



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 85 OF 2018

DAVID MULWA NGUMBI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the conviction and sentence passed on 12th September, 2018 by the Senior Principal Magistrate Hon C.A. Ocharo SPM sitting at Machakos Chief Magistrates Court in Criminal Case 1298 of 2011)

BETWEEN

REPUBLICRESPONDENT

VERSUS

DAVID MULWA NGUMBI..... APPELLANT

JUDGEMENT

1. The Appellant, **DAVID MULWA NGUMBI**, was charged with several counts being of obtaining money by false pretences (Counts 1) **contrary to Section 313 of the Penal Code**, making a document without authority (Count 2 and 3) contrary to **Section 357(a) of the Penal Code** and uttering a document with intent to defraud (Count 4) contrary to **Section 357(b) of the Penal Code**.
2. The particulars of **Count 1** were that the appellant on the 30th day of July, 2010 at Machakos Township in Machakos District within Eastern Province with intent to defraud, obtained from Benard Muteti Mung'ata Kshs 600,000/- by falsely purporting to be Joseph Kyatu Mwatu and in a position to sell agricultural Plot **No 1746 in Malili Ranch Co. Ltd** to the said Benard Muteti Mung'ata a fact he knew to be false.
3. The particulars of **Count 2** were that the appellant at an unknown place in Nairobi within Nairobi Area with intent to defraud without lawful authority made allotment letter and green card for Agriculture Plot NO. 1746 in the name of Joseph Kyatu Mwatu purporting it to be a genuine allotment letter and green card issued to him by Malili Ranch Co. Ltd.
4. The particulars of **Count 3** were that the appellant at an unknown place in Nairobi within Nairobi Area with intent to deceive or defraud without lawful authority made identity card No.1009589 in the name of Joseph Kyatu Mwatu purporting it to be a genuine identity card issued to him by the registrar of Persons a fact he knew to be false.
5. The particulars of **Count 4** were that the appellant on the 30th day of July 2010 at Machakos Township in Machakos District within Eastern Province with intent to defraud, knowingly uttered to Benard Muteti Mung'ata a forged identity card No. 1009589, Allotment letter and Green card for Plot No. 1756 all in the names of Joseph Kyatu Mwatu a fact he knew to be false.
6. The Appellant pleaded not guilty to all the charges and was taken through the trial process. A judgement was rendered by the trial court wherein it was found that it was undisputed that the complainant purchased Plot 1746 Malili Ranch on the strength of the agreement between him and Joseph Kyatu Mwatu but it was established that the said Joseph Kyatu Mwatu did not have any dealings with the complainant. It was found that it was undisputed that the person who presented the documents pertaining to the suit property was positively identified by the complainant and Pw3 and that the said person received Kshs 600,000/- but failed to collect the balance. The trial court framed four (4) issues being whether the appellant received monies from the complainant by false pretence; whether the appellant falsified documents in order to appear that he was Joseph Kyatu Mwatu, a fact that he knew was false; Whether the appellant forged documents to a person knowing them to be false and finally whether the prosecution proved its case beyond reasonable doubt. With respect to the 1st issue, the trial court in placing

reliance on Section 312 and 313 of the Penal Code found that the appellant offered to sell Plot 1746 Malili Ranch and received payment for the same and that the documents presented to the complainant were falsified. On the 2nd and 3rd issues, the court found that the appellant presented forged documents to the complainant with full knowledge that they were forged and he pretended to be Joseph Kyatu Mwatu. The court found that the prosecution proved its case against the appellant on all four counts and he was convicted. After considering the mitigation, the court noted that the appellant had several previous records and the appellant was sentenced to serve imprisonment of 12 months for count 1, 5 years for count 2, 5 years for count 3 and 7 years for count 4; the sentences were to run concurrently.

7. Having been dissatisfied with the decision of the trial court, he preferred the instant appeal on 26.9.2018 as amended through his advocates on 21.3.2019. His five grounds of appeal in summary are as follows:-

a. that conviction on the first count was erroneous as the charge sheet was defective;

b. reliance on previous records when sentencing the appellant was a misdirection as the said records were not presented in court but mere hearsay;

c. The prosecution witnesses contradicted themselves;

d. The prosecution did not discharge the burden of proof beyond reasonable doubt; and

e. The trial court failed to consider the defence of the appellant.

8. The Appellant's counsel sought no prayers in the appeal as amended.

9. The appellant's counsel vide submissions dated 14.10. 2019 solely submitted on the issue of the conviction and sentencing of the appellant on a defective charge sheet as per Section 214(1) of the Criminal Procedure Code. It was counsel's submission that the appellant was charged under the wrong provisions of the law in count 4 and that count 4 could not be proven when the same appellant was convicted of count 2 and 3 of making false documents. Counsel cited the case of **Dennis v R (2018) eKLR** where the court observed that it was no proved that the appellant made the document. Counsel cited the case of **Yongo v R (1983) KLR 319** where it was observed that a charge is defective if it did not accord with the evidence given. It was counsel's argument that count 4 gave a misdirection of the offence in its particulars as the particulars stated that the appellant presented a document that was signed by another person and no evidence was produced in court to back this claim. Counsel argued that the trial magistrate failed to invoke Section 214(1) of the Criminal Procedure Code to cure this defect.

10. Learned counsel further submitted that count 2 and 3 were to the effect that the appellant made documents without authority contrary to Section 357(a) of the Penal Code yet there was no witness to that effect. Counsel was of the view that Pw7, a fingerprint expert only stated that the identification card that was with the appellant was a forgery but no handwriting expert was called in to show that the forged documents were forged by the appellant. Reliance was placed on the case of **David Mutsotso v R (2019) eKLR** and Section 70 of the Evidence Act. Counsel urged the court to allow the appeal as prayed and quash the conviction and set aside the sentence handed in Machakos Criminal Case 1298 of 2011.

11. The State opposed the appeal and submitted solely on the issue whether the charge sheet was defective. Counsel cited the provisions of Section 134 of the Criminal Procedure Code and the case of **Sigilani v R (2004) 2 KLR 480** that relate to the principles of the law governing charge sheets. It was counsel's argument that an accused can commit two offences in a single transaction being uttering a false document and making document without lawful authority and therefore charging the appellant with both offences did not make the charge sheet defective. Counsel further argued that the appellant was charged with offences known in law and the same were disclosed and stated in a clear and unambiguous manner that the appellant was able to. Hence in placing reliance on Section 382 of the Criminal Procedure Code counsel submitted that the appellant was aware of the charges facing him and this ground of appeal lacked merit. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

12. The evidence on record was as follows. Pw1's testimony was taken by Hon P.N. Gesora **and there are some pages missing in proceedings**. What can be made out of the testimony was that Pw1 was a director of Nthoki Enterprises and a sale was executed between the appellant who had an identity card in the names of Joseph Kyatu Mwau and Nthoki Enterprises Ltd. Pw1 testified that he was at Machakos Police station when the appellant emerged and the police were alerted. He testified that the real Joseph Kyatu Mwau was also at the police station and he reported the matter to the police whereupon the appellant was charged. Pw1 tendered in court a copy of the ID that the appellant gave him and the same was marked for identification.

13. Pw.2 was Joseph Kyatu and **equally some pages of his testimony are missing from the record**. What can be gathered from the record was that he was informed that there were people seen on his land No. 1746 and at Malili Ranch offices he got information that Nthoki Enterprises had purchased the land through Pw1 from someone who used Pw2's name. He told the court that the particulars of the identity card that were used to sell the land were different from those on his identity card; that was the ID Number, date of birth, place of issue and signature. It was his testimony that he later heard that the suspect had been arrested.

14. Pw3 was Simon Mutuku Makau, a commission agent who told the court that someone called Joseph Kyatu Mwau telephoned him informing him that he had land in Malili that he wanted to sell. He stated that he did a search on the land with the documents that the appellant supplied and he got a buyer who was Pw1 with whom he organized a meeting with the seller. He testified that the purchase price was negotiated as Kshs 1.6m/- and Kshs 600,000/- was paid to the seller who never came back for his balance. He identified the appellant as the seller.

15. On 27.7.2015, directions were made by Hon C.A. Ocharo that the matter was to start de novo. The hearing commenced on 24.8.2018 before Hon C.A. Ocharo and **Lenard Chanya Githua** testified as **Pw1**. He testified as the director of Malili Ranch who oversaw the subdivision of the Ranch. He testified that on 2.8.2010 the Appellant came to the office with a sale agreement, allotment letter and ballot card

seeking the transfer of parcel 1746. He told the court that the land belonged to Joseph Kyatu Mwau. He told court that the sale agreement dated 30.7.2010 was between Joseph Kyatu Mwau and Nthoki enterprises in respect of parcel 1746. He stated that the allotment letter he came with was No. 1143 and he also had ID No. 1009589 in the names of Joseph Kyatu Mwau. He told the court that after looking at the documents and confirming from the register that it bore the names, a receipt was generated to effect transfer to Nthoki Enterprises but he later got a complaint from Nthoki Enterprises that its parcel of land had been sold. It was his testimony that he noted that the ID card and ballot card were not genuine. On cross examination, he told the court that he looked at the documents presented to him and effected the transfer and did not anticipate fraud. He further testified that the land was in the names of Nthoki Enterprises.

16. Pw2 was Benard Muteti Mungata. He told the court that on 30.6.2010, Simon Makau came to his office in the company of Joseph Kyatu Mwau in respect of the sale of Plot 1746 Malili Ranch that he was interested in. He told the court that Joseph Kyatu Mwau was the appellant who informed him that he worked at Del Monte. He proposed to pay a deposit of Kshs 600,000/- that was paid in cash on the insistence of the appellant. He stated that a sale agreement was executed between Joseph Kyatu Mwau and Nthoki enterprises where he was a director and that the appellant refused to come for his balance. It was his testimony that when he went to the site, the neighbours informed him that they knew who the plot owner was and they did not think that he would have wanted to sell the land. He testified further that he forwarded the documents that the appellant left him with being an ID card, ballot document (green card) to Malili Ranch for confirmation and had the land was transferred to Nthoki Enterprises. He told court that he was at one time at Machakos Police station when the Appellant was brought in handcuffs and it was then that the genuine owner of the land turned up leading to the appellant being charged. On cross examination, he testified that the appellant was not present on the day the transfer was effected. He told the court that the photograph on the ID card was that of the appellant and that there was another claimant to the land with the same names and that was why he thought the documents were not genuine.

17. Pw3 was Simon Mutuku Makau, a land broker. He testified that someone called Joseph Kyatu Mwau telephoned him informing him that he had land in Malili that he wanted to sell. He told the court that the person supplied him with a copy of the allotment letter and he did a search on the land. He told the court that he managed to get a buyer in the name of Nthoki Enterprises and that the seller came to his office with the allotment letter issued in July, 2006, his ID. No. 1009589 that had a photo of the appellant but he came without a witness. He testified that the purchase price was negotiated at Kshs 1.6m/- and Kshs 600,000/- was paid to the seller who never came back for his balance. He informed the court that he and Pw2 went to the land and found a son to Mr. Kyatu who told them that Mr. Kyatu had not sold the land. He then got in touch with Mr Kyatu and noted that the ID No was correct according to the Malili record but the photo and serial number were different and he reported the matter to Machakos police station. On cross examination, he testified that the documents that were presented to him by the appellant appeared genuine and when he did a search, the land was clean. He testified that the land was sold by a fake person. On re-examination he testified that the appellant presented himself as Joseph Kyatu Mwau and that the appellant was the one who received the money.

18. Pw4 was Joseph Kyatu Mwau who testified that in 2010, he went to Malili Ranch to inquire about his plot 1746 and was informed that the same had been transferred to Nthoki Enterprises by Simon Makau. He testified that he went to Simon Makau who gave him an ID card that contained a different picture from his. He also noted that the year of birth, serial number and place of issue were different. He testified that he reported the matter to the police and he tendered a copy of his ID card. He testified that he had the original allotment that was issued on 19.8.2006, a green card and a membership card. He pointed out to court that the allotment that was used for the transaction was dated 27.7.2006. On cross examination, he told the court that he was in possession and utilizing the land and had not been evicted. On re-examination, he testified that he did not have any agreement to sell his property to Nthoki and the issue he had was that his name was being used in the transaction.

19. Pw5 was Julius Maweu Kilonzo who testified that in 2009 he was a director at Malili Ranch and secretary so he would take minutes and sign allotment letters. It was his testimony that he had an allotment letter for Joseph Kyatu Mwau in respect of Plot 1746 signed by him, dated 19.8.2006 and issued on an even date. He told the court that Joseph Kyatu had a membership card 1146. He testified that MF1-2 was an ID card with the names of Joseph Kyatu Mwau but not the same person. He testified that MF14 was an allotment letter that was not issued by him, it was dated 27.7.2006 and it was not signed by him. He testified that MF1 3 was the Green Card for Malili Ranch but not issued by his company as it was whitish in color yet theirs were dark green. He told the court that it had no membership number and that its seal was on the top whereas the original ones had a seal on the left. He told court that the plot was issued to Joseph Kyatu Mwau. On cross examination, he told the court that he knew Joseph Kyatu Mwau as they were both teachers and his brother was married to Pw5's sister. He testified that he was the one who issued the original allotment letter and the green card and that the land was being used by Mr Kyatu.

20. Pw6 was Sgt Anthony Gatavai from CID headquarters and the investigating officer. He told the court that he received a complaint from Joseph Kyatu Mwau that someone had impersonated him and sold his plot 1746 in Malili. He testified that he received the ownership documents of Joseph Kyatu Mwau being allotment letter dated 19.8.2006, membership card No 1143, Receipt for payment of Kshs 5000/- dated 21.9.1987, Green Card no 1746 for Malili Ranch and original ID cards all in their original form. He told the court that he visited Nthoki Enterprises and Pw2 informed him that the plot was sold to him by the appellant who presented himself as Joseph Kyatu and he received documents from him being green card No 1746, allotment letter dated 27.7.2006, ID card No 1009589 for Joseph Kyatu with the appellant's photo and a sale agreement. He testified that he took the 2 ID cards to the Registrar of Persons and a report prepared to the effect that the ID that was used by the appellant was not genuine as the serial Number belonged to Joseph Karanja. He testified that the appellant was arrested and charged with the instant offences. On cross examination, he told the court that the sale agreement indicated the amount that the appellant received.

21. Pw7, Jane Rose Lusike Munialo a fingerprint officer at the National Registration Bureau told the court that she knew Mr. Evans Oyugi whom she worked with and was now on retirement. She sought to produce a document on his behalf. She testified that the identification report indicated that Identity card 1009589 Serial No 204853994 was registered in the names of Joseph Kyatu Mwau was genuine whereas the ID card 1009589 Serial No 213272348 in the names of Joseph Kyatu Mwau was found to be suspicious. She produced the certification of identification report as an exhibit. The prosecution closed their case and the court found that the appellant had a case to answer. He opted to give unsworn evidence.

22. The appellant testified on oath that he was not involved in the instant matter and was arrested at the police station when he went there over other matters.

23. Cognizant of my duty as the 1st appellate court and having considered the petition of appeal, submissions of counsel and the record of the trial court, the substantial issues to be addressed are whether the prosecution proved its case against the appellant beyond reasonable doubt in respect of all the counts; whether the charge sheet was defective; whether the trial court failed to consider the appellant's defence and whether the court improperly took into account the previous records of the appellant when passing the sentence.

24. The main issue to grapple with is whether the offences were proved beyond reasonable doubt and this shall be addressed together with the issue of consideration of the appellant's defence. The first offence was obtaining money by false pretences contrary to **Section 313 of the Penal Code**. It is defined thereunder as;

“Any person who by any false pretenses, and with intent to defraud, obtains from any other person anything capable of being stolen, or includes 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.”

25. The evidence on record speaks to the fact that all the ingredients of the offence as provided under section 313 of the Penal Code have been satisfied. This is because, there is evidence that the complainant testified that he met the appellant, executed a sale agreement with him and gave him money. This evidence is corroborated by the sale agreement that had not been objected to as well as the payment voucher indicative that the appellant was positively identified as the one who received the money. The presentation that the appellant was the seller and in a position to sell the suit land was proved from the account of the complainant and corroborated by the evidence of Pw3 and Pw5. Pw7 confirmed that the appellant was in possession of an ID that was in the names of the genuine owner, and that was proved to be false. Pw5 confirmed that the allotment letter and green card was not issued at his instance. The remission of money was proved by the account of the complainant and corroborated by the documentary evidence being the sale agreement and the payment voucher. The complainant spotted the appellant at the police station and raised alarm and pointed to the police that he was the purported seller who had received kshs.600,000/= from him.

26. From the evidence on record as led by all the witnesses on record, the exhibits tendered, there is no indication that the appellant controverts the same. The complainant had given his account of how he met the appellant and because no evidence is given by the appellant to challenge it, the appellant cannot be seen to say that his defence was not considered. He did not say anything of value that would shake the evidence against him. I find that there is ample evidence to support the conviction recorded against the appellant in respect of the 1st count.

27. The 2nd and 3rd offences were hinged on **Section 357a of the Penal Code**. The section creates an offence known as making a document without authority and it provides 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; or

28. In order to prove the offence under **section 357(a) of the Penal Code**, the prosecution must establish, “the making” as provided in **section 357(a)** thereof and the intent to defraud or deceive. The first element requires the proof of the actus reus being that of making the allotment letter and green card for agricultural plot 1746 in the names of Joseph Kyatu Mwau as well as the Identity card No. 1009589 in the names of Joseph Kyatu Mwau. The second element requires that the, “*intent to defraud or deceive*” be proved.

29. In order to prove, “*intent to defraud*”, the prosecution must establish the underlying conduct that constitutes fraud or deceit which can be imputed to the appellant.

30. The prosecution was required to lead evidence to show that the appellant made the allotment letter, green card and identity card. **Section 70** of the Evidence Act (Cap 80 laws of Kenya), is clear that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting alleged to be in that person's hand writing must be proved to be in his hand writing. There was no evidence that the appellant prepared the document, nor can the court tell who made the same. This evidence could only be tendered by a handwriting expert. See **Hassan Salum v R 1964 EA 126**.

31. In the absence of the same, the court is not able to see how the conduct of the appellant fell within the definition of *making within Section 357(a)* of the Penal Code. I therefore without much ado find that counts 2 and 3 were not proven to the required standard and hence the conviction thereon were not safe.

32. As regards the charge of uttering a document with intent to defraud contrary to **Section 357b of the Penal Code** the same provides that ***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, is guilty of a felony and is liable to imprisonment for seven years

33. **Section 348 of the Penal Code gives insight to intent to defraud and states that** intent to defraud is presumed to exist if it appears that at the time when the document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

34. The documents in question are the allotment letter, the green card and the ID Card. The appellant gave no evidence that was of value. The complainant gave evidence that he saw the ID card of Joseph Kyatu Mwau that was presented to him by the appellant. He also saw the green card and the allotment letter and actually received the same and this made him believe that the appellant was the seller and he had money

given to the appellant on the strength of the documents. On the face of the evidence available, because it had not been proven that the appellant made the impugned documents, then it is safe to conclude that the said documentation was made by a person other than the appellant, who had the requisite intent as the evidence of Pw3 was to the effect that the appellant made it known that he had land that he wanted to sell. As fate would have it, the documents that he sought to rely upon proved not to be genuine was clearly brought out in the testimony of Pw7 and Pw5. Pw2 turned out to be the unfortunate victim of the actions of the appellant. The complainant relied on the suspect documents presented by the appellant to enter into a sale agreement and to make a part payment of the price to the appellant. The appellant gave no evidence that was of value that would serve in his defence and he has the temerity to aver that his defence was not considered. I find that there was no such defence to consider. Having reached that conclusion, I hold that the prosecution proved the 4th count and hence the conviction in respect of the same was safe.

35. The appellant has labored in his submission to explain why this court should find the charge sheet defective on the grounds that count 4 was not supported by evidence. In light of my findings in paragraphs 32 to 34 above, I find that this ground lacks merit.

36. Finally on the sentences meted out, the appellant vide his amended petition of appeal has faulted the trial court for relying on the previous records of the appellant in sentencing him yet the said records were never presented before the court. The standard practice has always been that the aspect of whether a convict has some past records must be presented by the court prosecutor before the trial court proceeds to mete out the appropriate sentence. Whenever a convict has an issue to the presentation or authenticity of any such records, he is at liberty to voice his or her objections so that the same is determined before the appropriate sentence is meted out. The appellant in the present case did not contest the said past records. No evidence has been presented to show that the learned trial magistrate had been unduly influenced by the said past records while meting out the sentences. I have looked at the sentences and find them to be within the limit prescribed by the penal code provisions and are not at all excessive. This ground of appeal must fail.

37. In the result the Appellant's appeal on counts 2 and 3 succeeds and I hereby proceed to quash the attendant convictions and set aside the sentences. The appeal against **count 1** and **4** is dismissed. The conviction and sentences thereon are hereby affirmed.

Orders accordingly.

Dated and delivered at Machakos this 30th day of April, 2020.

D. K. Kemei

Judge