

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. E026 OF 2023

JOYCE NJOKI GIKORE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

- 1. Joyce Njoki Gikore**, the Appellant, was arraigned following allegations of having committed the offence of **Perjury contrary to Section 108(1)(a) as read with Section 110 of the Penal Code.**
- Particulars of the offence were that on the 10th of May, 2014 at Meru within Meru County, in a judicial proceeding consent to confirmation of grant in the High Court of Kenya at Meru in which Joyce Njoki Gikore was the Applicant and the Republic (Respondent) in an affidavit sworn before advocate John Njogu, a commissioner of oaths in the Republic of Kenya and filed the said confirmation of grant, knowingly gave false testimony on a matter which was material to question then pending in that proceeding namely succession cause No. 442 of 2004 without including James Mwangi Wanjohi to her knowledge.
- Briefly, facts of the case were that on the 13/01/1997; James Mwangi Wanjohi, the Complainant entered into an agreement with Patrick Gikore (deceased) the husband of

Appellant for sale of 5 acres of land being part of L.R. No. Laikipia/Marmanet North Rumuruti/Ndurumo 19 at a purchase price of Kshs.150,000/- whereby Kshs.50,000/- was paid in cash while Kshs.100,000/- was to be paid in kind by the Complainant handing over a posho-mill to the Appellant's husband.

4. They went to the Land Control Board and obtained a consent for subdivision on 27th March, 1997 of the land whereby he took possession of the portion of land. In the year 1999 Patrick Gikore Mwitari passed on.
5. During the sale transaction between James Mwangi Wanjohi, Titus was a witness but he made it difficult to have the property transferred to the Complainant's name. They disagreed as he wanted the entire portion of land transferred to him then he would transfer the 5 acres to the Complainant which was unacceptable.
6. Later he met the Appellant who proposed that he takes back the posho-mill and pay her Kshs.100,000/- but he declined having fulfilled his part as a purchaser. He went with Titus to the Land Registry but he was only willing to transfer to him 2 ½ acres of land.
7. Subsequently, he learnt of a Succession Cause that had been filed, No. 442 of 2004 by the Appellant and her son Erick Githinji but he was excluded. He previously filed a suit in Nakuru Court following disagreement over the parcel of land with the deceased. Investigations carried out culminated into the arraignment of the Appellant.

- 8.** Upon being placed on her defence the Appellant stated that following the death of her husband, together with her son Erick Githinji, they filed a Succession Cause. That the deceased had money in the bank and had sold some 15 acres of land, 10 acres to Titus Munene and the remaining 5 acres to James Wanjohi. Therefore, he advised the court to give Titus 10 acres and the remaining 5 acres to be registered jointly between herself and James Wanjohi. That she filed a replying affidavit before the Meru Court on 8th March, 2022.
- 9.** That James Wanjohi had obtained the land consent to subdivide the land fraudulently hence the District Officer had written to him directing him to remove the posts he had erected on the land. That at the time of filing this Succession Cause she had no knowledge if the Complainant had fully paid for the land as she had not seen all the documents. That according to the sale agreement he was to pay Kshs.150,000/-. He paid Kshs.50,000/- and he was to deliver a posho-mill as the balance but there was nothing to show that he had finished paying. That she was not aware of the acknowledgment note for the posho-mill.
- 10.** DW2 Titus Munene Kareria stated that he witnessed the sale agreement. That the land was divided into three and Patrick Gikore his cousin had given him the title deed. He had purchased 10 acres while his friend the Complainant that he introduced to the seller purchased 5 acres. That the consent to transfer was not produced by the seller and the

matter was referred to the Directorate of Criminal Investigations and Wanjohi was arrested and charged then he filed a case at Nakuru against Patrick Gikore. Patrick then wrote a letter to him intending to refund money. A letter was written to Wanjohi by the District Officer asking him to move out of land. He denied having witnessed the handing over of the posho-mill.

11. The court considered evidence adduced and reached a finding that when the Appellant swore the affidavit at the time of filing the Succession Cause No. 442 of 2004 she knew the Complainant's interest in the 5 acres of land but deliberately chose to mislead the court with a view of denying him his entitlement. That the Appellant worked in cahoots with DW2 to frustrate the Complainant with a view of denying him his rightful interest in the property. The court found the Appellant guilty and accordingly convicted and fined her Kshs.30,000/- and in default she was required to serve one (1) year imprisonment.

12. Aggrieved, the Appellant appeals on grounds that;

1) The learned trial Magistrate erred in law and in fact in finding that the posho-mill was picked by Patrick Gikore with a Land Rover with tag 'mwamba' behind even when the same had not been proved at all.

2) The learned trial Magistrate erred in law and in fact in finding that it's the accused person who

executed the agreement for the sale of land while it was her deceased husband.

3) The learned trial Magistrate erred in law and in fact in finding that the Complainant had completed payment for the posho-mill even when the same was not proved beyond reasonable doubt.

4) The learned trial Magistrate erred in law and in fact in relying on an acknowledgment purportedly written by a deceased person and signed by unnamed witness to found a conviction against the Appellant.

5) The learned trial Magistrate erred in law in finding that the Appellant was guilty without the slightest iota of evidence against her.

6) The learned trial Magistrate erred in law and in fact in convicting the Appellant of perjury even where the affidavit in question was sworn jointly with another person.

7) The learned trial Magistrate erred in law and in fact in entertaining dispute that was more civil in nature than criminal and proceeded to convict the Appellant on the same.

8) The trial Magistrate erred in law and in fact in shifting the burden of proving that there was no completion of the agreement by the

Complainant on the Appellant instead of the prosecution.

9) The learned Magistrate erred in law and in fact in failing to find that the deceased had actually disputed the said sale of land at the time of his death there were still civil matters over the said sale pending in court.

10) The learned trial Magistrate erred in law and in fact in treating the debt claimed by the Complainant at the time the Appellant was filing for succession as a proven liability even where there was no decree from the pending cases between the deceased and the Complainant.

11) The learned trial Magistrate erred in law and in fact in relying on an acknowledgment that the High Court at Meru had declared required the test of a civil suit in order for it to stand in for proven liability.

12) The learned trial Magistrate erred in law and in fact in failing to find that the charging of the Appellant alone even when the affidavit in question was sworn jointly with another person was against Article 27 of the Constitution of Kenya, 2010.

13) The learned trial Magistrate erred in law and in fact in finding that the elements of the

offence of perjury had been proved beyond reasonable doubt against the Appellant.

14) *The learned trial Magistrate erred in law and in fact in sitting as a civil court and therefore lowering the standard of proof from beyond reasonable doubt to on a balance of probabilities hence the conviction of the Appellant.*

15) *The trial Magistrate erred in law and fact in finding that the offence of Perjury had been proved against the Appellant beyond reasonable doubt.*

16) *The conviction is therefore dangerous and against the weight of the evidence.*

17) *The sentence is illegal.*

13. The appeal was canvassed through with submissions. It is urged by the Appellant that the dispute between the parties falls under the Law of Succession and in particular **Section 83(d) of the Law of Succession Act.** That the prosecution did not tender evidence to demonstrate that the Complainant's claim was one of "proven liability".

14. That there was no proof of completion of the agreement. That contrary to the allegations in the particulars of the offence, the Complainant was included as a purchaser in the affidavit. That the Appellant was found guilty without an iota of evidence.

- 15.** That the charge and particulars did not disclose that the Appellant committed the alleged offence. That there were two (2) deponents of the affidavit and circumstances under which one deponent was identified to be charged remained unexplained.
- 16.** That contrary to the requirement of **Section 108(a) of the Penal Code**, the prosecution did not produce an affidavit sworn on 10th May, 2014 as alleged in the charge sheet. That failure to prove that John Njogu was an advocate who was commissioner of oath deflated the allegation that the Appellant was lawfully sworn.
- 17.** That there was no proof of the deceased having acknowledged receipt of the posho-mill and hence being within the knowledge of the Appellant. That the time of death the Complainant had sued the deceased in **Nakuru HCCC No. 243 of 1998** to recover the same land, a suit that he abandoned upon his death. His claim having been for 10 acres as opposed to 5 acres.
- 18.** In response, the Respondent submits that the Appellant filed a **Succession Cause No. 442 of 2004** over the deceased estate which formed part of the 5 acre parcel of land that was a subject of the criminal case and she indicated that she co-owned the 5 acre piece of land with the Complainant.
- 19.** That evidence adduced proved acknowledgment of the delivery of the posho-mill which completed the sale agreement and the fact of the Complainant having been in

continuous uninterrupted use of the 5 acre piece of land for 26 years could not escape the Appellant's notice, hence the Appellant had knowledge of the Complainant's interest in the parcel of land but knowingly misled the court while filing the Succession Cause matter to deny the Appellant his entitlement hence all the three (3) elements of perjury were proved beyond reasonable doubt.

20. On sentence it is urged that it was illegal given that **Section 110 of the Penal Code** prescribes a sentence of 7 years imprisonment without an option of fine.

21. I have considered the appeal and this being a first appellate court it is duty bound to re-examine evidence adduced at trial and scrutinize the findings bearing in mind that it did not have the opportunity of seeing or hearing witnesses to assess their demeanour, then form its independent conclusions. This, was summed up in ***Okeno v Republic (1972) EA 32*** thus;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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 own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

22. The Appellant was indicted of having made some false testimony in judicial proceedings. The lies in issue having been made deliberately, this would be intended to affect the outcome of the proceedings. **Section 108(1) (a) of the Penal Code** defines the offence of Perjury thus;

Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.

23. To prove the charge the prosecution had the onus to prove that there existed judicial proceedings or there was the intent to institute the same when the act was committed; the perpetrator knowingly gave a false testimony regarding the judicial proceedings; the false testimony was so significant such that it would affect the decision to be made in the judicial proceedings which were ongoing.

- 24.** Doubtlessly, **Meru High Court Succession Cause No. 442 of 2004** was in existence where the Appellant and another were the Administrators of the Estate of Patrick Gikore Mwitare (deceased). And James Mwangi; the Complainant was included as a purchaser.
- 25.** According to the particulars of the offence in the criminal matter, in the consent to confirmation of grant it was purported that the Appellant swore an affidavit before advocate John Njogu, a commissioner of oath where the Complainant was excluded.
- 26.** The prosecution did not avail the stated commissioner of oaths who commissioned the purported affidavit as a witness. Circumstances under which the affidavit was deposed remained scanty. However, what was adduced in evidence was the physical file of the Succession/Matter. PW4 Andrew Kariuki Maina, a Senior Court Assistant adduced in evidence the stated Succession Cause No. 442/2004.
- 27.** The affidavit adduced which is in support of summons for confirmation of grant to Administration Intestate was deposed by two Administrators of the estate of Joyce Njoki Gikore and Erick Kithinji Gikore and it was commissioned by Otieno Willy Calvine Advocate and Commission of Oaths. This particular affidavit was dated 21st February, 2014 and it was indicated that 5 acres of land out of L.R. No. Marmaent/North Rumuruti Block 2(Ndurumo)/9 was to be held jointly by the Complainant and the Appellant. In particular, the affidavit alleged to have been sworn on 10th May, 2014 was not part of the evidence.

- 28.** It is emphasized by the Respondent/State that the Appellant had the knowledge that the Complainant had an interest in the estate of the deceased but misled the court with the intent to deny him his entitlement. The question to be answered is whether the Appellant knowingly gave a false testimony regarding the Succession Cause.
- 29.** The only issue that can be discerned from the proceedings is the question of joint ownership. The deceased sold to the Complainant a parcel of land measuring 5 acres. According to the agreement commissioned by PW3 Charles Gakuhi Chege Advocate the purchase was for a parcel of land measuring 5 acres. The consideration was Kshs.150,000/- whereby the vendor was to receive Kshs.50,000/- and the balance of Kshs.100,000/- was to be offset by the purchaser's posho-mill. Further, the purchaser was to take possession upon the consent being obtained from the Land Control Board.
- 30.** The Kshs.50,000/- was paid and acknowledged by the vendor. The Appellant was not party to the agreement. It is urged by the Complainant whose evidence was supported by that of his wife PW2 Jane Njoki Wanjohi that the deceased collected the posho-mill, and documentary evidence stated to have been authored by the deceased.
- 31.** The affidavit deposed by the deceased in the case between him and Complainant in ***Nakuru Civil Suit No. 243 of 1998*** was an admission of the deceased having sold to the Complainant the land measuring 5 acres but urged that he rescinded the sale as the consent to subdivide was obtained

irregularly. There was no mention of the posho-mill having not been collected and/or returned per the acknowledgment relied on by the Complainant.

32. It was the testimony of the Complainant that he withdrew the Nakuru case following the death of the deceased.

33. Since the Appellant was not party to the agreement and subsequently there were disputes over the land, per the allegation that the Complainant faced a criminal case and he also instituted a civil case against the deceased, the prosecution was required to prove beyond reasonable doubt that the Appellant knowingly gave a false testimony that would affect the decision of the court which was not the case.

34. Going back to the technicality of the matter, the Appellant who was accused was presumed to be innocent and the burden of proof lay with the prosecution. The prosecution was obligated to prove critical evidence of the affidavit stated in the particulars of the offence and the commissioner for oath who commissioned it had to be called to authenticate the document by confirming that it was properly sworn. This would have helped the court to verify if the alleged statement was false. Without evidence of the document and that of the commissioner of oaths, the evidence adduced was wanting. (See ***Republic v David Nderitu & Another [2018] eKLR***). This was hence a case to be resolved by a Land Court.

35. In the result, I find the appeal having merit. Accordingly, it is allowed. The conviction is quashed and sentence meted set aside. The fine, if paid shall be refunded.

36. It is so ordered.

**Dated, signed and delivered virtually this 27th day of
January, 2026.**

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L.N. MUTENDE
JUDGE