**Muchai v Republic (Criminal Appeal E076 of 2022)**
**[2024] KEHC 287 (KLR) (Crim) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 287 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E076 OF 2022**

**K KIMONDO, J**

**JANUARY 25, 2024**

**BETWEEN**

**NAOMI WANGUI MUCHAI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the judgment in Milimani Chief Magistrates Criminal Case No. 1248 of 2016 by K. Cheruiyot, Senior Principal Magistrate, delivered on 9th May 2022)***

## JUDGMENT

1. The appellant was adjudged guilty on seven counts revolving around the theft and fraudulent transfer of title deed No. 62455 for land parcel No. IR 31029/29 (hereafter the title deed). The property belonged to Mary Wanjiru Muchai (hereafter the complainant). It is situated in South East Kahawa Station measuring 0.0883 hectares and was valued at Kshs 80,000,000.

2. Count I was for theft of the title deed contrary to section 268 (1) as read together with section 275 of the Penal Code. The particulars were that on or before 23rd June 2016 at Garden Estate within Nairobi County she stole the title deed valued at Kshs 500.

3. Count II was for conspiracy to defraud contrary to section 317 of the Code. The particulars were that on or about 23rd June 2016, at an unknown place within the Republic, jointly with others not before the court, with intent to defraud, she conspired to defraud the complainant of the land by falsely pretending that it was transferred by the complainant, a fact she knew to be false.

4. Count III related to forgery contrary to section 345 as read with section 349 of the Code. The particulars of the offence were that on or before the 23rd June 2016, at an unknown place within the Republic, jointly with others not before the court, with intent to defraud, forged the signature of the

complainant on the transfer agreement for the land purporting it to be genuine a fact she knew to be false.

5. Count IV was for making a document without authority contrary to section 357 (a) of the Code particulars being that on or before 11th December 2016 at an unknown place within the Republic, jointly with others not before the court, with intent to defraud, made an application letter for consent to transfer the land.

6. In Count V, she was charged with uttering false documents contrary to section 353 of the Code. The particulars were that on or before the 23rd June, 2016 at an unknown place within the Republic, jointly with others not before the court, with intent to defraud, used the transfer agreement above to convey the property to herself.

7. Count VI was also for uttering false documents contrary to section 353 of the Code particulars being that on or before the 10th December 2016, at an unknown place within the Republic, jointly with others not before the court with intent to defraud, she uttered an application letter for consent to Fredrick Indoko Lubulelah, Senior Land Registrar, purporting it to be genuine and written by the complainant.

8. Count VII related to giving false information to a person employed in the public service contrary to section 129 (a) of the Code. The particulars were that on or before the 10th December 2016, at an unknown place within the Republic, she gave false information to the Lands Registrar that she bought the land from the complainant which information was intended to influence the Registrar to issue the consent to transfer.

9. The appellant was sentenced to a fine of Kshs 100,000 in default to serve 8 months in jail on each of Counts I to IV. She was fined a further Kshs 50,000 or in default 5 months' imprisonment on each of Counts V, VI and VII.

10. The appellant was aggrieved and lodged the petition of appeal dated 23rd May 2022. It raises ten grounds but some are repetitive. I will accordingly compress them into six. Firstly, that PW1 testified in Kikuyu and the record is silent on interpretation by the court. The appellant thus contends that she was denied her right to participate in the trial contrary to Article 50 (2) of *the Constitution*.

11. Secondly, that there was a breach of section 200 of the Criminal Procedure Code because the sentence was delivered by a new magistrate. Thirdly, that the judgment offended section 169 of Criminal Procedure Code. Fourthly, that the learned trial magistrate misapprehended the evidence and in any case, there was insufficient evidence to convict the appellant. Fifthly, that the trial court allowed admission of certain documents by incompetent witnesses; and, sixth, that the learned trial magistrate failed to appreciate the "acrimonious relationship" between the complainant and the accused who were co-wives of Samuel Muchai Kinyanjui (now deceased).

12. The appeal is contested by the Republic through grounds of opposition dated 28th January 2023. In a synopsis, the State contends that all the elements of the offences were proved beyond any reasonable doubt; and, that the appeal is hopeless.

13. The appellant filed detailed submissions dated 2nd August 2022 together with a bundle of authorities on. The Republic replied through submissions dated 28th January 2023.

14. On 13th December 2023, I heard further arguments from learned counsel for the appellant and the Republic.

15. This is the first appellate court. I have re-appraised the evidence and records and drawn my independent conclusions. There is a caveat because I neither saw nor heard the witnesses. Pandya v Republic [1957] E.A. 336, Okeno v Republic [1972] E. A. 32, Njoroge v Republic [1987] KLR 19.

16. It is a truism that the legal and evidential burden rested squarely on the Republic. Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332.

17. I have re-appraised the evidence of the 8 witnesses called by the State as well as the defence by the appellant (DW1). It is not in dispute that the complainant and the appellant were co-wives of Samuel Muchai Kinyanjui (now deceased). The two wives may have had a strained relationship. But from the evidence of the complainant (PW1); that of her son, Abraham Njoroge Muchai (PW2); and, the statement to the police made by Samuel Muchai Kinyanjui, and produced by Corporal Wesley Mutai (PW8), I entertain no doubt that the land was at all material times registered in the name of PW1.

18. Sometime in June 2016, PW1 and PW2 discovered that the title deed was missing. When PW2 conducted an official search, it revealed that the property had been conveyed to the appellant. It is noteworthy that when the police visited the home of Samuel Muchai to take his statement (which was admitted by the court posthumously), he was emphatic that the title belonged to PW1.

19. The appellant (DW1) questioned the mental capacity of the deceased to have authored the statement. He was over 85 years old and battling serious medical conditions. The matter was argued at length before the trial court. In a considered ruling dated 10th July 2019, the learned trial magistrate held-

> " I find and hold that there is no proof that Mr. Kinyanjui suffered any mental incapacity at any time and specifically at the time he recorded his statement with the police regarding this matter. Consequently, I find and hold that his statement .. may be produced in evidence"

20. I concur in that finding. Furthermore, the title deed was registered in the name of the complainant (PW1) and not that of Samuel Muchai. The key defence mounted by the appellant was that following a family meeting or an agreement on distribution of Samuel Muchai's properties, she was given the title deed. Like I have stated, that version was disputed by both the complainant and the late Samuel Muchai.

21. As I observed, the burden of proof for the charges lay on the prosecution. It may well be that the appellant felt strongly that she was entitled to the land in the family matrix. But it was not hers. I thus readily find that there was no consent from PW1 to transfer it to her; and, that she never executed the sale agreement uttered to the Registrar of Lands. Accordingly, the defence by the appellant was counterfeit. It must follow that Count I was proved beyond reasonable doubt.

22. As a corollary, the series of events that followed and ended with a conveyance of the land to the appellant was a fraudulent conspiracy. Black's Law Dictionary 10th Edition 2014, Thomson Reuters, at page 375 defines conspiracy to defraud as "a secret plan by two or more people to cheat a person or organization". See generally Rebecca Mwikali Nabutola & 2 others v Republic, Nairobi High Court Criminal appeal 232 of 2012 [2016] eKLR.

23. In this case, I find that there was implementation of the conspiracy discernible from the following set of facts. The appellant stole away the title deed belonging to the complainant. A title deed is property capable of being stolen. She had no intention of returning it because she engineered a transfer. The appellant acting in concert with other persons not before the court prepared the bogus agreement for sale. They also forged the complainant's signature on it. The purported sale further contradicts the appellant's defence that the property was given to her following a family meeting.

24. The application letter for consent to transfer the land was equally fraudulent. The consent was uttered to Fredrick Indoko Lubulelah, Senior Land Registrar (PW4) asserting it to be genuine and authored by the complainant. It follows that the appellant gave false information to the Lands Registrar that the complainant sold the land to her. It was a scheme to influence the Registrar to grant the consent to transfer.

25. In the end, I concur with the learned trial magistrate that the prosecution marshalled sufficient evidence that proved all the seven counts beyond reasonable doubt.

26. Before leaving the matter, I wish to deal with a number of other grounds raised in the petition and submissions. Firstly, it was contended that PW1 testified in Kikuyu and the record is silent on interpretation by the court. The appellant thus argues that she was denied her right to participate in the trial contrary to Article 50 (2) of *the Constitution*.

27. On the date of plea, the language of the appellant was indicated as English. PW1 testified on 15th May 2018, in Kikuyu. The typed transcript shows there were two court assistants, Kambu and Faith. I agree with the appellant's counsel that the mere fact that the appellant has a Kikuyu name does not necessarily mean she understood Kikuyu. Section 198 of the Criminal Procedure Code requires that whenever evidence is given in a language not understood by the accused, it shall be interpreted in a language she understands.

28. I have stated that there were court assistants in court. Obviously, there is no specific indication of the translation offered. I gave a caveat at the beginning that I neither saw nor heard the witnesses. But I note that the appellant was represented by counsel throughout the trial and who, in particular, cross-examined PW1 at length. I thus find that the mere fact that the record was silent on the interpretation did not occasion an injustice or breach Article 50 (2) of *the Constitution*.

29. Learned counsel for the appellant also submitted that there was a contravention of section 200 of the Criminal Procedure Code because the judgement was read and the sentence delivered by a new magistrate. Section 200 (3) of the Code requires the succeeding magistrate to explain to the accused, on the record, of the right to recall any witnesses. See generally Raphael v Republic [1969] EA 544; Republic v Wesley Chepchieng High Court, Eldoret Criminal Case 4 of 2008 [2013] eKLR.

30. I have carefully studied the record. All the evidence from the 8 witnesses was taken by K. Cheruiyot, Senior Principal Magistrate. He also wrote the judgment. The judgment was only read on his behalf by B. Ochoi, Senior Principal Magistrate. Section 200 was thus inapplicable. The latter magistrate was also entitled to sentence the appellant.

31. Learned counsel for the appellant also submitted that material witnesses were not called to the stand. That may well be so. However, under section 143 of the *Evidence Act*, no particular number of witnesses is required to prove any particular fact.

32. I also agree that there were certain inconsistencies, for instance between the evidence of PW2, PW4 and PW6 on the correct reference number for the property vis-à-vis the particulars in the charge sheet. But there was never doubt of the stolen title deed and which was marked and produced at the trial. I thus find the discrepancies to be immaterial. Furthermore, in any trial there are bound to be such discrepancies. Joseph Maina Mwangi v Republic, Criminal Appeal No. 73 of 1993.

33. The appellant challenged the production of documents by some witnesses. I agree that documents should ideally be produced by their makers. But there are exceptions to that general rule. I am unable to impeach the trial court on that aspect.

34. But I agree with the appellant that Paul Kiiru (PW7) did not lay a proper foundation about his appointment as an administrator of the law firm of S. K. Riitho or table sufficient documents on the illness or incapacity of the latter. But the material evidence from PW7 was that he was instructed by Riitho to hand over to the appellant the original transfer. I also find that even in the absence of the evidence of this particular witness, the combined evidence of all the other witnesses was sufficient to prove all the counts beyond reasonable doubt.

35. Learned counsel for the appellant also submitted that the judgment did not comply with section 169 of the Criminal Procedure Code. It is true that the judgment of the lower court was a brief one; perhaps even sketchy on the evidence of some witnesses. However, I dismiss this ground of appeal for the following reasons: The impugned decision analyzed all the seven counts and weighed them against the evidence. It set out the points for determination and made findings on each of the counts. It also weighed the defence against the prosecution evidence. After reviewing the provisions of the law and some precedents, the learned trial magistrate correctly reached the finding of guilt.

36. I will now turn to the attack on the amended charge sheet. True, it is not drawn in an elegant manner and has some discrepancies. But the statement of the charges and the penal sections are indicated. The particulars provided were equally sufficient to enable the appellant understand the nature of the case she was facing. I also find that the material evidence from the witnesses was not at any serious variance with the particulars of the amended charges. Furthermore, any inaccuracy in the particulars is curable under section 382 of the Criminal Procedure Code.

37. The upshot is that the appeal on conviction on all the seven counts is unmerited and is hereby dismissed.

38. Regarding the sentences, I find that that there is no appeal on sentence or any cross-appeal by the Republic. I will accordingly let the matter rest.

39. The upshot is that the entire appeal is devoid of merit and is hereby dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.**

**KANYI KIMONDO**

**JUDGE**

Judgment read virtually on Microsoft Teams in the presence of-

Appellant.

Mr. Nyaberi for the appellant instructed by Omwoyo, Momanyi Gichuki & Company Advocates.

Mr. Mongare for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.