REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 14 OF 2018

CALISTO ODEMBA OJANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged, in Butere PMCCRC No, 32 of 2015, with five counts of procuring execution of documents under false pretences, contrary to section 355, as read with section 349, of the Penal Code, Cap 63, Laws of Kenya, and giving false information to a person employed in the public service. He was convicted and sentenced accordingly.

2. Being dissatisfied with the conviction and sentence, he lodged the appeal herein, vide the petition of appeal, on record, dated 5th February 2018. The gist of the appeal is that the trial court erred in convicting him on the basis of documents that had not been prepared by the appellant, erred as to the burden of proof and failed to consider evidence as a whole, erred by relying on samples that had not be subjected to forensic investigation, erred in ignoring the submissions made by the appellant and failed to see that there was a family land dispute before the High Court, erred in ignoring the appellant's right to representation on the day of sentencing by proceeding before the agreed time, and that the sentence imposed was excessive in the circumstance .

3. The duty of the first appellate court is to re-analyse and re-consider the evidence tendered before the trial court, with a view to arriving at its own independent conclusions. See *Okeno vs. Republic* [1972] EA 32. In Kiilu *& Another vs. Republic* [2005] 1 KLR 174, the Court of Appeal stated:

> *"1. 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.*
>
> *2. 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."*

4. The same was reiterated in *David Njuguna Wairimu vs. Republic* [2010] eKLR**,** where the court of appeal stated:

> *"The evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."*

5. The appellant herein was charged on Count I with the offence of procuring execution of documents by false pretences, and that, he by means of false representation, had the title of Kisa/Wambulishe/330 transferred to his name. During the hearing of the case, no evidence was adduced by the prosecution as to how the property passed to or was transferred to name of the appellant. The trial court, in the judgment held:

> *"I do believe that PW1 ought to have produced more and concrete evidence to prove that the 1st Accused used fraud to transfer the parcel of land to himself. On this count I do rely entirely on the defence counsels evidence that this count was not sufficiently proved."*

6. No evidence was adduced in court with regard to the subdivision and transfer of the said property. The land registrar, who testified as PW4, confirmed that the documents on the subdivision and transfer were missing in the file, and could not be traced. Without such evidence, it was impossible for the court to have arrived at a conclusion that there was fraud and false representation as alleged in Counts II, III and IV. It is my finding, therefore, that the prosecution had not proven the charges on Counts I, II, III and IV, and the appellant ought to have been acquitted on the same.

7. With regard to Count V, the charge was that of "giving false information to a person employed in the public service,'' contrary to section 129 of the Penal Code. The said provision says:

> *"129. Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service –*
>
> *(a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or*
>
> *(b) to use the lawful power of the person employed in the public service to the injury or annoyance of any person, is guilty of a misdemeanour and is liable to imprisonment for three years."*

8. No evidence was adduced as to how the appellant gave the land registrar false information. The land registrar, in his testimony, did not give any evidence alluding to that, that at any given time, the appellant presented to him information that was false. He had no documents pertaining to the transaction, the subject of the charge, and he relied only on green card entries which were not detailed.

9. In the end, I find and hold that the prosecution failed to prove its case to the required standard, and, as such, the appeal herein succeeds, and is hereby allowed. The conviction of the appellant, in Butere PMCCRC No, 32 of 2015 is hereby quashed, and the sentence imposed upon him is hereby set aside. The appellant shall be set free from prison custody, if he is being held there, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18THDAY OF DECEMBER 2020

W MUSYOKA

JUDGE