



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 69 OF 2018

MARGARET NJERI MUTWAMBURI.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Thika, C.A. Otieno-Omondi, (PM) dated 13th December, 2015 in Criminal Case No. 3319 of 2015)

JUDGMENT

1. **MARGARET NJERI MUTWAMBURI (Margaret)**, was charged before the Thika Chief Magistrate's court with two counts. On the first count, Margaret was charged with the offence of obtaining land registration by false pretences contrary to **Section 320** of the Penal Code. On the second count, Margaret was charged with the offence of obtaining money by false pretences contrary to **Section 313** of the Penal Code.

2. After her trial before the Thika Chief Magistrate's Court, Margaret was convicted on the first count, and acquitted on the second count. On being convicted on the first count, Margaret was sentenced to a fine of Kshs.150,000/= and in default to prison sentence of one year. She being aggrieved by that conviction and sentence filed this present appeal.

3. This Court is mindful of its role as the first appellate court as was held in the case **OKENO VS. REPUBLIC (1972) EA32**, that is, this Court is required to review the facts and evidence and come to its own conclusion on the case bearing in mind that this Court neither saw nor heard the witnesses testify.

PROSECUTION'S CASE

4. The prosecution set out to prove that Margaret wilfully procured for herself a registration of title deed for Land Parcel Number **RUIRU/RUIRU BLOCK1 (GITHUNGURI)/1362** by falsely pretending that she was the legitimate owner of the said parcel of land, a fact she knew was false.

5. The prosecution called **Kirika Kamungu (Kirika)**, as a witness. He testified that he purchased a share at Githunguri Constituency Ranching Company, a Land buying Company in the year 1968. Kirika stated that he paid for his share by instalments from 1968 to 1989. He was issued by the land buying company with a share certificate and a ballot paper 149 for the plot bearing ballot number 742. On 17th June, 2011 Kirika paid to the company Kshs.4,500/- for clearance and proceeded to the property. On the property, he found the same had been sub-divided and there were people occupying it. On inquiring he was informed by those in occupation that they purchased the land from Margaret. Kirika reported the matter to the police.

6. Prosecution also called **John Maina Mburu** as a witness. This witness stated that he was the current chairman of the board of the land buying company a position he has held since 2009. He confirmed that he was the sole custodian of all the land buying company records and signatory of its documents. In his absence he delegated his duties to the vice chair or the company secretary. The chairman stated that in the year 2011 Kirika went to the company's office seeking clearance ballot No. 742 which ballot represented the property Ruiru East Block 1/1362. Once Kirika paid the clearance fee the chairman and surveyor took Kirika to the property. On the property they found people in the occupation of sub-divisions and some were carrying out construction. The chairman advised Kirika to report the matter to the police.

7. The chairman provided a certified copy of the register which demonstrated that Kirika was allocated the land in question in 1983. Kirika's signature was on that register. He also confirmed that the ballot No. 742 had not been transferred from Kirika's name. The chairman reiterated that the subject property No. 1362 represented by share certificate 1656 was in the name of Kirika. He further stated that the company had not cleared the issuance of the title deed of the subject property to anyone else. On being cross-examined the chairman denied that there had been cases of double allocations of the shareholders' properties and he said:-

“Only instances of thieves trying to steal land from genuine owners.”

8. The chairman further on being re-examined stated:-

“The accused (Margaret) did not have any documents from the company. She is not a member.”

9. **David Chege Kariuki (Kariuki)** stated that he made inquiry on land that was on sale when he was given a copy of the title of the subject property, which was on offer for sale. He carried out a search on 23rd August, 2004 which search revealed the subject property was registered in the name of Margaret. Margaret offered the subject property for sale and they ultimately agreed a purchase price of Kshs.280,000. Kariuki made payment of that purchase price by instalment and when he had a balance of Kshs.14,000/= he sub-divided the property into 16 plots for different buyers and Margaret agreed to transfer the sub-divisions to those buyers. Kariuki confirmed that the buyers of the sub-divided plots had taken possession.

10. On being cross-examined Kariuki stated Margaret had not lied to him nor had she obtained money from him by false pretences and that the buyers of the sub-divided plots had no claim against Margaret.

11. The prosecution called the Investigating Officer Corp. Moses Kiema who produced exhibits ranging from exhibit number 1 to number 15. I have however been unable to trace those exhibits in the trial court’s file. I was only able to peruse prosecution exhibit NO. 4 which reflects Kirika’s name next to ballot number 742 and it reflected that the said ballot was for parcel NO. 1362.

DEFENCE CASE

12. Margaret stated in evidence that the subject property was sold to her by the land buying company for Kshs.50,000. That she bought the land “with” her late husband **Kariuki Kairu**. She stated:-

“I paid for the land at the company. They gave me a week and told me to go for a title deed.”

13. On being cross examined, Margaret stated:-

“I bought land from Githunguri Ranching. I heard that there was land being sold. The directors were selling land. I was not a member of Githunguri Ranching Co. Ltd...”

I did not bother with minutes authorising the company to sell. I only have a title...

I bought the land in 2003. I paid Kshs.50,000 to David Macharia...

I was dealing with David Macharia as a director...

I was given the title deed at the office. I do not have any documents relating to the sale. My deceased’s husband dealt with the sale.”

14. Margaret called as a witness, **Francis Kairanja Njoroge (Francis)** who stated that he was a director of the land buying company between the years 2003 and 2009. He stated:-

“I was a director at Githunguri Constituency Ranching Co. Ltd which allocates land to shareholders. I was the secretary of the board. I used to keep documents/records and sign documents. I used to keep registers, clearance certificates. The company began in 1960.”

15. This witness alluded to a breaking-in and theft at the Land buying offices which was reported at Ruiru police station. He further stated that during that breaking-in of the company’s office records like share certificates, seals and registers were stolen.

16. This witness on being examined stated:-

“It is not possible for a non-member to get land unless he/she bought it from a member. It is not possible for a director of a company to sell land to a non-member...”

A director does not receive such money. The accused (Margaret) person a member of the company. I saw her name in the register...

Her name was in our records.”

THE APPEAL

17. As stated before, Margaret was convicted on the first count and was acquitted on the second count.

18. On the first count, prosecution was required to prove that Margaret wilfully procured the registration into her name of the subject property by falsely pretending she was the legitimate owner of that property.

19. Prosecution proved through the evidence of the chairman of the land buying company and which evidence was confirmed by defence witness, Francis, that the land buying company sold shared representing parcels of the land; that shareholders undertook balloting; and on one obtaining a ballot the ballot represented the land owned by that shareholder. Francis, the defence witness, was emphatic that one was only allocated land if they were members (shareholders) of the company.

20. Prosecution in my view proved beyond reasonable doubt that Kirika was shareholder of the company, he was issued with a share certificate No. 1656 and when he balloted he was issued with ballot number 742 which represented the suit property. Prosecution produced amongst other documents, the register reflecting the ballot NO. 742 and the parcel NO. 1362. Kirika signed that register.

21. Prosecution's evidence was consistent and credible that one had to be a shareholder, which Kirika was proved to be and the shareholder on undertaking balloting was issued with a ballot number representing a parcel of land.

22. Kirika's evidence about his acquisition of his share and his balloting for parcel of land NO. 1362 was corroborated by the documentation produced at the trial and by very solid and credible evidence of the chairman of the company. There is therefore evidence beyond reasonable doubt that parcel No. 1362 belonged to Kirika and not to Margaret.

23. Margaret's evidence was contradictory to that of her witness Francis. She stated she was not a shareholder of the company and she also stated that she did not have in her custody any document confirming how she obtained registration in her name of parcel No. 1362. Francis her witness emphatically stated that one could obtain a parcel of land from the company unless they were shareholders.

24. I need to state that although the prosecution produced various documents in support of its case, only one document is in the trial court file and on the contrary, all the documents produced on behalf of Margaret are all in the trial file. It is not clear whether the missing exhibits of the prosecution is due to any design or error.

25. There are various issues that arise from the grounds of appeal filed by Margaret. Those issues can be summarised as follows:-

- Did the prosecution provide credible evidence to prove the charges?
- Did the trial court consider Margaret's defence?
- Did the trial court err in convicting Margaret on first count after acquitting her on the second count?
- Did the trial court fail to accord Margaret sufficient time to defend herself?
- Was the sentence excessive?

26. As it will be appreciated the first two issues above have been extensively considered in this judgment. I have found that the prosecution proved its case against Margaret on the required criminal standard. **Section 320** of the Penal Code provides:-

“Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanor and is liable to imprisonment for one year.”

27. In the Court of Appeal decision ***MATHLIDA AKINYI OWARE V. REPUBLIC (1989) eKLR*** considered what constitutes false pretence and quoting another decision stated:-

“Devlin, J. in the case of R. V. Dent, [1975] 2 All E.R. 806 at page 807 letter H said that “to constitute a false pretence the false statement must be of an existing fact.”

28. Prosecution proved that Margaret's representation to the land registrar was false, because the parcel No. 1362 belonged to Kirika. Her representation before the land registrar was no doubt intended to defraud Kirika of his said parcel of land.

29. Margaret testified that she was not a shareholder of the company and further that she did not hold any document relating to the registration of parcel No. 1362 into her name. Contrary to her testimony, the land registrar produced an occurrence book (OB) report by Margaret which showed that she had lost her share certificate No. B2568. Strangely, although that OB shows it was Margaret who reported that loss to the police, she was unaware of the existence of OB. Further, although Margaret said she bought the parcel of land in the year 2003, the copy of the share certificate NO. B.2568, produced by the land registrar issued in Margaret's name is dated 8th October, 1990.

30. On the whole, the defence offered by Margaret was incredible and unbelievable. Although Margaret, in her submissions argued that the prosecution's case had contradictions, I was unable to see any such contradiction but rather it is the defence which had too many unexplained contradictions.

31. The trial court did not in my view err in convicting Margaret on the first count. Margaret was properly convicted of the offence of obtaining registration of the parcel of land into her name by false pretence.

32. It does not follow that because she, Margaret was acquitted on the second count, she ought to have been acquitted on the first count. The second count depended on the evidence of Kariuki. Kariuki stated that he was not deceived by Margaret nor was he claiming a refund from Margaret. The trial court, in view of that evidence, rightly acquitted Margaret on the second count.

33. There is no basis of Margaret arguing that she was not afforded adequate time to defend herself. That submission is not supported by the proceedings of the trial court. The defence hearing date was fixed by consent of Margaret's counsel, when Margaret opted to give her defence on oath.

34. Although the first count stated that Margaret obtained her registration of parcel No. 1362 on 14th September, 2003, the correct date of that registration is 4th September, 2003 and not 14th September, 2003. The discrepancy in the date in the charge sheet is a minor one and was inconsequential. It is curable under the provisions of **Section 382** of the Criminal Procedure Code. The

mis-dating did not lead to miscarriage of justice against Margaret. In this regard, I rely on the case **NAHASHON OTIENO ODHIAMBO VS. REPUBLIC (2019) eKLR** thus:-

“We have examined the charge sheet and the P3 form. We find substance in the observation made by the appellant with regard to the existence of a discrepancy in the OB numbers as reflected in the charge sheet and the P3, as OB/NO.51/2/4/2012, and OB No. 50/2/4/2012 respectively. However, this in our view, is no more than a typographical error as the totality of the evidence shows without a reasonable doubt that both the charge sheet and the P3 form relate to the same incident that led to the prosecution resulting in this appeal...”

We find that the discrepancy is inconsequential and not prejudicial to the appellant and therefore curable under section 382 of the CPC. We therefore reject that ground.”

35. On the appeal against sentence Margaret failed to demonstrate to this Court that her sentence of a fine of Kshs.150,000/= was excessive, or at all.

DISPOSITION

36. Accordingly, I find no merit in the appeal against conviction and sentence. The appeal is hereby dismissed.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Appellant: Ms. Muhoro

DPP for Respondent: No appearance

Appellant: Present

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE