



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 12 OF 2018

ABDALLAH KHALIF NYABWAR.....-APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

(Consolidated with HCCRA No. 10 of 2018 for purposes of Judgement)

[Being an Appeal from the Conviction and Sentence of Hon. P. W. Wasike (RM) Keroka Law Courts dated 18th May 2018 in Keroka Principal Magistrate's Court Criminal Case No. 1394 of 2016]

JUDGEMENT

The appellant was jointly with Abdallah Khalif Nyabwari the appellant in HCCRA NO. 12 OF 2018 charged with four counts, viz:-

COUNT I: OBTAINING MONEY BY FALSE PRETENCES,

CONTRARY TO SECTION 313 OF THE PENAL CODE.

COUNT II: MAKING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 357 (a) OF THE PENAL CODE.

COUNT III: UTTERING A DOCUMENT WITH INTENT TO DEFRAUD CONTRARY TO SECTION 357 (b) OF THE PENAL CODE.

COUNT IV: FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE.

Abdallah Khalif Nyabwari, the appellant in HCCRA NO. 12 OF 2018 separately faced two more counts namely **COUNT V – MAKING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 357 (a) OF THE PENAL CODE. COUNT VI – UTTERING A DOCUMENT WITH INTENT TO DEFRAUD CONTRARY TO SECTION 357 (b) OF THE PENAL CODE.** Although the appellants filed separate appeals which they prosecuted separately, I have **consolidated them and written one Judgement as the issues raised in the appeals are similar.**

All the charges pertained to a sale agreement which the appellant and his co-accused had allegedly entered into with the complainant in respect of a land parcel described in the proceedings as MATUTU S.S./1268.

The appellants pleaded not guilty on all the charges whereupon the prosecution called six witnesses who included a Document Examiner and a Land Registrar. The appellants were also given a chance to defend himself and after evaluating the evidence adduced the trial magistrate found the appellants guilty on all the counts and after convicting them and hearing their mitigation sentenced them as follows: -

Count I: 3 (three) years imprisonment.

Count II: 6 (six) years imprisonment.

Count III: 6 (six) years imprisonment.

Count IV: 2 (two) years imprisonment.

Count V: 6 (six) years imprisonment.

Count VI: 6 (six) years imprisonment.

The sentences were to run concurrently. Being aggrieved by the conviction and sentences the appellants preferred this appeal the appellant in this appeal through the firm of Ochoki & Company Advocates and Abdallah Khalif Nyabwari in person. This appeal is premised on the following grounds:-

- “1. The learned trial magistrate erred in fact and in law in finding and/or holding that the Appellant was guilty of the offences charged when the prosecution had not established guilt beyond the required standard of proof.**
- 2. The learned trial magistrate erred in law and fact in analysing and/or evaluating the Respondent’s evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/or dispelling the pre-meditated impression upon the Appellant contrary to the established principle in criminal law, which casts the burden of proof upon the Respondent.**
- 3. The Trial Magistrate erred in convicting the Appellant on Counts 2 and 4 when no evidence was tendered to suggest that the Appellant made, forged and/or participated in the making thereof of the alleged false and/or forged documents.**
- 4. The Learned Magistrate erred in law and fact in convicting the Appellant on Count 3, a charge of uttering a false document when the person the alleged false document was uttered to was never called to testify thus occasioning grave miscarriage of justice.**
- 5. The Trial Magistrate erred in Law and fact in disregarding the findings and/or opinion of Pw5, a document examiner thus arriving a finding not well based on Law.**
- 6. The Trial Magistrate Convicted the Appellant on entirely wrongly principles and conclusions without addressing himself on whether or not the ingredients of the offence the Appellant was accused of had been Proven beyond reasonable doubt.**
- 7. The Learned Trial Magistrate erred in law and in fact in not affording the Appellant an opportunity to be represented by an advocate of his choice and to be supplied with witness statements and documents the prosecution was to rely on.**
- 8. The learned trial magistrate erred in law and fact in making a finding that the prosecution had established guilt against the Appellant to the required standard of beyond any reasonable doubt when the Respondents’ evidence was riddled with massive contradictions that could not sustain a conviction.**
- 9. The sentence meted against the Appellant was very harsh and excessive in the circumstances.”**

Abdallah Khalif Nyabwari was unrepresented and his appeal is premised mainly on the grounds that the charges were not proved beyond reasonable doubt.

The appeal was opposed. In respect of Alphonse Ombaga Obaga, Counsel for the parties elected to canvass the appeal by way of written submissions but only those of the appellant were received. In brief Counsel for the appellant herein urged this court to find that the learned trial magistrate did not evaluate the evidence entirely in order to arrive at the finding that led to the conviction of the appellant. Counsel relied on several cases to submit that the charges against the appellant were not proved beyond reasonable doubt. Counsel contended that the appellant was merely a witness to the sale agreement and it was not proved that the appellant obtained money from the complainant let alone by false pretences and with intent to defraud. Counsel submitted that since the prosecution did not prove that the advertisement for the parcel of land was made on the appellant’s Facebook page or that the Facebook post in fact existed, intent and the act of inducing were not established and as such the offence of obtaining money by false pretences was not proved beyond reasonable doubt. Counsel for the appellant herein further submitted that the evidence of the document examiner absolved the appellant from the offence of making a document namely a title deed without authority.

On the charge of uttering a document with intent to defraud Counsel submitted that there was no evidence that the appellant personally uttered the impugned title deed; that in any event the appellant did not purport to be the vendor of the alleged property. Counsel submitted therefore that the trial magistrate erred in his finding that the appellant committed the offences. Counsel urged this court to allow this appeal, quash the conviction and set aside the sentences on all the counts and set the appellant at liberty forthwith.

On his part Abdallah Khalif Nyabwari relied on written submissions in which he reiterated that the charges against him were not proved beyond reasonable doubt. He contended that the evidence of the five prosecution witnesses did not connect him to the offences. He denied ever having participated in the purported sale agreement and stated that at the police station his co-accused stated that he did not know him. He questioned the omission to call the Advocate who superintended the sale agreement as a witness. He contended that the real culprits were released by the police and further stated that his first encounter with the forged documents was in court. Abdallah Khalif analysed the evidence of each and every witness and faulted the trial magistrate for arriving at the conclusion he did. He alleged that it was a lie that Section 200 of the Criminal Procedure Code was read to him by the succeeding magistrate. He pointed out that there were a lot of errors in the typed proceedings. He reiterated that the photograph in the identity card produced in evidence was not his. He stated that he had established through his own investigations that the owner of that identity card was already in prison for similar offences. He claimed that he was harshly convicted and his mitigation ignored. He further stated that the fact that he was already on probation for three years should not have influenced the court. He stated that a probation officer who he named made demands for a lot of money and his refusal to oblige could have resulted in this conviction. He also claimed to have overstayed in remand due to lack of a surety. He urged this court to consider that his family is suffering as his mother is sick and his father died.

Prosecution Counsel, Mr. Ochieng, responded to Abdallah Khalif’s submissions orally. He vehemently opposed the appeal and urged this

court to dismiss it. Abdallah Khalif (Appellant in HCCRA No. 15 of 2018) however reiterated his submissions that the charges against him were not proved beyond reasonable doubt and urged this court to allow his appeal. On Section 200 (3) of the Criminal Procedure Code he stated that he told the incoming trial magistrate that if the evidence was going to be different then the case was to start afresh but if it was going to remain the same then the case was to continue.

As the first appellate court I am not confined to the submissions but rather I am enjoined to re-evaluate the evidence in the trial court 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**. That is not to say that I have not considered them. They have been a very useful guide on the areas that should be relooked.

Briefly the facts of the case against the appellants were that sometimes in August 2016 the complainant (Pw1) saw an advert for the sale of land located at a place called Amakara on the appellant's (Alphonse Ombaga Obaga) Facebook page. He was interested in purchasing a piece of land in his home area and because he knew the appellant's (Alphonse Ombaga Obaga) telephone number as they were classmates in High School he called him. The appellant informed him that the land belonged to a James Bikundo and that an acre was going for Kshs. 1.2 million but the price was negotiable. The appellant (Alphonse Ombaga Obaga) then gave him a phone number 0737735594 allegedly for the said James Bikundo's son Evans. Thereafter the complainant and his brother Charles Nyaanga (Pw2) travelled to Amakara and met "James Bikundo", the appellant's co-accused (Abdallah Khalif Nyabwari). Abdallah was accompanied by one Nelson Osoro. Together they took the complainant and his brother to view the parcel of land and also negotiated the price to Kshs. 800,000/= per acre. Abdallah Khalif who alleged to be James Bikundo Otuoma also told the complainant the reference number for the land was Matutu/SS/1268. Using that land reference number, the complainant proceeded to Nyamira Land Registry and after confirming that the land belonged to James Bikundo Otuoma he met Abdallah Khalif who alleged to be James Bikundo Otuoma at the Chambers of M/s Samson Matoke Nyagaka & Co. Advocates where they reduced their agreement into writing and also executed some transfer forms. Abdallah Khalif had given a copy of his national identity card and photograph to the complainant. The court heard that on that day the appellant (Alphonse Ombaga Obaga) in this appeal was present and attested the agreement as a witness for the vendor (Abdallah Khalif).

After executing the sale agreement and the blank transfer forms, the complainant paid Kshs. 1.2 million being part of the purchase price. He was to pay the balance of Kshs. 400,000/= within 14 days. The complainant was to call Evans, who the appellant herein had introduced as the vendor's son, later so that they could meet to agree on when the land would be partitioned. That meeting never materialized because the complainant's calls to the said Evans and the alleged vendor Abdallah Khalif went unanswered. He called the appellant (Alphonse Ombaga Obaga) to help him trace them but he did not turn up. The complainant became suspicious and decided to do his own investigations. He went back to the piece of land he had been taken by the appellants. There he met an elderly woman who disclosed to him that the land was not available for sale. He obtained the phone number of the real James Bikundo and when he called him James Bikundo confirmed he was the owner of the land and stated that it was not on sale. The complainant reported the matter to the police and when a search was conducted at the Nyamira Land Registry it was found the title deed the complainant had been given by the appellants was a forgery. It was also established that the identity card Abdallah Khalif Nyabwari had given the complainant was also a forgery. It was then that the appellants were arrested and charged with these offences.

From the totality of the evidence there is no doubt that the parcel of land Matutu S.S/1268 did not belong to the person who purported to sell it to the complainant. It is not disputed that Alphonse Ombaga Obaga, the appellant in HCCRA 10 OF 2018, is the one who introduced the complainant to that person. It was also not disputed that the appellant herein attested the agreement between the complainant and the person, who purported to be the owner of that land and that the complainant paid a sum of Kshs. 1.2 million pursuant to the agreement. This court finds it a fact that the title deed and copy of identity card presented to the complainant by the alleged vendor were both forgeries. For the title deed the land registrar who it was purported had signed it gave evidence at the trial and denied he had signed it. This was confirmed by the document examiner. The title deed was clearly a forgery. The identity card was also a forgery as the person who purported to be the holder was falsely holding or presenting himself as James Bikundo Otuoma. The real James Bikundo Otuoma testified in court and denied that the identity card was his. I find it a fact from the evidence that the title deed and identity card were false documents made with intent to defraud the complainant of a sum of Kshs. 1,600,000/= on the pretext that the person who presented himself as James Bikundo was in a position to sell land to him a fact that the offenders knew was false. The documents were no doubt uttered to the complainant. This happened at the inception of the agreement and also in the Chambers of the Advocates where the agreement for sale was reduced into writing. The issue for determination in this appeal is whether the appellants herein participated in the commission of the aforesaid offences.

It is my finding that the appellants in this case committed these offences. Although evidence concerning the Facebook page was not produced in evidence, it can be deduced from other evidence that it was Alphonse Ombaga Obaga who advertised the land for sale. That other evidence is, firstly that he was present when the complainant was taken to view the land by Abdallah Khalif Nyabwari. Secondly he was present at the Advocates office when the agreement between the complainant and the purported vendor; was reduced into writing. Thirdly, when the complainant contacted him after the "vendor" and his alleged son went under he refused to co-operate. Fourth, it is the appellant who connected the alleged vendor to the complainant and very well knew that the person he introduced to the complainant was not the owner of the land. His conduct both before and after betrays him as a person who was a party to the fraudulent transaction. He knew his co-accused well and together they hatched a plan to offer for sale to the public a piece of land which did not belong to them with intent to defraud. When the new trial magistrate put them on their defence Ambrose Ombaga Obaga did not say anything instead choosing to say that the trial was not fair. This notwithstanding that his right under Section 200 (3) to have the witnesses recalled had been explained to him. He did not therefore offer any explanation which could have rebutted the evidence of the prosecution regarding his role in the transaction. While I am alive that it is never the duty of an accused person to prove his innocence or to disprove the prosecution's case, in this case where the appellant's (Ambrose Ombaga Obaga) involvement in the fraudulent transaction was established prima facie, it was inevitable for him to offer some explanation to rebut that evidence. I am not persuaded that his right to a fair trial was violated. He robustly participated in the trial meaning that he understood the charges facing him. Moreover, had the rights been violated, this would have been one of the grounds in this appeal. In the submissions his Advocate has not alluded to such violation. It was proved beyond reasonable doubt that the appellant and his co-accused with intent to defraud obtained Kshs. 1,200,000/= from the complainant by falsely pretending that his co-accused was in a position to sell to him 2 acres of land that was to be hived from Matutu SS/1268 a fact which they knew to be false as his co-accused was not the genuine owner of the land.

The appellant and his co-accused had a title for the Matutu SS/1268 which was a forgery which they showed to the complainant. It was proved beyond reasonable doubt that the title was a forgery. The land registry confirmed that the title deed did not emanate from their

office. That title deed could only have been made by the appellants with intent to defraud and the appellants had no authority to make it.

I am satisfied that the ingredients of the charges facing Ambrose Ombaga Obaga (the appellant herein) were proved beyond reasonable doubt. I am also satisfied that the charges against Abdallah Khalif Nyabwari (Appellant in HCCRA No. 12 of 2018) were proved beyond reasonable doubt. The complainant and his brother (Pw2) positively identified Abdallah Khalif Nyabwari as the person who took them to view the land and also the person who gave the complainant the land reference number which he used to carry out a search at the Nyamira Land Registry. They also positively identified him as the person with whom the complainant entered into a sale agreement in the lands office. They interacted with him more than once and there is no possibility that they could have mistaken him for someone else. The real James Bikundo testified in this case and confirmed that the land was his and also that he was not offering it for sale. I find it a fact from the evidence that this appellant fraudulently held himself out as James Bikundo and purported to sell the land to the complainant and even received the purchase price knowing very well that the land was not his and he was not capable of passing any interest to the buyer. The ingredients of all the offences facing him were proved beyond reasonable doubt. In his reply to the submissions of the Learned Prosecution Counsel he admitted that the provisions of Section 200 (3) of the Criminal Procedure Code were explained to him. His submission that his rights under that Section were violated is therefore far from the truth. As for his prolonged stay in remand it was for the fact that he could not get someone to stand surety for him and this cannot vitiate the judgement of the lower court. The appeal on conviction is dismissed.

On the sentence, it was held in **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 stated is shown to exist.”

In sentencing the appellants, the court considered the nature and circumstances of the offences, the antecedents of the appellants, their attitude towards the offences as well as the prevalence of the offences. The sentences meted were within the law and I see nothing to warrant this court to interfere with the same. The submission that the sentences were harsh and excessive has no merit and the appeals against the sentences are rejected.

In conclusion, the judgement of the lower court is undisturbed and conviction and sentences which are to run concurrently are upheld.

Signed, dated and delivered in Nyamira this 14th day of March 2019.

E. N. MAINA

JUDGE