



REPUBLIC OF KENYA



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**Republic v Migiro (Criminal Appeal E030 of 2021)
[2024] KEHC 6564 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E030 OF 2021**

WA OKWANY, J

MAY 30, 2024

BETWEEN

REPUBLIC APPELLANT

AND

JOESPH MOKAYA MIGIRO RESPONDENT

*(Being an Appeal against the Judgment of Hon. B. M. Kintai - PM
Keroka dated and delivered on 23rd July 2021 in the original Keroka
Principal Magistrate's Court Criminal Case No. 1031 of 2016)*

JUDGMENT

1. The Respondent was charged with four different counts in the trial court as follows: -
 - i. Count 1: Making a document without authority contrary to Section 357 (a) of the [Penal Code](#). The particulars of the charge were that on the night of the 15th day of December 1993, at Keroka in Masaba North sub-county, within Nyamira County, with intent to defraud, without agreement of a parcel of land known as portion No. Nyansiongo Settlement Scheme/10 in Borabu location, in Nyamira District which was measuring 3 Acres and was registered in the name of Elijah Ongoro Mogaka, purporting it to have been signed by the said deceased Elijah Ongoro Mogaka.
 - ii. Count 2: Forgery contrary to Section 349 of the [Penal Code](#). Particulars being that on the 15th day of December 1993, at Keroka in Masaba North sub-county, within Nyamira County, with intent to defraud, forged the signature of the late Elijah Ongoro Mogaka in a sale agreement of a parcel of land known as No. Nyansiongo Settlement Scheme/10 purporting it to be a genuine sale agreement between him and the late Elijah Ongoro Mogaka.
 - iii. Count 3: Forgery contrary to Section 349 of the [Penal Code](#). Particulars being that on the 14th day of March 1994, at Keroka in Masaba North sub-county, within Nyamira County, with



intent to defraud, forged the signature of the late Elijah Ongoro Mogaka in a sale agreement of a parcel of land known as No. Nyansiongo Settlement Scheme/10 purporting to be a genuine sale agreement between him and the late Elijah Ongoro Mogaka.

- iv. Count 4: Forgery contrary to Section 349 of the *Penal Code*. Particulars being that on the 14th day of September 1995, at Keroka in Masaba North sub-county, within Nyamira County, with intent to defraud, forged the signature of the late Elijah Ongoro Mogaka in a sale agreement of a parcel of land known as No. Nyansiongo Settlement Scheme/10 purporting to be a genuine sale agreement between him and the late Elijah Ongoro Mogaka.
2. The Respondent denied all the four charges and the case proceeded to a full trial. The Appellant called six (6) witnesses in support of its case.

The Prosecution's (Appellant) Case

3. PW1, Prisca Bosibori, testified that sometime in 1994 she engaged the services of her brother in law, the Respondent herein, to purchase a parcel of land for her. She claims that the Respondent managed to get 1 acre and that she paid Kshs. 100,000/= to the seller, one Elijah Ongoro Mogaka, through the Respondent after which the seller and Respondent signed a sale agreement. She testified she only realised that the land was not registered in her name when Kenya Power Lighting Company wanted to construct a power line through the land and the said company declined to pay her on the basis that she was not the land owner. She later discovered that the land was registered in the name of the Respondent's wife, Cecilia Mokaya. She claimed that she filed a case over the issue before the High Court which case is still pending. She followed up on the matter at the Lands Office in Nyamira where she noted that the seller transferred the land to Cecilia Mokaya.
4. PW1 added that Elijah died in 2003 before he could do the transfer and that the transfer on record was dated 31st June 1989. She claimed that she also had a transfer letter dated 17th November 1993.
5. PW2, Donald Onsongo Mageka, testified that the Respondent is his elder brother and a neighbour and that PW1 was his sister-in-law. He testified that sometime in 1994, they both agreed to look for land for PW1 and that money was given to the Respondent on the strength of his letter dated 7th October 1994. He added that the Respondent given Kshs. 100,000/= to purchase land parcel No. Nyansiongo Settlement/10 which had since been sub-divided. It was his testimony that PW1 made an agreement and that she had lived peacefully with the Respondent until 2011 when power lines were being laid on the land and PW1 was not paid because the land was not in her name. PW2 further testified that a family meeting attended by the chief and elders over the issue did not yield any fruits as the Respondent became hostile thus leaving them with no option but to take the dispute to the High Court at Kisii *vide* Civil Case No. 538 of 2012.
6. PW3, Jacob Okemwa, testified that he knew the Respondent as a neighbour. He testified that he was a witness to the buyer Prisca Bosibori in 1994 when she bought land from Kennedy Mogaka measuring one and a quarter acre.
7. PW4, Naomi Nyaboke, was the wife of the late Elijah Mogaka. She stated that she was aware that Elijah sold land to the Respondent and Onsongo (PW2) but did not know how Prisca (PW1) came into the picture. She stated that she did not know how much was paid for the and that her son, Kennedy, sold land to Mokaya Onsongo (1 acre) while Prisca bought one and a quarter acre for a consideration of Kshs. 100,000/=. She testified that she later learned that Mokaya and Prisca were quarrelling over that land and that Mokaya had processed a title deed for himself.



8. PW5, No. 248593 P.C. Philip Eshabola, took over the investigations of the matter from C.I. Wepukhulu who had retired and PC Koech who had resigned in 2018. He testified that the complainant reported the matter on 26th May 2016 while claiming that the Respondent made a document in respect to parcel No. Nyansiongo Settlement Scheme/10 without authority. It was his testimony that a suspicion arose when the documents from the lands office were compared to the original documents of the land owner, Elijah Ongoro.
9. PW5 testified that the Investigating Officer prepared an exhibit memo and sent the documents to the DCI headquarters for examination. Upon examination, the signatures on the documents were found to be different thus forming the basis for the charges against the Respondent.
10. PW6, No. 232056 S.P. Geoffrey Chania, an officer working with National Police Service under DCI Forensics, Document Examination laboratory at DCI headquarters produced a report prepared by Michira Ndege. He testified that they received B1-B4 the questioned document; B1 – B2 Sale Agreement between Elijah Ongoro and Joseph Mokaya for land described as Nyansiongo Settlement Scheme/10 in Borabu location, B1-B2 PMFI1; B3 acknowledgment dated 14/3/1994; B3 Copy of Mutation Form dated 14/9/1995; A1 and A2 which contained known signatures and disputed signatures of Elijah Mogaka as follows: A1 was a copy of transfer form dated 31/7/1985, A2 was a letter from the Officer's settlement addressed to the Secretary Borabu Land Control Board dated 17/11/1995 and A1 had no indication of marking; A1 – MFI12 and A2- MFI13. PW6 testified that in the company of the documents was a memo form forwarded by PC Boniface Njoroge from CID Nyamira with a request to ascertain whether the signatures pointed by red pen on the questioned document marked B1 and B2 (Sale agreement MFI13) was made by the same author when compared with known signature on the documents marked A1. It was his testimony that they found that the signatures were not made by the same person. He added that Elijah Mogaka did not sign the sale agreement marked MFI1 and concluded that the signatures and the document were forged.
11. PW6 produced the report together with the Exhibit Memo as P.Exh 14 and 15 respectively. He also produced the document examined as B1 and B2 Sale Agreement (P.Exh 1), B3 (P.Exh11), B4 (P.Exh 10), A1 (P.Exh 12) and A2 (P.Exh 13).
12. At the close of the Prosecution's case, the trial court found that the Respondent had a case to answer and placed him on his defence. He elected to give sworn testimony and did not call any witnesses.

The Respondent's Case

13. DW1, Joseph Migiro Mokaya, the Respondent herein, testified that he was a retired teacher and that he knew Elijah as the owner of Parcel No. Nyansiongo Settlement Scheme/10 while Kennedy was his (Elijah's) elder son. He stated that both Elijah and his son were deceased. He testified that the land in question had been subdivided and that he had mutation forms and a title deed in the name of Cecilia Nyangara who owned No. 524.
14. DW1 produced the Green Card (D.Exh1) and stated that the subdivision was done by Elijah Ongoro who was the owner of parcel No. 10. DW1 testified that he bought the land in 1993 and that the title was issued to Cecilia in the year 2000 after subdivision had been done in 1995. He produced an agreement (D.Exh2) written by Makori Omwaro. DW1 stated that he paid Kshs. 170,000/= and a balance of Kshs. 70,000/= was paid to the deceased after which an acknowledgement letter dated 14th March 1994 (D.Exh4) was written.
15. He produced a letter from the chief (D.Exh10) and testified that he had a case in ELC No. 1081 of 2016 touching on the same matter. He further stated that the land registrar visited parcel No. 523 and



524 and prepared a report dated 29th January 2020 (D.Exh 11). He stated that the charges against him were not true and prayed to be acquitted. He produced the titled deed (D.Exh 12) and the Mutation forms (D.Exh 13).

16. At the end of the trial, the trial court found that the case against the Respondent was not proved to the required standards after which he was acquitted on all the four counts under Section 215 of the *criminal Procedure Code*.

The Appeal

17. Dissatisfied with the decision of the trial court, the Prosecution Counsel filed the present Appeal and listed the following grounds of appeal in the Petition of Appeal dated and filed on 10th November 2021: -

1. That the Learned Trial Magistrate erred in law and fact in acquitting the Respondent of all the four counts under Section 215 of the *CPC* when sufficient evidence had been tendered by the Prosecution contrary to the findings of the trial magistrate.
2. That the Learned Trial Magistrate erred in law and fact by blatantly ignoring expert witness evidence which corroborated the primary evidence presented by the Prosecution.
3. That the Learned Trial Magistrate erred in law and fact by directing his mind on extraneous facts over and beyond those presented in the case before him therefore occasioning miscarriage of justice by importing an erroneous assessment of facts presented by the Prosecution.
4. That the Learned Trial Magistrate erred in law and fact by totally not addressing the key ingredients of the offences on record.
5. That the Learned Trial Magistrate erred in law and fact by purporting to introduce his own version of events different from the facts presented in court by the Prosecution.

18. the Appellant sought orders that the Appeal be allowed and that the Respondent be convicted. In the alternative, Counsel prayed that the proceedings before the trial court be declared a mistrial and a fresh trial be conducted before another magistrate.

19. The Appeal was canvassed by way of written submissions which I have considered.

20. In *Kariuki Karanja vs. R* (1986) KLR 190, the court restated the duty of a first appellate court as follows: -

“On a first appeal from a conviction by a judge or a magistrate, the appellant is entitled to have the Appellate Court's own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit.”

Issues for Determination

21. The issues for my determination are: -
- i. Whether the charge of making a document without authority was proved to the required standard.
 - ii. Whether the 3 counts of the charge of forgery were proved to the required standard.



Analysis and Determination

I. Whether the Charge of Making a Document Without authority was proven to the required standard.

22. Section 357 provides as follows: -

357. Making documents without authority

Any person who, with intent to defraud or to deceive—

- (a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or
- (b) knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.

23. For the charge of making documents without authority to stand, the Prosecution must prove that there exists a document, that that document was executed or made in the name of another person without the express authority of the said person. In this case, the Prosecution's evidence demonstrated that there was a sale agreement P.MFI1 which PW1 testified was made between one Elijah and the Respondent herein. On Record is the contentious agreement for sale dated 15th December 1993 (D.Exh1) which I have re-examined and noted that it makes reference to parcel No. Nyansiongo Settlement Scheme/10 measuring 3 Acres for which the Respondent agreed to pay a consideration of Kshs. 240,000/=. The Respondent testified that he paid Kshs. 170,000/= at the point of execution and later paid the balance of Kshs. 70,000/= which was acknowledged through letter dated 14/3/1994 (D.Exh5). He explained that at the time of paying the balance of Kshs. 70,000/=, Elijah (the seller) was unwell and that his son, the late Kennedy Nyambati Mogaka, executed the acknowledgment on his behalf. He also testified that the agreement was drafted and witnessed by a lawyer Makori Omwaro Partners. He produced a receipt (D.Exh2) for the same which I have perused and noted that the sum of Ksh. 800/= was paid for drafting the land agreement.

24. I note that even though the Respondents witnesses were both deceased and the said Kennedy Mogaka could not be called to verify or corroborate the Respondent's account that he signed the acknowledgement on behalf of his ailing father Elijah, the burden of proving whether the Respondent made the sale agreement dated 15th December 1993 without authority rested on the Prosecution. This Court cannot shift that duty to the Respondent by requiring him to tender evidence in this regard. This principle was explained in *Ajwang vs. Republic* [1983] KLR 337 thus: -

“The burden of proving the ingredients of the offence are entirely on the prosecution and the accused cannot be called upon to prove his innocence.”

25. It is my finding that the Prosecution did not demonstrate whether the sale agreement was made by the Respondent without the authority of the seller. The Respondent's testimony on how and when the agreement was made impeaches the claim by the prosecution that the agreement was made without authority.

II. Whether the 3 counts of the charge of forgery were proven to the required standard.

26. Section 349 of the *Penal Code* provides for the punishment of the offence of forgery as follows: -



349. General punishment for forgery

Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.

27. I note that even though the *Penal Code* does not expressly define the offence of forgery, a definition was given by the Supreme Court of India in *Dr. Vimla v Delhi Administration* (1963) AIR 1572 1963 SCR Supl. (2) 585 where the Court explained that the offence of forgery relates to making a false document as follows: -

“The definition of ‘false document’ is a part of the definition of forgery’ and both must be read together. If so read, the ingredients of the offence of forgery relevant to the present case are as follows: (1) fraudulently signing a document or a part of a document with an intention of causing it to be believed that such document or part of a document was signed by another under his authority; and (2) making of such a document with an intention to commit fraud or that fraud may be committed. In the two definitions, both mens rea described in Section 464, i.e., “fraudulently” and the intention to commit fraud in Section 463 have the same meaning.... The second thing to be noticed is that in Section 464 two adverbs, ‘dishonestly’ and ‘fraudulently’ are used alternatively indicating thereby that one excludes the other. That means they are not tautological and must be given different meanings.”

28. The Supreme Court of India similarly held as follows in *Sheila Sebastian v R. Jawabaraj & Anr. Etc.*, Criminal Appeal Nos. 359-360 of 2010 at para. 26: -

“The definition of ‘false document’ is a part of the definition of ‘forgery’. Both must be read together. ‘Forgery’ and ‘Fraud’ are essentially matters of evidence which could be proved as a fact by direct evidence or by inferences drawn from proved facts. In the case in hand, there is no finding recorded by the trial Court that the respondents have made any false document or part of the document/record to execute mortgage deed under the guise of that ‘false document’. Hence, neither respondent no.1 nor respondent no.2 can be held as makers of the forged documents. It is the imposter who can be said to have made the false document by committing forgery. In such an event the trial court as well as appellate court misguided themselves by convicting the accused. Therefore, the High Court has rightly acquitted the accused based on the settled legal position and we find no reason to interfere with the same.”

29. For a document to be false, it must purport to be something which it is not (see *Brott v R* (1992) 173 CLR 426). The ingredients of the offence therefore are: -

- i. There has to be the making of a false document;
- ii. With intent to defraud or deceive; and
- iii. That the document was made by the accused.

30. PW6 testified that his findings were that the signature on the sale agreement marked MF11 was not made by the same person who signed the transfer form dated 31st July 1985 and the Land Control Board letter dated 17th November 1995, Elijah Mogaka. He concluded that the signature and the document were forged.



31. I have considered this evidence of PW6 alongside other evidence. While it is clear that PW1 had liaised with the Respondent and PW2 to buy land way back in 1993, the Respondent produced evidence to show that the parcel of land in contention, Nyansiongo Settlement Scheme/10, was subsequently subdivided into several portions and that he purchased No. 524 which was what he registered in his wife's name. The Prosecution did not present evidence to show that PW1 bought that specific portion of land so as to prove that any other document made in respect to the portion is a forgery.
32. PW1 did not tender documents to prove that she paid money to Elijah through the Respondent or that she took steps to register the land for all those years. Furthermore, the sale agreement on record relates to the sum of Kshs. 240,000/= while she said that she paid Kshs. 100,000/=.
33. It only leads this Court to conclude that the sale agreement between the Respondent and Elijah produced as D.Exh 2 was not in reference to the alleged land sale transaction between PW1 and Elijah for which she allegedly paid Kshs. 100,000/=. The Prosecution also never produced for the court's consideration, the sale agreement between PW1 and Elijah that PW2 testified was allegedly concealed by the Respondent.
34. Based on the forgoing, it is my finding that the Prosecution's case was founded on mere suspicion and lacked tangible evidence to prove the charge of forgery. It is trite that mere suspicion cannot form the basis of a conviction. (see *Sawe v Republic* [2003] KLR 364)
35. A perusal of the record of appeal reveals that the only documents alleged to have been forged were the sale agreement dated 15th December 1993 and the acknowledgment letter dated 14th March 1994. There is no record of any other sale agreement as described in the fourth count for this Court's consideration. Consequently, I find that even though PW6 concluded that the documents may have been forged, a cursory glance at this evidence alongside other evidence creates reasonable doubt as to whether the purported agreements, as described in the second and third count, were a forgery perpetrated by the Respondent.
36. I further note that the forensic examination conducted by the DCI Document examiner was based on copies of documents which were alleged to contain known signatures of the deceased Elijah. It is my finding that the forensic examination should have been conducted on the original documents and not on photocopies of documents which were allegedly signed by the deceased that were compared with the alleged forged document. This means that the finding that the documents were forged cannot stand.
37. I find that the Prosecution did not discharge its burden of proof beyond reasonable doubt on the charges in count 2, 3 and 4. I therefore uphold the decision of the trial court to acquit the Respondent on all the charges.
38. In the final analysis, I find no merit in the appeal which I hereby dismiss.
39. Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 30TH DAY OF MAY 2024.

W. A. OKWANY

JUDGE

