REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 1 OF 2020

SERPEPI SANJA SIROMO...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal from conviction and sentence by the Chief Magistrate's court at Kajiado

(Hon. M. Kasera, PM) dated 31st January 2020 in criminal case No.1135 of 2016)

JUDGMENT

1. The appellant was charged with the offence of obtaining registration by false pretense contrary to section 320 of the Penal Code. Particulars were that on 20th day of November 2008 at Kajiado Township in Kajiado Sub-County in Kajiado County with intent to defraud, he willfully procured himself registration of land title Number **Kajiado/Dalalekutok/1062** falsely pretending that he was the registered owner, a fact he knew to be false.

2. He was also charged in count 2 with forgery contrary to section 349 of the Penal Code. Particulars being that on 20th November 2008 at Kajiado Township, Kajiado Sub-County in Kajiado County, with intent to defraud, he forged a certain sale agreement for land Title Number **Kajiado/Dalalekutok/1062**, purporting it to have been signed by Julius Maletiam Kanderi.

3. The appellant denied both counts and after a trial in which the prosecution called 8 witnesses and the appellant's defence, he was convicted and sentenced to one-year imprisonment in count 1 and four years' imprisonment in count 2. He was aggrieved with both convictions and sentences and lodged this appeal raising the following grounds, namely;

> **1. That the Honourable Magistrate erred in law and fact by convicting the appellant in the absence of his advocate and in the absence of mitigation hence denied the appellant a fair trial**
>
> **2. That the Honourable magistrate erred in law and fact by failing to consider that the prosecution had not proved their case beyond reasonable doubt.**
>
> **3. That Honourable magistrate erred in law and fact by imposing a harsh sentence**
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> **4. That the Honourable magistrate erred in law and fact by disregarding the evidence of the appellant**
>
> **5. That the Honourable magistrate erred in law and fact by failing to consider the persons who signed the green card, the title deed and the sale agreement for Kajiado/Dalalekutuk/1062 were not called as witnesses.**
>
> **6. That the Honourable magistrate erred in law and fact in failing to consider that he complainant never testified.**
>
> **7. That Honourable court erred in law and fact by failing to consider that ingredients of the offence of obtaining registration by false pretense and forgery had not been proved to the required standard.**

4. During the hearing of this appeal, Mr. Itaya, learned counsel for the appellant, submitted that the prosecution did not prove the case against the appellant beyond reasonable doubt. He argued that the prosecution did not prove ingredients in count 1 of obtaining registration by false pretence. According to counsel, the appellant adduced evidence of purchase of the property; that the agreement for sale was drawn by a firm of advocates and witnessed by an advocate who was not called as a witness.

5. He also argued that the prosecution did not adduce evidence to show that the appellant procured registration. According to counsel, PW5 testified that there was a transfer that was registered by the Land Registrar, one Mr. Nyamweya and, therefore, there was no evidence that the appellant committed false pretence. He further argued that the owner of the land did not testify.

6. With regard to count 2, Mr. Itaya submitted that the prosecution did not call the advocate who witnessed execution of the sale agreement and, for that reason, the prosecution did not prove the ingredients of the offence. He also argued that there were no complainants in the two counts. On sentence, he argued that the sentences were harsh. He urged the court to allow the appeal, quash convictions and set aside the sentences.

7. Mr. Meroka, counsel for the respondent, opposed the appeal. He submitted that the parcel number in question was registered in the name of Maseto Ene Korau who died on 10th October1992 and therefore the prosecution could not call her as a witness. For that reason, he submitted, the sale agreement that was used to transfer the property to the appellant was fraudulent.

8. Mr. Meroka argued that the land was not sold by the registered owner; that the argument that the land was sold by the deceased's son was controverted by the documents examiner who testified that the alleged son did not sign the agreement for sale.

9. According to Mr. Meroka, although the agreement was executed in 2008, PW6 testified that the deceased's son did not execute that agreement. He submitted that when the loss of the title deed was gazetted on 12th February 2010 in Gazette No. 1340, the property was in the name of the first owner and name on the Green Card showed that the property moved into the appellant's name on 15 th April 2011. He argued that the purported transfer was fraudulent.

10. Regarding count 2, Mr. Meroka submitted that the prosecution established that Julius M. Kanderi's signature was forged and that failure to call the Land Registrar and the advocate who witnessed execution of the agreement was not fatal to the prosecution case.

11. On sentence, counsel submitted that the sentences are lawful. He urged the court to dismiss the appeal, uphold convictions and affirm the sentences.

12. I have considered the appeal and submissions by counsel for the parties. I have also read the record of the trial court and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reanalyze and reevaluate the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

13. In **Okeno v Republic** [1973] EA 32. The court stated:

> **"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 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] EA 424.)"**

14. Further in ***Kiilu v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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; 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."**

15. PW1 Penina Koinako testified that the land belonged to her mother in law Muteso and that they had agreed during her lifetime that the land was to be inherited by Tumbla. She testified that after Muteso's death and on carrying a search, they realized that the land was in the appellant's name. When they asked the appellant who had sold the land to him, he told them that it was Maletian, her brother in law who is now deceased. She told the court that Maletian was present when the family agreed that the land was to be inherited by Tumbla. The witness told the court that she did not know whether Maletian sold the land because he died without disclosing that he had sold the land.

16. PW2 Salmoi Kienvlo Kanderi testified that Maseto was his grandmother and that she died on 10th October 1992. He stated that in 2006, they sat as a family and agreed that his uncle Kanderi was to inherit the land. Later a report was made on the loss of the title deed and a Gazette Notice issued on 10th February 2010. When a search was conducted, the land was found to be in the appellant's. They then reported the matter to the police. She testified that she saw the sale agreement at the police station and one of the people who signed it was Koinato Ole Kurau Silanoi who denied that his father sold the land. He also stated that all the witnesses to the sale agreement are deceased and that Koinato died in 2007. He told the court that he did not know whether Maletian was paid any money.

17. PW3 David Makand Kanteri testified that parcel No. 1062 was given to Wilson Topieko who is now deceased and that the land was to go to Tumbla according to a family meeting. He told the court that he later learnt that the land had been taken by the appellant. According to this witness, the appellant did not buy the land. In cross-examination the witness denied that he had any grudge with the appellant. He stated that although he had borrowed money from the appellant, he repaid back the money after he received a demand letter from the appellant's advocates.

18. PW4 Kitemet Ole Sempile a former Village elder, testified that she knew Muteso, now deceased whose land was to be inherited by Topieka. He later heard that the land was in the appellant's name. He reported the matter to the police. He stated that he never witnessed money being paid by the appellant to Maletian.

19. PW5 Daniel Musika Kyule, former Land Registrar Kajiado, testified that on 13th May 2017 he was called to the CID office Kajiado and shown Gazette Notice No. 1340 of 12th February 2010. He had gazette lost title belonging to Masento Ene Koikurao Kanderi being Kajiado/Dalalekutuk/1062. The officers wanted to know if he had signed the Gazette Notice. They also showed him a copy of the Green Card. The land had been transferred to the appellant. He told the court that it was not him who registered the transfer but Mr. Nyamweya. The witness told the court that he could not tell whether the land was transferred through false pretence.

20. PW6 No. 235261 CI Susan Wambugu, a forensic documents examiner, told the court that on 19th July 2016 she received exhibits from PC Morris Muli of DCI Kajiado. They included B1 signature of Julius M. Kanderi deceased; B2-questioned document with signature of Julius Maletian and Surpepi Saya dated 20th November 2008. She was to ascertain if signature on B1 compared with B2 was by the same person. Her findings were that signature B1 compared with signature B2 were made by different persons. She signed the report on 29 th July 2016. She produced the exhibit memo as PEXH 2 and the report as PEXH 9. In cross-examination, the witness told the court that she could not get sample signature because the person was deceased. She therefore used known signature which was available.

21. PW7 No. 74560 Morris Muli of DCI Kajiado testified that on 22nd June 2016 he was assigned to investigate the case of obtaining registration by false pretence. He commenced investigations, recorded statements from witnesses and established that Maseto was allocated parcel No. 1062 measuring 28.75 acres from Entorika Group Ranch. She passed on in 1992 but the title deed was issued in 1994. She left behind only one son Wilson Topoika who died in 2008 after the family had sat on 2nd July 2006 and resolved that the land be registered in his name.

22. According to the witness, the family caused the loss of the title deed to be gazetted on 12th February 2010 in Gazette No. 1320. They later conducted a search and found that the parcel of land had been transferred to the appellant on 15th April 2011. He contacted the appellant who presented to him a sale agreement between him and Julius Maletiam Kanderi Sirimo. Julius died on 21st January 2010 at Kenyatta National Hospital. He prepared an exhibit memo to the documents examiner for signature comparison on the sale agreement with the known signature of the person said to have signed the sale agreement. He later charged the appellant with the offences. According to the witness, Muteso died in 1992 while the parcel of land was sold in 2008.

23. PW8 Dr. Maryann Kurai testified on behalf of Dr. Mudenyo, Head of Department of Health Records at Kenyatta National Hospital (KNH), that Julius M. Kanderi was admitted in ward 5 at Kenyatta National Hospital but died on 21st April 2010. They later got an inquiry from DCIO Kajiado and they wrote back indicating that he died on 21st April 2010. The letter was produced the letter as PEXH 11.

24. On being put on his defence, the appellant gave a sworn statement and called no witness. He told the court that it was not true that he got the land fraudulently. He testified that the land was sold to him by Julius M. Kanderi and Museto Kurau Kanderi. He denied that Museto died on 10th October 1992. He told the court that he gave 28 heads of cattle to Museto and her son; that the title deed got lost and the loss was advertised; that the title came out in the name of Museto in 2010 and that Museto was alive and she signed all the documents. He also denied that he forged the signature of Julius Maletian in the sale agreement. He also denied giving the police his specimen signature and that Tobika Njoroge never gave evidence in court. He denied stealing the land.

25. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt. It stated at page 5 of the judgment;

> **"…the sale agreement is dated 20/10/2008. This means the land was sold after the death of Museto which took place on 10/10/19992. Exhibit 1(a) referred to the purported seller Julius Maleta did not (sic) own the land at the time he sold it….The issue before this court is whether the accused is the legal owner of the land Kajiado/ Dalalelukuk/ 1062.Whether he acquired it legally…"**

26. The trial court went on to find as a fact that the green card was in the name of Museto and that the title deed came out after she had died. There after the title deed was declared lost and the family sought a replacement. They conducted a search which revealed that the land had been transferred into the appellant's name. According to the trial court, the sale agreement between the appellant and Julius Maletian is dated 20th November 2008 and maletian died on 21st January 2010 at KNH where he had been admitted on 14th January 2010. The trial court also referred to Exhibit 11 as a death certificate. However, that document actually is a letter from Kenyatta National Hospital dated 12th April 2017 stating that the Julius Maletiam Kanderi was admitted at the hospital's Accident and Emergency Department on 14th January 2010 following an accident, was admitted to Ward 5B on the same day and died on 21st January 2010.

27. The letter was a response to one from the DCI Kajiado, dated 3rd February 2017. The DCI had requested the hospital management to confirm if the deceased died in their hospital and furnish him with **a certified copy of the burial permit.**

28. I have considered the arguments by both the appellant and the respondent. The appellant faced two counts. In count 1, he was charged with obtaining registration by false pretence contrary to section 320 of the Penal Code. That is, he was accused of willfully obtaining registration of himself as proprietor of parcel No. **Kajiado/Dalalelukuk/1062** by pretending that he was the owner of that parcel of land, knowing that this was false.

29. He was also charged in count 2 with forgery contrary to section 349 of the Penal Code. Particulars stated that on 20th November 2008 at Kajiado Township, with intent to defraud, he forged a sale agreement for Title Number **Kajiado/Dalalekutok/1062**, purporting it to have been signed by **Julius Maletiam Kanderi**.

30. The appellant's argument is that he purchased the land. In his defence, he stated that he actually purchased the land from both the owner and her son, both now deceased.

31. The prosecution argued that the owner of the land died in 1992 while her son Julius who is purported to have entered into the disputed sale agreement died in 2010. Its witnesses, PW1, PW2, PW3 and PW4 denied that the deceased or her son sold the land. They stated that they had agreed as a family that the land was to be taken by Wilson Topoika Kanderi unconditionally. They relied on family meeting resolutions that showed Wilson Topoika was to inherit the land. For those reasons the respondent argued that the appellant must have obtained registration of the property into his name by false pretence.

32. From the above contestations, the issues that arise for determination in this appeal are; whether the prosecution proved its case beyond reasonable doubt; whether the prosecution failed to call necessary witnesses and if this was fatal to the prosecution case; whether the trial court ignored the appellant's defence and whether the sentences was harsh. I will deal with count 2 first.

33. The appellant was charged in count 2 with forging an agreement for sale on 20th November 2008 at Kajiado Township for land Title Number **Kajiado/ Dalalekutok/ 1062**, purporting it to have been signed by **Julius Maletiam Kanderi**. Now deceased.

34. Section 345 of the Penal Code defines forgery as ***"the making of a false document with intent to defraud or to deceive."*** Section 347 deals with making of a document while section 348 defines intent to defraud. The prosecution was required to prove beyond reasonable doubt that the appellant forged the sale agreement dated 20th November 2008; it was false and was intended to defraud.

35. The prosecution argued that the sale agreement was not signed by Julius Maletiam Kanderi. It relied on the evidence of PW 6, the documents examiner, who compared known signature of Julius Maletiam Kanderi obtained from resolutions of a family meeting held on 2nd July 2006 (Pex 9) and the signature on the sale agreement. PW6 concluded that the signatures were by different people.

36. The agreement was drawn by a firm of Advocates and executed before an advocate. That advocate was not called to testify. There were three other independent witnesses who also witnessed execution of the agreement but were too not called to testify. The appellant insisted that Maletiam was alive and that he executed the sale agreement. The sale agreement has Julius Maletiam's identity card number which the prosecution did not also dispute. More fundamentally, the prosecution did not lead evidence to prove that it was the appellant who signed the signature on behalf of Julius Maletiam Kanderi.

37. Although the prosecution maintained that Julius Maletiam Kanderi was deceased, it did not call credible evidence to prove that he was indeed dead. It merely relied on the letter dated 12th April from KNH as evidence of death. That letter could not be taken to be conclusive evidence of death in a court of law. The letter from DCI to KNH was clear that the DCI wanted a certified copy of the Burial permit. The hospital did not give a copy of the burial permit to confirm that Julius Maletiam had died. No explanation was given why there was no burial permit. It is not clear why the police did not get to the bottom of the allegation that Julius Maletiam was dead. Was it deliberate not to lead evidence of death or call that witness if he was alive?

38. In any criminal trial, the prosecution bears the burden of proving its case beyond reasonable doubt and not for the accused to prove his innocence. This principle has been stated in many leading decisions.

39. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, **Lord Denning** stated with regard to the phrase "proof beyond reasonable doubt" that:

> **"Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."**

40. In ***Bakare v State (***1987) 1 NWLR (PT 52) 579, ***Oputa, JSC,*** writing for the Supreme Court of Nigeria, amplified that phrase, stating:

> **"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".**(emphasis)

41. The prosecution failed to prove that Julius Maletiam was dead and could not therefore testify. It also failed to call key witnesses, the advocate and the three other independent witnesses who witnessed execution of the sale agreement.

42. Section 143 of the Evidence Act states that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. That is to say, the prosecution has the right to call the number of witnesses it deems fit to prove its case. However, it has a duty to call crucial witnesses through whom it should extract evidence to prove its case beyond reasonable doubt.

43. In **Keter v Republic [2007] 1 EA 135, 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.*

44. On the same issue, the court held in *Bukenya & Others v Uganda* [1972] EA 549, that the prosecution must make available all

witnesses necessary to establish the truth even if their evidence may be inconsistent with its case, and that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would, if tendered, have been adverse to the prosecution.

45. The emphasis in the above decisions is that the prosecution must call all crucial witnesses to prove its case beyond reasonable doubt. Failure by the prosecution to call crucial witnesses such as the advocate who drew and witnessed the sale agreement as well as the other independent witnesses to that agreement to testify before the trial court, denied the trial court an opportunity to get crucial evidence on the case. Those witnesses would have disclosed to the court the person who signed the sale agreement as Julius Maletiam. Failure to call these witnesses should be taken that had their evidence been called, it would have been adverse to the prosecution case.

46. Turning to count 1, the appellant was accused of obtaining registration by false pretence contrary to section 320 of the Penal Code. The prosecution case was that he willfully obtained registration of himself as proprietor of parcel No. **Kajiado/Dalalelukuk/1062,** knowing that this was false. He denied the charge and argued that he documents were properly signed. The prosecution relied on the fact that Museto, the proprietor died in 1992 before the title to the land was issued and that she could not have therefore signed the transfer documents.

47. The trial court agreed with the prosecution and found as a fact that the green card was in the name of Museto and that the title deed came out after she had died. The title deed was later declared lost and the family sought a replacement. When they conducted a search it revealed that the land had been transferred into the appellant's name.

48. The appellant was charged with the offence of obtaining registration by false pretences contrary to section 320 of the Penal Code. In other words, he is accused in that he procured registration of land parcel No. **Kajiado/ Dalalelukuk/1062** into his name through false pretences.

49. Sectio 320 of the Penal Code provides that:

> **"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 misdemeanour and is liable to imprisonment for one year."**

50. Section 312 defines the offence thus:

> **"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 <u>the person making it knows to be false or does not believe to be true,</u> is a false pretence."**

51. From the above definition, the ingredients of the offence are that; there must be a representation on matters of fact about the past or present; that representation must be false and it must have been made with the intent of defrauding someone of his property. It must have been acted upon to the disadvantage of the complainant. The prosecution must therefore prove these ingredients in order to succeed in the case of obtaining registration by false pretences.

52. This fact is supported by judicial decisions. In ***<u>Edgington v Fitzmaurice</u>*** (1885) 29 Ch D 459, ***Bowen, L.J***. observed that

> **. "In order to sustain his action he must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the Defendants, or that they made it not caring whether it was true or false…[L]astly, when you have proved that the statement was false, you must further shew that the plaintiff has acted upon it and has sustained damage by so doing: you must shew that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting."**

53. In the Nigerian case of ***<u>Dr. Edwin U. Onwudiwe v Federal Republic of Nigeria</u>*** SC. 41/2003, the Supreme Court of Nigeria observed that in order to prove the offence, there must be a pretence; that the pretence should have emanated from the accused person; that it was false; that the accused person knew of its falsity or did not believe in its truth; that there was an intention to defraud; that the thing is capable of being stolen and that the accused person induced the owner to transfer his whole interest in the property.

54. Further, in ***<u>Mathlida Akinyi Oware v Republic,</u>*** Cr App. No 12 of 1989, [1989] eKLR the Court of Appeal stated referring to the decision of "***Devlin, J.*** R. V. Dent, [1975] 2 All E.R. 806 at page 807 letter H, that to constitute a false pretence the false statement must be of an existing fact.

55. Sadly, in the case before the trial court, the prosecution did not adduce evidence on how the land was transferred from Museto, (deceased), into the appellant's name. The prosecution did not produce the transfer forms for that land to show who signed them. There was no evidence and the prosecution did not show that the appellant singed those forms or that they were purported to have been signed by the owner, which was false.

56. The law requires that there be representation and that the person making the representation knows it to be false or does not believe to be true. In this particular case, there was no evidence at all that the appellant made a representation that was false and that it had been made to someone resulting into the transfer of the parcel of land into the appellant's name.

57. PW5, former Land Registrar Kajiado, testified that the registration was made by a Mr. Nyamweya, also a Land Registrar. That means it was not the appellant who recorded the entries in the land register. There was therefore no evidence of any representation by any person as the basis on which the entry moving the land from the deceased owner to the appellant was made.

58. I have carefully gone through the trial court's record and the exhibits produced. There was no evidence at all that the appellant made representation which was false. The trial court could not assume that it was the appellant who made representation in the absence of cogent evidence. This being a criminal trial, the land registrar, as the custodian of registration documents, was not called to testify and shed light on how and why the land moved from the deceased to the appellant.

59. As the Court of Appeal stated in ***Pius Arap Maina v Republic*** [2013] eKLR;

> "[**T[he prosecution must prove a criminal charge beyond reasonable doubt and, as a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused**."

60. It is clear from the evidence before the trial court that the prosecution never attempted to establish the ingredients of the offence of obtaining registration by false pretences. First, there was no evidence that the appellant made a representation of past or present facts; to whom the representation was made; that the representation was false and that it influenced the registration of the land into his name. This is a classic case of poor investigations.

61. Regarding sentence, the learned trial magistrate imposed a sentence of one (1) year on count 1 and two (2) years on count two. The law provides for a sentence of one (1) year on conviction under section 320 and three (3) years under section 349. The sentence was legal and not harsh.

62. Having considered the appeal and reevaluated the evidence myself, the conclusion I come to is that the prosecution did not prove its case against the appellant on the two counts as required by law. The trial court fell into error and appears to have shifted the burden of proof to the appellant.

63. For the above reasons, I am satisfied that the appellant's appeal has merit and is allowed. Conviction is hereby quashed and the sentences set a side. The appellant shall be set at liberty unless otherwise lawfully held.

64. Any security for bond or cash bail be released to the depositor

Dated, Signed and Delivered at Kajiado this 18th day of September 2020.

E. C. MWITA

JUDGE