



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 88 and 89 OF 2014

STEPHEN ODDIAGA KIKOMBERO.....1ST APPELLANT

SWALEHE MOHAMED MWAKURIWA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. E. K. Usui SRM in Criminal Case No. 865 of 2007 delivered on 3rd December 2013 in the Senior Principal Magistrate's Court at Kwale)

JUDGMENT

The Appeals

1. The 1st and 2nd Appellants were jointly charged with four counts in the trial Court. Count I was that of conspiracy to defraud contrary to section 317 of the Penal Code. The particulars of the Count were that on diverse dates between 28th May 2004 and 11th August 2004 at Mombasa District of the Coast Province, jointly with others not before court and with intent to defraud and by fraudulent means, they instituted Civil Suit No. 139/2004 against Samuel Njoroge Waruhiu in respect of plot No. Galu/Kinondo/674.
2. Count II was that of making a false document contrary to section 347(a) of the Penal Code. The particulars of Count II were that on 12th July 2004 at Mombasa in Mombasa District of the Coast Province, jointly with others not before court and with intent to defraud, they made a false plaint purporting that Samuel Njoroge Waruhiu had received and signed the Chamber Summon through J.J. Kyondo And Company Advocates of Box 455 Voi dated 11th October 2004 in respect of Civil Suit NO. 139/2004.
3. Count III was obtaining by false pretences contrary to section 313 of the Penal Code. The particulars of Count III were that on 22nd of July 2004 at Mombasa Law Court in Mombasa District of the Coast Province, jointly with other not before court, and with intent to defraud, they obtained a court order by fraudulent means from Priscilla Nduta Ngigi, the Deputy Registrar of the High Court, Mombasa.
4. Count IV was that of uttering a false document contrary to section 353 of the Penal Code. The particulars were that on 23rd July 2014 at Kwale District Land Registry in Kwale District of the Coast Province, jointly with others not before court, they knowingly and fraudulently uttered a court order in respect of civil suit No. 139/2004 to Hashim Got Sat, the District Land Registrar, purporting it to be a genuine court order.
5. The last Count (Count V) was that of obtaining by false pretences contrary to section 313 of the Penal Code. The particulars of this Count were that on 11th August 2004 at Kwale District Land Registry in Kwale District of the Coast Province, jointly with others not before court and with intent to defraud, they obtained a title deed No. Kwale/Galu Kinondo/674 from Hashim Got Sat in the name of Swalehe Mohamed Mwakuriwa.
6. The 1st and 2nd Appellants pleaded not guilty to all the counts on 15th May 2007 at the commencement of the trial, and after trial, they were convicted of Count I, II and III, and acquitted of Counts IV and V. The Appellants were then sentenced as follows: for Count I to each pay a fine of Kshs 50,000/= and in default 12 months imprisonment; for Count II to each pay a fine of Kshs 30,000/= and in default 8 months imprisonment; and for Count III to each pay a fine of Kshs 20,000/= and in default 6 months imprisonment .
7. The 1st and 2nd Appellants are aggrieved by the judgment of the trial magistrate, and have preferred this appeal against the conviction and sentence. The appeals of the 1st and 2nd Appellant were consolidated to be heard and determined together at the hearing held on 18th September 2018. The 1st and 2nd Appellant's grounds of appeal are in their Petitions of Appeal which both filed in Court on 27th March 2014 by their Advocate, J.O. Magolo & Company Advocates.

8. The grounds of appeal by both Appellants are as follows:

- a) That the learned trial Magistrate erred in law and fact in proceeding with a trial and reaching a conviction on a charge that was defective.
- b) That the learned trial Magistrate erred in law and fact in finding that the offence charged and its particulars had been proved.
- c) That the learned trial Magistrate erred in law and fact in finding that the evidence pointed to the guilt of the Appellant
- d) That the learned trial Magistrate erred in law and fact in convicting the Appellant on unclear facts.
- e) That the sentences were manifestly excessive.

9. Mr. Magolo, the Advocate for the Appellants filed written submissions dated 8th September 2017 and made oral submissions during the hearing. It was his submission that Count II is an illegal charge as section 347 of the Penal Code does not create an offence, and only defines what amounts to making of a false document. Further, that the offence is found in section 357 of the Penal Code, and that the charge was not amended until the close of prosecution case, therefore making it fatally defective. In addition, no evidence was brought of making of a plaint, as alleged in the particulars of the Count.

10. On Count III, it was submitted for the Appellants that section 313 of the Penal Code provides for obtaining “*from the person anything capable of being stolen*”. However, that what was said to have been obtained in the charge was a Court Order, which cannot be described as an item capable of being stolen. In addition, that the said Court order was obtained from the Deputy Registrar Priscilla Ndung’u Ngigi, who testified in court and did not say who obtained the order from her.

11. According to the Appellants, the mischief in the case against the Appellants seemed to have been the entry of a consent judgment in a suit filed without the knowledge of the Defendant. That the parties seem to have chosen to settle their differences by way of a civil suit in the Court of Appeal, and it may be an abuse of court procedure to have a civil suit and the criminal proceedings running hand by hand. Further, that while this is not illegal, it could be argued that the criminal proceedings were being used to get advantage over the civil proceedings

12. The Appellants also submitted on the failures of the Prosecution case, particularly that there was no evidence adduced of involvement of the Appellants in any fraudulent activity, and none of the Prosecution witnesses were able to connect the two Appellants with any fraudulent filing of papers for registration or writing of orders, including Mr. Kiondo when he testified.

13. In addition, that the Prosecution’s case is that the Appellants filed a suit, Plaint, an affidavit of service and signed a purported consent, and that the only way to prove it would have been by subjecting the handwriting and signature of the Appellants to forensic examination. However that this was not done, leaving the court without the knowledge of who are the perpetrators. Furthermore, that the best witness could have been the process server who knew who instructed him to serve, how he served and how he was paid for his services, but who was never availed as a witness. Therefore, that the conviction of the Appellants was not safe.

14. Mr. Masila, the learned prosecution counsel, opposed the appeal and relied on written submissions filed in Court on 5th October 2018 by Berryl Marindah, a Prosecution counsel. It was stated therein that in May 2004 a false claim HCC 139/2004 was filed at the High Court in Mombasa as was proven by the testimony of PW6. Further, that it was filed by the 2nd Appellant on his own behalf, and that thereafter the 1st and 2nd Appellants together fraudulently made and filed documents purporting that they were a response to the suit from the firm of J.J. Kiondo which never acted in the matter, as was confirmed by the advocate in person as PW13.

15. The Prosecution submitted that there was overwhelming evidence that all the steps of misrepresentation were made within the full knowledge of the Appellants, and that they obtained the Court Order by fraudulent means and misrepresentation of facts well within their knowledge from the then Deputy Registrar, Priscilla Nduta Ngigi.

16. According to the Prosecution, section 193A of the Criminal Procedure Code allows for concurrent criminal and civil proceedings, and that the two Appellants in their defence admitted to filing the suit and participating in the proceedings. Further, that they benefitted from their fraudulent actions when they transferred the subject land and proceeded to sell the same to unsuspecting third parties.

17. My duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR 21** and **Kimeu v Republic (2003) 1 KLR 756**.

The Evidence

18. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called thirteen witnesses. Of these witnesses, the testimony of Samuel Njoroge Waruhiu (PW1) and Ushwin Khanna (PW2), was that a case was filed by the 2nd Appellant against PW1 in Mombasa HCCC 139 OF 2004, in which PW1 was not served with the suit papers, and in which the 2nd Appellant obtained orders to cancel PW1’s title number Galu/Kinondo/674. They pointed out the irregularities in the said suit and the orders issued therein, including that PW1 did not instruct Kyondo Advocates to act for him in the matter. Mr. James Kyondo testified as PW13 and confirmed that he did not know PW1, and did not get any instructions to act for him in the case.

19. Micheal Shume Shinyakha (PW3), who served as the District Land Registrarat Kwale at the time testified as to the transactions that

were made involving title number Galu/Kinondo/674, including the cancellation of PW1's title, the transfer of the land to the 2nd Appellant and thereafter to a Dr Kauriject Singh Rekhi who testified as PW9. Ali Kassim Mkunga, a member of the Msambweni Land Control Board, testified as PW4, while PW5 was Francis Kijumu Randu, a clerk at Lands Office in Kwale, and both testified as to minutes of the Land Control Board meeting held on 8th June 2005 where consent was given to subdivide Galu/Kinondo/674. PW4 claimed not to be aware of the consent, while PW5 testified that he participated in the preparation of the consent.

15. Grace Milly Oketch (PW6), Esther Ndunge Kimatu (PW7), and Ann Ngatha (PW8) were all court officials at Mombasa High Court at the time, and they testified as to the filing of HCC 139/2004 and produced the file in Court as an exhibit. Dr Kauriject Singh Rekhi who was a doctor in Diani was PW9, and he testified to buying the land comprised in Galu/Kinondo/674 from the 2nd Appellant who had title, and that he later subdivided the land and sold part of it to a third party. Edward Marenje Kiguru who is a land surveyor testified as PW10, and he confirmed that he was contracted to sub-divide the said land.

16. Priscilla Nduta Ngigi testified as PW11 and stated that she was the Deputy Registrar at the High Court Mombasa in 2004, and remembered signing an order in HCC 139/2004 which looked irregular, but due to a busy schedule forgot to check on the irregularities, and the said order was taken back to the registry. ACP Emanuel Kenga, a document examiner in CID headquarters testified as PW12, and stated that some signatures in court documents and a transfer of land form availed to him matched specimen signatures of the 1st and 2nd Appellant. He produced his report as an exhibit. Cpl Isaack Nakitare (PW14) testified as to preparing the exhibit memo for the said documents and specimen handwritings, and taking the same to the CID Headquarters

17. The last witness (PW15) was Cpl Fenancia Njeri, the investigating officer, who testified that she received a complaint from PW1 that his land had been fraudulently transferred, and produced copies of documents that were obtained from the District Land Registry in Kwale as exhibits. She testified that after her investigations, she found that no such civil case was filed in the High Court and that the Appellants fraudulently obtained court orders.

18. The trial court found that both Appellants had a case to answer and put them on their defence. The 1st Appellant gave sworn testimony, and stated that he did not commence the suit in HCCC 139/2004 and was only instructed to make an application for summary judgment. He denied that the Deputy Registrar signed a fake order as the judgment was still on record.

19. The 2nd Appellant also gave sworn evidence, and stated that the land in Galu/Kinondo/674 was his land as he was born there, and that after the land was demarcated in 1974, he searched and learnt that PW1 was the owner and sued him. He confirmed that he instructed the 1st Appellant and that he was the Plaintiff in the suit.

The Determination

20. I have considered the arguments made by the Appellants and the Prosecution, as well as the evidence before the trial court. I find that there are four issues for determination raised in this appeal. The first is whether the charge against the 1st and 2nd Appellants was defective; and if the Appellants are found to have been properly charged, the rest of the issues that the court will need to consider are whether there was sufficient, consistent and credible evidence to convict the 1st and 2nd Appellants; and lastly, whether the sentence meted on the Appellants is legal.

Whether the Charge Sheet is Defective

21. On the first issue, the Appellants submitted that they were charged under a non-existent charge in Count II, as no offence is disclosed by section 347(a) of the Penal Code. The law on the framing of charges requires clarity in the charge sheet as stated in section 134 of the Criminal Procedure Code which provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

22. In addition it was held in Sigilani vs Republic, (2004) 2 KLR, 480 that:

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

23. Section 347 of the Penal Code that was cited in Count II provides for the circumstances when a person is deemed to make a false statement, and includes in paragraph (a) when the person makes a document purporting to be what in fact it is not. It does not disclose an offence or any penalty for an offence and to this extent this particular Count was clearly defective.

24. Having found the charge to be defective, I am guided by the decision by the Court of Appeal sitting at Nairobi in Peter Ngure Mwangi v Republic, [2014] eKLR that there are two limbs to the issue of a defective charge sheet. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.

25. In addressing the second limb as to whether the irregularity in the charge sheet is curable, section 382 of the Criminal Procedure Code provides as follows in this regard:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

26. In the instant appeal, I note that the evidence adduced in the trial Court by the prosecution did not support the particulars in Count II, which were that the Appellants made a false plaint purporting that Samuel Njoroge Waruhiu had received and signed a Chamber Summons through J.J. Kyondo and Company dated 11th October 2004. No such Chamber Summons was produced in evidence, neither by Samuel Njoroge Waruhiu who testified as PW1 or J.J. Kyondo, who testified as PW13. The error in the charge sheet is therefore one that is not curable under section 382 of the Civil Procedure Code, as to admit the said charge would clearly cause prejudice caused to the Appellants, as they will be made answerable to a charge that is not supported by evidence.

27. The second charge which was alleged to be defective was Count III, on the ground that a court order is not an item capable of being stolen within the meaning of section 313 of the Penal Code. The said section provides as follows:

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

28. Section 267 of the Penal Code provides for the things that are capable of being stoles as follows:

“(1) Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen.

(2) Every inanimate thing which is the property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.

(3) Every tame animal, whether tame by nature or wild by nature and subsequently tamed, which is the property of any person is capable of being stolen.

(4) Animals wild by nature, of a kind which is not ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, and which are usually kept in a state of confinement, are capable of being stolen, whether they are actually in confinement or have escaped from confinement.

(5) Animals wild by nature, of a kind which is ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, are capable of being stolen while they are in confinement, and while they are being actually pursued after escaping from confinement, but not at any other time.

(6) An animal wild by nature is deemed to be in a state of confinement so long as it is in a den, cage, sty, tank or other small enclosure, or is otherwise so placed that it cannot escape and that its owner can take possession of it at pleasure.

(7) Wild animals in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen.

(8) Everything produced by or forming part of the body of an animal capable of being stolen is capable of being stolen.

(9) Information is capable of being stolen.”

29. It is evident that the things that are capable of being stolen are firstly movable or corporeal things, and secondly that are shown to be the ownership of another person. See in this regard **Yusuf Omari and Another vs Republic (1964) EA 162**. A court order on the other hand is defined in **Black’s Law Dictionary, Ninth Edition** at page 1206 as “a written direction or command delivered by a Court of judge”, and does not fall in the category of things that can be stolen, neither can it be capable of having proprietary qualities. In this regard it was held in **Chilemba vs Republic, (1975) EA 90** that where a public servant obtains payments from the government on the strength of false vouchers, such obtaining did not amount to obtaining money by false pretences but that of stealing by a person employed in the public service.

30. The error in Count III is also one that is not curable under section 382 of the Civil Procedure Code, as the evidence adduced as to the court order obtained in HCCC 139 OF 2004 did not point to commission of any other offence by the Appellant. On the contrary, PW11 who was the Deputy Registrar at the time, admitted to an element of negligence on her part and other Court officials in the issue of the said Court order, which can only be construed in the Appellants favour.

Whether the Evidence was Sufficient

31. The only Count that is left standing and subject to interrogation as to whether the Appellants’ conviction thereof was on the basis of sufficient evidence is Count I, which was the charge of conspiracy to defraud contrary to section 317 of the Penal Code. The said section provides as follows:

Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.

32. The offence of conspiracy to defraud must of necessity be committed by two or more persons acting in concert to execute a common intention to defraud. In **Archibold: Writing on Criminal Pleadings, Evidence and Practice (1999) 3rd Edn.** It is observed at pages 2589 and 2590 that:-

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

33. The prosecution must therefore prove the existence of an agreement between the accused persons and some other person to do the act complained of. In the present appeal, it was alleged that the Appellants jointly with others not before court and with intent to defraud and by fraudulent means, instituted Civil Suit No. 139/2004 against Samuel Njoroge Waruhiu in respect of plot No. Galu/Kinondo/674.

34. The 2nd Appellant admitted that he instituted the said civil suit, and instructed the 1st Appellant to represent him later on in the suit. The evidence by the other actors that participated in the suit namely the court officials and Deputy Registrar who testified as PW6, PW7, PW8 and PW11, and Mr. Kyondo who was alleged to have acted for the complainant and who testified as PW13, did not indicate any knowledge of or linkage with the Appellants.

35. The other actors involved with the case were officials in the Lands Registry at Kwale who testified as PW3, PW4 and PW5 and the subsequent purchaser and land surveyor who testified as PW9 and PW10, and who came on the scene long after the suit had been instituted, and court orders given therein as regards plot No. Galu/Kinondo/674. There was thus no evidence adduced of a conspiracy involving the Appellants and other persons in the institution of the said civil suit, and insufficient evidence was adduced of any intention on the part of the Appellants to defraud the complainant, over and above the stated defence of recovering land that the 2nd Appellant believed belonged to him.

36. Consequently, I find that the Prosecution did not prove their case against the 1st and 2nd Appellants beyond reasonable doubt. I accordingly quash the conviction of the 1st and 2nd Appellants for Count I of conspiracy to defraud contrary to section 317 of the Penal Code, Count II of making a false document contrary to section 347(a) of the Penal Code and Count III of obtaining by false pretences contrary to section 313 of the Penal Code. I also set aside the sentences imposed upon the 1st and 2nd Appellants for each of these convictions. Any fines already paid to the 1st and 2nd Appellants shall be refunded to the said Appellants upon production of the relevant receipts.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21st DAY OF FEBRUARY 2019.

P. NYAMWEYA

JUDGE