



REPUBLIC OF KENYA



KENYA LAW
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**Director of Public Prosecution v Alii & 2 others (Criminal Case
E371 of 2021) [2023] KEMC 275 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEMC 275 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E371 OF 2021
ZK KAGENYO, RM
NOVEMBER 1, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

HASSANI SELEMANI ALII 1ST ACCUSED

SULEIMAN HASSAN SULEIMAN 2ND ACCUSED

ALI ABDALLAH NGANGA 3RD ACCUSED

RULING

1. By way of a consolidated charge sheet, the three accused persons are jointly facing one indictment in count one, and severally separate indictments as hereinbelow;

a. In count 1;

The three accused are facing a joint indictment of conspiracy to defraud contrary to section 317 of the Penal Code.

The particulars are that, on or before the 9th day of September 2016 at unknown place within the republic of Kenya, jointly with others not before Court conspired to defraud Rashid Mohamed Barua and the heirs of the estate of Ahamad Masudi Pashua alias Ahmed Masudi Daye of their land registered as Kwale/Msambweni A/2883 measuring 2 Hectares valued at Kshs. 13, 200, 000/=.

b. In count 2;

The 1st Accused is facing an indictment of forgery of judicial document contrary to section 351 of the Penal Code.



The particulars are that on or before the 9th day of September 2016 at unknown place within the Republic of Kenya, jointly with others not before court forged a Court Order dated 9th September 2016 vide Kwale Kadhi's Court Succession Number 77 of 2016.

c. In count 3;

The 1st Accused is facing an indictment of uttering a false document contrary to section 353 as read with section 351 of the Penal Code.

The particulars are that on the 19th day of December 2016, at Kwale Land Registry within Matuga sub-county of Kwale county, you uttered a false document to wit a Court Order vide Kwale Kadhi's Court Succession Cause Number 77 of 2016 to the Registrar of Land.

d. In Count 4;

The 1st Accused is facing an indictment of forgery contrary to section 345 as read with section 349 of the Penal Code.

The particulars are that on or before the 9th day of September 2016 at unknown place within the Republic of Kenya, jointly with others not before court you forged a Death Certificate Number 7577177 in the name of Rashid Mohamed Barua.

e. In Count 5;

The 1st Accused is facing an indictment of uttering a false document contrary to section 353 as read with section 349 of the Penal Code.

The particulars are that on the 19th day of December 2016, at Kwale Land Registry within Matuga subcounty of Kwale county, you uttered a false document to wit a forged Death Certificate Number 7577177 in the name of Rashid Mohamed Barua to the Land Registrar.

f. In Count 6;

The 1st Accused is facing an indictment of obtaining registration by false pretences contrary to section 320 as read with section 36 of the Penal Code.

The particulars are that on the 19th day of December 2016, at Kwale Land Registry within Matuga subcounty of Kwale county, you willfully procured for yourself a land certificate for a parcel of land Kwale/Msambweni A/ 2883 by falsely pretending that you are the heir of Ahmed Masudi Daye alias Ahamadi Masudi Pashua and Rashid Mohamed Barua.

g. In count 7;

The 2nd Accused is facing an indictment of false swearing contrary to section 114 as read with section 36 of the Penal Code.

The particulars are that on the 9th day of September 2016, at Kwale Kadhi's Court within Matuga subcounty of Kwale county while giving evidence in the Succession Cause Number 77 of 2016 you falsely swore before Hon. Kadhi Wendo Shaban Wendo that Rashid Mohamed Barua was dead a fact you knew to be false.

h. In count 8;

The 3rd Accused is facing an indictment of false swearing contrary to section 114 as read with section 36 of the Penal Code.



The particulars are that on the 9th day of September 2016, at Kwale Kadhi's Court within Matuga subcounty of Kwale county while giving evidence in the Succession Cause Number 77 of 2016 you falsely swore before Hon. Kadhi Wendo Shaban Wendo that Rashid Mohamed Barua was dead a fact you knew to be false.

2. The trio denied all the respective charges and a trial ensued, the Prosecution marshalling 9 witnesses and closed its case on the 3rd day of July 2023 wherefrom a ruling under section 210 of the Criminal Procedure Code was required.
3. The Prosecution case was conducted by Ms. Luseno and Ms. Wangari, learned counsel for the Prosecution, the victims were represented by Mr. Titus Kirui, learned counsel, while the 1st and 2nd Accused persons were represented by Mr. Aminga and Mr. Oliech, learned counsel. The 3rd Accused acted in person.
4. Before making the aforesaid ruling, the court invited the Prosecution, the victim and the three Accused persons to make their respective closing submissions or arguments, only the 3rd Accused electing to put in his written submissions while the other parties opted to rely on the record in the file and invited the court to give the ruling under section 210 of the Criminal Procedure Code.

The Prosecution's case

5. PW 1, Tima Rashid Barua told this court that she is the daughter of Rashid Mohamed Barua of whom, due to advancement in age and health challenges he was having some recollection challenges, and he was being nursed at home. She told the court that in December 2021, she learnt, through the police officers from the Directorate of Criminal Investigations (DCI) that their father and his brother, one Ndaye, had a parcel of land namely Msambweni A/2883 and that there was a person actively trying to steal the said land from them. She said that all along, she believed that that piece of land belonged to them only that her father had been procrastinating to take its title documents.
6. PW 2 Mohamed Hamad Pashua, one of the surviving children of Hamadi Masudi Pashua. He told the court that his father owned the land which he was however informed by the area Assistant Chief, in December 2021, that the land has been stolen from them.
7. PW 3, Mr. Julius Mwangi Kinyua, the Registrar of Births and Deaths stationed at Kwale testified in his official capacity and informed the court that whereas their office had issued a genuine Certificate of Death for Hamisi Juma, the said Certificate of Death had been edited and manipulated to show that the Certificate of Death was for Ahamed Masudi Daye. To the extent of such manipulations, he said that the said Certificate of Death was a forgery.
8. PW 4, Mr. Robert Matheri Kamau, the Court Administrator at the Kwale Law Courts testified before court and said that he was the Executive Officer for the Court in 2016. He said that on 17th November 2021, he received a letter from the Kwale County Criminal Investigations Officer (CCIO), whose subject matter was investigations regarding the Succession Cause No. 77 of 2016 (Kadhi Court at Kwale). He produced certified copies of the documents that were said to be housed in the aforementioned file, which he said was available as at the time of such investigations but missing at the time of his testimony in Court. Among the said documents was the Petition and a Vesting Order issued on the 9th September 2016. He acknowledged that the petition did not bear the date-stamped imprint on its face and that was contrary to the practice of all the documents filed in court. Further, he confirmed that the Vesting Order in issue was issued by the Court albeit unprocedurally as there was a hijack of the process by a Judicial Officer. However, for all purposes and intent, he acknowledged it to be a valid Order from the Court.



9. PW 5, Mr. Bakari Salim Bizi, the Chief at Msambweni location since June 2021 told this court that on 10th December 2021, he was required by officers from the DCI to help locate and find one Rashid Barua and Daye which mandate he executed as expected of his office. He admitted that P. Exh 9 was a letter issued from his office by its previous holder, Mr. Juma Nasoro Mwanyali, who died in 2020. The said letter was to the effect that Ahmed Masudi Daye and Rashid Mohamed Barua were dead.
10. PW 6, Hon. Wendo Shaban Wendo, Senior Resident Kadhi at Msambweni, testified to the effect that as at 9th June 2016, he was serving at Kwale Law Courts. He said that on 9th June 2016, just 9 months into his position as a Kadhi, he received a Petition to adjudicate over and as was his duty, he conducted the hearing but he could not give final orders on that date due to deficiency of the required items being a lack of; 1. The official Search for the Land from the Department of Lands; and, 2. The Death Certificate for the Deceased. As a result, he adjourned the case to 15th September 2016 to afford an opportunity to the parties to provide the said documents. However, since that day, he never saw neither that file nor the parties ever again but to his astonishment, he learnt, way much later when the matter was under investigations that on the day he sent back the file, in what appeared to be a daylight outright betrayal by a colleague, his colleague Kadhi took the file and granted the vesting orders on the very same day. According to PW 6, this was contrary to the well laid down standard operating procedures on how a Judicial Officer should handle a file and more particularly, a file assigned to a fellow Judicial Officer. Being one, I wish not comment on the same.
11. PW 7 Ms. Daisy Halima, a Land Registrar working for the Ministry of Lands told the court that as of 9th December 2021, she was working at Kwale when officers from the DCI came knocking into her office and requiring information regarding the land parcel Msambweni A Plot No. 2883. She testified that the said land was initially registered under Ahmed Masudi Daye and Rashid Mohamed Barua and then in 2016 on the strength of a Court Order in Succession Cause No. 77 of 2016 (Kadhi's Court at Kwale), the land was transmitted to Hassan Selemani Alii. Thereafter, in 2019, the said land was said to be subdivided into two parcels being plots numbers 3766 and 3767. In her assessment, the file at their registry had nothing to lay any suspicion of any irregularities.
12. PW 8, Lumumba Hamisi Mbago, described himself as a land broker who operates within Kwale. Lumumba told the court that in 2016, two men, being Ali Ng'aNg'a and the Deputy County Commissioner (DCC), Msambweni one Mr. Maina approached him and gave him an original Court Order from Kadhi Court Case No. 77/2016. The Order was a Vesting Order. Lumumba said that he took the Court Order to the Land Registrar, Kwale, one Mr. Njoroge. Upon giving the Court Order to Mr. Njoroge, the latter told Lumumba that the Green Card for the said land Parcel No. Kwale Msambweni A 2883 was missing. Upon hearing the sad news of the missing Green Card, the two, Lumumba and Mr. Njoroge, and with the express authorization of the instructing clients namely the DCC and the 3rd Accused, struck a business deal. The deal was that Mr. Njoroge abuse his position of power and make the non-existent Green Card available by whatever means and in exchange, he would be given something by Lumumba upon successful transfer. As lucrative as the business sounded, Mr. Njoroge opened another Green Card with the same speed the business had come his way. Consequently, a Certificate of Title was issued under the name of Hassan Suleiman Alii dated 19th December 2016. Four years later, Lumumba found a buyer who wanted to purchase just 1 Acre out of the 5 Acres thus necessitating a subdivision of the land that gave Kwale Msambweni "A" 3766 and 3767 respectively, of which the latter was 1 Acre and that was sold at Ksh. 1, 200, 000/= and successfully transferred to the buyer. Regarding the remaining 4 Acres, Lumumba told the Court that he heard that the same was sold in the year 2020 at a total purchase/selling price of Ksh. 12, 000, 000/= . According to Lumumba, he said that the Ksh. 12, 000, 000/= was to be paid in installments and he was present when the said agreement was drafted at Chimera Advocates, who indeed held the monies.



His presence in the said transaction was to take the share for the Mr. Njoroge, the Land Registrar as a reward for the corrupt practice he committed. However, at the instance of transferring the land, things went south as another person claimed ownership and the transfer was not effected. This revelation marked the beginning of the end.

13. PW 9, NPS officer Service No. 73716 Cpl John Mmasi testified in his capacity as the investigating officer. He told the court that the origin of the complaint was an anonymous letter dated 2nd November 2021 that was brought to the attention of the CCIO who directed PW 9 to investigate. The letter was said to be unsigned but bearing the name Hamisi. According to him, the letter was lodging a complaint of forgery on Kwale Msambweni A/2883 and was stating that three people, namely, Hassan Seleman Ali, Ng'ang'a and Chimera were stealing land from people. PW 9 detailed how he got the documents from the Court and the Land Registrar in his investigative process. He said that he did not investigate the Land Registrar on the advice of the ODPP and even if he investigated him, that would be like losing sight of an antelope for a passing squirrel. This was the same situation with Mr. Maina, the DCC whom the investigating officer in his opinion found it not important to investigate him. According to the Investigating Officer, the Land Registrar and the Deputy County Commissioner, the suspected facilitators of fraud by abusing the position given to them by the Kenyans, were what he described as mere dashing squirrel in comparing to the 3 at the dock who he found to be the bigger threats to integrity in this Republic. He also said that he did not charge Lumumba because he was a witness and in any case, the decision to charge lies with the ODPP. According to the Investigating Officer, Lumumba was too much an important witness that he had to be afforded prosecutorial immunity as early as at the investigative stage in exchange of him being a witness. It is Lumumba who confided to the Investigating Officer how officers in government offices, facilitated corruption, Lumumba as the middleman brokering both land and corrupt dealings and such officers pushing the rogue dices but yet himself together with such government officers had to be spared from the accountability before the law. Maybe its time the campaign on Plea Agreements under Section 137A-O of the Criminal Procedure Code is to be revived.

Analysis and Determination

14. Section 210 of the Criminal Procedure Code guides this Court at this stage that;

If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

15. At this stage, the Court is called upon to determine whether a prima facie case has been made out by the DPP requiring the each or either of the accused to defend himself.
16. A prima facie case was defined in *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 as

Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can



never be enough: nor can any amount of worthless discredited evidence...It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence (emphasis mine).

17. Section 107 of the *Evidence Act* places the burden of proof of all the accusations against the accused person on the DPP. This burden hardly shifts to the accused who on the other hand is to be presumed innocent until the contrary is proven. An accused person has no duty to fill any gaps in the Prosecution’s case and in my understanding, a prima facie case is established if at the instance of placing him on his defence his silence may lead to a conviction based on the evidence adduced. This goes even to propriety of the charges against him in draftsmanship and legality.
18. From the onset, the Court wishes to express its understanding and appreciation of the independence of other institutions such as the Office of Director of Public Prosecutions under Article 157 (10) of *the Constitution* of Kenya and that of the Office of the Inspector-General of the National Police Service under Article 245 (4) (a) and (b) of *the Constitution* of Kenya. To that end, any apparent selective application of the law by such independent offices shall not be commented on by this court otherwise the court shall be risking accusations of interfering on the powers of other independent constitutional offices on whom to investigate and prosecute, whether there is apparent abuse of position of authority or such persons are immune from investigations and prosecutions but I dare say that to the best of my knowledge Article 10 of *the constitution* enjoins us all to saintly abide by it. I am consoled by the knowledge of the fact that at the end of the day, we are all answerable to *the Constitution* of Kenya, over and above our own conscience and any abuse of the same has a repercussion one way or another.
19. From the evidence adduced by the prosecution, I did not find evidence bringing an action with a common intent or motive among the three accused persons. The Honourable Kadhi Wendo Shaban Wendo stated that he could not identify any of the accused persons as the ones who appeared before him. There is no singular person who placed them at the scene. Is it safe to make an inference that they have been placed at the scene at the Kadhi’s office by dint of their names and details being used in the proceedings? In my assessment it is an unsafe inference which I choose not to make. I say this while well aware that the lodgment documents initiating the Petition at the Kadhi’s court were done in a very clandestine manner that one could not discern when they were lodged or by who. There was no indication that the Petition was filed in Court as there was no evidence of receiving the same by the Court neither was the Verifying Affidavit commissioned. At the Petition and at the Verifying Affidavit, there are imprints trying to suggest that they were signatures. Gracefully, they were handwritten and gave a handwriting that could be subjected to expert examination, sadly, the same was not done. Probably this could have unlocked a puzzle and placed an individual at the scene. That is the much I can say in regards to Count 1.
20. On Count 2, it was admitted by PW 4, the Court Administrator and PW 6 the Hon. Kadhi that the impugned Court Order was issued by Hon. Said H. Bedzenga, Kadhi at Kwale Law Courts, by then. As such, the said Court Order was not a forgery to warrant the charging of any person, save as for the reservations registered by Hon. Wendo on the regularity of issuance of the same.
21. On Count 3, the prosecution led evidence that the DCC Msambweni and the 3rd Accused procured PW 8 to transact with the Land Registrar, Mr. Njoroge. It is PW 8 who uttered the Court Order to Mr. Njoroge and not the 1st Accused. However, as earlier observed, I dare say that the Court Order was not a false document.
22. On Count 4, evidence was led showing that the Certificate of Death in issue was a forgery. However, there was no evidence to show that the 1st Accused person forged the impugned Death Certificate.



23. On Count 5, there was no evidence to indicate that the 1st Accused person lodged any document with the Land Registrar or uttered any document to the Land Registrar.
24. On Count 6, the prosecution proffered evidence that the DCC Msambweni, Mr. Maina and the 3rd Accused person instructed PW 8 to have the land registered in the name of the 1st Accused. There was no evidence to show that the 1st Accused caused such registration. His name was however used on the title document. I find no evidence suggesting that the 1st Accused caused the land to be registered in his name.
25. On Counts 7 and 8, the Hon. Wendo Shaban Wendo said that he could not identify any of the accused persons as the ones who swore before him. This was rightfully blamed on passage of time and most likely on the high traffic of clients the Hon. Kadhi handles and the fleeting period he handles them with. As such, there was no evidence to show that either the 2nd Accused or the 3rd Accused swore before the Hon. Kadhi Wendo Shaban Wendo. Further, I have looked at the charges in count 7 and 8 and it is my opinion that the desired offence to be charged was that of perjury under section 108 (a) of the Penal Code as opposed to the offence of false swearing under section 114 which even if evidence was led to that effect, the accused would not be convicted for the same as, being a misdemeanor equal to the perjury, could not find substitution under section 179 of the Criminal Procedure Code.
26. In the end, I find the charges against the 3 accused person heavily based on suspicion as opposed to evidence and find no prima facie as having been established in any of the 8 counts as against any of the accused.

Disposition

27. Having found so, this court hereby dismisses the cases against each of the 3 accused persons and forthwith acquits each of them under Section 210 of the Criminal Procedure Code for the charges of;
 - a. For the 1st Accused person,
 - i. Conspiracy to defraud which is proscribed under section 317 of the Penal Code;
 - ii. Forgery of judicial document which is proscribed under section 351 of the Penal Code;
 - iii. Uttering a false document which is proscribed under section 353 as read with section 351 of the Penal Code;
 - iv. Forgery which is proscribed under section 345 as read with section 349 of the penal Code;
 - v. Uttering a false document which is proscribed under section 353 as read with section 349 of the Penal Code; and
 - vi. Obtaining registration by false pretence which is proscribed under section 320 of the Penal Code.
 - b. For the 2nd Accused person,
 - i. Conspiracy to defraud which is proscribed under section 317 of the Penal Code; and
 - ii. False swearing which is proscribed under section 114 of the Penal Code.
 - c. For the 3rd Accused person,
 - i. Conspiracy to defraud which is proscribed under section 317 of the Penal Code; and



ii. False swearing which is proscribed under section 114 of the Penal Code.

28. All the 3 accused persons who have been out on personal bond with sureties, pending the trial, are hereby, together with their respective sureties, discharged forthwith.

RULING WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 1ST DAY OF NOVEMBER, 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Ruling has been Delivered in Open Court at Kwale on this 9th day of January, 2024, by Hon. C.K. Auka, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

In the presence of:

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

The 1st, 2nd and 3rd Accused persons.

