi Area Police and investigations were underway culminating with arrest & arraignment of the 3 Accused persons in Court charged with various charges highlighted above.
12. PW2 Sammy Mandela Gachugu; neighbour and friend to PW1 testified and confirmed he accompanied PW1 to the Roysambu Society offices to confirm sale documents from Julius Irungu Kihoro who claimed to be seller of the Plot NBI block 116276 and found the 2nd Accused, Maina Karanja, a neighbour too, in the Society's office. PW2 told PW1 to confirm identity of seller with Registrar of Persons and she came with document duly stamped that 1st Accused was seller. PW2 accompanied PW1 to 3rd Accused's offices, Advocate OH Momanyi Advocates, where they all met seller 1st Accused person with his witnesses and brokers. The Agreement for Sale was prepared

and he signed as witness Purchase price was Ksh 2m he was not part of price negotiations.

13. PW 2 witnessed PW1 make various payments and went and did electronic transfer of Purchase price to Mr Momanyi's Account of Ksh 1, 875,000/- and the funds were for 1st Accused person who was accompanied by 2 men Kamau & Wa Muthee. After 2 weeks, PW1 called PW2 to take her to the Society's offices; 2nd Accused Maina Karanja & PW1 paid Ksh 100,000/- Later, 1st & 2nd Accused person came to her house and she called him to witness them having brought title in PW1's name.

14. Later, someone reported to the Chief that someone PW1 was building on their Plot. As Chairman of the Community, he enquired and found it was the real Julius Irungu Kihoro who appeared younger, taller than the 1st Accused who posed as owner who did not have front teeth. The Transfer of Lease Exh 11 from 1st Accused person to PW1 and stamped by the 3rd Accused Momanyi Advocate was fake. PW1 paid Ksh 2m for sale of land.

13. PW3 Bernard Kipkemoi Letich from Ministry of Lands Nairobi testified that CID wrote letter dated 5/12/2012 Exh 12 and sought information history of ownership of Land Parcel NBI/Block 116/276;

certified copies of green card, certified copy of letter of allotment and certified copy of letter of lease and any other relevant information or letter/document. By letter by his colleague dated 20/12/2012 Exh 28 which indicated registered owner as Julius Irungu Kihoro of Box 74657 Nairobi leased from GOK for 99 years lease as shown by Green card opened on 18/12/2012 for Portion 0.0347 hectares. White Card Exh 34 Letter in Response Green Card and other documents Exh 28, 29, 33 & 34 were genuine from Lands Office. Exh 31 & 32 were not from Lands Office.

14. PW4 Julius Irungu Kihoro, Purchaser/owner of 3 Parcel Numbers 276, 987 & 1077 purchased on 7/9/1976 and registered with New Roysambu Land Company and he paid over the years by instalments; he produced receipts of payments made for purchase price, survey fees Advocates Fees from Maosa Advocates & processing of Title documents.
15. PW4 found on the ground encroachment onto the properties he reported to New Roysambu Company Treasurer Joshua Maina & Security Maina Karanja (both 1st & 2nd Accused persons respectively) and after investigations, PW1 was fencing Nairobi Block

116/276.PW1 called the Chief and both produced documents of ownership and PW1 confirmed PW4 had not sold her the property yet the documents ID card and names of seller were similar.

16. PW5 CI Iranda Masiku; Forensic Document Examiner, examined the questioned document, Copy of Lease with known signatures C1 -C2 specimen signatures of one Julius Irungu Kihoro and Specimen signature of Commissioner of Lands & the signatures were not by the same hand. The documents were not genuine.
17. PW6 Filbert Liwa from Registrar of Persons on 8/6/2016 received from CID HQ letter Exh 39 ID 18654472 with attached form with fingerprints impressions- Form P20 Exh 40(a) & ID card of Julius Irungu Kihoro No 18654472. A search confirmed the name Julius Irungu Kihoro ID 1865472 and confirmed extract of register from our office to confirm that ID belongs Julius Irungu Kihoro and it has its particulars and finger prints impressions P Exhibit 42.
18. PW7 CPL Samuel Kamau of DCI Investigation Officer received Complainant Esther Njambi Kangethe, PW1 who reported Julius Irungu Kihoro selling Parcel Land Nairobi Block 116/276 situated

in Zimmerman. To prove ownership he provided Lease Certificate of New Roysambu Housing Co Ltd in the name of Julius Irungu Kihoro dated 19/4/79. He carried out investigations of 1st & 2nd Accused persons lodging documents and that were found by expert witnesses to be fake and forged despite PW1 having made various payments over and above purchase price to 1st & 2nd Accused persons.

19. PW8 No 57399 PC David Kweomi Ndiema of Land Fraud Investigations DCIO HQ testified that he took over the matter when colleagues were transferred and during hearing, PW3 Bernard Kipkemoi Letich testified and pointed to 1 of Accused persons appearing in the documents, Defense Counsel pointed to the real owner of the property PW4 Julius Irungu Kihoro. He later took his fingerprints and Statement recording and copy of ID card and took to Registrar of Persons who confirmed to be *bona fide* owner of the property.
20. The Accused persons were placed on their Defenses; 1st Accused was Treasurer later Secretary of Waisambu Housing Cooperative Society and narrated how he denied receipt of any monies by PW1 to him. 1st Accused admitted refund of Ksh 200,000/- vide cheque as another

person with similar names came claiming same property.

21. 2nd Accused Secretary of Roysambu Cooperative Society claimed that PW1 came to ask for clearance letter to enable her process a title and that PW1 came with a Certificate and claimed she bought from Julius Irungu Kihoro and he knew nothing about the transfer. He knew nothing of the Ksh 2 million as he was not given the money and he did not forge any lease certificate from Ardhi House.
22. 3rd Accused/Appellant stated that on 9/12/2009, PW1 Complainant and Julius Irungu Kihoro; came to his office; St Georgis House within Parliament Road, Nairobi and requested he draws a Sale Agreement and they came with a witness. They brought Allotment Letter Exh 3, Payment Receipt for Plot No. Nairobi Block 116/276 Exh 3(a) & (b) for New Roysambu Housing Company Ltd and Certificate of the Company Exh 6.
23. He drew Sale Agreement of Ksh 2m and was advised to draw another Agreement for Ksh 800,000/- by Kariuki who was to assist in transfer of the property to Purchaser's name. 3rd Accused

advised them to check with Lands Office the rates pending for payment. The 2nd Agreement was by Kariuki and he witnessed the Complainant and seller Julius Irungu Kihoro as they appeared before him and gave him Identity cards and they had their witnesses too.

24. The Purchase price Ksh 1,875,000/- was deposited in his Account Equity Bank AC 0240291466290 Harambee Avenue Branch Exh 9 deposited by PW1 buyer Esther Njambi Kangethe for onward transmission to the seller. He was paid Ksh 50,000/- by PW1 and he spent Ksh 20,000/- during the meeting and the rest was to settle rates at Lands Office. He paid the seller Ksh 1,835,000/- as per discharge D Exh 2. His role ended there.
25. 2 years thereafter; 14/9/2012, PW1 and witnesses/parties came to his office and asked him to confirm that Julius Irungu Kihoro sold property to PW1 and sought clearance from Roysambu Housing Co. He prepared the letter PExh 12 and all parties signed, Samuel Mandela Gachugu & John Kamau Mwangi but Julius Irungu Kihoro failed to turn up.

26. A year later, he was summoned to DCI Headquarters to confirm that he witnessed the Complainant PW1 & Julius Irungu Kihoro transact in his office, he was locked up and next day he was arraigned in Court charged with witness in **Criminal Case 314/2013** with 2nd Accused and later consolidated with the present matter.
27. He was charged with conspiracy to defraud Ksh 2m together with 2nd Accused person which was not true, he did not meet 2nd Accused until they were charged together in the matter. The 3rd Accused person stated that he did not participate in any of meetings for purchase of property until the parties came to his office. He was not instructed to conduct due diligence as parties had resolved the same prior to coming to his office. He did not negotiate, sell, transfer any property, the parties agreed then came to his office and handed him documents and he prepared the Sale Agreement. Before being arraigned in Court 1 in this matter, he was sued in **Civil Case ELC 776 of 2012** as 5th Defendant.

28, The Trial Court delivered judgment on 22/3/2021 and found All/Each of the Accused persons guilty as charged in Counts 2,5,6,7,8,9 & 10 under **Section 215 CPC**. On 1/4/2021 after Pre-sentence proceedings the Trial Court sentenced each of Accused persons Ksh 50,000/- fine in default 6 months imprisonment for each of the Counts found guilty.

PETITION OF APPEAL

On 13th October 2021 Hesbon Ongetta Momanyi, 3rd Accused person; the Appellant herein filed a Petition of Appeal with 14 grounds of appeal condensed as follows;

1. Convicting the Appellant notwithstanding that he was an advocate working in the ordinary course of his duties and failed to take judicial notice of the mandatory provisions and in contravention of **Section 80 of the Advocates Act**.
2. Finding-that the prosecution had established *prima facie* case against the Appellant on entirely wrong principles and key ingredients of the offences the appellant was facing were proved in accordance with the required standards of proof

beyond any reasonable doubt. The offence of conspiracy to defraud contrary to section 317 of the Penal Code without proof of the salient ingredients of the offence-conspiracy to defraud.

3. Count-one-was-defective-and-untenable in law in the circumstances hence conviction on it was unsafe.
4. The Complainant had done due diligence in ascertaining the identity of the seller and verified her ownership documents from the relevant authorities before going to the Appellant's office for making and executing a sale agreement accompanied by the seller and their respective witnesses, therefore the appellant's role as conveyancing lawyer was limited. The Appellant had no prior knowledge, that the documents presented to him were fake and had no mechanism of detecting their status particularly when the complainant and the seller checked their validity together at the land buying company before executing sale agreement hence conviction was without basis and unsafe.
5. The offence of making a document without authority with intent to defraud contrary to Section

357(a) of the Penal Code disregarding the evidence on record without justifiable reason that the complainant and the seller had appeared together at the appellant's office with their express authority to attest/witness the signing of transfer of lease against their affixed photos (passport size) in the ordinary course of his duties as an Advocate.

6. Convicting the Appellant on the offence of obtaining money by false pretenses contrary to section 313-of the Penal Code as detailed in Count 9 thereby failing to appreciate that the appellant's involvement in the sale agreement in question was in the ordinary course of his duty as an Advocate between complainant and seller who received money for onward transmission to the seller.
7. Failing to take into account the defense and uncontroverted evidence adduced by the appellant thereby disregarded and refused to see, consider, examine and evaluate such evidence and attached authorities or decisions from the Court of Appeal and the High Court.
8. Failing to note and consider that crucial witness the Painter and one Samuel Kamau who linked the Complainant and the Seller were never called by

Prosecution to shed more light on the origin of the transaction in question.

SUBMISSIONS BY THE APPELLANT

1. “On diverse dates between 1991 - 2009 at unknown place within the Republic of Kenya jointly with others not before court conspired with intent to defraud ESTHER NJAMBI KANGETHE Kshs.2,000,000 by purporting that you were in position to sell her a piece of land Nairobi/Block/116/276 a fact you knew not to be false”.

Points to Note

2. The charge is defective ‘a fact you knew not to be false.’ This is ambiguous, it is not clear as what is meant and the same was not amended hence conviction on the same is not safe.
 - The period of conspiracy is 18 years.
 - The complainant expressed intention to purchase land in 2009 to her painter - Kyalo.
 - The painter introduced one John Kamau Mwangi to the complainant Esther Njambi Kangethe.
 - The said John Mwangi introduced the seller Julius Irungu Kihoro to the complainant.

- There were series of meetings between the seller, the complainant and other people in the absence of the appellant.

I rely in the case of;

Bukenye and others vs. Uganda [1972] EA 549

where the court stated;

“In our view, the failure by the prosecution to call crucial witness weakened their case to an extent that they failed to prove the case against the appellant beyond reasonable doubt as required in criminal cases. The gap created by failure of the prosecution to call important witness is a doubt where benefits we must give to the appellant which we hereby do.”

3. Points to Note

- It is in evidence that the complainant and the seller presented themselves before me in my office with the transfer of lease already prepared for witnessing.
- They both signed the transfer willingly in my presence.
- I only witnessed their signing their authority to do so.
- I did not execute/witness signing of the transfer on behalf of another person.

- There is no evidence that I intended to defraud or deceive anybody and I did the witnessing as a conveyance lawyer not a beneficiary, a seller or otherwise.

4. Ingredients of Making a Document

1. The document was made by accused person.
 2. The document must be intended to deceive or defraud.
 3. The making, signing or execution was done without authority.
5. The complainant buyer and seller both willingly signed the transfer in my presence hence the charge cannot stand as there is no evidence that I made the transfer on behalf of Julius Irungu Kihoro.

The prosecution did not prove that the document was made by me and I made the same on behalf of another person hence they failed to prove their case beyond any reasonable doubt. The drawer of the transfer documents is not known nor was he disclosed.

6. Points to Note

- There are two (2) sale agreements between the complainant and one Julius Irungu Kihoro.
- The land parcel is Nairobi Block 116/276.

- Purchase price in the two agreements is Kshs.2,000,000/= and Kshs.800,000/= (contractual)
- The complainant and the seller both signed the said agreements together with their respective witnesses - the intention was to sell and purchase.

Ground 1

7. It is my submission that there was no complaint lodged against me as per the provisions of section 80 of the Advocate Act hence referring the same to the Tribunal as proposed but the prosecution is overtaken by events.

WRITTEN SUBMISSIONS BY THE RESPONDENT

1. In the appeal the issue for determination is whether in the whole transaction of the land sale agreement in question, the appellant did an overt act/act that resulted in commission of offences of conspiracy, fraud and forgery. The answer to that question is founded on the scope of limitation of the advocate's role when undertaking or pursuing duties of profession nature in line with his duties as an advocate.

2. A section of the Advocates Act Cap 16 Laws of Kenya, provides in sub-section (1) that a complaint against an Advocate of professional misconduct, which expression includes disgraced or dishonorable conduct incompatible with the status of an advocate may be made to the tribunal by any person. Under sub-section (3) the advocate may then be required to appear before the tribunal and file a response if any.
3. **Section 55 of the said Act** highlights savings of disciplinary powers of court. It says; nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the Judges of the court to deal with misconduct or offences by an advocate, committed during, or in the course of, or relating to proceedings before the Chief Justice or any Judge.
4. In brief, the alleged conduct of the appellant amounted to professional misconduct, if sufficiently proved, and the right forum to deal with the same would be by way of a duly constituted tribunal pursuant to the provisions of **section 60 of the Advocates Act Cap 16 Laws of Kenya**. That is the remedy laid down, available to an

aggrieved party who has suffered loss and damage due to professional misconduct by an Advocate, while acting in the course of his ordinary duties. One tried and found guilty the penalty is provided under those provisions.

Authority in Support of Respondents Submissions

- ✓ Court of Appeal at Nairobi.
 - ✓ Criminal appeals Nos. 118, 120 of 1981.
 - ✓ (Appeal from the High Court at Kisumu. Seriven J. 1985 KLR. *Makokha vs. Republic*)
5. The appellants were jointly charged in Resident Magistrate's Court under section 308(1) of the penal code (Cap.63) in that they were found with dangerous weapons with intent to commit a felony of robbery with violence. The prosecution alleged that the complainants had encountered the appellants at a bridge who attacked them with pangas and ran away. The appellants denied the charge and stated in their defence that they hadn't known each other prior to their arrests. After they were convicted and sentenced, the appellants appealed to the High Court asserting their earlier defences. The Judge purporting to act under section 352 (2) of the CPC (Cap 75) summarily

rejected the appeals. The appellants appealed against this summary rejection to the Court of Appeal.

The Court held that; **It follows that where 2 or more persons are jointly charged with an offence under Section 308 (1) of the Penal Code, an essential ingredient of the offence must be proof of a common intention between the persons charged jointly to commit a specific felony in future.**

The assertion by the Appellant that they were strangers to each other amounted to a contention that they could not jointly, acting in concert, have formed the intention or made preparation to commit a felony.

ANALYSIS & DETERMINATION

1. The Court considered the Trial Court record, Petition of Appeal and detailed submissions made herein on behalf of the Appellants and the Respondents. This appeal lies on whether the prosecution proved its case against the Appellant, 3rd Accused to the required legal standard, and in particular, whether the Prosecution proved all the essential ingredients of the charges preferred against 3rd Accused person/Appellant, Counts 1,2,3,4,5 & 9.

2. As first appellate court, the court is obligated to re-evaluate the evidence afresh, and make its own conclusions bearing in mind that it did not have the advantage of hearing and observing the demeanor of the witnesses as elaborated in the case of **Okeno vs. Republic [1972] E.A 32.**

3. It is trite that all criminal offences require proof beyond reasonable doubt. In **Peter Wafula Juma & 2 Others v Republic [2014] eKLR**; Court referred to

Viscount Sankey L.C in the case of H.L. (E)* **WOOLMINGTON V DPP [1935] A.C 462 pp 481** on legal burden of proof in criminal matters, that;

‘Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’

Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

4. With regard to Count1the 3rd Accused person jointly with 1st & 2nd Accused persons were charged with the offence hereinbelow;

Section 317 of the Penal Code provides for Conspiracy to defraud as states as follows:

“Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any

person, is guilty of a misdemeanor and is liable to imprisonment for three years.”

5. Shah v Republic (Criminal Appeal E070 of 2021) [2024] KEHC 837 (KLR) (25 January 2024) (Judgment) The case-law relating to proof of the offence of conspiracy c/s 317 Penal Code is as follows;

Ronald Kiptoo Yator vs Republic 2019 eKLR, the Court observed;

This court agrees with the Appellant’s counsel that for the offence of conspiracy to defraud to be complete evidence must be adduced to show that there existed an agreement, consent or combination of the two or more persons.

For that proposal, the Appellant’s counsel relied on the case of Christopher Wafula Makhoha -vs- Republic [2014] eKLR. This court agrees with the holding in that case where the court (Mabeya J) held that the charge of conspiracy to defraud must involve two or more persons and not a single accused person.

6. Evanson Mwangi Kihumba v Republic [2022] eKLR, the Court considered conspiracy as; In **Black Law Dictionary 9th Edition at page 351 Conspiracy is defined as follows;**

“An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreements motive, and (in most cases), action or conduct that furthers the agreement; a combination for unlawful purpose.

The agreement may be proved in the usual way or by proving circumstances which the jury may presume it. Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in principle of an apparent criminal purpose in common between them.”

The High Court in **Ann Wangechi Mugo & 6 others v Republic [2022] eKLR** also elaborated on how to prove conspiracy and held as follows:

“To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court (see Republic Vs Anne Atieno Abdul & Others [2017] Eklr

In Abdi & another v Republic (Criminal Appeal E033 of 2020) [2024] KEHC 8021 (KLR), the court held as follows;

“167.Having evaluated the evidence adduced, I find that the trial was well guided in its finding on conspiracy. The intention of the conspirators cannot be supported by direct evidence “for not even the devil knoweth the mind of man”. Conspiracy by its nature is an opaque offence heavily guarded and clouded.

168.It is not easy to find direct evidence and indeed part of commission the offence is to conceal the evidence. Thus, if the court were to insist on direct evidence per se, no one will be convicted of the offence. The knowledge and involvement in the offence can be inferred from the conduct of the parties with a common desire to commit a criminal offence”

7. The prosecution ought to prove beyond reasonable doubt, common intention among between the Accused persons that depict knowledge, consent and/or agreement to act in concert to achieve desired or earmarked illegal or unlawful outcome through deceit, dishonesty or fraud.
8. In the instant case, evidence on record PW1 & PW2 stated, that the meeting and discussions on sale and purchase of suit property was by PW1 enquiring from her Painter Kyalo who brought on board one John Kamau, who told her that owner of

Land parcel No 116/276 authorized him to sell the land. The owner was Julius Irungu Waiharo & Sammy Machogu Mugo & Kihoro &PW1 went to Ardhi House 4th Floor and the Allotment Letter & Share Certificate were confirmed to belong to Julius Kihoro. PW1 went to Registration of Persons Bureau and confirmed Copy of ID No 1865472 belonged to Julius Kihoro who took PW1 to Advocate OH Momanyi.

9. At the 3rd Accused Person's office, Agreements were drawn based on documents that were handed over to Advocate to draw the Sale Agreement. It is also confirmed that 2 Agreements were drawn 1st for Ksh 2m and the other for 800,000/- which one Kamau/Karanja brought prepared requiring signage and witnessing.
10. The 3rd accused/Appellant conceded the parties came to his office the Agreement for 2 m he drew and Agreement for Ksh 800,000/- already prepared and he executed both documents. The Sale Agreement was drawn from documents given to him by parties and which PW1 had confirmed to be genuine as per her testimony; they went to Roysambu Housing Coop Ltd Checked with

Lands/Ardhi House and Registrar of Persons BEFORE going to 3rd Accused person's office.

11. Secondly, the 3rd Accused received monies on behalf of Seller 1st Accused person and the funds were deposited in his Account and after signing Sale Agreement released funds to Seller, 1st Accused person. Thereafter, when 1st Accused disappeared, the Parties came to 3rd Accused person's office, he told them the 1st Accused /seller was sick, he did not hide or ran away or refuse to talk engage with them.
12. Later, when summoned and also sued, 3rd Accused person was available and he cooperated with authorities. For almost 10 years, the 3rd Accused was reachable, in touch, consulted/interrogated until he was arraigned in Court. This is not conduct of one who connived with 1st Accused person to defraud PW1 of land parcel or Purchase price. 3rd Accused was not involved in negotiations on purchase of the property, that was done way before, the parties came to his office. At the office he was presented with documents and parties sought his legal services to draw Sale Agreement at Pg 162 of Record of Appeal; between Esther

Njambi Kangethe ID 4435706 of Po Box 780 Ruaraka & Julius Irungu Kihoro ID 1865472 P.O.Box 74651 Nairobi for Sale of LR Nairobi Block/116/276 situated in New Roysambu Housing Co Ltd.

13. PW1 paid total of Ksh 1,875,000/- through Bank Transfer Equity bank Moi Avenue Branch OH Momanyi & Co Adv Acc No 0240291466290; Ksh 58,000/- Land Rates and Ksh 50,000/- to Julius Kihoro. 2 Agreements for Sale were drawn 1st Agreement for Ksh 2,000,000/- and 2nd Agreement for Ksh 800,000/-. PW1 took the Agreement, Allotment & Certificate to Lands Office many times but not transfer was done. PW1 was told to go with the seller & was to bring letter from the Society. Julius Kihoro had disappeared for 3 months.
14. The events outlined above depict 3rd Accused /Appellant carried out normal legal duties as Advocate, Parties voluntarily came to his office, they told him what they wanted, he took instructions and they presented documents and he prepared Sale Agreement and was presented with 2nd Agreement for signing and witnessing. All these processes were carried out in the normal course of Legal Work in Conveyancing.

15. The Trial Court found ‘that the Imposter seller took Complainant to his Advocate, 3rd Accused with whom he must have been familiar with and who by virtue of his office and practice was under obligation to act in law with due respect to the oath of his office and to do what was lawful in the circumstances. He was under duty to ensure that everything he was witnessing was lawful and not fraudulent. It was his duty to ensure integrity of any legal document that he drew and witnessed in the ordinary course of his duty.’ This is apt observation of duty of care required in discharge of legal services to clients.
16. However, in the circumstances, there is no evidence on record that the 1st 2nd & 3rd Accused person hatched the plan by conspiring to defraud PW1 of her money and/or Suit property through fraudulent sale. Infact evidence shows, 1st Accused an official of the Company obtained members documents, PW4 Julius Kihoro impersonated him and presented the documents and held himself out to PW1 as either being the seller or with authority to sell the property Nairobi/Block 116/276 knowing

very well from the Company records the property belonged to PW4.

17. At no point in the preliminary stage is there evidence of connivance of all Accused persons through contact, knowledge, consent and/or agreement that in concert they would defraud PW1. Initially 1st & 2nd Accused persons met PW1 & her neighbor, PW2 at her home and went together to various official offices and pretended to confirm a genuine sale and ONLY thereafter, went to the advocate 3rd Accused in his office and sought drawing of Sale Agreement and assured the 3rd Accused person the sale was legitimate and documents presented had been verified.
18. In the absence of initial contact meeting conversation on sale of suit property to PW1, I find common intention not established between 1st & 2nd Accused persons with 3rd Accused persons. Infact the 3rd Accused saw 2nd Accused for the 1st time upon detention and later arraignment in Court. There is no nexus of common intention to defraud save for 1st Accused taking PW1 & PW2 to 3rd Accused persons office for drawing Sale Agreement.

19. PW1 testified that she verified the documents presented by 1st Accused and agreed to the sale until, she was accosted by PW4 the actual Julius Irungu Kihoro with his daughters on the suit property as she was fencing and when Lands Ardhi House office declined transfer seeking to see the actual seller, and 1st Accused had disappeared in thin air.
20. In the absence of any action, omission or insinuation of 3rd Accused's conduct to suggest connivance and/or common intention to defraud PW1, the offence of conspiracy with intention to defraud fails against 3rd Accused person, out of carrying out legal duty drew Sale Agreement, received Purchase Price funds and discharged by paying the Seller 1st Accused. There was nothing overt that suggested the documents presented were forged and PW1 already, conducted due diligence which Trial Court emphasized was to be done by 3rd Accused.
21. The 3rd Accused person /Appellant is discharged of Count 1 due to lack of evidence to prove beyond reasonable doubt that the 3rd Accused was part of the conspiracy to defraud PW1 of land or money.

The evidence on record does not confirm that the Appellant was involved in conspiracy to defraud through the forged documents presented for him to draw Sale Agreement and there is no evidence to imply that the 3rd Accused person knew and/or was involved in obtaining the forged documents or personating actual owner/seller PW4.

22. Count 2 3 & 4 Forgery c/s 350 (1) Penal Code, Count 5 making a Document with intent to defraud c/s 357 (a) of Penal Code; without authority making a Transfer of Lease The 3rd Accused/Appellant was charged with forging a Lease Document and Certificate of Lease for LR Nairobi Block 116/276 with intent to defraud PW1.

23. The documents prepared and/or witnessed by 3rd Accused/Appellant are;

a) Agreement for Sale LR Nairobi/Block/116/276 situated in New Roysambu Housing Co Ltd for Ksh 2,000,000/- exclusive of charges by Ministry of Lands for processing title and deposit of Ksh 50,000/- paid as deposit. The Agreement duly signed by Vendor, Julius Irungu Kihoro & Purchaser,

Esther Njambi Kangethe in presence of witnesses; John Kamau Mwangi & Sammy Mandela Gachugu stamped by Commissioner For oaths OH Momanyi Advocate.

b) The 2nd Agreement for Ksh 800,000/- witnessed by 3rd Accused Appellant is contested as drawn by one Kariuki

Brought to the Advocate for execution and he was told it was for purpose(s) of Stamp duty.

c) Letter on Letter heads OH Momanyi & Co Advocates of 4/9/2012 addressed to Roysambu Housing Cooperative Society Reference Confirmation of Sale of Land Ref Nairobi Block 116/276 Vendor Julius Irungu Kihoro Purchaser Esther Njambi Kangethe. The Land Parcel was sold on 16/12/2009 and witnesses present during signing of Agreement for Sale were John Kamau Mwangi for Vendor and Samuel Mandela Gachugu for Purchaser. He confirmed the whereabouts of the vendor were unknown and hence could not be contacted for further information.

24. The evidence on record confirms other than these 2 documents, 3rd Accused Appellant did not author the subject documents presented to PW1. PW1

testified that she met 1st Accused who gave her the title document, Share Certificate LR 8345/11 Plot No 22 & letter of Allotment. They met at Gichobo Bar and 1st Accused produced ID and receipts in the name of Julius Irungu Kihoro.

25. When they went to 3rd Accused person's office, PW1 gave him the Allotment & Share Certificate and he prepared the Agreement for Sale. There is no evidence of 3rd Accused/Appellant prepared any other document and presented to PW1 with intent to defraud her. The documents prepared by 3rd Accused/Appellant were pursuant to instructions details and information by and from the Parties that came to his office, the Purchaser & Seller and their Witnesses, agents or brokers.
26. The documents 3rd Accused person/Appellant prepared the parties signed willingly with no coercion, inducement or misrepresentation was made by Appellant to PW1. PW1 was given the 2 documents from New Roysambu Housing Co Ltd. The totality of the above evidence on Trial Court record does not disclose and act omission statement or writing that proves 3rd Accused

Appellant forged the stated documents. The counts of forgery also fail against 3rd Accused/Appellant.

27. Obtaining money by false Pretences c/s 313 of Penal Code. The 3rd Accused /Appellant with intent to defraud obtained Ksh 1.875m from Esther Njambi Kangethe Parcel Land Nairobi Block 116/276 within Nairobi a fact they knew to be false.

28. The evidence on record shows that Julius Kihoro took PW1 to Advocate OH Momanyi and each paid Ksh 25,000/- and Agreement for sale was drawn - Exh 16 and parties voluntarily executed the Agreement. PW1 paid Ksh 1,875,000/- through Bank Transfer Equity Bank Moi Avenue Branch OH Momanyi & Co Adv Acc No 0240291466290; thereafter the funds were transferred to 1st Accused who posed as Julius Kihoro Vendor.

29. The 3rd Accused Appellant did not offer any land for sale to PW1. PW1 and 1st Accused & 2nd Accused met with others and discussed the sale/purchase of Nairobi/Block 116/276 before they went to the Advocate 3rd Accused Appellant after there was agreement then 1st Accused took PW1 to 3rd

Accused as advocate who drafted Agreement and transferred the purchase price to Vendor in line with duty of Conveyancing Lawyer. Similarly, this Court finds no act, omission, utterance or presentation by the Appellant to PW1 to sell her land or demand monies from her for alleged purchase of land. He acted as Advocate gave legal services to vendor and Purchaser.

**30. JR DIV MISC APPL. NO. 124 OF 2013
REPUBLIC/APPLICANT -VS ODPP CM CT
KIBERA & AG EX PARTE: DISMAS NDEGE
OGWOKA & SIMON NDEGE**

The application by Simon Ndege, the 2nd Applicant herein on 16th April, 2013, on 17th April 2012, police officers arrested the applicants and on the 18th April, 2012, were both charged with two counts of Obtaining Money by False Pretences contrary to Section 313 of the Penal Code. By the time they were charged in court, they were in the middle of taking the 1st Applicant's statement and they had not taken any statement from the deponent which omission deprived the police of an opportunity to fairly

evaluate the case before deciding to charge them in court. It was deposed that the background to the charge was a conveyancing transaction which was once conducted by the firm run by the deponent and in which the 1st Applicant is an associate and has never been a partner which firm was at all material times and to date known as S. Ndege and Company Advocates. The said transaction at the time when it was being handled at his said firm was handled by the 2nd Interested Party, Stephene Mose, exclusively and it involved the sale of property known as LR No. 12715/517 - Syokimau from one Regina Nyokabi Kuriato the first Interested Party, Mercia Properties Limited as purchasers. In the course of and before completion of the said transaction, Stephen Mose who was handling the said transaction left the firm of S. Ndege and Company Advocates and established his own firm known as Mose and Company the firm of S. Ndege and Company Advocates released all monies in relation to this transaction that

were held in its account to the firm of Mose and Company Advocates receipt of which the latter firm acknowledged and released the firm of S. Ndege and Company Advocates from any liabilities relating to the said transaction. While under arrest at Gigiri Police Station, the 2nd Interested Party came with the above stated letter of discharge to inform the police that none of the Applicants had anything to do with this transaction they were charged in Court.

GVOdungaj (as he then was) observed as follows; while granting orders of Certiorari & Prohibition;

It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal

offence, the Court will not hesitate to bring such proceedings to a halt.

31. Disciplinary Proceedings Under Advocates Act. Section 53-60 of the Act provides for disciplinary proceedings against Advocates misconduct dealt with by Advocates' Complaints Commission Tribunal. The Advocates Act Section 80 provides for Advocates professional misconduct to be placed before the Tribunal. The Purchaser PW1 ought to have lodged complaint against the Appellant and processed with the Tribunal first. PW1 was also sued in **ELC 776 of 2012**

DISPOSITION

- 1. The Appeal succeeds on all Counts 1, 2,5,6,7,8,9 & 10**

The Prosecution did not prove beyond reasonable doubt that 3rd Accused/Appellant Advocate for both parties Purchaser and Vendor conspired to defraud PW1 forged and made documents intending to defraud PW1 and obtained by false pretences monies or land from PW1.

- 2. The Counts/Charges preferred against 3rd Accused Appellant only are dismissed and**

convictions quashed and fines to be reimbursed and sentences set aside.

**JUDGMENT DATED SIGNED DELIVERED IN OPEN
COURT CRIMINAL DIVISION HIGH COURT
MILIMANI- VIRTUALLY/PHYSICALLY ON 9/10/2025.**

**M.W.MUIGAI
JUDGE**

ORIGINAL