REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 21 OF 2019

LEMOMO OLE NTEKNSE.....1ST APPELLANT

TUPET KAUWET MURRE.....2ND APPELLANT

PASHILE OLE NEIPU.....3RD APPELLANT

SAMUEL SOPONI PRASHURU.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence (HON. CHELOTI(Mrs) SRM) at the Chief Magistrate's court Kajiado in criminal case No. 77 of 2017, Republic v Lemomo ole Ntekense& 3 others delivered on 12th April 2019)

JUDGMENT

1. The appellants were charged with 4 counts; of conspiracy to defraud contrary to section 317 of the Penal Code. Particulars in count 1,were that on the 22nd August, 2006 at Kajiado Lands Office in Kajiado Sub-County within Kajiado county, being officers of Partimaru Group Ranch, conspired to defraud Lenkollelio Ole Retei of his late father's parcel of land number Kajiado/Longusua/1213.

2. Particulars with regard to count 2 were that on the 8th day of August, 2006 at Kajiado Lands office in Kajiado Sub-county within Kajiado County, being officials of Partimaru Group Ranch they conspired to defraud Nketuma Ole Ntikise of his land parcel No. Kajiado/Longusua/1255.

3. Particulars relating to count3 were that on the 31st May, 2006 at Kajiado Lands office in Kajiado Sub-county within Kajiado County being officials of Partimaru Group Ranch they conspired to defraud Mary Nyambura Gichihia of her parcel No. Kajiado/Longusua/1265. While particulars in count 4 were that on the 2nd day of April, 2001 at Kajiado Lands office in Kajiado Sub-county within Kajiado County, being officials of Partimaru Group Ranch conspired to defraud Tarayian Ene Lekae of her late husband's land parcel number Kajiado/Longusua/1273.

4. The appellants pleaded not guilty to the charges and after a trial in which the prosecution called 8 witnesses and the evidence from the appellants, the trial court convicted the appellants in all the counts and sentenced each of them to a fine of Kshs, 500,000 on each count or two years imprisonment in default.

5. The appellants were aggrieved by the conviction and sentence and filed a petition of appeal dated 16th April 2019 and amended on 7th May, 2019 raising the following grounds, namely that;

> ***1. The learned trial magistrate erred in law and fact by finding that there was evidence to support the charges of conspiracy to defraud contrary to Section 317 of the penal code as set out in count 1 to count 4 of the charge sheet.***
>
> ***2. The learned trial magistrate erred in law and fact by finding that the charges of conspiracy to defraud had been proved beyond reasonable doubt.***
>
> ***3. The learned trial magistrate erred in law and fact by finding that the testimonies of the prosecution witnesses were contradictory but nonetheless proceeding to rely on the same evidence to convict the appellants.***
>
> ***4. The learned trial magistrate erred in law and fact by relying on secondary evidence against the provisions of the evidence Act.***

5. The learned trial magistrate erred in law and fact by accepting the prosecution case as proved without taking into consideration the defence case.

6. The learned trial magistrate erred in law and fact by ignoring legal principles governing circumstantial evidence and when to convict on the basis of such evidence.

7. The conviction was against the weight of evidence.

8. The learned trial magistrate erred in law and fact as the evidence adduced in toto by the prosecution did not support the charge.

9. The learned trial magistrate relied on biased investigative evidence.

10. The learned trial magistrate erred in law and fact as the sentence was manifestly harsh and excessive.

11. The learned trial magistrate erred in law and fact in considering and applying marked documents which were otherwise not produced in court.

12. The learned magistrate erred in law and fact in failing to consider and apply the rights of the accused persons as per the constitution.

13. The learned trial magistrate erred in law in issuing civil orders in criminal case and orders which lacked foundation from the trial.

6. During the hearing of this appeal, Mr. Katwa leading other counsels for the appellants, submitted highlighting their written submissions dated and filed on 22nd October, 2019, that the prosecution did not prove its case against the appellants. According to learned counsel, the complainant in count 2 did not testify and therefore there was no evidence to prove that count and that indeed the investigating officer, PW8, confirmed that that complainant did not testify because he had been given another parcel of land. According to counsel, this fact was also confirmed by the 1st appellant in his defence.

7. Regarding count 3, Mr. Katwa submitted that PW4 stated he had no complaint against the appellants. He submitted therefore that the witness told the court that he got his land parcel No. 1256 after his initial land was given to someone else.

8. As for count 4, learned counsel submitted that the complainant had told the court that he had his land and title deed. In that regard , PW7 told the court that he had no complaint against the appellants. He further submitted that the witness also stated in cross examination that he had no issue with the appellants and that he had no complaint against any of them. Counsel argued that on the basis of that evidence, the 3 counts had been discounted and discredited but that notwithstanding, the trial court went ahead to convict the appellants in those accounts and even ordered that those complainants be given land which they already had.

9. With regard to count 1, counsel submitted that the only evidence on record was that of PW1, Pw2 and PW8. He argued that the parcel of land in question is subject to a succession cause; that the parcel of land belongs to a deceased person and that evidence of those who testified with regard to that count did not prove the count against the appellants. According to Mr. Katwa, PW6 was said to be the complainant in court but admitted in cross-examination that the land belonged to his deceased father and it was not therefore clear in what capacity PW6 was testifying..

10. Mr. Katwa argued that the 1st appellant testified that there may be dissatisfaction with the leadership of the group ranch but that is not a criminal offence. He also submitted that same members had lodged caution against the land and that there is a suit, ELC No. 177/2008 still pending at Machakos and therefore these facts are known to members. Counsel submitted relying on section 169 of Criminal Procedure Code that a decision of the trial court should contain reasons yet the trial court convicted the appellants without evidence and pointed to the fact that crucial exhibits were not produced. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

11. Mr. Njeru, learned Assistant Deputy Prosecution Counsel, conceded this appeal. According to counsel, having considered the totality of the prosecution evidence before the trial court, he was of the view that that the issue was really about the allocation of group ranch Land where the appellants are officials and not a criminal conduct. He submitted with regard to count 1, that PW6 was claiming through his deceased's father yet there was no evidence that he was a son of the deceased and that he had stated that he did not know who had been given the land.

12. Mr Njeru also agreed with Mr. Katwa that the complainant in count 2 did not testify against the appellants which means he was not complaining against them and therefore that count was not proved.

13. Regarding count 3, he submitted that PW1 stated that the record at the lands Registry showed that she was still the owner of the land, while on count 4 PW2 stated that that she was widow to the deceased owner but there was no proof that she was complaining on behalf of the estate. Counsel also admitted that although the prosecution referred to several critical documents, they were never produced as exhibits.

14. On the order made by the trial court that the appellants give land to the complainants, Mr.Njeru agreed with Mr. Katwa that this was, at best, a civil order which could only be made in a civil suit. For those reasons he conceded the appeal and the prayer sought.

Determination

15. I have considered this appeal, submissions by the appellants and those made on behalf of the respondent. This appeal has been conceded by the prosecution. That does not, however, mean this court must agree with the respondent md allow the appeal on that ground alone. This court has a duty to consider the appeal and come to its own conclusion on it.

16. In that regard, the Court of Appeal held in ***Odhiambo v. Republic*** [2008] KLR 565, that;

> ***"[T]he court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."***

17. With the above view in mind, this being a first appeal, it is by way of retrial and parties are entitled to expect this court's reanalysis, reassessment and reconsideration of the evidence afresh and its own decision on that evidence. in ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> ***"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. 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."***

18. PW1, Mary Nyambura, testified that she was given parcel No. 1265 by Partimoru Group Ranch. She went to the 1st appellant and asked that the land be transferred into her son's name. The 1st appellant asked for Kshs. 20,000/-; that she later went to the land and found all trees cut down a dam and building constructed on the land which prompted her to make a report. The Registrar told her that the record still showed that she was the owner of the land but she told the court that she had not been given a title deed for the land. She testified that she was shown a members' list which was marked as MFI 1. In cross-examination, the witness told the court that her complaint was that although she had paid Kshs. 20,000, she had not been given a title deed. She admitted that she was however shown the land.

19. PW2, Taraiyian Ene Lekeu testified that parcel No. 1273 belonged to her husband, now deceased, but she had never been shown the land since her husband died before he showed her the land. She told the court that her husband was a member of the group ranch; that when her husband died, she followed the matter with the 1st appellant but she was shown a smaller parcel of land; that she was then introduced to the 2nd appellant who showed her another parcel of land but it was later given to another person. According to the witness she later heard that her land had been given to someone else. She also found that her name had been removed from the register and replaced by another person's name prompting her to report the matter to the police. In cross-examination, she told the court that she was not a member of the group ranch but widow to a deceased member.

20. PW3, Shipo Njenga, testified that he is a member of the group ranch and identified his name in the members' register, MFI 2. He told the court that he got land from the ranch and that he knows Lenkollelio Ole Ritel, son to Oreket who was member No. 1213 within the group ranch. He told the court that some people came to survey land and when sons of late Oreket asked them what they were up to, they did not tell them anything. According to the witness, when a search was later conducted they discovered that the land had been sold to George Wainaina prompting the matter to be reported to the police. He referred to copy of green card MFI 3. He also told the court that a search for parcel No. 1255 indicated that there are 4 owners and referred to a copy of green card MFI 4. According to him, the land should belong to the 2nd complainant.

21. PW4 Jeremiah Lematashu on his part testified that when the land was subdivided he got his land but later the land was given to someone else; that that he was not aware who owned the land before; that the area list showed that it was initially owned by Meunte Peumuia, Retei's son but he did not know him. He told the court that he knew Lenkollellio son to Retei, a deceased member of the group ranch. He also told the court that he knew Nketune Ole Ntikise who was also a member of the group ranch but he did not know Tarayian. In cross-examination, the witness told the court that he has land in the group ranch being No. 1256 and he has a title deed. He also testified that none of the appellants had harassed him over the land.

22. PW5 Daniel Nchootok Sosio testified that he was allocated land at the group ranch; that he paid Kshs, 3,500 and was shown the land by the 2nd appellant. He settled on the land and started utilizing it and was later given the title deed for the land. According to the witness, he later heard that someone, a lady by the name Nyambura Gishoiyan, was claiming the land. He told the court that he did not know where parcel No. 979 was. In cross-examination, he maintained that he was given land and ha a title deed.

23. PW6 Lenkoleno Ole Ritei testified that his father, Mutero Ouketi, was a member of the group ranch. According to this witness, his father had been given parcel No. 1213 but was not issued with a title deed by the time he died in 1998. He testified that in 2015 some people went on the land and said they were looking for beacons. In 2016, he came to know that the land had been allocated to someone else he did not know. He told the court that he was not aware whether the title deed was out or not. He stated that there is a matter in court over the group ranch and that titles will be issued once that case is finalized. He also told the court that they live on the land and that they have not been asked to vacate. In cross-examination, the witness admitted that he is not a member of the group ranch and that his siblings are not complainants in the case.

24. PW7 Soipero Ole Lekene on his part testified that he owns a parcel of land which he was given by the group ranch officials but he could not remember the parcel Number and that he has a title deed. He told the court that he was in court because some people were saying that that was not his land. He confirmed that he was given the land by the appellants. He however told the court that it was not the appellants who were claiming that the land is not his. In cross-examination the witness admitted that he had no issue with the appellants.

25. PW8 No. 74560 PC Maurice Muli, the investigating officer, testified that on 4th November, 2015 he was assigned the case by the DCIO involving four members of the group ranch. According to the witness, the complaint was about parcels of land that had been transferred to other people without owners' knowledge or consent. He investigated the case and confirmed that the complainants were members of the group ranch and had been allocated parcel Nos 1265 – 2nd complainant, 1273, 3rd complainant, 1213- 4th complainant and1255, Ole Ntikise.

26. According to the witnesse, the complainants did not get title deeds for their parcels of land. He testified that the complainants conducted searches at the lands registry and found that their parcels had been given to some other people. The witness testified that the first complainant's land as transferred to Daniel Sosio on 31st May, 2016, the 2nd complainant's land was transferred to Mumpe on 4th April, 2011, the 3rd complainant's land was transferred to Rachel Negika on 22nd August, 2006 and the 4th complainant's land was transferred on 8th August, 2006 to the appellants and later given to George Wainaina.

27. The witness concluded that the appellants had colluded to take away the complainants' land and therefore decided to charge them in court. In cross-examination, he told the court that the 4th complainant had land in the group ranch but had no title. He also confirmed that the complainant in count 2 did not testify against the appellants because he was given another parcel of land.

28. The appellants gave sworn testimonies. The 1st appellant told the court that they gave parcel No. 1213 to the children of Ritei, a deceased member of the group ranch. Regarding count 2, he told the court that they gave Lentume his land and that member did not testify against them. As to counts 3 and 4 he told the court that the complainants were given land but have never presented their documents for purposes of processing the title deeds.

29. The 2nd appellant told the court that parcel No. 1213 is in the name of Ritei who is deceased and the family has not completed succession proceedings for the deceased's estate. On count 2, he told the court that the complainant was given land and did not testify against them. He testified that some members had not presented documents for processing title deeds.

30. The 3rd appellant similarly told the court that once land has been allocated to members, they should give their documents for purposes of processing title deeds. He denied the claim that they had given out land to some people. The 4th appellant also told the court that he is not an official of the group ranch and is not involved in matters concerning allocation of land.

31. From the above evidence, the trial court convicted and sentenced the appellants prompting this appeal.

32. The law places the burden on the prosecution to prove its case against any accused person beyond reasonable doubt. Proof beyond reasonable doubt means that at the end of the trial, the trial court should have no doubt in its mind that the accused committed the offence he is charged with. Proof beyond reasonable doubt does not .allow plausible possibilities in a criminal trial. The prosecution evidence through its witnesses must prove conclusively that the accused committed the offence. There are many authorities on this but suffices to mention a few.

33. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, Lord Denning stated with regard to the phrase "proof beyond reasonable doubt":

> ***"Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***

34. In ***Bakare v State (***1987) 1 NWLR (PT 52) 579, ***Oputa, JSC,*** writing for the Supreme Court of Nigeria, amplified the phrase stating:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".***

35. And in ***Pius Arap Maina v Republic*** [2013] eKLR, the Court of Appeal made it clear that;

> "[***T[he 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***."

36. The appellants were charged with four counts of conspiracy to defraud the complainants of their parcels of land. The prosecution called 8 witnesses in an attempt to prove its case against the appellants. I have carefully reviewed and reconsidered the evidence of the prosecution before the trial court and the defence case and also considered the judgment of the trial court. It is clear to me that the evidence before the trial court did not meet the threshold of proof beyond reasonable doubt.

37. PW6 who was supposed to be the complainant in count 1 did not prove that he was the owner of any land. He said he was son of a deceased member of the group ranch but was unable to tell the court in what capacity he was complaining. He also did not adduce any evidence to show that his father had been given land which the appellants defrauded him. The witness also admitted that there is an ELC case which is not yet concluded and that title deeds would only be issued when that case is concluded. He did not therefore prove that the appellants had committed any crime.

38. Regarding count 2, it is clear that the complainant did not testify. None other than the investigating officer, PW8, told the court that the complainant in that count did not testify because he had been given land. That means this count was not proved against the appellants. As regard counts 3 and 4, the witnesses told the court that they had their land and so that they had no complaint against the appellants.

39. I have also considered the evidence of PW8, the investigating officer in this case. He claimed to have investigated the complaints and charged the appellants after ascertaining that they were culpable. The record however points otherwise. The witness claimed that the complainants' parcels of land had been transferred to other persons but never produced evidence to support these allegations. There were no documents to show that the complainants had been given land and that those parcels of land had been transferred to other people and that the appellants were responsible for the transfers.

40. This witness' evidence is also irreconcilable with that of other witnesses who told the court that they had their land and title deeds. It is not clear to this court therefore why the investigating officer decided to press the charges against the appellants in light of the evidence that was eventually placed before court against them.

41. The appellants gave evidence that clearly exonerated them from blame when weighed against that of the prosecution. For instance, the 4th appellant told the court that he was not an official of the group ranch and therefore had nothing to do with allocation of land within the group ranch. That evidence was not controverted by the prosecution. That is; the prosecution did not produce the record of the officials of the group ranch to show that this appellant was an official and that the charge against him was well founded.

42. The totality of the prosecution evidence against the appellants was lacking in substance and was misplaced in so far as criminal justice is concerned. It is possible that the complainants had issues with the leadership and management of the group ranch. That, in my respectful view, is a matter that raises a different cause of action not related to criminal justice.

43. The trial court did not properly analyse the evidence and apply its mind on the standard of proof placed on the prosecution in criminal law. Had the trial court done so it would have come to the conclusion that the prosecution had not proved its case against the appellants and the result would definitely have been different.

44.The trial court further made an order that the appellants give each of the complainants land. Well this order has two potential problems. First; some of the complainants like PW6 who was the 1st complainant did not own land and is not a member of the group ranch.. The land was allegedly owned by his deceased father and if anything it belongs to the estate of that decedassed member. It could not be given to this complainant. Further, there was no evidence that this complainant is indeed a son of the deceased member.

45. The 2nd complainant did not testify and therefore had no claim before court. It is inconceivable how he would be given land without laying a claim for some land when the person already had land. The same thing applies to the 3rd and 4th complainants. The order was therefore made without any justification.

46. Second and more importantly, the issue in this case as I perceive it, was more of civil than criminal. The complaint if any was more about processing of title deeds for the members than fraud. This is clear from the evidence of both the prosecution witnesses and the defence. Some of the prosecution witnesses clearly stated that all they were complaining about was that they had not been given title deeds. Some even said that there was no threat against them from the appellants; that here was a civil case in court and that title deeds could only be issued once it was concluded and the defence case that some members had lodged cautions against the land which prevented them from transacting on the land including processing title deeds.

47. Having therefore considered the evidence, reviewed and reanalyzed it myself, the inescapable conclusion I come to, is that the prosecution did not prove its case against the appellants beyond reasonable doubt as required by law. the trial court was in error in convicting the appellants on the basis of that evidence. Mr. Njeru, learned Assistant Deputy Prosecution Counsel properly conceded this appeal.

48. Consequently and for those reason, this appeal is allowed, conviction quashed and sentence set aside. The appellants are hereby set at liberty forthwith unless otherwise lawfully held. Any fines paid to be refunded to the depositor. Sureties, if any, are herby discharged

49. Orders accordingly.

Dated Signed and Delivered at Kajiado this 20th Day of December 2019.

E C MWITA

JUDGE