



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO E6 OF 2020

SHABAN OTIENO ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon Nyaberi (SPM)

delivered at Winam in the Senior Principal Magistrate's Court in

Criminal Case No 708 of 2016 on 30th September 2020)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged and convicted on four counts of obtaining by false pretense contrary to Section 313 of the Penal Code, forgery contrary to Section 350 of the Penal Code, making documents without authority contrary to Section 357(a) of the Penal Code and uttering a document with intent to defraud contrary to Section 357(b) of the Penal Code.

2. The particulars of the offences were that:-

Count 1: On diverse dates between 19th December 2014 and 22nd November 2015 at Konya Estate in Kisumu East District within Kisumu County jointly with others not before court with intent to defraud obtained from Moses Wagunde Were (hereinafter referred to as "the Complainant") Kshs 2.5 million by falsely pretending that he was selling him a plot no. Kisumu/Konya/2868 which he knew was not in existence.

Count 2: On the 22nd day of October 1996 in Kisumu East District within Kisumu County with others not before court with intent to defraud forged a title deed No Kisumu/Konya/2868 purporting it to be genuine title deed.

Count 3: On the 22nd day of October 1996 in Kisumu East District within Kisumu County with others not before court with intent to defraud and without lawful authority made a title deed No Kisumu/Konya/2868 purporting it to be a title deed issued by the Kisumu Land Registrar.

Count 4: On the 22nd day of October 1996 in Kisumu East District within Kisumu County with others not before court with intent to defraud knowingly uttered a title deed No Kisumu/Konya/2868 which had been made by Shaban Otieno Onyango and others without lawful authority.

3. On 30th September 2020, the Learned Trial Magistrate, Hon Nyaberi, sentenced the Appellant to serve one (1) year imprisonment in respect of Count I and Count II and three (3) years imprisonment in respect of Count II and County IV. He directed that the sentences would run consecutively.

4. Being dissatisfied with the said Judgement, on 14th October, 2020 he lodged this appeal. In his Petition of Appeal dated 13th October 2020, he set out seven (7) grounds of appeal challenging both conviction and sentence.

5. His Supplementary Written Submissions (**sic**) were dated 18th April 2021 and filed on 26th April 2021 while his Written Submissions (**sic**)

were dated and filed on 13th July 2021. The State's Written Submissions were dated 12th July 2021 and filed on even date.

6. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

8. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

9. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that have been placed before it for determination were:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

b. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful and or warranted.

10. The court dealt with the two (2) issues under the following distinct and separate heads.

I. SECTION 200(3) OF THE CRIMINAL PROCEDURE CODE

11. The Appellant argued that failure of the Trial Court to explain to him Section 200(3) was fatal. He submitted that Section 200(3) of the Criminal Procedure Code is intended to address the mischief that may arise when a succeeding magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had previously testified for cross-examination, if need be.

12. On its part, the State submitted that Section 200 (3) of the Criminal Procedure Code was fully complied with. It asserted that on 10th July 2019, Hon Nyaberi took over from Hon R. Kasavuli and the Advocate for the Appellant present took directions and agreed that the matter should proceed from where it had reached.

13. A perusal of the proceedings indicated that the provisions of Section 200(3) of the Criminal Procedure Code had been complied with. It did not indicate how the same had been complied with. However, the Appellant's counsel confirmed that the matter could proceed from where it had reached.

14. Despite paucity of information of what transpired in court at the time, this court was satisfied that the Appellant's advocate's response was sufficient to persuade this court to find and hold that the Learned Trial Magistrate complied with the mandatory provisions of Section 200 (3) of the Criminal Procedure Code.

II. PROOF OF PROSECUTION'S CASE

15. Grounds of Appeal Nos (1), (2), (3), (5) and (7) were dealt with under this head as they were all related.

16. The Appellant also submitted that the Prosecution did not lead evidence to show that the impugned land was inexistent and that forgery took place on 22nd October 1996. It was his contention that the Complainant did a search by himself and found out that the land was existing. He argued further that at no time did he claim that the said land belonged to him or that he was the seller and neither did he carry out any search for the Complainant.

17. It was his contention that George Otieno, a Land Surveyor, (hereinafter referred to as PW 2) also visited the said land and confirmed its presence. He added that the Land Registrar was never called upon as a witness and neither did he dispute that a search had emanated from his office.

18. He was categorical that the monies were received on behalf of the seller by virtue of the Power of Attorney and thus the acknowledgement was by the seller through the power of attorney. He added that the alleged Title Deed was in the name of Danton Otieno Ongira and any acts of forgery could only be alluded to the said Danton Otieno Ongira. It was his case that the failure to charge Danton Otieno Ongira was fatal.

19. He relied in Section 107(10) of the Evidence Act which provides that the Prosecution bears the burden of proof on every element in a criminal charge beyond reasonable doubt. He relied on several case among them the case of **Oware vs Republic (1984) KLR 2001** where the Court of Appeal held:-

“A representation as to a future event cannot support a charge of obtaining money by false pretences.”

20. He further argued that although the Complainant alleged that he paid him Kshs 2,500,000/=, the Prosecution never led any evidence to prove that he indeed received the said money. He relied on the cases of Joseph Mukuha Kimani vs Republic [1984] eKLR and the case of Caroline Wanjiku Ngugi vs Republic [2015] eKLR where the courts were categorical on the elements of forgery and argued that the prosecution failed to prove that count on him as the title deed was not proven to be a forgery by a forensic document examiner or an officer from the Land Registry.

21. He added that no signature samples were taken for examination to establish if the signature was that of the Land Registrar or not. He stated that the Complainant testified that the Title Deed was handed over to him by Danton Otieno Ongira before he paid the money.

22. He argued that the Prosecution failed to prove that he was the one who forged the Title Deed either through typing, writing with his own handwriting or otherwise. He was categorical that charging on count III and IV would amount to duplicity of charges.

23. He pointed out that several key witnesses were left out of the Prosecution case making its case handicapped but appreciated Section 143 of Evidence Act (Cap 80) Laws of Kenya and the case of Bukenya & Others vs Uganda [1972] EA 549 and the case of Keter vs Republic [2007] 1EA 135 where the court held that the prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.

24. He added that the Prosecution failed to prove that he was the one who uttered the Title Deed that was presented to the Complainant. He stated that his defence was not taken into consideration and urged the court to allow his appeal, quash the conviction and set aside the sentence.

25. On its part, the State was categorical that the Prosecution had proved its case beyond all reasonable doubt. It submitted that the Complainant testified on how he was approached by the Appellant who told him that his father wanted to sell an acre of land to cater for his medical needs. It added that it was the Complainant's testimony that the Appellant together with his father and brother gave him a title deed for the Land Reference No Kisumu/Konya/2868 upon which he entered into a Sale Agreement for a half an acre and paid the full purchase price.

26. It pointed out that the Appellant induced the Complainant to buy the remainder of the portion of land which he paid half of the purchase price. It added that the Appellant also acted as a representative of the father through a "Power of Attorney" when he said that the father was ailing and in South Africa seeking medication. The Appellant undertook a sale agreement and took the money for the land.

27. It was its contention that the Complainant later on discovered the title deed was fake and the search document which had been given to him showing Danton Otieno Ongira as owner of the land did not originate from the Land Registrar's Office, Kisumu. The land was also found to be inexistent.

28. It contended that CPL Naftally Lagat (hereinafter referred to as "PW 3") also testified that he wrote a letter to the land Registrar Kisumu East for verification of issuance of title deed who replied vide a letter dated 19th July 2018 indicating that the Title deed in respect of Kisumu/Konya "A" 2868 given to the Complainant was genuine and never originated from the Kisumu Lands Office.

29. Notably, the Complainant testified that in December 2014, the Appellant approached and informed him that his father had one (1) acre of land within Konya Kisumu and they had intended to sell it to cater for his medical expenses. He told the court that he told the Appellant to come with his father, which he did together with a brother. He further testified that the trio told him that they were selling the land at Kshs 4,000,000/= but he agreed to buy half an acre at Kshs 1,500,000/=. He stated further that he took a copy of the Title Deed from the Appellant and conducted an official search which indicated that the land belonged to one Danton Otieno Ongira.

30. It was his testimony that he engaged the services of an Advocate one Peter Warindu who drew a Land Sale Agreement dated 19th December 2014 where he paid Kshs 900,000/= to the Appellant in the presence of his Advocate. He stated that on 20th February 2015 he paid the balance in the presence of the Appellant, his brother and father. He further told the court that the Appellant later approached him to buy the remaining piece of land for the reason that his father was sick and flown to South Africa, that his Advocate advised them to obtain a Power of Attorney and he proceeded to buy and paid Kshs 590,000/= and later on added Kshs 50,000/= when the Appellant told him that his father had died in South Africa.

31. He testified further that when he engaged the services of a surveyor, he found out that the land was inexistent. He visited the Land Office where it was confirmed that the Title deed was fake. He added that when he tried to get in touch with the Appellant, he became elusive.

32. PW 2 testified that he was contracted by the Appellant to survey the land he had bought and put beacons. He told the court that he also obtained Title Deed and Certificate of Search which he presented to the Land Register who informed him that the Title deed was not genuine and retained the mutation form.

33. PW 3 stated that he then proceeded to prefer the charges against the Appellant after his investigations showed that the Title Deed of the said parcel of land was not genuine.

34. Section 313 of the Penal Code provides as follows:-

“Any person who by false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and

is liable to imprisonment for three years.”

35. From the above section the essential elements of the offence of obtaining through false pretences can be summed up as follows:-

- a. Obtaining something capable of being stolen**
- b. Obtaining the money through a false pretence.**
- c. Obtaining the money with intention to defraud.**

36. The Penal Code defines “false pretence” under section 312 to be **“any representation made by words, writing or conduct, of a matter of fact, either past or present which representation is false in fact, and which the person making it knows to be false or does not believe to be true is a false pretence.”**

37. In the instant case, the Complainant testified how he was approached by the Appellant who informed him that his father had an acre of land for sale, to cater for his medical needs. It is upon this representation that Complainant bought the said piece of land. The Appellant again approached him on the basis that his father was sick and the Complainant bought the remaining piece of land. Later the land was found to be inexistent.

38. Having said so, this court agreed with the Appellant that the Prosecution did not adduce any evidence to show that he received any money from the Complainant. It was not enough for the Complainant to have said that he paid him cash of Kshs 900,000/=. Since his advocate was purportedly present at the material time, he ought to have been called as witness to testify him seeing the exchange of the monies.

39. There were also additional monies in the sum of Kshs 640,000/= the Complainant alleged he paid the Appellant herein. It was difficult to say with certainty that the monies were paid because they were said to have been in cash and given in the presence of the Appellant, his father and brother. It was not clear why the Complainant who had a lawyer opted to bypass him and deal directly with the Appellant. In the absence of any plausible explanation as to why he did so, this court found and held that if he paid monies as he had contended he had, he did so at his own risk as it could not be accounted for.

40. This court was therefore not persuaded that the Prosecution proved its case of obtaining money by false pretenses to the required standard.

41. Section 350 of the Penal Code Cap 63 (Laws of Kenya) provides that:-

“Any person who forges any will, document of title to land, judicial record, power of attorney for the payment of money is liable to imprisonment for life...”

42. PW 3 adduced in evidence a letter emanating from the Land Registrar indicating that the said impugned Title deed was not authentic. The said Land Registrar was not called as a witness. No plausible reason was given to explain why he was not called as a witness.

43. Section 72 of the Evidence Act Cap 80(Laws of Kenya) provides that:-

“Where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

44. This court also agreed with the Appellant that failure to call the Land Registrar to testify on the validity or otherwise of Title deed was fatal to the Prosecution’s case. A letter said to have emanated from the Land Registrar was not sufficient evidence that the impugned Title Deed was not genuine. PW 3 was an Investigating Officer and while he could tender in evidence the letter that he received from the Land Registrar, the said Land Registrar ought to have adduced the letter to court as its maker. His evidence was crucial considering that the Complainant had conducted a search and established that indeed the Title Deed belonged to the said Danton Otieno Ongira.

45. The offence of making a false document without authority is set out in Section 357(a) as follows:

“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.”

46. Indeed, it was mandatory that the following ingredients be demonstrated:-

- a. proof of the making, signing or execution of a document and that the same was done by the accused,**
- b. proof that the making, signing or execution was without lawful authority or excuse and**

c. proof that the making, signing and execution was with the intention to defraud or deceive.

47. It may or may have not been true that Title deed held false information regarding the alleged Land Title No Kisumu/Konya/2868. The alteration of the results could also have meant that the certificate was not a genuine document. However, this was not proof that Appellant was either involved in the alterations or he procured the making of the alteration. It was incumbent upon the Prosecution to adduce such evidence.

48. The Prosecution ought to have adduced evidence that he gave the Complainant the Title deed with a view to defraud him. The fact that Danton Otieno Ongira was not called as a witness or charged alongside the Appellant as he was said to have died denied this court an opportunity of establishing how he obtained the said Title Deed that was said not to have been genuine. This court thus found that the offence under Section 357(a) of the Penal Code was not proved beyond reasonable doubt.

49. As regards the offence of uttering a false document, the same is defined under Section 357(b) of the Penal Code as;

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

(b) knowingly utters any document or electronic record or writing so made, signed or executed by another person”

50. Similarly, in the absence of the evidence of the said Danton Otieno Ongira and the Land Registrar, this court could not state with certainty it was the Appellant who made the false Title deed or aided in its making of the same. His conviction in this count was therefore unsafe.

51. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (5) and (7) were therefore merited and the same be and are hereby upheld.

52. As this court had found that the Prosecution had not proved the four (4) counts to the required standard, which in criminal cases, is proof beyond reasonable doubt, it did not find it necessary to analyse the legality or otherwise and/or its fairness of the sentences that were imposed on the Appellant.

DISPOSITION

53. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 14th October 2020 was merited and the same be and is hereby allowed. The effect of this decision is that the judgment of the Learned Trial Magistrate be and is hereby set aside and the conviction and sentence set aside as it was unsafe.

54. It is hereby directed that the Appellant be released from custody unless he be for any other lawful cause be held.

55. It is so ordered.

DATE AND DELIVERED AT KISUMU THIS 26TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE