



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OUKO & GATEMBU, JJ.A)**

**CRIMINAL APPEAL NO. 99 OF 2013**

**BETWEEN**

**KEPHA MOSES MOGOI.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from a ruling of the High Court of Kenya at Nairobi*

*(Achode, J.) dated 12th March, 2013*

*in*

***H.C. Cr. A. NO. 190 OF 2011)***

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**JUDGMENT OF THE COURT**

The appellant was convicted by the Chief Magistrate, Nairobi for three counts namely:

Count 1: Making a false document contrary to section 357(a) of the Penal Code.

The particulars of the offence alleged that on 11th June 2007 with intent to defraud or deceive and without authority or excuse he made an Abstract from Police record issued at Central Police Station.

Count II: Uttering a false document contrary to section 353 of the penal code.

The particulars of the offence alleged that the appellant on diverse dates between 16th and 29th June 2007 at Land Office Kajiado knowingly and fraudulently uttered a false document namely, an Abstract from police records to the Registrar Kajiado purporting it to be true and genuine document.

Count III: Giving false information to a person employed in public service contrary to section 129(a) of the penal Code.

The appellant was alleged to have informed Silvanus Lukoko Were, the District Registrar Kajiado that his title Deed for Ngong/Ngong/10632 had got lost an information he knew or believed to be false intending thereby to cause or knowing it to be likely that he would thereby cause Silvanus Lukoko Were to use his lawful power to make a new registration for the land.

The appellant was upon conviction sentenced to a fine of Shs. 150,000/- in each count, in default to serve one year imprisonment. His first appeal to the High Court was dismissed.

The investigations and the subsequent framing of the charges against the appellant arose from an alleged sale of land transaction between the appellant as vendor and Stephen Nyareru Rianga as purchaser (complainant) (**Rianga**). Rianga complained to the police that the appellant had in 1998 sold his land

Title No. Ngong/Ngong/10632 for a consideration of Shs. 500.000 which he paid in two installments; that the appellant had handed over the original Title deed to him and that in 2007 Rianga discovered that the land had already been transferred to Lucy Mbuthu Kamau.

Investigations as to process of the transfer of land to Lucy Mbuthu Kamau was conducted by three police officers – PC Ochieng who handed over to PC Justus Namaswa after transfer and Cpl. Nicholas Muluki who took over from PC Justus Namaswa. The investigations revealed that a police Abstract dated 11th June 2007 showing that Kepha M. Mogoi had on the same date reported the loss of Title Deed for Ngong/Ngong/10632 to Central Police Station Nairobi, and that the Abstract and an accompanying affidavit applying for a new Title Deed had been filed at Kajiado District land office where the land had been registered. Thereafter, the Land Registrar Kajiado had published Gazette Notice No. 8517 in the Kenya Gazette of 7th September 2007 of the loss of the original Title Deed and his intention to issue a new Title Deed.

The investigations further revealed that a new Title Deed was subsequently issued on 28th November 2009. An application for consent of Land Control Board indicating that Kepha Moses Mogoi intended to transfer land title Ngong/Ngong/10632 to Lucy Mbuthu Kamau was approved by the District Commissioner Kajiado. A letter of consent to transfer granted on 4th December 2007, a transfer allegedly executed by Kepha Moses Mogoi to Lucy Mbuthu Kamau on 14th December 2007 which transfer was registered on 20th December 2007 and a new Title Deed issued to Lucy Mbuthu Kamau on 21st December 2007.

The investigation officer took two documents to Emmanuel Kenga – a document examiner at CID Headquarters. The two documents were an application for consent of the land control board for transfer of Ngong/Ngong/10632 from **Kepha Moses Mogoi** to **Stephen Nyaperu Rianga** and the statement of the appellant to the police made on 26th March 2008. The document examiner compared the signatures in the two documents and formed the opinion that there were similarities in the two signatures indicating that they were made by the same author.

**PC James Mungai** testified at the trial that the police abstract form indicated that it was downloaded from the police website and the completed form did not contain the O.B. Number or the official receipt and that it was not in the handwriting of any known police officer at the Central Police station. He testified that the procedure was that before a person downloads the Police Abstract Form, he must first make a report of the loss at the police station, after which he is advised to download the form and bring it to the police station for completion.

Rianga and his wife Rebecca Moraa Nyareru (Rebecca) gave evidence at the trial. According to him, it is his wife who looked for the land to buy assisted by a broker and thereafter his wife arranged a meeting with the owner – the appellant at the land where an agreement was reached. The appellant showed him the title deeds after which he paid first installment of Shs. 250,000/- and the appellant gave him the Title Deed. Thereafter an application for consent of the Land Control Board was made, a consent given on 7th March 2000 and Rianga paid the balance of Shs. 250,000/-. Thereafter they agreed that the transfer would be executed at the Kajiado Land office. However, he could not trace the appellant and was informed that he had gone to America. It was his evidence that there was no agreement in writing

and no receipt was issued for payment of the purchase price. He later filed a Civil Suit No. 173 of 2008 at Kajiado. Rebecca gave similar evidence but added that it was Pius Nyambane, their driver who was also a broker who introduced her to the appellant.

Mr. Lokoko Were, the Land Registrar Kajiado at the material time also gave evidence at the trial relating to how the transfer of land to Lucy Mbuthu Kamau was processed and effected. He produced some documents from the records at the land office. He testified that the affidavit shown to have been sworn by Kepha Moses Mogoi on 27th June 2007 before an advocate deposing that the original title deed was lost that led to his office preparing the Gazette Notice and that he could not say from the photocopy of the transfer form relating to the transfer of the land to Lucy Mbuthu Kamau that it was the appellant's photograph.

The appellant denied selling the land to Rianga or to Lucy Mbuthu Kamau. He also denied making the police abstract, making the affidavit or presenting both to the Land Registrar, Kajiado. His explanation was that his brother who was working in Mombasa and later in Mandera asked him to buy land on his behalf in Ngong which he did in 1989 and the land was registered in his name. Later, in 1998 his brother called him and told him he wanted to sell the land to buy another land in Langata. He informed him that he had found a buyer Pius Nyambane Nyakwar and instructed him to release the Title Deed and transfer documents which he did. He testified that he took police to the house of his broker Peter Mugoi but they did not find him and that his brother died later.

Stephen Oyende a nephew of the appellant gave evidence. According to him, he called Rianga for a meeting to resolve the matter and at the meeting at Olympic Restaurant near Bomas, Rianga told him that he bought the land from Peter but was taking the appellant to court because the land was in appellant's name.

The trial magistrate made a finding that the appellant committed the three offences on the basis that he signed the application for consent of the Land Control Board as testified by the Documents Examiner and also because as the registered owner of the land he is the only one who stood to gain by the issuance of a new Title Deed. The High Court dismissed the appeal for the same reasons triggering the present appeal.

The decision of the High Court is faulted on grounds, amongst others, that the High Court failed to properly re-evaluate the evidence, failure to determine what constitutes the offences of making false documents and uttering, failure to consider provisions of section 70 of the Evidence Act, admission of photocopies to documents and failing to determine whether the appellant had signed or executed the documents.

The appeal is opposed on the ground that the two courts below made the correct findings.

The police abstract was the basis of the offences in first and second counts. There was credible evidence that no report of loss of the original title deed was made at the Central Police Station. There was also credible evidence that the police abstract was not issued and did not originate from Central Police Station. The police abstract purported to be what in fact it was not and is a false document as defined in section 347 of the Penal Code. However, the offence of making a false document under section 357 of the Penal Code is established, if a person with intent to defraud or deceive without authority or excuse, makes, signs or executes any document. By section 70 of the Evidence Act, if a document is alleged to have been written or signed by a person, the handwriting or signature must be proved to be in his hand writing.

The questioned police abstract has some writings but no signature. It was not submitted to the documents examiner for examination of the handwriting. It is thus clear that the prosecution failed to prove by concrete evidence that it was made by the appellant.

The offence of uttering a false document under section 353 of the Penal Code is proved if a person knowingly and fraudulently utters a false document.

Although the District Land Registrar did not in his evidence refer to the police abstract, and testified that it is the affidavit filed on 27 th June 2007 which led to issuance of a Gazette Notice relating the loss of the title deed, it was clear that the police abstract was referred to in the said affidavit. The copy of the Abstract produced by **Cpl. Nicholas Muluku** is certified by the District Land Registrar as the true copy of the original thereby showing that the original police abstract was presented together with the affidavit to the land office. There was credible evidence which the two courts below believed that the original Title Deed had not been lost and was indeed in possession of Rianga. The offence of uttering a false police abstract was proved. However, according to the District Land Registrar, the documents were processed by the clerks and the identity of the person who presented the affidavit and the abstract was not proved by concrete evidence.

Similarly, the offence of giving false information to a person employed in the public service was proved. The false information was that original Title Deed had got lost. The person who gave the information through the police abstract and the affidavit did so knowing it was false and intended to cause the Land Registrar to issue another title deed which he could not have done if he knew the true facts. However, the District Registrar relied on the affidavit which had been sworn before an advocate and did not see the person who presented the documents. Thus, the prosecution did not prove by concrete evidence that it was the appellant who gave the false information.

The only evidence to connect the appellant with the three offences was the presence of his name in the police Abstract and in the affidavit. His name also appeared in the application form and in the letter of consent relating to the transfer of land to Rianga and also in relation to the transfer of land to Lucy Mbuthu Kamau. Richard Lenana Ole Kulei who was a clerical officer and secretary to the Land Control Board at the District Officer's office did not identify the appellant or Rianga as the persons who appeared before the Board in relation to the application for consent.

Similarly, there was no evidence of the identities of the persons who appeared before the Board when the application for consent to transfer the land to Lucy Mbuthu Kamau was given. There was evidence that there was a broker involved in the sale of the land to Rianga. Rianga reluctantly gave the name of the broker as Pius Nyambane who he claimed was also his driver. Rebecca testified that it was Pius Nyambane who was the broker who introduced her to the appellant, and further that Pius Nyambane just disappeared. The application for consent of the Land Control Board which Rianga relied on indicated that the appellant intended to transfer the land to Pius Nyambane Nyakwar. The appellant explained that he gave the original Title deed and other documents to Pius Nyambane Nyakwar after his brother instructed him that he had sold the land to him.

By **section 119** of the Evidence Act, a court can presume the existence of any facts which it thinks likely to have happened having regard to the common course of, amongst other things, the human conduct in relation to the facts of a particular case.

The two courts below presumed that it was only the appellant who could have committed the three offences. In making the presumption the two courts below failed to appreciate that they were not determining the civil dispute between the appellant and Rianga concerning the sale of land where the burden of proof was lower. The High Court failed to evaluate the evidence particularly the role of Pius Nyambane Nyakwar. The High Court also failed to evaluate the evidence of the appellant's witness Stephen Oyende as to whether it is Pius Nyambane Nyakwar who sold the land to Rianga.

The High Court further failed to appreciate that three vital witnesses namely Lucy Mbuthu Kamau, Pius Nyambane Nyakwar and Richard Odenyo – an advocate before whom the affidavit was sworn were not called as witnesses.

The evidence of Lucy Mbuthu Kamau could have shed light on the identity of the person who transferred the land to her as the photograph of the vendor on the transfer document was not identified by the District Land Registrar or by any other witness as belonging to the appellant. The evidence of the appellant and his witness, the failure to evaluate the entire evidence coupled with omission to call vital witnesses weakened the presumption that it is only the appellant who could have committed the

offences. The appellant was in our view entitled to the benefit of doubt.

For those reasons, the appeal is allowed, the convictions quashed and sentences set aside. The fines if paid shall be refunded to the appellant.

***Dated and delivered at Nairobi this 18th day of July, 2014.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***W. OUKO***

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***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***

***S. GATEMBU KAIRU***

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***JUDGE OF APPEAL***

*/hg.*