

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 25 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. 2 of 2015 delivered by Hon. W. Kagendo Chief Magistrate on 17th July, 2018))

JUDGMENT

- 1 The Appellant herein the Republic of Kenya is represented by the Director of Public Prosecutions (DPP). Stephen Mburu Ndiba the Respondent herein was the accused person before the Nyeri Chief Magistrates Court in Anti-Corruption Case No. 5 of 2014.
- 2 He was charged with 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 19th 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 Julius Ndururi Gatamu by issuing him a title deed for land parcel No LAIKIPIA /DAIGAUMANDE/BLOCK4/498(NYARIGINU) measuring 0.76 Hectares , a public utility plot that had been reserved for a Tree Nursery for the benefit of area residents.

3 After a full hearing of the case the Respondent was acquitted under section 215 Criminal Procedure Code. 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 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 eight (8) witnesses. PW1 is **Mary Wanja Mureithi** an officer at the Ministry of Lands Laikipia County. She told the court that on 4th June 2013, Anti-Corruption Officers came to their office and requested for some documents. The officers produced a letter(PEXB.1) explaining the purpose of their visit.

5 She gave them an area list for Daiga/Umande(Nyariginu) Block 6 and for Block 4(PEXB.3) which were amended. She also gave them 2 letters(PEXB.5) i.e one from the Chief Land Registrar dated 15th January and the other from the Chief Provincial Survey's Office Rift Valley dated 26th February, 1997. She certified the letters before giving them to them.

6 PW2 **Eliakim Washington Olweny** was a surveyor working under the name and style of Olweny and Associates based in Nakuru. He confirmed that he conducted the survey and settlement of members of Mwichiri II Farmers Limited Company. He explained that in order to conduct the survey, he relied on a list of members/ shareholders of the company and he subdivided the land accordingly leaving provisions for public utility.

7 He recalled that at the time he did the survey, the land was not developed and after making a development plan, he subscribed it to the Government for approval and the Commissioner of Lands wrote a letter approving the plan.

8 He also carried out another survey to implement the plan for Daiga/Umande /Block 4/Nyariginu land. He produced the approved plan (PEXB.6) and confirmed that the registry index map clearly showed the following public utilities:-

Plot No. 496 was reserved for a public school.

Plot No. 497 a church

Plot No. 499 a dispensary

Plot No. 811 a water source

Plot No. 498 a tree nursery

Plot No. 495 a Polytechnic

Plot No. 498 a Primary School.

9 In addition to this, he prepared the area map which was in court. However, on being shown the area list in court, he stated that it was indicating amended yet the one he had prepared was not amended. On cross examination, he revealed that an area list cannot be amended.

10 PW3 **Paul Mweru Mwinzi** is a senior is a Land Registrar who was previously based in Laikipia between 2012 to early 2015. He told the court that his duties included issuance of title deeds where land buying companies were involved. He explained that Land Registrars are mainly guided by the register consisting of the names of the people to be issued with the title deeds, the area list of the area and the map from the survey.

11 He however explained that in as much as he was familiar with Mwachiri Land Buying Company, by the time he was a Land Registrar at Laikipia, the transactions had been completed and documents were not in his office as they had been taken away by EACC officers.

- 12 Thus, he only came to know of the case after he was bonded and saw the register of Mwichuri 2 at the EACC offices. In reference to the register, the area list and map in court, he confirmed that they were indicating the names, parcel numbers, acreage and public utilities. He also noted that in the register, the entry 498 had the name **Paul Nderitu** although there was some cancellation and white out on that page.
- 13 He also identified the green card for parcel number LAIKIPIA/DAIGA/UMANDE 498 which showed that the 1st entry is Government of Kenya made on 3/2/1998, 2nd entry is **Julius Muchiri Githomo** and in the 3rd entry the said **Julius Muchiri Githomo** was issued with a title deed. He however observed that initially, plot no. 498 was reserved for a tree nursery in the map.
- 14 He was also referred to an area list for Daiga Umande Block 2 showing acreages of the plots and plot numbers running from 401 to 1079. He stated that plot no. 498 appeared as T.CEN but he did not know what T.CEN stood for. In reference to the area map for Daiga Umande Block 4, he stated that he had not seen an amended area list and if such an amendment was ever done, its only the Commissioner of Lands who could do it.

- 15 PW4 is **Joseph Mathenge Muturi** is a resident of Mwichuiri farm who started living in the farm as from 1983 when he bought land there. He explained to the court that he bought the land from Stanley Kabere a shareholder who was also a director and secretary of the Mwichuiri Farmers Company.
- 16 He explained that in as much as Mwichuiri was a land buying company which used to buy and sell land to members of the public, the company kept changing surveyors from time to time hence, disputes arose forcing the provincial administration to step in. At one point, the President directed all land buying companies to issue title deeds to buyers.
- 17 As a consequence thereof, in 1993, the D.C. called all company directors to solve the issue of title deeds. Thus the company chairman M' Marete Stanley, Company Secretary and the Treasurer M'Marete M' Ibutu went to Nanyuki. At Nanyuki one of the complaints was that Nyariginu company had processed title deeds yet Mwichuiri company was yet to process the same. The D.C. intervened, selected representatives to work with the directors and they agreed to have a corporate surveyor. They recommended Olweny and associates.

- 18 He confirmed that he was part of the monitoring committee set up to ensure that the process was streamlined. Thus, he was appointed as patron of the 7 member care taker committee. Furthermore, he testified that after the meeting with the D.C, they agreed on how the surveyor would get his fees since it had been alleged that the directors had embezzled funds meant for the survey. Thus Olweny was paid and started working.
- 19 He further confirmed that he used to issue receipts on behalf of the surveyor upon presentation of bank slips. Apparently, the committee was also issuing clearance certificates. Upon completion, the surveyor gave the survey map and told them to lodge any complaints if they had. Pw2 then surrendered the map and the area list to the Land Registrar Laikipia.
- 20 He identified the survey map Daiga Umande /Block 4 Nyariginu (PEXB.4) and the area list for Block 4(PEXB.3). He confirmed that no changes were made after submitting the area list and survey map to the Land Registry and that public utilities were provided for as it was compulsory. He also confirmed that they assigned plot no. 948 for a primary school, plot no. 496 for a nursery school, plot no. 495

polytechnic, plot no. 497 for a church, plot no. 811 as a water plant and plot no. 499 as a dispensary.

- 21 Later, he was alerted that the plots marked for public utility had been converted into personal use. He also recalled that upon completion of the survey, three registers had been opened i.e for the Land Registrar, the D.C's office and the 3rd one was to remain with the company and monitoring team. He identified a register (PEXB.4) in court and confirmed that he was the one who had written the particulars.
- 22 He confirmed that PEXB.4 was used to clear members when issuing clearance certificates which reflected particulars in the area list and map. When he realized that the public utility plots were grabbed, he reported to the relevant authorities and the Respondent was summoned.
- 23 Lastly, he identified the area map (PEXB.6) which showed that plot no. 498 was a tree nursery, and he did not know who had altered the register. He further stated that plot no. 498 was changed from tree nursery and eventually it ended up with **Julius Ndururu**.
- 24 PW5 **Francis Rwengo Macharia** the Chief of Muramati location told the court that he became chief in December 2007 and was approached in June 2008 by 'Karimira Ciana' a youth group in his

location who wanted to register a self-help group for the purposes of mining quarry ballast within Mwichuiru area. Apparently, they wanted him to sign some forms for them so that the Ministry of Culture and Social Services would register them.

25 He did not sign the forms because he realized that the plot was designated as a public utility land for polytechnic, school, dispensary and water point. He recalled that he tried to stop the illegal mining but the group was adamant. Later, EACC asked him to serve notices to Mr. Ndururi Gatema and Gitui.

26 PW6 **CIP Daniel Gitu** is a forensic document examiner working with DCI headquarters. He confirmed that on 30/6/14 he received documents from EACC under the escort of J.A Baitharu accompanied by a memo form. The relevant part of the memo form to this case is form B1 and B6, E1-E7 and A1-A10(PEXB.13) of PW6's report.

27 A1 and A10 were specimen handwriting and signature of Stephen Mburu(PEXB.12) while E1-E7 were his known handwriting.

The witness was to ascertain whether the handwriting and signature pointed by pencil on the questioned documents B1-B6 were made by the same hand when compared with the specimen handwritings A1 to

A10 and the known handwritings E1-E7. Upon examination, he opined that they were made by the same hand, which was the Respondent's

28 PW7 **Julius Ndururi Gatamu** a farmer living in Nanyuki Nyariginu Block 4 was called to explain how he got the land in dispute which had been set aside for a tree nursery for the benefit of the public. He recalled buying a shamba from Mwichuri 2 company i.e 2 shares from Mwichuri 2 and one share would be about 6 to 8 acres. He explained that he repaid Kshs. 850 per acre and later topped up to Kshs 960. He further testified that there was an influx of people and disputes arose. According to his title deed he owns 46 hectares.

29 He stated that many surveyors went to the land but he did not get his land. However, when PW2 came, he was given plot no. 498 (the tree nursery) as he had a big interest in planting trees. He explained that the plot belonged to the company and the seedlings were for trees to be planted in the area generally. Upon inquiry he was informed by the company directors in particular Marete Danson and Kabeere that if there were no buyers for the seedlings, the plot would be his together with the trees. He was thereafter given a clearance certificate (PEXB.15) for the parcel by the directors.

30 Later, he took the clearance certificate to the Land Registrar the (Respondent herein), and paid all his dues and rates after which he was given a title deed (PEXB.9). After fencing the land, anti-corruption officers inquired from him how he obtained the plot. He explained to them that he had purchased plot 390 which was later changed to 818 when the surveyor came. In reference to the second plot, he said that he was given the plot for nursery trees. The officers informed him that the land belonged to the Government even after showing them his ownership documents.

31 Later, he got a demand letter (PEXB.10), and after a heated argument with them over ownership of the land he surrendered the title deed to them.

32 PW8 **Japheth Angaine Baithera** the deputy director of EACC and the investigating officer in this case testified that on 21/9/2011, PW4 went to his office to report that some public utility plots had been irregularly alienated at Daiga Umande area. He visited the area and commenced investigations. He interviewed (PW7) who wrote a statement on how he had acquired the parcel of land.

33 He also requested for particulars of this parcel and certain documents from the Chief Land Registrar in Nairobi. He wrote a letter dated

18/9/2012 to the Director Land and Settlement Nairobi asking for the area list and area map for Laikipia/ Daiga Umande/ Block 4 Nyariginu and Laikipia/Daiga Umande/Block 6 Nyariginu.

- 34 He testified that he personally obtained the registry index map (RIM) (PEXB.6) (RIM), the area list and area map from the Provincial Surveyors Office in Nakuru. He thus confirmed that parcel no. 498 was a tree nursery in both the area list(PEXB.3) and area map (PEXB.6).
- 35 Furthermore, he got the register for Mwachiri Daiga Umande Block from Laikipia District Survey Offices. He conducted searches for Block 4 Nyariginu 342 and 498(PEXB.17) and also obtained the green card for Laikipia/ Daiga Umande/Block 4 plot no. 498(PEXB.8) which showed that the land was transferred to **Julius Gatamu** and title was issued on that same day.
- 36 In the course of his investigations, he got a letter(PEXB.5) from the Provincial Surveyor Nakuru forwarding copies of the RIM and area list to Nanyuki signed by Tebet. After receiving all the documents, he sought to establish who transferred the land.
- 37 He later established it was the Respondent, who had done that. He then recorded statements from the witnesses and Respondent. The

Respondent also gave him specimen signatures together with any document he had authored. He prepared an exhibit memo form (PEXB.10) dated 26/6/2014 and confirmed that the entries were made by the Respondent.

38 PW8 compiled his file and did a recommendation letter to the DPP recommending that the Respondent be charged with abuse of office. He further stated that he recorded statements from the directors of Mwachuri who also gave him the members registers. He also wrote a demand letter to Julius(PEXB.10) who surrendered the title deed(PEXB.7). He produced Julius's clearance certificate(PEXB.16).

39 The Respondent elected to give a sworn statement with one witness to call when he was placed on his defence. He testified that he was an employee of the Ministry of Lands and a registration officer based at Nyeri currently under suspension due to the instant case. He stated that he was the district land registrar in Nanyuki from 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.

40 He confirmed that he was involved in the issuing of title deeds to Mwachuri 2 Farmers, and that he did so procedurally. He mentioned

that none of the eleven (11) directors gave evidence in this case. He identified a list of directors (DEXB1) for Mwichuri company certified by one Beatrice Mwai, the area list (DEXB.2) and title deed clearance certificate with signature of authorising officer(DEXB.3). He further stated that the area list(DEXB.2) was certified by the district land registrar and that none of the signatories to the clearance certificate ever gave evidence.

41 He also produced another letter from the chief land registrar authorising him to issue title deeds in the Nyariginu parcel and Mwichuri. He described the procedure of issuing title deeds in both Nyariginu and Mwichuri as follows:-

- That the person brought a clearance certificate
- Confirmation that it is valid
- Confirmation that the person is a member from the member list
- Preparation of the transfer.

42 He further contended that no one contested that Julius was a member of the Mwichuri Land company and none of the directors including the farm's secretary whose statement he was issued with came to testify. In addition to this, he denied making any alterations in the register and maintained that he acted procedurally as the files and green cards were opened before he got into office.

43 He further stated that the amended area list was questionable as it was even rejected by Pw2. Moreover, the EACC filed a civil suit against him which they did not follow through, and he produced the pleadings (DEXB.5).

44 Lastly, he contended that he has been a land registrar for the last 27 years and 5 of those in Laikipia where he was in charge of 9,000 acres of land hence, benefitting himself with such a small piece would be an irony. He thus contended that the EACC officer had his own reasons for bringing him to court 2 years after the filing of the civil suit.

45 DW1 **Beatrice Wairimu Mwai** is a civil servant in the capacity of land registrar. She confirmed that she was in Laikipia station from 2012 but is now in Athi River. She produced a letter from the chief land registrar(DEXB.1), the area list(DEXB.2), a specimen of the clearance card(DEXB.4) and a letter(DEXB.4) dated 5/2/98 to support the Respondents' case.

46 She denied having authorized anyone to certify any documents as she was in the office. She stated that the plots marked 495, 496, 497 and 495 are seen to have restrictions in the area list provided before the court by the Appellant while the one she certified personally had none. Lastly, she contended that PW8 never asked her to record any statement.

- 47 Mr. Malamu for the Appellant made oral submissions during the hearing of this appeal. He submitted that plots Nos. 496, 498, 499 & 811 were reserved. That the surveyor said that there was no amended area list and that a mutation was done on 4/1/06. He further submitted that PW3 confirmed that plot no. 498 had the name of **Paul Ndiritu Waweru** but was cancelled with white out.
- 48 Counsel submitted that the 1st entry number was a Government one, entered in February 1998 and that the green card had a different name from the register. He thus contended that the proper procedure was not followed leading to the signing and issuance of the questioned title by the Respondent.
- 49 Counsel submitted that PW3's evidence was corroborated by that of PW4 as the land had public utilities i.e nursery school and others. That PW6 confirmed that the signature and writing on the green card belonged to the Respondent who issued the title deeds.
- 50 The appeal was opposed by Mr. Njuguna Kimani counsel for the Respondent. He submitted that the Respondent followed all procedures before issuing the title. He contended that there was a member's register for Mwichiri though it was not known who prepared it since the directors never testified.

51 Counsel further submitted that PW4 prepared the register and he denied making the cancellations/entries. That the clearance certificate which was procedurally given to the Respondent had been cleared by the Mwachuri directors, and he simply did what he ought to have done by issuing titles the subject one included.

52 He argued that the amended area list was used to generate the map yet PW2 denied amending the area list. Lastly, counsel submitted that no material has been presented before this court to show the extraneous matters the trial court considered to arrive at its decision.

53 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

54 I have duly considered the evidence on record and the grounds of appeal. I have equally considered the submissions by all 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 to land parcel no. LAIKIPIA/DAIGAUMANDE/BLOCK4/498(NYARIGINU) measuring 0.76 Hectares to Julius Ndururi Gatamu.**

55 The Respondent is a land registrar in the Ministry of Lands and Physical Planning. At the time he was charged, he was a lands registration officer based at Nyeri but under suspension because of this case. He is accused of using his office to improperly confer a benefit on one **Julius Ndururi Gatamu** by issuing him with a title deed for Land Parcel No. Laikipia/Daiga/Block4/498(Nyarigiru). **Julius** testified herein as PW7. He does not deny having been issued with the title deed complained of. He however explained the

circumstances under which the plot was given to him by the Directors of Mwichuri Land buying company.

56 The prosecution did not deem it fit to summon the directors of the land buying company to come and either confirm or refute PW7's claims. If indeed they wrongfully allocated this plot which was a public utility to PW7 then they too should have faced trial.

57 In his defence the Respondent testified and stated on oath that indeed he issued the subject title deed among others. According to him he did so diligently by relying on the title deed clearance certificate for Mwichuri 2 farm which includes Ndaiga Umande Block 2 & 4, (DEXB3) letter by the chief land registrar Mr. F.R.S. Onyano dated 15/1/98 directed to the land registrar Laikipia authorizing him to issue title deeds in Mwichuri & Nyariginu (DEXB4) using the area list of Daiga Umande Block 4 (Nyariathu) (DEXB2.)

58 The Respondent also gave a detailed procedure of issuing title deeds for Mwichuri & Nyariginu which was never challenged by the prosecution. He mentioned the following documents as his areas of reference:

- The area list
- Already opened cards.
- The clearance certificate

- Transfer
- Members list

59 The Appellant had produced;

- The register of members PEXB4
- Amended area list PEXB 2
- Map of the area PEXB 6.

In cross examination by the defence the prosecution witnesses admitted that the register had numerous gaps, cancellations, alterations and white outs. PW4 confirmed having prepared the register but none of the witnesses appeared to know who or when the said alterations were made and for what purpose. PW4 was however quick to add that PEXB4 which he prepared was meant to show those who had been cleared for purposes of issuance of title deeds.

60 PW8 the investigating officer appears to have collected a number of documents in respect to this matter. Some of the said documents appear not to have been the ones relied on by the surveyor (PW2) and the land registrar (Respondent). For example PW2 who prepared the PDP & subsequently the area index map (PEXB6) was categorical that there was no amended area list. So if there was an amended area list, where did it come from?

61 PW1 Mary Wanja Mureithi an officer from Ministry of Lands in Laikipia said she released some certified documents to EACC officers on 4th June 2013. DW1 Beatrice Wairimu Mwai who was the land registrar Laikipia then denied authorizing any one to certify any official documents for use. She was in the office at the time and was only aware of having released DEXB1, 2, 3, & 4 dated 5/2/98. Despite being the land registrar then, she denied having been interviewed or recording any statement with the investigating officer. The reason for this was not explained by PW8.

62 The Appellant has submitted severally that the Respondent is guilty because he never followed the proper procedure in the issuance of the title to PW7. Which is this procedure that ought to have been followed which wasn't followed by the Respondent?

63 From the evidence of all the prosecution witnesses there is no single witness who explained to the court the said procedure that was not adhered to. It was not for the trial court to look for that procedure and present it to the Respondent for his reaction. The land registrar (PW6) told the court that land registrars rely on the following documents.

- (i) Register which has the names of the people to be issued with title deeds, the parcel number and acreage (PEXB4)
- (ii) Map from the survey department

(iii) Area list.

64 Before the trial court were two area Lists i.e PEXB2 & DEXB2. The former which was produced by the prosecution had alterations and had provision for a tree nursery at Plot No 498. The latter was produced by the defence and it had no alterations, and had no provisions for a tree Nursery. The big question then is when and by who the alterations were made. There was no evidence placed before the court to indicate who made these alterations and for whose benefit it was done. It is not also clear which between the two documents is the genuine one.

65 It was not disputed that the map produced (PEXB6) was according to the investigating officer (PW8) obtained from Nakuru survey office. The land in question is under Laikipia survey office. There was no map produced from the mother survey office to confirm that PEXB6 was the original map. I say this because the Respondent testified that PEXB6 was a 3rd edition and not the original map. This evidence was never rebutted by the prosecution.

66 Further the clearance certificate (DEXB3) which originated from the land buying company (Mwichuiri) was not contested. The Respondent explained that before a title deed was issued a person presented a clearance certificate which would be verified for its authenticity. The land registrar would then check from the register to confirm if the

person's name appeared in the members list. On being satisfied that this was in order, he would then issue the title deed.

67 There is no evidence showing that PW7 **Julius Ndururi Gatamu** was not a member of Mwichuri Land Company. There is also no evidence showing that DEXB3 was a forged document. The registers PEXB4 & DEXB3 originated from the company. Not a single director or even the secretary of the land company testified before the court. The Respondent was not a member of the land company and neither was he issued with any document or anything to stop him from issuing the title deed herein.

68 It is true the transaction herein was riddled with ugly spots from the beginning. PW8 should have started from the land buying company and the Laikipia lands office and survey office to understand how, when and by who the alterations were made to nab the culprits. The directors ought to have been investigated for their role in the whole saga to be exposed but this was not done. This is not in anyway to say the title deed issued to PW7 is valid. The evidence shows he surrendered it.

69 Upon an analysis of all the evidence herein I find that the learned trial magistrate assessed the evidence well and arrived at the correct decision to acquit which I hereby uphold.

70 The result is that the appeal lacks merit and is dismissed.

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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