



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 87 OF 2017

NICHOLAS AKALA MUMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence in Mumias SPMC Criminal Case No. 291 of 2014

by F. M. Nyakundi, RM, dated 2/8/2017)

JUDGMENT

1. The appellant was convicted in Counts 1 of the offence of conspiracy to defraud contrary to Section 317 of the Penal Code and sentenced to compensate the complainant with Ksh. 100,000/= in default to serve two years imprisonment and in Counts 2-5 of the offences of obtaining money by false pretence contrary to Section 313 of the Penal Code. In Count 2 he was sentenced to compensate the complainant in the sum of Ksh. 60,000/= in default to serve one year imprisonment; in Count 3 to compensate the complainant in the sum of Ksh. 10,000/= in default to serve 3 months imprisonment; in Count 4 to compensate the complainant in the sum of Ksh. 5,000/= in default to serve 3 months imprisonment; in Count 5 to compensate the complainant in the sum of Ksh. 60,000/= in default to serve one year imprisonment and in Count 6 to compensate the complainant in the sum of Ksh. 16,000/= in default to serve 3 months imprisonment. Sentence was ordered to run concurrently. The appellant was aggrieved by the verdict and filed the instant appeal.

2. The grounds of appeal are that:-

(a) The learned trial magistrate gravely erred in law and fact in convicting and sentencing the appellant on all the separate counts which were a duplication and which rendered the charge sheet defective.

(b) The learned trial magistrate grossly erred in law and/or misdirected himself in law and facts in presuming that the appellant was the vendor without observing that the evidence adduced clearly distinguished the appellant as a duly registered agent and absent witness as the vendor and beneficiary.

(c) The learned trial magistrate grossly erred in law and facts in convicting and sentencing the appellant without inquiring into the absence of material witnesses especially all parties to the agreement particularly the vendor.

(d) The learned trial magistrate grossly erred in law and facts in placing inordinate weight on unauthenticated documentary evidence without the opinion of an expert.

(e) The learned trial magistrate gravely misdirected himself in law and facts in convicting and sentencing the appellant to consecutive sentences based on malice, bias and presumptions thereby occasioning prejudice.

(f) The learned trial magistrate erred in law in convicting the appellant in light of fabricated, inadequate, malicious contradictory and misinformed evidence.

(g) The learned trial magistrate erred in law and facts in failing to observe that the prosecution's evidence only disclosed the appellant as an agent and not the ultimate vendor who may have been a beneficiary.

(h) The learned trial magistrate erred in law and facts in rejecting the appellant's defence and shifting the burden of proof on the appellant.

3. The state relied on the record of the lower court.

4. The particulars of the offence in Count 1 were that on the 29th day of August, 2013 in Makunga Sub Location of Makunga Location in Mumias Sub County in Kakamega County, with intent to defraud jointly (with others) conspired to defraud Getrude Andawa of Kenya Shillings 565,000/= by falsely pretending that you were in a position to sell her one acre of land from land parcel number E/Wanga/Isongo/952 in the names of Hannington Akungwi Nyaora a fact they knew to be false.

5. The particulars of the charge in Count 2 were that on the 29th day of August, 2013 in Makunga Sub Location of Makunga Location in Mumias Sub County in Kakamega County, with intent to defraud jointly (with others) obtained Ksh. 220,000/= from Getrude Andawa by falsely pretending that you were in a position to sell her one acre of land from land parcel number E/Wanga/Isongo/952 in the names of Hannington Akungwi Nyaora a fact they knew to be false.

6. The particulars of the charge in Count 3 were that on the 28th day of September, 2013 in Makunga Sub Location of Makunga Location in Mumias Sub County in Kakamega County, with intent to defraud (with others) obtained Ksh. 7,550/= from Getrude Andawa by falsely pretending that they were in a position to sell her one acre of land from land parcel number E/Wanga/Isongo/952 in the names of Hannington Akungwi Nyaora a fact he knew to be false.

7. The particulars of the charge in Count 4 were that on the 4th day of October, 2013 in Makunga Sub Location of Makunga Location in Mumias Sub County in Kakamega County, with intent to defraud obtained (with others) Ksh. 3,000/= from Getrude Andawa by falsely pretending that they were in a position to sell her one acre of land from land parcel number E/Wanga/Isongo/952 in the names of Hannington Akungwi Nyaora a fact they knew to be false.

8. The particulars of the charge in Count 5 were that on the 29th day of August, 2013 in Makunga Sub Location of Makunga Location in Mumias Sub County in Kakamega County, with intent to defraud obtained (with others) Ksh. 320,000/= from Getrude Andawa by falsely pretending that you were in a position to sell to her additional two acres of land in land parcel number E/Wanga/Isongo/952 in the names of Hannington Akungwi Nyaora a fact they knew to be false.

9. The particulars of the charge in Count 6 were that on the 22nd day of January, 2014 at Shianda Market, Shianda Location in Mumias Sub County within Kakamega County, with intent to defraud obtained (with others) Ksh. 15,750/= from Getrude Andawa by falsely pretending that they were in a position to sell to her additional two acres of land in parcel land number E/Wanga/Isongo/952 in the names of Hannington Nyaora Akungwi a fact they knew to be false.

Case for Prosecution –

10. The prosecution case was that the appellant was a land agent with an office at Luanda Market. That sometimes in the month of August, 2013, the complainant's brother PW2 passed by the office of the appellant and saw on the notice board a parcel of land that was on sale. PW2 informed the complainant of the sale. On the 27/8/2013 they went to the office of the appellant and met the appellant who told them that the land was situate at Makunga. They went back to the office on the following day and the appellant showed them the title deed and a search certificate to the land being land parcel No. East Wanga/Isongo/952 in the name of one Akungwi Nyaora. The appellant went and showed them the land which measured 3 acres. The complainant got interested with buying one acre. They agreed at a price of Ksh. 250,000/=.

11. On the following day the complainant and her brother went to the office of the appellant. They found him with the purported owner of the land Akungwi Nyaora, and one other person who was the 3rd accused in the case. The complainant made a down payment of Ksh. 220,000/=. The appellant drafted an agreement that was signed by herself and her brother PW2 and thumb printed by the purported seller and the 3rd accused.

12. The purported seller then told the complainant that he was ready to sell the other two acres. The total came to Ksh. 750,000/=. There was cane on the land. They put its value of Ksh. 30,000/= to make a total of Ksh. 780,000/=. The complainant was given time to look for money.

13. Subsequently the complainant made various payments in cash and through Mpesa. The Mpesa payments were made directly to the appellant. On 16/10/13 the complainant made cash payment of Ksh. 320,000/=. Ksh. 7,500/= and Ksh. 15,700/= were made to the appellant through Mpesa. Ksh. 3,000/= was made to the appellant in cash. The amount paid came to Ksh. 550,000/=. On the 16/10/2013, the appellant drafted an agreement for the total amount paid. The agreement was signed by the complainant, her brother and thumb-printed by the wife to the purported seller, the 3rd accused and a son to the purported seller, the 4th accused in the case. Thereafter the complainant wanted to plough the land. They found that the land belonged to one Paul Ndombi PW4 and was actually land parcel No. East Wanga/Isongo/1463 and not as purported by the appellant. They reported to the police. PC Rubia PW5 of the CID Mumias investigated the case. He arrested 4 of the persons and charged them with the offence. The purported seller went underground and was not found. The appellant was tried of the offences. During the hearing the agreements of 28/8/2013 and 16/10/2013 were produced as exhibits – P.Exh. 5 (a) and (b) respectively. The complainant's Mpesa statement showing the amount of money sent to the appellant were also produced as exhibit. The appellant was convicted of the offences and sentenced as stated above.

Defence Case –

14. When placed to this defence the appellant stated in a sworn statement that he is a registered land agent. That on 1/12/2012 one Hannington Akungwi Nyaora and John Auma Sakwa approached him and commissioned him to sell land parcel No. East Wanga/Isongo/952 for them. He conducted a search and confirmed its ownership. That on 28/8/2013 the complainant and PW2 went to his office. He showed them the land. On the following day Hannington Nyaora, John Sakwa and the complainant went to his office. They agreed on the purchase

price for one acre at Ksh. 250,000/=. He drafted agreement and the complainant paid Hannington a deposit of Ksh. 220,000/= and remained with a balance of Ksh. 30,000/=. That on 28/9/2013 the complainant sent Ksh. 7,550/= through his Mpesa account which he handed over to Hannington. Later PW2 informed him that the complainant had agreed with Hannington that she takes the other 2 acres at Ksh. 250,000/= per acre and Ksh. 30,000/= for the cane that was growing on the land. That on 16/10/2013, the complainant, Hannington and the son and wife to Hannington, the 2nd and 4th accused went to his office. The complainant paid Ksh. 320,000/= at his office. He drafted an agreement. She was to pay him Ksh. 30,000/=. On 22/1/2014 she sent him Ksh. 15,000/= through his phone. He was keeping the title deed. She demanded the original title deed. Hannington demanded that she completes paying the balance. He was later arrested by the police and charged. During the hearing he produced the following documents as exhibits – land agent registration certificate, title deed and search certificate to the parcel of land, Mpesa statement showing payment of Ksh. 7,750/= and agreement dated 16/10/2013. He also produced his office visitor's book as exhibit.

Submissions –

15. The appellant made written submissions. He submitted that Counts 3, 4 and 6 were a duplication of Counts 1, 2 and 5 that rendered the charge defective.

16. He submitted that the complainant and her brother confirmed that he was a land agent. That the sale agreements were entered into between the complainant and the seller, Hannington Akungwi Nyaora. That it is the seller who received part payment and was therefore the beneficiary of the proceeds. That the vendor to the land was Hannington Nyaora while he, the appellant, only acted as a land agent. That the vendor was not called as a witness to clarify the unresolved issues.

17. The appellant submitted that the prosecution did not call an expert witness to explain how the Safaricom transcripts were obtained. That failure to do so rendered the evidence worthless.

18. It was submitted that the trial magistrate misdirected himself in sentencing the appellant to consecutive sentences when the charges were a duplication. That the trial magistrate when sentencing him stated that he had threatened the complainant when there was no record of that.

Analysis and Determination –

19. This being a first appeal, the court is required to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the lower court had the advantage of seeing and hearing the witnesses testify –See **Okeno Vs Republic (1972)EA 32.**

20. The first ground of appeal is that the charges facing the appellant were a duplex. The complainant testified that she paid the money as follows:-

- Ksh. 220,000/= as per agreement P.Ex.1
- ksh.7,500/= through Mpesa
- Ksh. 3,000/= in cash
- Ksh. 320,000/= in cash vide agreement dated 16/10/2013

The total was said to be – Ksh. **550,500/=**

The total amount is confirmed by the agreement dated 16/10/2013 which stated that the amount of money paid by that date was Ksh. 550,500/=. In his defence the appellant admitted all the above stated payments.

21. The complainant further stated that she paid the appellant a further Ksh. 15,000/=. The appellant in his evidence admitted the complainant sending him the said amount on 22/1/2014 through Mpesa.

22. From the above analysis it is clear that the sums of Ksh. 7,500/= and Ksh. 3,000/= that the appellant says were a duplication of other payments were neither part of payment of Ksh. 220,000/= nor Ksh. 320,000/=. The two payments were made separately on different dates. There was therefore no duplication of the charges. The submission to that end is not correct. The charges were therefore proper.

23. The appellant was charged in Count 1 with conspiracy to defraud contrary to Section 317 of the Penal Code. The 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 misdemeanor and is liable to imprisonment for three years.”

24. The evidence against the appellant was that he conspired with others to defraud the complainant of the sum of Ksh. 565,000/= falsely pretending that they were in a position to sell land parcel E/Wanga/Isongo/952 to the complainant. The appellant in his defence admitted that the total amount of money paid by the complainant was Ksh. 565,7000/=. This was actually the total amount paid by the complainant including the Mpesa withdrawal charges.

25. The ingredients of the offence of conspiracy to defraud are as was observed by **Nyamwenya J in Stephen Oddiaga Kikombero & another – vs – Republic (2019) eKLR** that:-

“The offence of conspiracy to defraud must of necessity be committed by two or more person’s acting in concert to execute a common intention to defraud. In Archibold:- Writing on Criminal Proceedings, Evidence and Practice (1999) 3rd Edition, 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.”

26. The trial magistrate in convicting the appellant of the offence held that the appellant was the mastermind of the whole process to defraud the complainant as he is the one who had the title deed and the search certificate to the land. That he is the one who showed the complainant the land. That he introduced one Hannington Nyaora to the complainant as the owner of the land. That he is the one who drafted the sale agreements. That he is the one who received the total amount of the money paid of Ksh. 565,000/=. That the Magistrate did not believe the evidence of the appellant that he handed over the money to the seller. That the appellant conspired with the other accused persons to defraud the complainant of the money.

27. On my own evaluation of the evidence I find that there was sufficient evidence to convict the appellant of the offence of conspiracy to defraud. The land that the appellant purported to sell to the complainant did not exist on the ground. The land that the appellant showed to the complainant did not belong to the purported vendor, Hannington Nyaora but instead belonged to a different person Paul Ndombi, PW4. The appellant and his accomplices, one of whom was Hannington Nyaora, deceived the complainant that the subject land belonged to Hannington Nyaora as a result of which they defrauded the complainant of her money. The appellant was well aware that the land did not belong to the said person. The charge of conspiracy to defraud was sufficiently proved.

28. Counts 2-6 related to obtaining various amounts of money by false pretences contrary to 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 misdemeanour and is liable to imprisonment for three years.”

29. The ingredients of the offence are:-

(1) The act of obtaining something capable of being stolen.

(2) Obtaining the thing by false pretence.

(3) Obtaining the thing with intent to defraud.

30. On my evaluation of the evidence I find that the appellant and his accomplices received the various amounts stated in Counts 2-6 by falsely pretending that they would sell the subject parcel of land to the complainant. It was proved that the subject land did not exist on the ground. The land showed to the complainant by the appellant did not belong to the purported seller but instead belonged to a different person. There was sufficient evidence to show that the appellant knew that the land did not belong to the said person. There was no evidence that the appellant handed over all the money paid at his office and that paid directly to him to the purported seller. The appellant and his other accomplices must have shared the money after defrauding it from the complainant.

31. The trial court did consider the defence offered by the appellant and dismissed it. From the circumstances of the case, the appellant was not an innocent land agent. He was the mastermind of the fraud. The offences of obtaining money by false pretences were well proved. The trial court did not err in convicting the appellant of Counts 2-6. The conviction of the appellant on all the charges has no merit and is thereby dismissed.

Sentencing -

31. The trial court ordered the appellant to compensate the complainant failure to which to serve prison sentences ranging between three months to 2 years. Section 31 of the Penal Code states that:-

“Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.”

32. Section 175 (2) of the Criminal Procedure Code grants courts power to order for compensation upon the conviction of an accused person. The section provides as follows:

“(2) A court which—

(a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and

(b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the “injured party”), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.”

33. Section 175 (6) provides that:-

“An order under this section that has taken effect is enforceable in civil proceedings for the amount awarded by the order.”

34. It is clear from the above provisions that the court has no power to order a convicted person to serve a prison sentence for failure to pay compensation to the complainant. The compensation awarded is recoverable as a civil debt. The trial magistrate thereby erred in sentencing the appellant to serve prison sentences for failure to pay the amount of compensation awarded. Further that, the compensation contemplated by Section 175 (2) is that which the court ***“considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.”*** In Counts 2 and 5 the amount of compensation ordered was barely sufficient to compensate the complainant in a claim for damages in respect to the amount of money stolen. In my view the sentences imposed by the trial court were not lawful. I thereby set aside the sentences and substitute them as follows:-

Count 1 - Appellant is fined Ksh. 100,000/= in default to serve one

year imprisonment.

Count 2 - Appellant is fined Ksh. 60,000/= in default to serve one

year imprisonment.

Count 3 - Appellant is fined Ksh. 10,000/= in default to serve three

months imprisonment.

Count 4 - Appellant is fined Ksh. 5,000/= in default to serve three

months imprisonment.

Count 5 - Appellant is fined Ksh. 60,000/= in default to serve one

year imprisonment.

Count 6 - Appellant is fined Ksh. 10,000/= in default to serve three

months imprisonment.

If the fine is not paid sentence to run consecutively.

Delivered, dated and signed in open court at Kakamega this 17th day of December, 2019.

J. NJAGI

JUDGE

In the presence of:

...Miss Omondi..... for State

.....Appellant.....

Court Assistant ...Polycap.....

14 days right of appeal.