

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 26 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

LAWRENCE KURIA WARACHI.....RESPONDENT

*(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court Anti-Corruption Case No. 4 of 2014 delivered by Hon. W. Kagendo Chief Magistrate on 17<sup>th</sup> July 2018)*

JUDGMENT

1 The Respondent herein **Lawrence Kuria Warachi** was charged with two counts of Abuse of Office contrary to section 46 as read together with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. The particulars of the first count were that on the 2<sup>nd</sup> day of December 2009, at the District Land Registry, Nanyuki Town, within the county of Laikipia in the Republic of Kenya being, a person employed in the public service, as a Land Registrar, used his said office to improperly confer a benefit on Wellington Weru Kahuthia by issuing him a title deed for a land parcel number no. LAIKIPIA/DAIGA UMANDE/BLOCK 4/495(Nyariginu) measuring 0.98 hectares that had been reserved for a polytechnic for benefit of area residents.

2 The particulars of the 2<sup>nd</sup> count was that on the 2<sup>nd</sup> day December 2009 at the District Land Registry, Nanyuki Town, within the county of Laikipia in the Republic of Kenya being a person employed in the Public Service as a Land Registrar, used his office to improperly confer a benefit on Fredrick Muthaura Magiri by issuing him a title deed for a land parcel No. LAIKIPIA/DAIGA UMANDE/BLOCK 4/496(Nyariginu) measuring 0.4 hectares that had been reserved for a nursery school for the benefit of area residents. He was acquitted of the charges against him.

3 Being aggrieved with the Judgment, the Director of Public Prosecutions filed this appeal citing the following grounds:

1. *That the learned trial magistrate erred in law and in fact in acquitting the Respondent yet the Appellant adduced evidence against him to the standard required in law.*
2. *That the learned trial Magistrate erred in law and in fact in finding that the Respondent had poked holes on the Appellant's case which finding is against the evidence on record.*
3. *That the learned trial magistrate erred in law by placing weight on the defence evidence and failed to place appropriate weight to the Prosecution's overwhelming evidence.*

4. That the learned trial magistrate erred in law and fact in discounting the strength of the Prosecution's exhibits and in her over reliance on the defence exhibits which was not warranted in the circumstances of this particular case.

5. That the trial Magistrate erred in law in considering extraneous issues and hypothesis in arriving at the decision rendered in her judgment.

6. The learned trial Magistrate erred in law and fact by failing to consider the elements required to proof the charges before court.

4 The case of the prosecution is premised on the evidence of seven (7) witnesses. PW1 **Francis Mwenge Macharia** the Chief of Mwamaki Location recalled that he had been approached in June 2008 by youth from his location who wanted to register a self help group for purposes of mining quarry ballast within Mwichuiri area. They wanted him to sign some forms for them so that the Ministry of Culture and Social Services would register them. He did not sign the forms as he realized that the plot was designated as a public utility land for a polytechnic, school, dispensary and water point.

5 PW2 **Joseph Mathenge Muturi** started living in Mwichuiri farm in 1983 after buying land from a share holder and director of Mwichuiri

farm one Stanley Kabere who was also a secretary to Mwichiri Farmers Company. He noted that the company kept on changing surveyors from time to time and many disputes arose leading to the intervention by the provincial administration.

6 In 1993 the DC called all companies and directors to solve the issue of title deeds. The company Chairman one Marete Stanley, together with the company secretary and the treasurer M'Marete M'Ibutu went to Nanyuki Station. At the meeting, members complained that Nyariginu had processed title deeds while Mwichiri farm had not.

7 Through the D.C's intervention, they selected representatives to work with the directors and agreed to have a corporate surveyor with a recommendation that the surveyor who had done survey for Nyariginu does the survey for Mwichiri. Olweny and associates were thus recommended as the surveyors.

8 He was elected as patron of the monitoring committee composed of 7 members, to ensure that the money contributed reached the surveyor. He also issued receipts on behalf of the surveyor who did not want money to pass through the directors. Once the surveyor was paid, he started working.

- 9 Upon completion, he gave them the survey map and told them to lodge complaints in case they had any after which he surrendered the map(PEXB.6) and area list to the land registrar Laikipia in his company. The survey map was composed of two blocks i.e Daiga Umande/Block 4 Nyariginu and Daiga Umande /Block 6 Nyariginu. He thus identified the map before the court as that of Block 4(PEXB.6), the area list (PEXB4).
- 10 It was his evidence that public utilities were provided for in the map as it was compulsory. He further told the court that no changes were made after submission of the area list and survey map to the land registry. They assigned plot no. 498 for primary school, plot no. 496 for nursery school, plot no. 495 for polytechnic, plot no. 497 for church, plot no. 811 as water plant and plot no. 499 for dispensary.
- 11 He recalled that on completion of the survey, three registers were opened i.e one for the land registrar, the 2<sup>nd</sup> one for the D.C's office and the third one was to remain with the company and monitoring team. He thus identified a register(PEXB.4) and confirmed that he was in fact the one who wrote the particulars. According to him, the purpose of the register was to clear members when issuing clearance certificates as it reflected particulars in the area list and map.

- 12 He however started noting that the plots earmarked for public utilities had been grabbed. He reported this to the relevant authorities and the Respondent was summoned. Lastly, he identified the area map(PEXB.6) which showed that plot 495 was a polytechnic and 496 was a nursery. He also stated that he did not know who altered the register(PEXB.4) to show that 95 belonged to Samson Karimi.
- 13 PW3 **Daniel Gitu** is a forensic document examiner working with DCI headquarters. He told the court that on 30/6/201, they received documents from EACC under the escort of J.A Baitharu accompanied by a memo form. The documents marked B1-B5 and C1-C10 were the specimen handwriting and signature (PEXB.9) of the Respondent.
- 14 The requests made were for them to ascertain whether the handwriting circled by pencil on the questioned documents B1-B5 and B6 if compared with the specimen handwritings C1 to C10 were made by the same hand. PW4 examined them and opined they were made by the same person who was the Respondent.
- 15 PW4 **Bernard Githinji Marete** was a church minister previously based in PCEA Nanyuki Parish. He recalled that he had 18 congregations covering Nanyuki Town, part of Umande and Segera.

His mandate involved taking care of the church property in Nanyuki and he had a congregation called Daiga who brought him concern over the land i.e Laikipia/Daiga/Umande Block 42/496 (Nyariginu). The said land on which the church was to be built no longer belonged to them as they had been advised to move out.

- 16 He informed a church leader one Julius Mwangi who was from that area and also sought help from the DC Laikipia. The session clerk one Simon Wachira wrote a letter (PEXB.12) dated 20/2/11 which they took to the D.C's office in the company of Mr. Mwangi, Paul Kinyanjui, Beatrice Gichinjo with other church leaders. They gave the letter to the DC Mr. Mathenge who called the registrar to his office and told him to assist them.
- 17 He identified a letter dated 15/2/11 (PEXB13) from S.N Mburu to Fredrick Muthaura M'Magiri who had been allocated the land. A search(PEXB14) confirmed that the parcel was owned by Fredrick Muthaura M'Magiri who had a title deed.
- 18 PW5 **Julius Mwangi Mburu** was an ordinary member of Mwachiri Farmers Co. Ltd. In reference to Laikipia/Daiga/Umande Block /496, he recalled that in 1990, he was posted to start a school in that area then referred to as Mwachiri 2 Masai Area. He explained that he

started the primary school under a tree and found two grass thatched rooms which housed a nursery school.

19 An issue then arose as the structures housing the nursery school belonged to the primary school. He consulted with the chief, assistant chief one Benson Karuri and parents of the children. The chief linked them to the directors of Mwachiri 2 and that is when he realized that there was a plot earmarked for the nursery school which was used as a nursery school from Monday to Friday and a church on Sundays.

20 After being called by the church minister and other leaders in 2011 he discovered that the church /nursery school plot had been allocated to Fredrick Muthaura M'Magiri. They then went to report to the D.O who told them that the land tribunal would deal with the matter. They were however never summoned to the tribunal.

21 PW6 **Joel Mwemi Mwinzi** a land registrar who previously worked in Laikipia from 2012 to late 2015. He testified that his duties included being the custodian of land records, issuance of title deeds, settling of disputes and making entries in the green cards. He explained that land buying companies would present a register containing names of persons allocated land, the parcel number and acreage. The green card (PEXB2) was opened on 4/2/98 and a title deed issued to Wellington



Kahuthia on 2/2/09 by Warachi who he had worked with. Plot 496 had a title deed issued to Fredrick Muthaura M'Magiri on 2/12/09 by the same Warachi. A reconstruction was later given on 4/6/13

- 22 He denied issuing any title deeds to members of Mwichuri Company. He further confirmed that once an area list is issued to the land registrar it cannot be amended. He did not however know when the area list in this case had been forwarded. He pointed out that DEXB1 differed from the one produced by the prosecution (PEXB2).
- 23 PW7 **Japheth Angaine Baitharu** a Deputy Director of EACC told the court that in the year 2013, he was based in Nyeri region as the region head hence the investigating officer in this matter. He testified that on 2/9/2011, Pw2 went to his office to report that some public utility plots had been irregularly alienated at Dalga Umande area.
- 24 He commenced investigations by requesting for certain documents from the Chief Land Registrar in Nairobi vide a letter dated 28/9/2012 to the Director Land and Settlement Nairobi. The documents he requested for were the area list, area map for Laikipia Daiga Umande Block 4 Nyariginu and Laikipia Daiga Umande Block 6 Nyariginu.

- 25 Letters were sent requesting for several documents, including searches EXB3, 18 & 19. At the Nakuru Survey Office, they managed to get the registry index map(PEXB1) an amended area register (EXB2); Green cards (EXB4D & 4E) He however confirmed that plots number 95 and 496 were reserved for polytechnic and nursery school respectively but had been were given out to Wellington Weru and Fredrick Muthaura M'Magiri.
- 26 He produced the area list(PEXB 3), the members register(PEXB.4) from Mwichuri Daiga Rumande Block 4 which indicated plot 495 and 496 were reserved for polytechnic and nursery school respectively. He also obtained the green card for Laikipia/Daiga/Umande /Block 4/495 (PEXB.4D)which showed that plot no. 495 was transferred to Wellington Weru Kahuthia on 2/12/2009 and title was issued on the same day. In addition to this, he stated that the green card for parcel no. 496(PEXB.4E) indicated that the plot was also transferred to Fredrick Muthaura on 2/12/2009 and title deed was issued. Thereafter, he filed restrictions on both parcels indicated as entry no. 4 in the green cards.
- 27 The trial court adopted the evidence of Mr Olweny in ACC No 2 of 2014 since the said witness had passed on. His evidence was that he did the

survey of the land in 1997 and made provision for public utilities. He made a part development plan (PDP). It had a Registry Index map (RIM) which was approved (PEXB6). He prepared an area list for the plan and the same was not amended. The one in court (PEXB2) was amended.

- 28 He stated that the plots which had been preserved for public utilities were: No 496 – (public school), 497 (church), 499 (dispensary and 498 (tree nursery), 495 (polytechnic) 948 primary school. He stressed that an area list is guided by the original map and it can never be amended. He also said the map in court was an original after a mutation had been done the last entry having been done on 4/1/2006.
- 29 The Respondent elected to give a sworn statement and also adopted the evidence of Beatrice Mwai (DW1 in ACC No. 4 of 2014) when he was placed on his defence. He stated that he is a retired land registrar and had served in that capacity in the years 2008-2012. His duties were administrative like listening to members of the public, solving land disputes, searches and also issuing title deeds.
- 30 He also testified that he issued the two title deeds for the parcels of land in issue i.e Nos 495 and 496 to Wellington Weru Kahuthia and Fredrick Muthaura respectively. That he relied on the list of directors(DEXB.1),

the area list for Daiga Umande Block 4 Nyariginu (DEXB2) the sample of the title deed clearance certificate showing who would sign,(DEXB3) letter dated 3/2/1998 from the chief land registrar giving directions to the district land registrar to issue title deeds (DEXB4).

31 He stated that none of the directors came to court to testify as to how the title deeds were issued and equally none of the three directors who signed the clearance certificates gave evidence in the case. He pointed out that the area list (PEXB.2) for Daiga Umande Block 4 Nyariginu read "amended". He confirmed that an area list cannot be amended. He said he never saw (PEXB.2) in the course of his work and only saw it when it was produced in court.

32 He further stated that the register for Nyariginu produced in court had a lot of cancellations which were not counter signed and denied ever making any alterations. Lastly, he stated that green cards were opened in 1998 and there were no reservations in them at all. Having been presented with clearance certificates he saw no need of obtaining consent from the Commissioner of Lands. According to him, he did not do anything outside his normal scope of duty.

- 33 The evidence of DW<sub>1</sub> (Beatrice Mwai) in ACC No 5 of 2014 was adopted in this case. She was the land registrar at Laikipia at the time of incident. She said she never recorded any statement with the EACC. She denied any knowledge of the amended area list (PEXB<sub>2</sub>). She also denied authorizing Mary her secretary to certify any documents related to these cases. She is the one who produced DEXB<sub>1-4</sub>. DEXB<sub>2</sub> was according to the defence the genuine area list as it was not amended.
- 34 When the Appeal came for hearing Mr. Moranga for the Appellant submitted that the trial court misdirected itself on issues of fact. That from the evidence of Pw<sub>2</sub>, it was clear that the disputed plot assigned to the P.C.E.A Church had been set aside for a Nursery School. Counsel further submitted that PW<sub>2</sub> was the main complainant as he was there from the beginning and his evidence was therefore material. He argued that PW<sub>2</sub> was also the author of a register (PEXB.<sub>3</sub>) listing the beneficiaries and the only dispute was on over writings which he denied being responsible.
- 35 Mr. Moranga submitted in reference to the area list (PEXB.<sub>2</sub>) of 1998 that there was no other area list and save for amendments to the amended list he was able to recognize it. He argued that the evidence of PW<sub>7</sub>, PW<sub>4</sub>, PW<sub>5</sub> & PW<sub>6</sub> flowed very well, and the chain of the

documents was clear. Counsel contended that the Respondent was to check all documents to assist him make a correct decision. He further submitted that the naming of the exhibits including the area list (DEXB1 or 2) may have caused confusion and accused the trial court of over relying on the documents produced by the defence e.g DEXB.2.

36 Counsel further submitted that the area list had issues because the origin was unknown, the amendments were not material and the Respondent was the one in possession of these documents. By virtue of his office, he ought to have made an informed decision but he took no action making his decision an abuse of office.

37 Mr. Moranga went on to submit that according to the trial court, the surveyor disowned the area list. He submitted that the amendments were either by the Respondent or his cronies.

38 Mr. Njuguna for the Respondent opposed the Appeal and submitted that a lot of emphasis had been placed on the evidence of PW2 who was never a director of the company and that none of the directors of the company testified. He further submitted that the register which was prepared by PW2, had many erasures, whiteouts, and over writings which were never linked to the Respondent. PW2 was not able to explain them.

- 39 In reference to the area list, he submitted that PW2 was not the author of the same but a self-styled caretaker of Muchuri Farmers Company Limited. That the surveyor (Olweny) disowned the area list (PEXB2) since he said the same cannot be amended. He further submitted that the area list (DEXB1) the Respondent produced had no amendments.
- 40 Mr. Njuguna further submitted that the Prosecution supplied them with a clearance certificate signed by the directors and none disputed it. Further that the beneficiaries of the title deeds never testified. Counsel argued that the Respondent made a detailed procedure in his defence hence the adoption of DW1's evidence. He said the two beneficiaries of the titles, Mary Mureithi and the directors never testified in this case.
- 41 Lastly, counsel submitted that there was no material to support to the ground that the Learned Trial Magistrate relied on extraneous matters.
- 42 This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record as a whole and make its own decision. An allowance must be given owing to the fact that the appellate court did not see nor hear any of the witnesses. See **Okeno v Republic**

**1972 EA. 32; Patrick & Anor v Republic [2005] 2KLR 162 & Muthoko & Anor v Republic 297.**

**DETERMINATION**

43 I have duly considered the evidence on record and the grounds of appeal. I have equally considered the submissions by both parties. I have found the following to be the issue falling for determination:-

- i) **Whether the Respondent acted diligently as a land Registrar in issuing the title deeds to land parcel no. LAIKIPIA/DAIGA UMANDÉ/BLOCK4/495 & 496 to (NYARIGINU) Wellington Kahuthia & Fredrick Muthaura.**

44 The Appellant's case was that the Respondent allocated land Nos 495 & 496 which had been set aside for public utility to two individuals in total disregard of the laid down procedures for issuance of titles of first registration.

45 PW6 **Joel Mwinzi** told the trial court that land registrars rely on the register (which contained the names of the people to be issued with title deeds), the parcel number and acreage before issuing title deeds. In addition to this, the land registrars also look at the map from the survey department and the area list to assist them.



46 During the trial in the lower court, the following documents were availed by the Appellants:

- i) The register of members (PEXB.4)
- ii) The amended area list (PEXB.2)
- iii) Map of the area (PEXB.6)

Thus, according to the evidence of PW6, these are the documents the Respondent should have relied on when issuing title deeds and if he ignored them, then he was in breach of his duty of office.

47 The investigating officer (PW7) testified that his officers one Faith Ngethe and Diana Obula had obtained the registry index map (PEXB.6) from the survey office in Nakuru. Furthermore, PW7 also obtained the area list (PEXB.2) from Nanyuki land office as well as the members register (PEXB.4). It was thus the evidence of PW7 that the two plots in issue were meant for public utility and the Respondent acted contrary to the law by issuing title deeds on the plots to individuals.

48 Furthermore Mr. Olweny (the surveyor whose evidence was adopted in this case) had confirmed in Anti-Corruption Criminal Case No. 2 of 2015 that he had clearly set aside land for public utilities and identified PEXB.6 as the registry index map he prepared. PW2, PW4 and PW5

also testified that the two parcels of land were reserved for public utilities as shown in the area map.

49 The Appellant's witnesses had during cross examination by the defence confirmed that the register (PEXB4) had numerous gaps, cancellations, white out and no one had any idea as to who prepared the register and made alterations. This court notes that none of the eleven (11) directors gave evidence so as to shed light as to where the documents were who did the cancellations or how the land parcels were re-allocated.

50 The area list(PEXB.2) according to the evidence of PW6 was to be used alongside the register and the map. It was dated 21/4/98 and indicated "amended". PW7 told the trial court that he obtained this area list from the Laikipia land registry and the same was certified by Mary Muriithi. It was PW7's evidence that the land registrar in 2012 was Beatrice Mwai who instructed her secretary one Mary to certify documents for him.

51 Under section 26(b) of the Land Registration Act a person who is not a land registrar cannot certify such documents. The documents PW 7 obtained from the Laikipia land registry cannot therefore be relied on as they were in compliance with the law.

52 Furthermore, the evidence of DW1 (Beatrice Mwai) the land registrar was that she never consulted or instructed Mary to certify or give any document to PW7. DW1 herself had another set of documents which she had certified, i.e the area list (DEXB.2) which had not been amended at the top. The others were DEXB1, 3 & 4.

53 A comparison of the area list(PEXB.2) produced by the Appellant and the area list(DEXB.2) produced by Respondent shows that the two area lists had the same numbers from 401-560. Whereas the area list by the Appellant indicates polytechnic and nursery, the non amended area list for the Respondent does not show such indication.

It was the Respondent's evidence that he relied on the non amended area list which did not show that the land was reserved for any public utility to issue the title deeds. He also told the court that the green cards were opened on 3/2/98 in the name of Government of Kenya and at part C on encumbrances, there was no note or mention of any reservation as a public utility.

54 The evidence of the surveyor (PW2 in ACC Cr. no.2 of 2014) also comes in to consideration. In his evidence, he told the court that he developed the PDP for Daiga/Umande/Block 4 Nyariginu and provided for the following public utilities:

496-Public School

497-Church

499-Dispensary

811-Tree Nursery

495-Polytechnic

948-Primaru School.

He thus produced the index map (PEXB.6) and confirmed that an area list could not be amended.

55 The court was in possession of an amended area list with public utilities (PEXB2) and an unamended area list without public utilities (DEXB2). Quite interesting! PW7 did not see the need for establishing which of them was the authentic area list.

56 This leaves us now with the registry index map(PEXB.6) which also indicated that the said plots were reserved for public utilities. However, this court notes that the said registry index map was a 3<sup>rd</sup> edition and the prosecution never brought out any evidence to establish what was contained in the 1<sup>st</sup> and 2<sup>nd</sup> editions. The same were not produced as evidence.

57 PW7 testified that the registry index map was obtained from the Nakuru Survey Office. The officers who according to PW7 obtained this

map did not testify. The Appellant also failed to prove that this (PEXB6) was also the same edition available at the Laikipia lands registry and invariably the same map relied on by the Respondent when issuing the land title deeds.

58 With all due respect to the Appellant, this court notes that it did not lead any evidence to establish that it was indeed the Respondent who failed to act with due diligence when he issued title deeds to private persons on properties clearly meant for public utility. From the evidence, there is an obvious aspect of foul play as the late Mr. Olweny the surveyor had no reason to lie that he had allocated some plots for public utility. PW2 had mentioned collusion between unnamed company officials and some of Olweny's staff to deprive them of the public utilities. The Appellant did not establish that the Respondent was part of this foul play.

59 More diligent investigations ought to have been carried out to establish the real facts behind this scheme. Not all is lost as the State can still pursue other causes of action. For criminal liability, I find that the Appellant failed to prove its case to the required standard of beyond reasonable doubt.

60 The result is that the appeal lacks merit and is dismissed. The acquittal of the Respondent is upheld.

Orders accordingly.

Delivered, signed and dated this <sup>22<sup>nd</sup></sup>.....day of February 2019.

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HEDWIG I. ONG'UDI  
JUDGE

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