



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 20 OF 2019

DANIEL KAYIAKI OLE PIROS.....1ST APPELLANT

MATAMPASHA KELIO KIKWA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 10th April 2019 in criminal case No. 554 of 2015 in the Chief Magistrate court at Kajiado (Hon S.M. Shitubi.-CM)

JUDGMENT

1. The appellants were charged with the offence of obtaining registration by false pretences contrary to section 320 of the Penal Code. Particulars were that on the 16th day of November, 2011 at Kajiado Township in Kajiado County with intent to defraud, willfully procured themselves registration of land Parcel No. KAJIADO/OSILALEI/1029 by falsely pretending that they were the rightful owners, a fact that they knew to be false.

2. The appellants pleaded not guilty to the offence and after a full trial in which the prosecution called 9 witnesses, they were found guilty, convicted and were sentenced to two years imprisonment each. Aggrieved by the conviction and sentence, they filed a petition of appeal dated 15th April, 2019 and raised the following seven grounds of appeal, namely:

- 1. That the Honourable Magistrate erred in law and fact by failing to consider submissions by the appellants***
- 2. That the Honourable Magistrate erred in law and fact by shifting the burden of proof to the appellants.***
- 3. That the Honourable Magistrate erred in law and facts by failing to consider that the prosecution had not proved their case beyond reasonable doubt.***
- 4. That the Honourable Magistrate erred in law and fact by imposing a harsh and illegal sentence.***
- 5. That the Honourable Magistrate erred in law and fact by disregarding the evidence of the accused persons.***
- 6. That the Honourable Magistrate erred in law and fact by failing to consider the witness who signed the Green Card and the Title Deed KAJIADO OSILALEI/1029 was not called as a witness.***
- 7. That the Honourable Magistrate erred in law and fact by failing to consider that the complainant was not existent and never testified.***

3. During the hearing of this appeal Mr. Itaya, learned counsel for the appellants submitted highlighting their written submissions dated and filed in court on 7th June 2019 that the trial magistrate shifted the burden of proof to the appellants. According to learned counsel, the trial magistrate stated that the appellants being the main beneficiaries of the registration, they should have produced minutes of the committee, consent to transfer and evidence on actual transfer.

4. Mr. Itaya further submitted that the appellants were convicted without the benefit of the complainant's evidence. He argued that no official from the group ranch testified against the appellants and that section 202 as read with section 206 of the Criminal Procedure Code provides for sanctions where the complainant fails to testify. He contended that under section 202, if the complainant fails to attend court the accused should be acquitted. He also contended that section 206 provides that if the complainant and witnesses are absent, the charge should be dismissed.

5. Mr. Itaya submitted, therefore, that the trial court failed to take into account that fact since the complainant failed to testify. He argued that although this fact was brought to the court's attention and authorities cited before it they were ignored and the court did not refer to those authorities, distinguish them or follow them, thus ignored the doctrine of precedent.

6. Thirdly, counsel submitted that the prosecution did not prove its case beyond reasonable doubt. He argued that the prosecution did not prove the ingredients of the offence of obtaining registration by false pretences. According to Mr. Itaya, there was nothing on record to show that there was representation from the appellants which was false and to whom the representation was made given that the complainant did not testify.

7. Counsel submitted that the appellants called a witness from the group ranch who confirmed that the group ranch processed the title deed and handed it to the appellants. The witness is recorded to have told the court that the committee produced the Title for the appellants.

8. Fourth, counsel submitted that the sentence imposed was illegal. According to Mr. Itaya, section 320 provides for a sentence of 1 year but the appellants were sentenced to 2 years which was an illegal sentence. He relied on several decisions and urged the court to allow the appeal quash the conviction and set aside the sentence.

9. Mr. Njeru, Learned Assistant Deputy Prosecution counsel, opposed the appeal, supported the conviction but conceded sentence. On conviction, learned counsel submitted that the appellants were charged with obtaining registration by false pretences under Section 320 of the Penal Code for which they were convicted and sentenced.

10. He contended that the prosecution proved the offence beyond reasonable doubt. In his view, the argument by the appellants' counsel that there was no complainant cannot hold. He submitted that the complainant was a group of persons calling themselves Osilalei group ranch and could appear through its members. He contended that those who testified were members of the group ranch representing interests of the whole group. According to counsel, section 202 of the Criminal Procedure Code cannot therefore be relied on by the appellants.

11. Regarding the submissions that the court shifted the burden of proof, he argued that this was not the case. He submitted that the appellants were found with a case to answer; that they testified but the trial Magistrate did not believe their defence since they had not tendered evidence to show how they were registered and, therefore, that could not be termed as shifting the burden of proof. He supported the reasoning of the trial court and argued that it did not amount to shifting of blame.

12. Mr. Njeru further submitted that the prosecution established that the land was registered in the name of the group ranch; that the witnesses testified on the procedure for transferring land from the group to individuals and that a person should be a member of the group ranch. He argued that the appellants were not members of the group ranch and if there had to be any change in ownership, there had to be a resolution by members of the group ranch.

13. He further argued that the appellants admitted in their defence that they were not members of the group ranch; that PW3 confirmed that there were no resolutions and that it was incumbent upon the appellants to show how they got registered and, therefore, the trial Magistrate was right in finding that they had not shown how the appellants got registered as proprietors.

14. Mr. Njeru contended that the 1st appellant is son to the Area Chief while the 2nd appellant is son to the chairperson of the group ranch, thus the appellants were not members of the group ranch and, in his view, it should be taken that they obtained registration by false pretences.

15. It is Mr. Njeru's further submission that according to DW3, the appellants were not members and did not apply for the land and, for that reason there were no minutes for such allocation. Counsel referred to page 4 of the proceedings (page 65 of the record) to demonstrate that the 1st appellant actually stated that he did not know why he got the land and that he did not apply for it. He therefore argued that the trial magistrate properly convicted the appellants.

16. Regarding sentence, Mr. Njeru conceded that the sentence of 2 years is more than that allowed. He urged the court to set aside the sentence of 2 years and substitute it with the correct sentence.

Determination

17. I have considered this appeal; submissions by counsel by the parties and the authorities relied on. I have also read the record and the judgment of the trial court. This being a first appeal, it is the duty of this court to reexamine the evidence, reanalyze and reconsider it and make its own conclusions bearing in mind that it did not see witnesses testify and give due allowance for that. In *Okeno v Republic* [1973] EA 32, the Court of Appeal held that:

“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.)”

18. PW1 Noah Kerika Ndere testified that he was the Chairperson of Kajiado Land Management Board between May, 2014 and January, 2015; that the board performs the National Land Commission's functions at the county level which involve dealing with complaints on historical land injustices and refers complaints to relevant investigative agencies.

19. The witness testified that he is also member No. 582 at Osilalei group ranch; that he was given land parcel 232 and that in July 2014 they received a complaint from members of the group ranch that land they had set aside for public utility had been given to two individuals who were not members of the group ranch. He told the court that the Board confirmed from the Registrar of Titles that title No. 1029 measuring about 23.898 HA was given to Eselengei Farmers group as public utility for common use.
20. According to the witness, they later discovered that the parcel of land had been given to the appellants and a title deed issued to them on 16th November 2011; that he also learnt that the 1st appellant was son to the Chief of Osilalei Location while the 2nd appellant is son to the Vice Chair of the group ranch. He told the court that he had not known the appellants as members of the group ranch and their names are not in the register of members which has names and details of all members of the group ranch. However, their fathers are members and had been given their parcels of land. He testified that for one to join the group ranch, a resolution had to be passed at a general meeting supported by 60% of the members. The resolution is then forwarded to the Registrar of Group Ranches to be included in the register of members.
21. PW2, Thomas Leshau Nkabashi told the court that in May, 2014 the group ranch held a meeting and in that meeting members complained that some parcels of land had been grabbed by non-members. Those mentioned were Chief Piros Sadera and Keloi Kikwa, Vice Chairperson of the group ranch. One of the parcels concerned parcel No. 1029 which had been set aside for public utility. He told the court that the matter was reported to the police and that a search conducted at the Land Registry was misleading as it showed no names yet they were aware that the Land had been grabbed. However the green card showed the appellants as the registered proprietors.
22. PW3, Moses Rana Kalempu also member No.48 in the group ranch, told the court that he was the Secretary of the group ranch; that as secretary, he used to keep minutes of the meetings of the group ranch and that each member of the group ranch was given land following the membership list. The witness testified that some parcels of land were set aside for public utility including parcel No. 1029 which was reserved as a watering point and that he later heard that the land had been given to the appellants who were not members of the group ranch. According to this witness, if the land was to be sold, members would have to pass a resolution but no such resolution was passed. In cross-examination he admitted that he signed the transfers and so did the Chairman. He also admitted that he must have signed the application for consent to transfer.
23. PW4 Michael Tanch, also a member of the group ranch told the court the parcel No. 1029 was one of the parcels set aside for public utility and was given the name "Eselengei Farmers Group". He testified that they later learnt that this particular parcel had been given to the appellants who were not supposed to get the land because they were not members of the group ranch. He told the court that they reported the matter to the police for appropriate action.
24. PW5, Magilanani Ole Nkibei and former chairman of the group ranch, told the court that his duties were to share out the land to members of the group ranch who were in the register; that they set aside parcels of land for public utility one of which was "Eselengei Farmers Group", parcel No 1029 and which still belongs to the group ranch. According to the witness this parcel was not allocated to any person; that he did not sign a transfer in favour of anybody and that as officials, they never agreed to sell or transfer it to anyone.
25. PW6 Julius Lengeta Ntiangau, another member of the group ranch testified that the parcel known as Eselengei Farmers Group was set aside for public utility; that they later discovered that the appellants had taken the land and that when they were asked to return the land they refused prompting them to report the matter to the police.
26. PW7 Morris Robert Otieno, the Chief Land Adjudication and Settlement Officer, Kajiado County, told the court that he deputized the in charge and advised group representatives and officials on group ranch matters and kept and maintained custody of group ranch documents and reports. The witness told the court that on 8th May, 2017, they received a letter from Deputy DCIO requesting information on some matters concerning parcel No. 1029 in Osilalei Group Ranch; that the Deputy DCIO wanted their office to confirm whether the appellants were members of that group ranch and to whom parcel No. 1029 had been allocated.
27. The witness testified that they replied through letter dated 10th May, 2017 and informed the Deputy DCIO that according to their records, the land was allocated to Eselengei Farmers Group and measured about 23.898 Ha; that the appellants were not members of the group ranch and were not in the register of members. He further told the court that he had never seen the appellants.
28. PW8 James Muthithi Wambua, a retired Land Registrar and who previously worked as the Kajiado Land Registrar, told the court that his duties were to register documents, issued documents such as certificates, searches and resolve land disputes. He testified that on 28th July, 2014, he received a letter from CID Kajiado dated 21st July, 2014 regarding parcel numbers Kajiado/Osilalei/1029, 638, 912, 262/1062 and 1056. The letter requested for documents over those parcels including green cards, copies of mutations, and consent from the land control board, transfer documents, beneficiaries' list and the group ranch survey map.
29. He told the court that he made certified copy of the green card for parcel No.1029 and gave it to the CID; that from the green card, the appellants were the registered owners and that they were registered in November, 2011 and a Title deed was issued to them. According to the witness, the other documents could not be traced. He produced the green card as Pex 3.
30. PW9 NO. 59105 Sgt. Titus Munialo attached to DCI Kajiado and the investigating officer in the case, told the court that on 2nd July, 2014, he was instructed by the DCIO Kajiado central, Daniel Musangi, to investigate allegations of irregular allocation of a parcel of land belonging to the group ranch; that he investigated the matter and ascertained that parcel No. 1029 was allocated to Oselengei farmers group for public utility but had been taken by the appellants. He also told the court that investigations revealed that the appellants were not members of the group ranch and were not in the register of members. He stated that he obtained documents from the Land Registry which confirmed that the appellants were the registered proprietors of the land. They were however unable to get transfer forms which enabled the appellants to transfer the land into their names.
31. When put on their defence, the 1st appellant who testified as DW1 told the court that he asked the committee of the group ranch to give him land which they did and asked him to present copies of PIN certificate; identity card, passport size photographs and Kshs. 16,000/-; that

he and the 2nd appellant were later called and shown the land and asked to own it jointly. He told the court that on 16th November, 2011 group ranch officials gave them the title Deed for the Land. He denied obtaining registration by false pretences.

32. The 2nd appellant testified as DW2 and told the court that he went to the group ranch offices several times and although he was not a member of the group ranch, he was given parcel No. 1029 together with the 1st appellant and a title deed was later brought to them by the Chairman, Treasurer and Secretary of the group ranch in December, 2011. He told the court that he did not understand why the Chairman later complained that they had obtained registration of land by false pretences. He maintained that they applied for the land from the group ranch which was given. He also denied using their parents' influence to get the land.

33. DW3, Sitoya Ole Kilempu, told the court that the appellants were known to him; that when the committee of the group ranch shared out the land, it allocated land to the appellants and that at the time he was the group ranch treasurer.

34. After considering the above evidence, the learned Chief Magistrate found that the prosecution had proved its case beyond reasonable doubt, convicted the appellants and sentenced each of them to 2 years imprisonment. The trial court stated at page 4 of the judgment:

“I have heard the evidence of all witnesses for the prosecution and the defence. What is not in doubt here is the fact that in the land registry, as shown by the Green Card produced herein, accused are the registered owners of Land Parcel No. Kajiado/Osilalei/1029. They obtained registration on 16th November, 2011. The issue for determination is whether the accused obtained such registration through false pretence and fraud. Evidence has been called of the fact that the parcel No. 1029 was allocated by Osilalei Group Ranch to Eselengei Farmers Group”

35. The court then continued:

“The court has not been shown minutes or resolution that allocated Parcel No. 1029 to the accused though they claim that it was a regular allocation. Steps leading to registration that are necessary for registration as proprietors of the land are not shown”

36. It then then concluded:

“The accused are the main beneficiaries and so cannot escape the fact that they played a crucial role in registering this parcel into their names. If they wanted the court to believe that they were genuine allottees, there was nothing simpler than availing the minutes of the committee’s resolution for transfer from the land control board and documents showing how the transfer was eventually done. Failure to do so confirms the fact that it was all through fraud.”

37. The appellants have faulted the trial court’s decision contending that the prosecution did not prove its case beyond reasonable doubt and that the trial court shifted the burden of proof to them.

38. The appellants were charged with the offence of obtaining registration by false pretences contrary to section 320 of the Penal Code, in that they procured registration of land parcel No. Kajiado/Osilalei/1029 through false pretences.

39. Section 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.”

40. 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 the person making it knows to be false or does not believe to be true, is a false pretence.”

41. From this 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.

42. This fact is supported by judicial decisions. In *Edgington v Fitzmaurice* (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.”

43. In the Nigerian case of *Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria* SC. 41/2003, the Supreme Court of Nigeria observed that in order to prove the offence, here must be a pretence; that the pretence should 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.

44. In *Mathilda Akinyi Oware v Republic*, Cr App. No 12 of 1989, [1989]eKLR the Court of Appeal stated;

“Devlin, J. in the case of R. V. Dent, [1975] 2 All E.R. 806 at page 807 letter H said that ‘to constitute a false pretence the false statement must be of an existing fact,’

45. The prosecution case was that the appellants were not members of the group ranch. Prosecution witnesses told the court that parcel No.1029, the subject of the case before the trial court, had been set aside for public utility and was allocated to Eselengei Farmers group for that purpose. The land somehow ended up in the appellants’ names though not members of the group ranch. The prosecutions’ evidence was that it could not tell how the appellants got registered as proprietors of that parcel of land.

46. The prosecution had to prove the false pretence together with a fraudulent intention on the part of the appellants in obtaining the property. It is clear from the evidence 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 appellants made a representation of past or present facts; to whom the representation was made or that the representation was false and that it influenced the registration of the land into their names.

47. It is strite law that in criminal trials it is the duty of the prosecution to prove its case against an accused beyond reasonable doubt and the burden never shifts. In this regard the court of Appeal observed in *Pius Arap Maina v Republic* [2013] eKLR, that ***“the 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.”***

48. The witnesses, including the officials of the group ranch, did not tell the court at all that the appellants made any representation including that they were members of the group ranch. The land registrars did not tell the court who presented the documents for registration; that the documents were forged or how the land ended up in the appellants’ names.

49. The appellants gave evidence in defence and told the court that they applied for land from the group ranch; that officials of the group ranch showed them the land; asked them to present copies of their documents and Kshs, 16,000/- which they did. Later the officials brought them the title deed for the land.

50. The appellant’s case was that they applied for the land which was given by the leadership of the group ranch. This was supported by DW3 who testified on their behalf that he was the treasurer when the appellants were given the land. It was his evidence that officials of the group ranch allocated the land to the appellants. This is in agreement with the appellants’ evidence that they gave documents to the officials who later brought the title deed to them.

51. The trial Magistrate did not consider this evidence at all that the registration may have been procured by officials of the group ranch and that there was no evidence of false misrepresentation of past or present facts to prove the offence of obtaining registration by false pretences against the appellants. In other words there was no evidence to show that the appellants willfully and knowingly used a false transfer to procure registration of the property in their names.

52. The appellants also complained that the trial court shifted the burden of proof to them. They argued that the trial court held that as beneficiaries, they did not show how they got registered as proprietors of the land. As already adverted to in this judgment, the burden of proof is always on the prosecution and never shifts. It is thus a cardinal principle in criminal justice system that the prosecution bears the burden of proof in all criminal cases and that burden never shifts except where the law allows.

53. It is true from the record that the trial court stated that the appellants as beneficiaries of the registration should have adduced evidence on how they obtained registration, produce transfer forms and consent from the land control board. I agree with the appellants that indeed the trial court shifted the burden of proof to them. It was not the appellants’ duty to disprove the charge of obtaining registration by false pretences or produce documents used for registration. The prosecution bore that responsibility, first; to show that registration was obtained by false pretences; that is, the appellants made a representation of facts either past or present which was false and that the false representation resulted into that registration.

54. Even from the appellants’ evidence in defence, there was nothing to show that there was any misrepresentation on their part that would have aided the prosecution’s case. The court should only convict on the strength of the prosecution’s case but not on the weakness or deficiency of the accused persons’ defence.

55. The Land Registrars who are the custodians of registration documents were asked by the police to give them copies of registration documents but they could not produce them. If the custodians of the documents could not produce them it was inconceivable for the trial court to expected the appellants who did not keep those documents to produce them in self-incrimination.

56. Regarding sentence, the learned trial magistrate imposed a sentence of 2years while the statute prescribes a sentence of one year. That sentence was clearly illegal and Mr. Njeru correctly conceded that ground.

57. I have considered the appeal and reevaluated the evidence myself, the conclusion I come to is that the prosecution did not prove its case against the accused as required by law. Instead the trial court shifted the burden of proof to the appellants thus fell into error.

58. For the above reasons, I am satisfied that the appellants’ appeal has merit and is allowed, conviction quashed and the sentence set a side. The appellants shall be set at liberty unless otherwise lawfully held.

Dated Signed and Delivered at Kajjado this 25th Day of October 2019.

E C MWITA

JUDGE