

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 24 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

STEPHEN MBURU NDIBA.....RESPONDENT

(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court Anti-Corruption Case No. 5 of 2014 delivered by Hon. W. Kagendo Chief Magistrate on 17th July 2018)

1 The Appellant herein is the Republic of Kenya represented by the Director of Public Prosecutions (DPP). Stephen Mburu Ndiba the Respondent herein was the accused before the Nyeri Chief Magistrates Court in Anti-Corruption Criminal Case No. 5 of 2014 charged with the offence of Abuse of office contrary to section 46 as read together with Section 48(1) of the Anti Corruption & Economic Crimes Act No. 3 of 2003. The particulars of the charge were that on the 18th day of March 2009, at the District Land Registry, Nanyuki Town, within the county of Laikipia in the Republic of Kenya the Respondent being a person employed in the public service, as a Land Registrar used his said office

to improperly confer a benefit on John Mwangi Ndirangu by issuing him a title deed for land parcel no. LAIKIPIA/DAIGAUMANDE/BLOCK

6/342(NYARIGINU) measuring 0.18 Hectares , a public utility plot that had been reserved for a Nursery School for the benefit of area residents. He was acquitted of the charge against him.

2 Being aggrieved with the Judgment, the Director of Public Prosecutions has 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 pocked 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 prove the charges before court.*

3 The case of the prosecution is premised on the evidence of six (6) witnesses. **PW1 Francis Mwenga Macharia** the Chief of Mwamati Location Laikipia East District recalled that in 2008, he was approached by a group calling itself Karimira Ciana which had invested in Gituamba quarry for ballast. The quarry was located in Mwichiri village within his jurisdiction.

4 The group wanted his assistance in its registration as a self-help group. Meanwhile, he received information that the place the group was extracting quarry from was public land. He thus, refused to assist in registering the group.

5 He wrote to their Chairman an official letter (PEXB.1) stopping the illegal extraction of work in the public property. He later learnt that these plots though public land had been allocated to some individuals. Only Julius Muiruri Gathimu among the allottees resided there. He recalled having been shown a map indicating that the land was public. He was later interrogated by a team from Kenya

Anti-Corruption office over the same matter.

6 **PW2 Joseph Muturi Mathenge** confirmed that he knew a company known as Mwichiri Company Limited which had started

in 1974. He joined it in 1983 after buying 5 shares from the former secretary one Stanley Kabera. By then the company, had several farms.

7 Initially the company had Mwichuiri Farm no. 1 located in Narumoru but later bought Mwichuiri farm No. II located in Laikipia. From the records Daiga/Umande/Block 4 (Nyariginu) and Daiga/Umande Block 6 (Nyariginu) were contained in Mwichuiri II. The land was then subdivided into individual shares by a surveyor known as Olweny and he got block 4 and 6.

8 He confirmed that he was elected as a Committee member to facilitate the preparation of title deeds which were later issued to individual shareholders. He also confirmed that in block 4 they provided for 20 acres for a primary school, cattle dip, polytechnic, tree nursery, catholic, P.C.E.A church and shopping centre which were all reflected in the map.

9 Apparently, the Catholic church developed their land but the P.C.E.A, Church did not as there was an individual who claimed to have been given the land. A report was made and the D.C summoned the Respondent to confirm how the land belonging to the church changed hands.

- 10 They later realized that several particulars had been converted from public utility to private developers. He then wrote a letter dated 2/10/2016 to the registrar of lands complaining about the fraud. He also wrote a letter to the registrar of companies confirming who the officials of the land buying company were.
- 11 He identified the sketch map (EXB2) for block 6. Below the map, he identified land set out for public utilities such as no. 342 which was reserved for a nursery school. He also referred to another map (EXB3) for Daiga/Umande Block 4/(Nyariginu) where no. 496 was reserved for a nursery school, 497 church, dispensary 499, polytechnic 495, tree nursery 498 and water point 811. A report was then lodged at the Anti-corruption office.
- 12 PW3 **Mary Wanja Mureithi** a secretary at the Ministry of Lands in Nanyuki, recalled that on 4/6/2013, she was in her office when anti-corruption officers came to see her boss (the land registrar) one madam Beatrice. Apparently, they had a letter addressed to the District land registrar Laikipia dated 31/5/2013 demanding the farm area list) for Daiga/Umande/Block 6(PEXB.5) and 4(PEXB.6.)
- 13 The land registrar then directed her to give them the area list for Daiga/Umande/Block 4 and 6. Furthermore, she gave them a copy of a letter (EXB7) dated 15/1/1998 addressed to the land registrar

by the Chief Land Registrar addressing the issue of the owners of Mwichuiri Farmers Company. She also gave them a copy of a letter dated 26/2/1996 written by B.S Nyabuti from Provincial Surveyor, Rift Valley province addressed to the land registrar Laikipia.

14 PW4 **Joel Mwebi Mwinzi** a senior land registrar was previously based in Laikipia land registry between 2012 to 2015. While working there, he came to know of a company known as Mwichuiri land buying company but he did not know the number of members the company had. He stated that he was not aware that the company had set aside public utility land. He however explained that as a matter of procedure, the members are given clearance certificates to confirm ownership before title deeds are issued.

15 He further stated that public utility land cannot be converted unless authorized by the Commissioner of Lands in writing. He confirmed that the green card in court (PEXB9) was opened in 1998 and the title to John Mwangi was issued in the year 2009. Upon cross examination he confirmed that the green card should have shown the purpose for which the public utility was required. That all green cards on properties are mainly indicated general land but if it is a public land utility the exact utility is indicated in Part A. The green card in court did not show any encumbrance.

16 PW5 **John Mwangi Ndirangu** is a member of Mwichuiri land buying company and the owner of Nyaruguini/Block 6/1342. He testified that he bought the land at a consideration of Kshs. 150,000 after the owners failed to secure it and he was issued with a receipt. They were advised to wait a little while for the title deeds but the members agreed to form a committee to oversee issues of the said title deeds. They were also instructed to clear the surveyor's fees. After clearing payments, he was informed that his land was actually meant for a nursery school as it was marked N/S.

17 He moved to see the directors to find out why they sold him land meant for a nursery school. The directors denied there being any provision for a nursery school. After the push and pull between the directors and the D.O, the Chairman who later on died insisted that he be issued with a title deed. Through the treasurer one Mwihaki he was issued with a clearance certificate, followed by a title deed (PEXB.11) issued by the Respondent who was the land registrar.

18 He confirmed the extract of the main register (PEXB.12) showing that his land No.342 was marked N/S though he still occupies the land. He recorded a statement with EACC officers on 11th June 2015 over this land.

19 PW6 CIP Daniel Gitu a forensic document examiner working at CID headquarters Nairobi, testified that on 13/6 /2017, he received documents from EACC under the escort of E.A Baitharu. The documents were accompanied by Exhibit memo Form (PEXB.14).

They were:-

- B1-B6 questioned documents
- E1 to 10 Specimen signatures of Justus Wangombe
- E8-E9 Known handwritings of Justus Wangombe
- A1-A10 Specimen handwriting of Stephen Mburu(PEXB.14)
- E3-E7 known handwriting of Stephen Mburu(PEXB.15)
- C1- C10 Specimen handwriting of Lawrence Warachi.

He was to examine and compare the known writings and signatures on the documents submitted against the questioned documents.

20 He explained that he subjected the questioned documents, specimen and known handwritings to image enlargement in a machine known as vide specter a comparator for better visibility and comparison of character formation.

21 His finding was that the signatures circled by red ink on B1, B2, B4, B5 and B6, 17 were made by same author as those on C1-C10. He examined them and opined that the same author-Lawrence Warachi (Respondent) signed the said documents.

22 PW7 **Japheth Angaine Baithari** the deputy director EACC, recalled that on 21/9/2011 while at EACC Regional office, he received a complaint from PW2 on irregular allocation of land in Nyaruguni Block 4 and Block 6 on plot Number Nyariguni Block 6/342 which had been marked as a nursery school but was later transferred to PW5. He wrote to the land registrar Laikipia requesting for certain documents including the members register.

23 On 28/9/2012 he received the letter addressed to the CEO EACC written by Beatrice Mwai the District land registrar Laikipia forwarding the extract from members register on Block 6 Nyariginu. He confirmed that the page had the details of plot no. 342 indicating that the same was a nursery school.

24 According to the green card (PEXB.9) parcel number 342 was transferred on 18/3/2009 to PW5 while the first entry to the Government of Kenya (GOK) was made on 3/2/1998. He also obtained a certificate of official search (PEXB.10) dated 10/07/2013 for parcel number 342 showing that on 18/03/2009 it was transferred to PW5. He further obtained a copy of title deed (PEXB.11) in the name of PW5 issued on 18/3/2013 and signed by the Respondent.

25 In addition to this, he obtained an area map which indicated that plot 342 was a nursery school. He confirmed that the map (PEXB.3) was done by Olweny. He further obtained the amended area list which showed that plot number 342 was a nursery school. He then forwarded the specimen signature of the Respondent to PW6 who compiled his report(PEXB.16).He recommended prosecution of the Respondent.

26 Mr. Olweny's (the surveyor) evidence was adopted as adduced in ACC No 2/15 where he testified as PW 2. His evidence was that when he did the survey of Muchuri land he made provision for several public utilities. He confirmed the area map (PEXB3) as having been done by him. He was however categorical that an area list can never be amended yet the one in court (PEXB5) was amended. He denied any knowledge of the amendment.

27 The Respondent elected to give a sworn statement with one witness to call when he was placed on his defence. He denied the charge against him and confirmed that he was the land registrar in charge in the years 2004 to 2011 and his core duties were:- verification of all documents presented after registration, registration of the same, issuing of title deeds and signing such entries on the green cards and other duties.

28 He confirmed that he dealt with issuing of title deeds for Mwichiri Farmers and referred to a letter(DEXB.1) dated 23/1/2016 showing a list of directors from the registrar of companies confirming that Mwichiri Farmers had eleven (11) directors as certified by Beatrice Mwai (DW1) on 18/11/2014. He stated that none of the directors were witnesses in this case.

29 He also produced the area list (DEXB.2) of Daiga Umande (Nyariginu) certified on 18/11/2014 by the District land registrar Laikipia. Also produced was a specimen of a clearance certificate and form of Mwichiri which includes Daiga Umande Block 2 and has the names of the authorizing officer duly certified (DEXB.3). He stated that none of the signatories on the clearance certificate gave evidence.

30 He further referred to a letter from the Chief Land Registrar one Mr. F.R.S. Onyango dated 15/1/1998 directed to the land registrar Laikipia authorizing the Laikipia land registrar to issue title deeds in Mwichiri and Nyariginu.

31 In explaining the procedure for issuing title deeds from Mwichiri and Nyariginu he said a member had to come with a clearance certificate which had to be confirmed with the register. It was his evidence that the prosecution did not adduce any evidence showing

that PW5 was not a member of Nyariginu. He added that none of the three (3) directors came to court to deny that they signed the clearance certificate in respect to parcel no. 495.

32 He explained that upon receipt of the clearance certificate, they would then prepare new cards for these parcels. He confirmed that the parcels were opened on 3/2/1998 and the beneficiary was the GOK.

33 He testified that in the easement sections, there were no restrictions, and nothing therefore stopped him from issuing the title deed. He stated that he knew the directors of Mwichuri as per the list and PW2 was not one of them. He stated that though Lawrence Mwangi Wamba the secretary of Mwichuri Farmers recorded a statement with the investigator he was never called to testify.

34 In reference to the register produced by the Appellant, he contended that the same had many cancellations and alterations and therefore not authentic. He also confirmed that the files were opened on 18/2/1998 and that the deputy land registrar gave authority for issuance of title deeds later.

35 In reference to the area amended list (PEXB.2) produced in court for Diaga/Umande Block 4 Nyariginu contended that an area list

can never be amended adding that the surveyor had disowned the area list produced. While referring to section 26(2) of the Land Registration Act he confirmed that only a land registrar can certify a document. He denied ever being conferred with a benefit and stated that he was only doing his job.

36 He further contended that he was sued in Nyeri ELC 2013 as the 2nd Defendant (DEXB5) and referred to a verifying affidavit sworn by PW7. He confirmed that he has never been called to testify in the said case. Lastly, he contended that the offences he was charged with ranged from 1998-2004 and that in 1998 there was no Anti-Corruption Agency hence, no report and recommendation was produced from EACC to the DPP complying with section 35 of the EACC.

37 Upon cross-examination he confirmed that the cards were opened way back in 1998 by one Mr. Silas. On being shown the area map, he said there was a tree nursery at 498 but he did not refer to that area map when issuing the title deed.

38 Upon re-examination, he confirmed that when the green card was opened in 1998, there was no entry in the easement section showing that Plot No 498 was a tree nursery. There was therefore no need to

obtain any consent from the Commissioner of Lands since the plot was not reserved.

39 His witness DW1 **Beatrice Wairimu Mwai** was a land registrar formerly in Laikipia lands office from 2012 to 2016. She confirmed that she certified documents dated 18/11/2014 i.e the letter from the chief lands registrar,(DEXB.1), the area list (DEXB.2),their specimen of clearance land certificate(DEXB.3) letter dated 5/2/1998 (DEXB.4).

40 In reference to the amended area list(DEXB.2), she stated that the stamp and signature dated 21/6/13 are for the land registrar Laikipia. She however denied certifying the said documents. On being shown entries in Plots nos. 495, 496 and 497 in the amended area list she confirmed that these plots have some reservations but in the area list she certified, the reservations are not shown.

41 She also confirmed not having recorded any statement in respect to this case. It was her evidence that besides the land registrar no one else was authorised to certify documents, and the said duty could not be delegated. She however confirmed that the stamp of the land registrar on (PEXB 2) is different from the one she used to certify (DEXB1 to 4).

42 During the hearing of this appeal Mr Maluma submitted that the evidence of PW1, was clear that the land in issue was public land given to Wellington Mburu and Julius Mwiruri respectively. He thus contended that the land was given un procedurally and urged the court to allow his appeal.

43 Mr. Kimani for the Respondent opposed the appeal and submitted that he was unable to comprehend the 6th ground of appeal. He urged the court to look at the evidence, the judgment and come to a finding that the appeal lacks merit.

44 He further submitted that parcel no. 494 never formed the basis of any charge in the lower court and contended that PW1 was the area Chief and was not a member of Mwichuri Farmers.

45 Mr. Kimani further submitted that the issues before the lower court touched on the number of members of Mwichuri Farmers, the number of directors (DEXB.1) who were eleven (11) and the register which had many errors. He argued that if the directors had testified they would have indicated who the members were.

46 Counsel further submitted by referring to the evidence of PW4 who categorically stated that no encumbrance was noted on this title.

That a clearance certificate was issued by the directors in respect to No. 342 and that there was never parcel number 494. He was quick

to point out that the prosecution never filed any submissions in the lower court.

47 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. The Court of Appeal in the case of Okeno v Republic 1972 E.A 32 had this to say of the duty of a first appeal court:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424.”

DETERMINATION

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

- i) **Whether the Respondent acted diligently as a land Registrar in issuing the title deed in respect of land parcel no. LAIKIPIA/DAIGAUMANDE/BLOCK6/342 (NYARIGINU) a public utility measuring 0.18 Hectares,**

49 I wish to point out on the onset that the State represented by Mr Maluma submitted on plots No 494 and 498 and referred to the beneficiaries as Wellington Mburu and Julius Muiruri. This was quite misleading. He got it all wrong. The beneficiary here is John Mwangi Ndirangu and the plot is no 342. He said he bought it from the directors.

50 On perusal of the evidence of the late Mr. Olweny it is clear that at the time he carried out the final survey, he made provisions for public utilities as it was required by the law. He also prepared the area list and the map where these parcels were clearly mapped out. The evidence of

the Appellant's witnesses is that the green cards for the respective plots were opened in the name of the G.O.K with the titles being issued between 1998-2000.

51 The Respondent did not deny issuing and signing the title deed in question. Mr. Olweny who did the survey, prepared the PDP and subsequently the area index map (PEXB.6) and was very categorical that there was no amended area list. PW7 told the court that DW1 forwarded to him certified copies of documents relating to this case vide the letter dated 31st May 2013 (PEXB4). DW1's response(PEXB.17) is however dated 28th September 2012 whose contents are unknown as it was never produced.

52 The cited dates do not add up at all! Its therefore clear that the source of the documents relied on by PW7 i.e extracts from the members register BLOCK 6 NYARIGINU, (PEXB.12), area map(PEXB.3), and amended area list (PEXB.5) which apparently showed that Block 6 NYARIGINU 342 is a nursery school remained unexplained.

53 PW5 **John Mwangi Ndirangu** the beneficiary of the plot told the trial court that he bought the land from the company directors at Kshs. 150,000/-. The said directors cleared him for issuance of the title deed which was issued to him by the Respondent. Further he stated that he

was a member of Mwichiri land buying company a fact that was not displaced by the Appellant.

54 It is the Appellant's case that the Respondent did not follow the laid down procedures before issuing the subject title. PW4 **Joel Mwebi Mwinzi** the senior land registrar did not even attempt to explain which these procedures are. The Respondent explained what he did and what he relied on to issue the title deed. This was never challenged as wrong procedure, and neither were the documents DEXB1-4 found to be false documents.

55 The directors who sold the land and even issued a clearance certificate to PW5 were never suspects in this case and neither were they called as witnesses. How on earth did the Appellant expect to prove its case without such vital evidence being tendered? My view is that this racket was an inside job and ignoring all the indicators and pinning down the Respondent alone who has given a plausible explanation will not assist the Appellant.

56 My finding is that the appellant failed to present sufficient evidence to establish that the Respondent failed to apply due diligence in signing and issuing the title deed of land parcel No.

Laikipia/Daigumande/Block4/342(Nyarigimu) measuring 0.18

hectares to John Mwangi Ndirangu. It is not all lost for the Appellant as far as this crafty scheme is concerned.

57 The upshot is that the appeal lacks merit and is dismissed. The acquittal is upheld.

Orders accordingly.

Delivered, signed and dated this 22nd day of February 2019 in open court at Nyeri.

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HEDWIG I. ONG'UDI
JUDGE



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