



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HCCRA NO.19 OF 2020

FRANCIS MECHEO OCHARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Kisii Criminal Case No. 392 of 2018,

before Hon. P. Wamucii R.M delivered on the 9th December 2019 in Kisii)

JUDGMENT

1. Francis Mecheo Ocharo the appellant was charged with the following offences:

- i. Count no. 1 Obtaining money by false pretence contrary to section 313 of the Penal Code. The particulars of the offence are that on the 22nd day of December 2017 at Kisii township within Kisii county with others not before the court, with intent to defraud obtained a total sum of Kshs. 800,000/- from Wycliffe Machuki Oenga by pretending that he had a land parcel title No. Nyaribari Chache/B/B/Boburia/3690 and that he would sell it to him a fact he knew to be false.
- ii. Making a document without authority contrary to section 357 (a) of the Penal Code. The particulars of the offence are that, at unknown dates within the republic of Kenya with others not before the court, with intent to defraud without lawful authority made land parcel title No. Nyaribari Chache/B/B/Boburia/3690 purporting it to be a title deed issued by Kisii County Registrar.
- iii. Count no.3 Uttering a document with intent to defraud contrary to section 357 (b) of the Penal Code. The particulars of the offence are that, on the 22nd day of December 2017 at Kisii township within Kisii county with others not before the court with intent to defraud knowingly uttered land parcel title No. Nyaribari Chache/B/B/Boburia/3690 which you purported to signed by the Kisii Land Registrar without lawful authority the property belonging to Daniel Mosomi Ombegi.

2. The appellant pleaded not guilty to all three counts. After a full hearing the trial court found that the appellant was found guilty on all three counts and sentenced to serve three years for count no 1 and seven years each for count 2 and 3. The sentences are to run concurrently. Aggrieved by the conviction and sentences the appellant filed his petition of appeal on the 20th February 2020 having been granted leave to file his appeal out of time. His grounds of appeal are as follows;

- i. That the trial magistrate erred in law and misdirected himself when taking plea thus occasioning miscarriage of justice.
- ii. That the trial magistrate convicted the appellant entirely on wrong principles and conclusions without addressing himself on whether or not the ingredients of the offence were proven.
- iii. That the trial magistrate erred in law and fact by not considering that the matter had taken a civil dimension and a civil solution had begun thus an alternative solution.
- iv. That the trail magistrate erred in law and fact by laying the burden of disapproving upon the appellant contrary to established principle in criminal law which has case the burden of proof upon the respondent.
- v. That the sentence meted against the appellant was manifestly harsh and excessive in the circumstances.

The appellant seeks that the appeal be allowed conviction quashed and sentence set aside.

3. The appeal was opposed. The appellant filed written submissions which I summarise as follows; that the trial court erred in law and fact by not considering that the matter had taken a civil dimension and that he refunded the complainant Kshs. 200,000/- before the court. That the gesture should not have been translated into guilty. That the judgment was given in the absence of the appellant and that he was locked out when the court read the judgment. That the sentence meted on him was manifestly harsh and excessive being a first offender and having started paying the complainant. That the court gave the maximum sentence on all counts and failed to consider the mitigation issues that came up during the hearing of the case. That the evidence of the document examiner did not link the appellant to execution of the signatures in the title deed.

4. Mr. Otieno Senior Prosecution Counsel office of the DPP responded as follows to the appellant's submission. That the appellant knew that he was not Daniel and that Daniel was the real owner of the land the complainant wanted to buy. That the appellant knowing very well that he was not Daniel went ahead and represented himself as Daniel. That the appellant even signed documents purporting to be Daniel the real owner of the land and gave the complainant the title documents which belonged to Daniel purporting to be Daniel Mosomi and he went ahead and received money from the Complainant. That the complainant all along knew he was buying land from Daniel the owner who in real sense was the appellant herein. That there was sufficient evidence on the offence of obtaining by false pretence. That the appellant even gave the complainant a title deed which had not been issued by the land's office and was a forged one. That the case against the appellant was proved beyond reasonable doubt. That the on the date the appellant was to give his defence he did not appear and so the trial magistrate was right in taking it that his defence had been closed as he did not appear at the time of his defence. That the conviction was proper and the sentences too. That the appeal should be dismissed.

5. As the first appellate court it's my task to re-evaluate the evidence so as to arrive at my own conclusion while at the same time taking into account that I did not see or hear the witnesses give evidence and making provision for that (see **Okeno Vs. Republic [1972] EA 32**).

6. The brief facts of this case are as follows; Wickliff Machuki Oenga (Pw1) testified that on the 15.12.2017 he got a call from George who told him that he had gotten his number from a broker whom he knew, that he had been informed that Pw1 was looking for land to buy. George told him that he co-owned the land with Daniel. On the 18.12.2017 George took Pw1 to see the land near Omoscho. After seeing the land, they discussed the purchase price. 5 days later George gave Pw1 the land parcel number Nyaribari Chache/B/Boburia/3690. Pw1 sent the said details to the surveyor (Pw4) who did a search. On the 22.12.2017 they met at Hema hotel Pw1 was with the surveyor, Daniel Mosomi (the appellant) and George and wife of Daniel. They went to the office of Abobo advocates and had a sale agreement written. The land was being sold for Kshs. 1.5 million. Pw1 was to deposit Kshs. 800,000/- and pay the balance in 2 instalments of Kshs. 350,000/- each. Pw1 paid the appellant Kshs. 500,000/- and he signed his part of the agreement. Pw1 promised to pay Kshs. 300,000/- after the Christmas break. On the 28.12.2017 Pw1 paid the appellant Kshs. 300,000/- in the presence of his wife and father (Pw3). This payment was not acknowledged in writing. They even took photographs. Thereafter the surveyor went to complete the transaction. After 3 weeks Pw1 wanted to make the next instalment of Kshs. 350,000/-. Pw1 called the appellant and he was not available. Pw1 called George and later George put off his phone. Pw1 got suspicious and reported the matter to the police. On verifying the identification card the appellant had given Pw1 it was found that the picture of the appellant had been inserted in the original ID card of the owner. It was discovered that the appellant's real names were Francis Mecheo Ocharo and that he was masquerading as Daniel Ombegi Mosomi. John Koina Nyakwaya (Pw2) recalled how he witnessed the transactions between Pw1 and the appellant on the 18.12.2017, 22.12.2017 and 28.12.2017. The caretaker of the said land told Pw2 that the owner of the land was in Nairobi. Charles Onderi Nyakwaya (Pw3) testified that he accompanied his son Pw1 on the 28.12.2017 to Hema building. He witnessed his son pay the appellant Kshs. 300,000/-. The appellant introduced himself as Daniel. Pw3 witnessed the sale agreement. Hesbon Kibiro (Pw4) a private surveyor testified that Pw1 called him to do a search for a piece of land he wanted to buy. He did the search and took the results to Pw1. He witnessed Pw1 pay the appellant Kshs. 500,000/-. The appellant signed the agreement and gave out the title deed. Later when he went to register the documents the Land Registrar asked to see the owner. Pw4 informed Pw1. The appellant could not be found thereafter. CPL Wilson Kiptum (Pw5) received the complaint from Pw1 and did investigations. Pw5 received a letter from the Land registrar that the title deed was fake. The photos on the transfer form were of Daniel Mosomi. Pw5 discovered that the appellant was not Daniel Mosomi but one Francis Mecheo Ocharo from the registrar of persons. He found out that the Land Control Application was not from the Land Control Board. The chairman of the Board had not signed it. The official stamp was not from the Board as indicated in the report by the document examiner.

7. The appellant in his defence told court that he is a farmer from Bogiakumu. He understood the charges well. He met with people who told him that they had land they were selling. He told them that he had nothing to do with it. That what he cannot explain is how he gave his ID which he gave and it was returned to him. That he was charged with selling land illegally. The police took his ID and he was charged with something he knows nothing about.

ANALYSIS AND DETERMINATION

8. The issues for determination in this appeal are

- i. Whether the trial court erred in the manner the plea was taken
- ii. Whether the prosecution proved their case beyond reasonable doubt.
- iii. Whether the matter before the court was a civil matter with an alternative solution
- iv. Whether the sentence meted against the appellant was manifestly harsh and excessive

On the plea taking the record shows that the appellant was presented in court on the 14.2.2018 and the charge was read to him in Ekegusi and he responded "Not true" to each offence. There after a plea of not guilty was entered and he was granted and a hearing date set. There is nothing irregular that was done by the court taking plea. This ground fails.

9. The next issue is whether the prosecution proved its case on the 3 counts. In **Francis Mwangi & Another v. Republic [2015] eKLR**, the ingredients of the offence of obtaining by false pretenses were stated as follows:

“From the definition, the basic ingredients of the offence can be summarized as follows: -

- 1) The act of obtaining something capable of being stolen.
- 2) Obtaining the thing by false pretences.
- 3) Obtaining the thing with intent to defraud.

The definition of false pretence on the other hand is given under Section 312 of the Penal Code as follows: -

“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.”

The operative word under Section 312 is representation which is applicable in the following circumstances: -

- 1) A representation by words, writing or conduct.
- 2) A representation in either past or present.
- 3) A representation that is false.
- 4) A representation made knowing it to be false or believed not to be true.”

10. From the evidence adduced there is no doubt that the land the appellant was selling did not belong to him. The appellant presented himself to Pw1 as the owner of the land and gave Pw1 a title. The appellant was paid a sum of Kshs. 800,000.00 for the said land. The appellant signed the sale agreement dated the 22nd December 2017 knowing very well that the land he was selling to Pw1 was not his land. The appellant received the sum of Kshs. 800,000/- in cash. They even took photos together which were tendered in evidence. The transfer form which the appellant signed displays his photograph with the name Daniel Mosomi Ombengi besides it. The land belonged to one Daniel Mosomi and not the appellant. The title deed the appellant gave Pw1 was fake. This was confirmed by the land registrar's letter dated 2nd October 2018, which was produced in court. The document examiner's report dated 3.10.2018 indicates documents purported to be from the Land Control Board were not signed by the chairman. The title deed presented by the appellant to Pw1 was a forgery. At the time of signing the agreement the appellant presented an ID card bearing the names Daniel Mosomi. Pw1 and his witnesses testified that the photo in the ID card was that of the appellant. The appellant presented that said ID to Pw1 to show that he was Daniel Mosomi. I find from the evidence that the title deed was a false document made with intent to defraud the complainant of a sum of Kshs. 8,000,000/= on the pretext that the appellant who presented himself as Daniel Mosomi was in a position to sell land to him a fact that the offender knew was false. The documents were no doubt uttered to the Pw1 the complainant. The trial magistrate did not err in her finding that the appellant knew very well that he did not own Nyaribari Chache/B/B/Boburia/3690 and that he went ahead to pass himself off as the genuine owner on Daniel Mosomi to the complainant. The appellant even went ahead and refunded the complainant Kshs. 200,000/- during the course of the proceedings, this further proves that the appellant took the money purporting to sell to Pw1 a parcel of land which he did not own.

11. In count no.2 the appellant was charged with making a document without authority contrary to section 357 (a) of the Penal Code. Investigations by Pw5 confirmed that the title deed presented to the complainant was fake. It was given to Pw1 by the appellant with an intent to defraud Pw1 of the sum he was paid. That title deed could only have been made by the appellant with intent to defraud and the appellants had no authority to make it.

12. In count no. 3 the appellant was charged with uttering a document with intent to defraud contrary to section 357 (b) of the Penal Code. The offence of uttering a false document, 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”

The Appellant in presenting the title deed to Pw1 knew the same to be fake title deed and he so did it with the intention of deceiving so that he could get money from Pw1. I am persuaded that since he had the title deed it is the Appellant who made the false certificate or was aided in the making of the same since he was another one George. In view the appellant was properly convicted. I am satisfied that the ingredients of the charges facing Francis Mecheo Ocharo, the appellant herein were proved beyond reasonable doubt. The defence given by the appellant in my view is not reasonable nor did it rebut the clear evidence adduced by the prosecution. I affirm the conviction on each count as charged.

13. The appellant has raised the issue that the trial magistrate erred in not finding that this was a civil matter. The case before the trial court was not a civil case. The trial court gave the appellant and Pw1 time to come to an agreement and the appellant paid Kshs. 200,000/-. The offence of obtaining by false pretences is a misdemeanour. A trial court has the discretion to allow reconciliation or compensation in some cases that are classified as misdemeanour. The trial court honoured the appellant's request but the appellant failed to honour his word and then the trial court proceeded with the trial to the end. The trial court was even forced to read the judgment in the appellant's absence as he failed to attend court at the scheduled time. He presented himself in court on the 6.1.2020 and was informed of the judgment. Section 168 (3) of the CPC provides that, “No judgment delivered by a court shall be invalid by reason only of the absence of a party or his advocate on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their advocates, or any of them, the notice of the day and place”. The trial court did not err in reading the judgment in the absence of the appellant. As ready stated this case before the trial court was a criminal case and not a civil case. I find that this ground too fails.

14. In the case of *Benard Kimani Gacheru Vs. Republic [2002] eKLR* that: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

15. The appellant was given the maximum sentences provided in law the sentences were to run concurrently. The prosecution indicated that they did not have his previous records that means the appellant is a first offender. It was stated that the offences are serious and notorious within this jurisdiction. At the hearing of this appeal the appellant asked the court to note that he is now 72 years though his ID card shows he is 68 years that he had paid Kshs. 220,000/-. That he seeks to be released so that he can maintain the friendship. Considering that the appellant is a first offender I will reduce the sentences imposed. For count no. 1, I substitute the sentence of 3 years with 2 years. For count no. 2 and 3, I substitute the sentence of 7 years each with a sentence of 4 years each on each count. The sentences will run concurrently from the date of sentence by the trial court. The appellant has a right of appeal.

Dated, signed and delivered at KISII this 17th day of September 2020.

R.E. OUGO

JUDGE

In the presence of:

FRANCIS MECHEO OCHARO Appellant in person

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Mr. Chomba Court Assistant.