



**Makwata & another v Republic (Criminal Appeal E107 of 2023)
[2024] KECA 1209 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1209 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E107 OF 2023
HM OKWENGU, JM MATIVO & JM NGUGI, JJA
SEPTEMBER 20, 2024**

BETWEEN

SHULA SONGA MAKWATA 1ST APPELLANT

TONY ASITWA MAKWATA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega (Musyoka, J.) dated 1st August, 2023 in HCCRA No. E045 of 2019 As Conducted Jointly with HCCRA No. E046 of 2019)

JUDGMENT

1. This is a second appeal. The original trial was at the Mumias Senior Principal Magistrate's Court in Criminal Case No. 80 of 2017. The two appellants were charged with four counts. The first count was for the offence of forgery contrary to section 345 as read with section 349 of the *Penal Code*. The second count was for the offence of obtaining registration of land by false pretences contrary to section 320 of the *Penal Code*. The third count respected the offence of making a false document without authority contrary to section 357(a) of the *Penal Code* while the final count was for the offence of intermeddling with the property of a deceased person contrary to section 45(a) of the *Law of Succession Act*.
2. The trial court convicted the two appellants of all counts and sentenced them to consecutive terms of 20 months; 8 months; 4 years; and 6 months in prison respectively.
3. The appellants were aggrieved by the convictions and sentences and appealed to the High Court. Their appeals were heard simultaneously by Musyoka J., who, in a judgment dated 1st August, 2023 acquitted them of the first two counts but affirmed the convictions and sentences in the remaining two counts.
4. The four counts with which the appellants were charged were as follows:



Count 1: Forgery contrary to section 345 as read with section 349 of the *Penal Code*: On an unknown date before 3rd January, 1997 at unknown place within the republic of Kenya, with intent to defraud, jointly with another before court forged the signature of John Danial Makwata Eshibuko (deceased) purporting it to be a genuine signature signed by John Daniel Makwata Eshibukho (deceased).

Count 2: Obtaining registration by false pretence contrary to section 320 of the *Penal Code*: On unknown dates before 3rd January, 1997 at Kakamega district land registry within Kakamega county, jointly with another not before court, wilfully procured for yourselves a land title deeds for land parcel S/Wanga/Lureko/717 measuring approximately five point zero zero acres and land parcel S/Wanga/Lureko/1138 measuring approximately zero point two zero zero by falsely pretending that the land parcels had been transferred to you by the late John Daniel Makwata Eshibukho, a fact you knew to be false.

Count 3: Making a document without authority contrary to section 357(a) of the *Penal Code*: On unknown date at an unknown place within the republic of Kenya, with intent to deceive without lawful authority or excuse, jointly, you made a false document namely Certificate of Death serial number 313490 purporting it to be a genuine certificate of death for the late John Daniel Makwata Eshibukho issued by the Registrar of Births and Deaths.

Count 4: Intermeddling with the property of a deceased person contrary to section 45(1) as read with section 45(2)(a) of the *Law of Succession Act*: On unknown dates at Lukoye village in Nabongo location within Kakamega county with others not before court, you took possession of one lorry registration no. KDZ 070, Make Ford yellow in colour; one tractor registration no. KAB 356L, make Massey Ferguson; and cane contract number 122 for Mumias Sugar, the property of the deceased John Daniel Makwata Eshibukho without authority.

5. The appellants were, again, dissatisfied with the judgment of the High Court and have preferred the present appeal. Their separate appeals were identical in terms of grounds appealed against and were consolidated. The two grounds of appeal which were against part of the judgment that affirmed the convictions and confirmed the sentence on counts 3 and 4, are as follows:

“ 1. That in exercising its duty of re-appraising, reviewing and reanalyzing the evidence on record in order to arrive at its own independent conclusions as required of it under *Selle v Associated Motor Boat Co.* and reiterated under *Okeno v Republic*, Hon. Musyoka’s Court grossly erred in law and fact by creating a disjunction between the subject matter of Counts 1 and 2 on the one hand, and the subject matter of Counts 3 and 4 on the other which error caused the Court to fail to realize and appreciate that an acquittal on Counts 1 and 2 on the one hand should have also led to an acquittal on Counts 3 and 4 on the other. The grave error of creating a disjunction between the subject matter of Count 1 and 2 on the one hand and Count 3 and 4 on the other manifests itself clearly in Hon. Musyoka’s judgment at paragraph 25 (appearing at page 210 of the Record) where the Learned Judge expresses himself as follows, quote-and-quote;

- a. “the case of the cane contract is, however, different. It
- i. was changed barely 20 days after the death of the
 - ii. deceased, and the appellants said they even collected
 - iii. some money under the contract within that period.”



court order was different from the actual death certificate of the deceased issued to them to wit serial No. 305059 (entry no. 3700202/1997).

- c. Thirdly, Patrick testified that he did a search for two motor vehicles which were owned by the deceased – a tractor and a lorry. He learnt, he said, that the ownership had changed hands to third parties subsequent to the death of the deceased,
10. Based on these discoveries, Patrick and the rest of the deceased’s family filed a complaint against the two appellants. This resulted in the four-count charges brought against them before the magistrate’s court. Seven witnesses testified at the trial while the appellants called three witnesses. As aforesaid, the trial resulted in convictions on all four counts.
 11. The first two counts – forgery and obtaining the registration of land by false pretences – were based on the transfer of the two parcels of land, to wit, South/Wanga/Lureko/717 and South/Wanga/Lureko/1138. In reversing the convictions in the first count of forgery, the learned Judge had the following to say:

“As framed, the charge discloses no offence. A signature can only be forged on a document, and the particulars must make reference to the document carrying or bearing the forged signature, for the objective of the forgery is to use the false document bearing the forged signature for some fraudulent purpose. A forged signature does not hand (sic) in the air, it is placed on a document. The charge as framed does not state the document that bore the forged signature. The evidence that was marshalled to prove forgery sought to establish allegations that were not before the court. The evidence presented by the document examiner was of little utility, as the documents claimed bore the signature said to be not that of the deceased were not featured in the forgery charge. The trial court ought not to have convicted on that bad or defective charge.”
 12. On the other hand, in reversing the conviction on the charge of obtaining registration by false pretences, the learned Judge held as follows:

“...the prosecution presented a land registrar, who took the position that the registration appeared to be above board, as it was supported by appropriate documentation necessary for the purposes of such registration. One would have expected that the prosecution would take steps to provide background evidence, from relevant Land Control Board to prove that no consent was obtained, no meetings were held by the board where that issue arose, among others. The Land Control Board is under the control of officials in the national government, and the prosecution should have no difficulty accessing them, and the relevant documents. That was not done. The land registrar testified that from his end, the transactions looked genuine. There was need to demonstrate that they were not genuine as no consent of the Land Control Board had been obtained, or the same had been obtained fraudulently. That could only be done by calling officials from the Land Control Board, and getting documents from them.....”
 13. However, the appellants’ fortunes ended there. When the learned Judge turned to the third count – that of making a document without authority – he found that the prosecution had proved beyond reasonable doubt that the appellants had uttered the document, to wit, Certificate of Death serial number 313490 and presented it to Mumias Sugar Company. In doing so, the learned Judge relied on the testimony of the Registrar of births and deaths from Trans Nzoia County, where the deceased died, who told the trial court that he did not issue the impugned certificate of death. The learned Judge dismissed the additional evidence adduced by the appellants on appeal in the form of a purported letter



from the County Coordinator of Civil Registration of Bungoma County dated 23rd November, 2022. That letter stated that the certificate of death serial number 313490 emanated from their office. The learned Judge disbelieved the authenticity of the letter for three reasons: first, that the appellants had not given a satisfactory explanation why they had not presented that evidence earlier during the trial; second, that the information in the letter was not subjected to cross-examination, and, therefore, its probative value was pretty low; third, that uncontroverted evidence showed that the deceased died in Trans Nzoia county, hence the Bungoma civil registry services would not have any information on his death.

14. Regarding the final count – that of intermeddling with the estate of a deceased person – the learned Judge absolved the appellants of the charge with respect to the motor vehicles, tractor and lorry. In doing so, the learned Judge found that the prosecution had not provided sufficient evidence that it was the appellants who had transferred the assets to third parties. However, the learned Judge found that evidence had been led proving beyond reasonable doubt that the appellants intermeddled with the cane contract to Mumias Sugar Company. In making this finding, the learned Judge relied on the evidence led that the cane contract had been transferred to the appellants’ names barely twenty days after the death of the deceased; and the appellants’ own admission that pursuant to that change, they had received monies from Mumias Sugar Company.
15. We have laid out at length the reasoning of the learned Judge on each count because the overriding complaint by the appellants is that it was a grave error for the learned Judge to discharge them of the first two counts while affirming their convictions on the other two counts since the four counts are connected. The four counts, the appellants argue, are connected and it was a “grave error [for the learned Judge to create] a disjunction between the subject matter of Count 1 and 2 on the one hand and Count 3 and 4....[because] This disjunction set Hon, Musyoka's Court on the wrong trajectory and caused tie Court to erroneously treat Counts 1 and 2 on the one hand, and Coun& 3 and 4 on the other as separate and unrelated Issues.” The appellants argue that the fundamental error of creating a disjunction between the first two counts and the final two is that the cane contract which is the subject of Count 4 is with respect to the same parcels of land which are the subjects of counts 1 and 2. According to the appellants, therefore, the fact that Counts 1 and 2 were adjudged unproved, it would have led to the same fate for counts 3 and 4.
16. Respecting the charge of making an official document without authority (in count 3), the appellants argue that the learned Judge erred in four ways. First, they say that he misunderstood the purport of the additional evidence they adduced on appeal. Second, the appellants argue that the learned Judge failed to note that the origin of the document purportedly made without authority was not proved as PW1 (the complainant), said he got the impugned death certificate from Mumias Sugar Company; while the investigating officer (PW7), told the court that he got the document from the 1st appellant when he asked him to bring it. Additionally, the appellants submit that the document actually produced as Exhibit 10 has a stamp of the chief of “Nabongo location, Mumias”. Lastly, the appellants argue that the impugned death certificate does not bear the rubberstamp of Mumias Sugar Company – hence raising reasonable doubt that the company actually received and relied on it. It would not have been possible, the appellants argue, for any reasonable tribunal to make a finding of guilt beyond reasonable doubt in these circumstances.
17. On our part, we have carefully scrutinized the record of appeal and keenly considered the arguments by the appellants as well as the submissions by the respondent. We are persuaded that the learned Judge was correct in his assessment of facts and law – and we discern no error in his analysis that is amenable to reversal on second appeal.



18. We begin by noting the fallacy in the appellants' lead argument that the nature of the four counts logically meant that an acquittal on the first two counts would automatically lead to an acquittal on the remaining two counts. As we have laid out the reasoning of the learned Judge with respect to count 1, the reason for the acquittal on that count was technical: the charge as drafted was defective. The charge did not identify the document which had been allegedly forged and could, therefore, not sustain a conviction. While the evidence led tended to show that the forged documents were the consents presented to the Land Control Board for the transfer of the two parcels of land, the learned Judge found, correctly in our view, that that was not the offence that was charged.
19. Turning to count 2, the learned Judge concluded that an acquittal was merited because of paucity of evidence showing that the appellants had, in fact, obtained the transfer of the two parcels of land to themselves under false pretences. This was because the evidence presented was insufficient to lead to the conclusion that the appellants had fraudulently transferred the two parcels to themselves absent controlling evidence from Land Control Board officials.
20. However, the conclusion that there was insufficient evidence to conclude that the charge of obtaining land registration by false pretences beyond reasonable doubt, is different from the analysis leading to the conclusion that the appellants unlawfully transferred the cane contract to themselves. While it is true that the cane contract was with respect to the cane grown on the two parcels of land which were subject to count 2, as the appellants argue, the subject matter of count 3 was a disparate contract – a document representing rights of economic value. That document – which both the trial court and the learned Judge found the appellants had unlawfully transferred to themselves – constitutes a separate legal issue from the question of ownership as a matter of law. A person can have rights to a cane contract without necessarily being the legal owner of the parcel on which the cane is grown. In any event, the conclusion that the charges in count 2 were not proved to the requisite standard was not a legal finding that the parcels of land were lawfully and procedurally transferred to the appellants, hence entitling them to possession of the parcels and everything thereon. The bottom line is that the cane contract remained the property of the estate of the deceased notwithstanding the court's findings on count 2, and it was an act of intermeddling with the property of the deceased for the appellants to have caused that contract to be transferred to themselves without letters of administration. Differently put, the cane contract had proprietary properties capable of being owned and transferred: they were owned by the estate of the deceased; and the appellants unlawfully transferred those rights to themselves. We, therefore, find that the learned Judge committed no error in affirming the conviction in count 4.
21. We, finally, turn to count 3. The offence in that count was making an official document without authority. The document so made Certificate of Death serial number 313490. This document was, both the trial court and the learned Judge found, presented to Mumias Sugar Company and became the basis for transferring the cane contract to the appellants. Before us, the appellants raise, for the first time, arguments about the authenticity of the document that was allegedly made without authority. They claim that the source of the exhibit produced is in question because PW1 said he got it from Mumias Sugar Company while PW7 said he got it from the 1st appellant yet the actual exhibit bears the stamp of the chief, Nabongo location.
22. Aside from the fact that this argument is being raised for the first time on second appeal, it is a red herring; and misses the legal point. The charge was that the appellants uttered a certificate of death bearing serial number 313490 without authority. Where the impugned document was presented after it was uttered, is part of the evidence meant to show that it was, in fact, uttered. It is pivotal that at the trial, the appellants did not contest the authenticity of the document. Instead, their defence vacillated between denying that they had anything to do with it (during the trial) and presenting evidence aimed to demonstrating that it was, in fact, a genuine document (as part of the additional evidence presented



to the 1st appellate court). It is readily obvious that there were several copies of the actual document that was uttered which were presented to different authorities: to Mumias Sugar Company; to the investigating officer; to the Chief, Nabongo location; and to the Magistrate’s Court, Mumias. The bottom line, though, is that a document, namely a certificate of death bearing serial number 313490 was made without authority.

23. The trial court and the learned Judge deduced from compelling circumstantial evidence that it was the appellants who uttered the document because they are the ones who presented copies of it to the four authorities. It, therefore, behooved them to offer an explanation how they had come to in possession of the document whose copies they presented to the authorities. They failed to discharge that burden. Indeed, as the learned Judge correctly stated, their attempt to explain, was to bring in evidence aimed at showing that it was, in fact, genuine – an attempt that failed the test of credibility. In short, the learned Judge was correct in his analysis and in upholding the conviction in count 3 as well. There was sufficient evidence to show that a certificate of death bearing serial number 313490 was not the genuine certificate of death of the deceased; that it was made without authority; and that it was the appellants who made it and presented it to the authorities. All the elements of the charge of making a document without authority were satisfied.

24. The upshot, then, is that this appeal entirely fails. It is dismissed.

25. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2024.

HANNAH OKWENGU

JUDGE OF APPEAL

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J. MATIVO

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

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I certify that this is a truecopy of the original

DEPUTY REGISTRAR

