



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 68 OF 2015

MARY WANGECHI NDORIA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal against conviction and sentence in Nyeri CMCRC. No. 864 of 2012 delivered on 26/08/2015 by Hon. J.ARINGO RM)

JUDGMENT

FACTS

1. The appellant, **Mary Wangechi Ndoria** and her husband who is now deceased, were charged with two counts; On Count I the offence was that of giving false information to a person employed in the public service contrary to **Section 129(a) of the Penal Code**.
2. The particulars of the charge was that on the 18th March, 2011 at the District Officer's office Narumoru in Nyeri County the appellants jointly informed Gache Mwarania Chair-lady Land Control Board Kiini East a person employed in the public service as a District Officer that they were the sole and rightful purchasers of land parcel number **NARUMORU/BLOCK 2/MURIRU/770** from Harun Muhari Wang'odu which information they knew or believed to be false thereby causing the said Gache Mwarania to use her lawful powers to approve the transfer of the said parcel of the land which she ought not to have prepared.
3. *The appellant also faced a second Count of obtaining land registration by false pretence contrary to **Section 320 of the Penal Code**.*
4. *The particulars being that on the 4/04/2011 at the Lands Office, Nyeri they jointly and wilfully procured for themselves a Land Title registration of land parcel number **NARUMORU/BLOCK 2/MURIRU/770** by falsely pretending that they were the sole rightful proprietors of the said parcel of land a fact they knew to be false.*
5. *The prosecution called a total of seven (7) witnesses to prove its case and after the trial the appellants were acquitted on Count I but were each found guilty on Count II; the trial court proceeded to convict them on Count II and the sentence meted out to each one of them was a fine of Kshs.10,000/- in default a term of three (3) months imprisonment;*
6. Being aggrieved by the conviction and sentence, the appellants both filed their Petitions of Appeal; but the 1st appellant (who shall hereinafter be referred to as the **'deceased appellant'**) passed on and his appeal was marked as having been withdrawn; the Grounds of Appeal of the remaining appellant are as summarized hereunder:-
 - (i) The conviction on Count II was erroneous as it was not proved to the desired threshold;
 - (ii) There was no false pretence as the registration was obtained on the strength of the Land Control Board consent granted on 10/03/2011;
 - (iii) The false pretence was not proved to the desired threshold;
 - (iv) All the ingredients of the offence were not proved or established;
 - (v) There were grave contradictions in the evidence of the prosecution;
 - (vi) The learned trial magistrate erred in finding that the registration was by false pretence;
 - (vii) The sentence meted out was manifestly harsh and excessive.

7. At the hearing of the Appeal the appellant was represented by Learned Counsel Mr. Wahome and Mrs. Gicheha was the Prosecuting Counsel for the State; both Counsels made oral submissions; hereunder is a summary of their respective presentations;

APPELLANTS SUBMISSIONS

8. The appellant submitted that;

- (i) The appeal is against conviction and sentence;
- (ii) That if Count I failed there was nothing to support Count II; the agreement is dated 7/02/1986 and the offence in Count II is said to have been committed on the 8/04/2011 which is almost thirty (30) years from the date of signing the agreement;
- (iii) The provisions of Section 6 and 7 of the Land Control Act (now repealed) state that a sale is void for all purposes unless the Land Control Board has given consent; Section 8 of the same Act provides that the application for consent must be made before the expiry of six (6) months from the date of making the agreement; the prosecution witnesses conceded that after thirty (30) years no consent had been obtained; could such transaction be a basis for Count II? which transaction was void;
- (iv) The law is clear at Section 7 that any money paid is recoverable as a debt by the person who paid the money; that **PW1** should recover monies paid to **PW3**; by 2011 such a claim was also statute barred by virtue of Section 4 of the Limitation of Actions Act; controlled transactions are voided by Section 6; Section 7 is without prejudice to Section 22;
- (v) The seller of the land was **PW3** and his evidence was that he went to the Land Control Board together with his wife and that he was not compelled to go there nor was he forced to sign the papers;
- (vi) The evidence of **PW4** who was the chair of the land board stated that on the 10/03/2011 Harun (**PW3**) and his wife appeared before the board to obtain consent to transfer; which consent was issued to the appellant and her late husband; the consent and the application were produced; the application was signed and consent issued and there was nothing to prevent the transfer.
- (vii) The Investigating Officer stated that the Land Control Board gave consent and the Registrar acted on the consent and the land was transferred to the appellant; that there was no false pretence;
- (viii) The trial magistrate addressed these issues and used the words *“this contention has some force”* but proceeded to convict; what was the false pretence?
- (ix) It was alleged that the appellant falsely represented themselves as being the rightful proprietors;
- (x) The Charge on Count II was defective in that it read that on the 4/04/2011 at the Lands Office the appellant wilfully procured a title deed by pretending they were the rightful owners of parcel no. Narumoru/Block 2/Muriri; they only presented a transfer; in the judgment a definition is given of a proprietor; the Charge Sheet refers to them as sole proprietor yet they only presented the consent and a transfer; where is the false pretence?
- (xi) There was no false representation done by the appellants; the appellant did not present herself as a proprietor of the land; no evidence of her doing so; the charge ought to fail like Count I;
- (xii) Case law referred to: **David Nyongesa vs R**- where there are gaps in the prosecution’s case then the appellant ought to be given the benefit of doubt; the evidence does not support the particulars in the Charge Sheet; **Mararo vs R [2016] eKLR**- gives the definition of false pretence and none of these criteria were established against the appellant;
- (xiii) Counsel urged the court to allow the appeal; quash the conviction and set aside the judgment; and refund the fine paid.

RESPONDENTS SUBMISSIONS

9. In response Prosecuting Counsel for the State started by giving an over-view of the prosecution’s case as follows;

- (i) The 1st appellant (now deceased) entered into an agreement with two foreigners for the purchase of the parcel of land the subject matter herein from **PW3**; the foreigners contributed Kshs.30,000/- and the 1st appellants contribution was Kshs.3,000/-; the evidence of **PW1** was that they resided in Germany so the 1st appellant was left to look after the land and he was given the responsibility of processing the title;
- (ii) It was the evidence of **PW1** that in 1993 the deceased appellant produced and availed to her a title which was in the joint names of the deceased appellant, herself and her late husband; when her husband died in 1998 she decided that the land be subdivided so that each of them were to get a separate title deed; she engaged the services of an advocate who later advised her that the appellants had registered the property in their names; that was the genesis of the charge.
- (iii) **PW6** conducted a search and found that the first title presented to **PW1** was non-existent and was therefore a forgery; the search confirmed that a title was issued in the names of the two appellants but the land belonged to others; **PW3** the initial owner testified that the appellants approached him and informed him that they had done away with the *“mzungu”* and told him to sign the documents to enable them transfer the land; he had no reason to doubt them; that is how the appellants were able to present their

documents;

(iv) The journey did not begin at the Land Control Board stage; the false representation of facts by the appellants is the issue of concern; the 2nd appellant rode on the back of the deceased appellant;

(v) The 2nd appellant stated that they had purchased the land for Kshs.100,00/- therefore she was party to the fraud; she knew that they never entered into any agreement with **PW3** to purchase the land in question from him;

(vi) The intention of the deceased appellant can be traced back to when he presented a fake title to **PW1** purporting it to be a genuine title; for over 30 years **PW1** actually believed that they had a title to the land; the appellants ought to have followed the correct procedure;

(vii) The manner in which the appellants procured the registration was under false representation of facts; **PW3** trusted the information relayed by the appellants; Counsel submitted that the registration of the land was through false representation; **PW1** started process of sub-division in 2011 and that is when she discovered what transpired.

(viii) Counsel prayed that the court does not interfere with the lower courts findings; and upholds the conviction and sentence; and dismisses the appeal.

REJOINER

10. Counsel for the appellant reiterated that the transaction was dated 1986 and was void under Section 6 of the Land Control Act and no interest could be conferred; therefore **PW3** was free to deal with it in any way he wanted; the evidence of **PW3** was that he went to the Land Control Board together with his wife and obtained consent; the appellant was then at liberty to register the land in her name and her late husband; there was nothing false in the registration or the procuring of the registration; the consent was not false it was valid; the transfer was valid as it was signed by **PW3**; not in question that payment was done; recourse of **PW1** is set out in Section 7 and that is to recover the money from **PW3**;

11. That the trial court was wrong in finding the 2nd appellant guilty based on a failed transaction in total disregard to Sections 6 and 7 of the Act; Counsel urged the court to allow the appeal in the interest of justice.

ISSUES FOR DETERMINATION

12. After taking into consideration the rival submissions made by both counsels these are the issues framed by this court for determination;

- (i) Whether the Charge Sheet on Count II was defective
- (ii) Whether the prosecution proved its case to the desired threshold;
- (iii) Whether the sentence meted out was manifestly harsh and excessive.

ANALYSIS

13. This court being the first appellate court it is enjoined to consider the entire evidence on record, re-evaluate and re-assess it and arrive at an independent conclusion bearing in mind at all times that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the Charge Sheet on Count II was defective

14. The appellant contends that the charge as framed was defective by the use of the words **“sole rightful proprietors”**;

15. The particulars of the charge state as follows;

“On the 4/04/2011 at the Lands Office, Nyeri she jointly wilfully procured for themselves a Land Title registration of land parcel number NARUMORU/BLOCK 2/MURIRU/770 by falsely pretending that they were the sole rightful proprietors of the said parcel of land a fact they knew to be false.”

16. It is noted that the particulars of the charge refers to the rightful proprietor not registered proprietor; and the offence at hand relates to wilfully procuring for themselves registration of the property by falsely pretending to be the sole rightful proprietors; both appellants were privy to the first agreement made with the **PW1** and her late husband (**‘the mzungu’**) and therefore they cannot purport to have been bona fide purchasers; there was also the evidence of **PW3** on the existence of these other rightful proprietors; **PW3** gave evidence how he was induced by the appellants false pretence which led to the exclusion of the **“mzungu”** in the paper work; hence the use of the words **“wilfully procuring for themselves”** in the particulars;

17. The manner in which the charge was framed and the particulars are found to be concise; the offence for which the appellants are said to have committed is one that is known in law; and it is clear from the evidence adduced by the prosecution that the words **‘sole rightful proprietors’** relates to a status that the appellants purported to have existed **‘ab initio’** that is before registration; further this court finds

nothing undesirable in the particulars that may have prejudiced or embarrassed the appellants; hence no defect is found in the charge;

18. This ground of appeal is found lacking in merit and is disallowed.

Whether the prosecution proved its case to the desired threshold:

19. The appellant was convicted and sentenced under the provisions of Section 320 of the Penal Code which provides;

“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.”

20. There are several issues that arise that the prosecution dealt with in this case; the main one being the false representation of facts made by the deceased appellant and the appellant to **PW3** with the intention of procuring the registration of the property known as parcel number **Narumoro/Block 2/Muriru/770** as its sole rightful proprietor;

21. It is not disputed that the deceased appellant entered into an agreement with **PW1** and her late husband for the purchase of the parcel of land the subject matter herein from **PW3**; **PW1** and her late husband contributed Kshs.30,000/- and the appellant's deceased husbands' contribution was Kshs.3,000/-; the instruments in support of this transaction are well documented and were produced as exhibits at the trial in the lower court; the evidence of **PW1** was that they resided in Germany so the deceased appellant was left to look after the land and was given the responsibility of processing the title;

22. It was the evidence of **PW1** that in 1993 the deceased appellant availed a title acquired in their joint names that is in the names of the deceased appellant, **PW1** and her late husband; this title was produced as '**PEXh.2a**'; after **PW1**'s husband died she decided in 2011 that the property be sub-divided and each of them to get separate title deeds; she engaged the services of an advocate to start the process who later advised her that Title '**PEXh.2a**' given to her by the deceased appellant was non-existent and further informed her that the property was in the appellants names;

23. **PW6** corroborated this evidence of **PW1** and stated that he conducted a search and found that the first title presented to **PW1** was non-existent and was a forgery; the search also confirmed that there was a Title only in the names of the appellants appearing in the records at the Lands Office confirming that they had procured registration of the property solely for themselves;

24. As submitted by Prosecuting Counsel for the State the appellant herein may not have been the main perpetrator of the offence but was implicated by virtue of her riding on the back of the deceased appellant;

25. The genesis of the first pretence can be traced back to when the deceased presented the non-existent Title (**PEXh.2a**) to **PW1** purporting it to be a genuine title; and for over 30 years **PW1** actually believed that they all had a title to the land;

26. The second phase of the pretence was when the appellants approached **PW3** the initial owner; he testified that the deceased appellant was a person known to him because he had sold the land to '**the Mzungu, his wife and Ndoria**' (Ndoria being the deceased appellant); his evidence was that the deceased appellant approached him and informed him that the "**mzungu**" had been dispossessed and told him to sign the documents to enable them transfer the land; **PW3** stated that he trusted the deceased appellant and he had no reason to doubt him having dealt with him previously on the first transaction; this testimony of **PW3** which was not controverted is sufficient proof that the information of the dispossession of the '**mzungu**' emanated from the appellants; that is how the appellants were able to induce him to transfer his whole interest in the subject property to them;

27. The appellants themselves knew this information relayed to **PW3** on the '**mzungus**' dispossession was false because they both knew that **PW1** was still alive and was still a joint owner and was further still fully interested in her and the late husband's share in the property; these facts were always in the appellants knowledge; they even knew that she had re-married **PW2** after the demise of her husband and that she was in constant communication with the appellants with respect to the property;

28. The appellant contends that they entered into a fresh agreement with **PW3** and paid Kshs.100,000/-; this was her defence and though she was under no obligation in law to prove anything all that she needed to do was to have produced these instruments in support of this transaction at the initial trial; this contention did not cast doubt on the prosecution evidence;

29. It is noted from the record that **PW3** did not state anywhere in his evidence that he had sold the property to the appellants he was categorical that the deceased appellant represented to him that they were dispossessed of the '**mzungu**' could not be given a title; it was **PW3**'s evidence that he never entered into a fresh agreement with the appellants nor was there any fresh consideration paid by the appellants; no such instruments of this transaction in support were produced at the trial;

30. Counsel for the appellant made reference in his submissions to the Limitations of Actions Act and the repealed Land Control Act and urged that in the interest of justice this court do allow the appeal; the presupposition is that the law is intended to confer a benefit on a wrongdoer and that the law should work to the detriment of a beneficiary or a third party; this should never be the case;

31. This court opines that the sections of the law cited could only have been available to a '**bona fide purchaser for value**' who had no notice of any other party's claim to the property; from the deceased appellants conduct throughout that is from 1993 to 2011 it is evident that the appellant(s) had knowledge of **PW1**'s interest; they cannot be said to have been '**bona fide**' purchasers for value without notice as they were privy to the first transaction and the non-existent title; from the conduct of the appellants throughout a conclusion can sufficiently be drawn that their intentions were far from being noble; the registration at the Lands Office and the Title deed obtained was the icing on the cake and sufficient proof of the fraudulent procurement of the property to themselves;

32. The evidence of **PW3** dispelled the appellants notion that they were the sole rightful purchasers and there was abundant documentary evidence that proved that the appellant(s) knew that there were others who had an interest in the property and that they were not the '**sole rightful**' owners; they knew that they ought to have duly included the **mzungus** in the whole process of registration;

33. This court is satisfied that the prosecution proved all the key ingredients of the offence in Count II; that the manner the appellant(s) procured the registration was done wilfully and under false representation of facts; that there was a pretence that emanated from the appellant(s); that the appellant(s) had full knowledge of documented and pre-existing facts and knew of the falsity of their representation which led to **PW3** being induced; their wilful intention was to defraud **PW1** of the property which had been jointly purchased from **PW3**; and that they indeed procured for themselves the registration of the property as the sole rightful proprietors;

34. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the sentence meted out was manifestly harsh and excessive.

35. The appellant was sentenced to a fine of Kshs.10,000/ or in default to serve a term of three (3) months imprisonment; which she contends is harsh and excessive;

36. The provisions of Section 320 of the Penal Code provides as follows;

“320. 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.”

37. It is trite law that an appellate court will not interfere with the discretion exercised by the trial court when passing sentence unless it is evident that the trial court acted upon a wrong principle of law or overlooked some material factors;

38. The record shows that the sentence is within the parameters as provided by the law; in the circumstances of this case it cannot be a valid contention that the fine of Kshs.10,000/- and the default term of three (3) months for such a prevalent offence that calls for a deterrent sentence was wrong in principle or manifestly excessive; there are therefore no valid reasons advanced by the appellant that warrants interference with the sentence; the sentence is found to be legal and not to be harsh and excessive;

39. This ground is found to be without merit and is disallowed.

FINDINGS

40. In the light of the forgoing this court makes the following findings;

- (i) The Charge Sheet on Count II is found not to be defective
- (ii) The prosecution proved the key ingredients of the offence to the desired threshold;
- (iii) The sentence imposed is not harsh and excessive; and is found to be legal and is as provided in law.

DETERMINATION

41. For the above reasons the appeal is found lacking in merit and is hereby disallowed.

42. The conviction and sentence are hereby affirmed

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 25th day of January, 2018.

HON.A.MSHILA

JUDGE