



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 67 OF 2013

BERNARD WAMBUA NZUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrates Court at Kibera Cr. Case No. 3495 Of 2008 delivered by Hon. Ochenja, SPM on 11th April, 2013).

JUDGEMENT

Background

The Appellant, **Bernard Wambua**, was charged with another with several counts of forgery (Counts 1 to V) **contrary to Section 349 of the Penal Code**, uttering a false document (Count VIII) **contrary to Section 353 of the Penal Code**, obtaining by false pretenses (Count IX) **contrary to Section 313 of the Penal Code** and attempting to obtain through false pretenses (Count X) **contrary to Section 389 of the Penal Code**.

The particulars of Count I were that on or about the 2nd of July, 2008 at Nairobi within Nairobi Area, jointly forged a title deed grant number LR. 63978 with intent to defraud purporting it to be a genuine and valid document issued by the Registrar of Lands.

The particulars of Count II were that on or about the 2nd of July, 2008 at Nairobi within Nairobi Area, jointly forged a title deed grant number LR. No.63979 with intent to defraud purporting it to be a genuine and valid document issued by the Registrar of Lands.

The particulars of Count III were that on or about the 15th of April, 2008 at Nairobi within Nairobi Area, jointly forged a letter of consent serial number 0774011 reference no. 191008 in respect of LR.No.20518 with intent to defraud purporting it to be a genuine and valid document issued by the Commissioner of Lands.

The particulars of Count IV were that on or about the 15th of April, 2008 at Nairobi within Nairobi Area, jointly forged a letter of consent serial number 0774012 reference no. 191009 in respect of LR. No. 20519 with intent to defraud purporting it to be a genuine and valid document issued by the Commissioner of Lands.

The particulars of Count V were that on or about the 27th of August, 2008, jointly forged a rent clearance certificate number 722301 Serial Number 4789 in respect of LR. No. 20518 and 20519 in the name of Bernard Wambua Nzuki.

On count VIII, the particulars were that on the 27th of August, 2008 at Nairobi in Nairobi Area, jointly knowingly and fraudulently uttered a false document namely a letter of consent No. 0774012 reference no. 191009 purporting it to be a genuine and valid letter issued by the Commissioner of Lands and handed over to Gichuki Karomo.

The particulars of Count X were that on the 22nd of July, 2008 and the 26th of September, 2008 while at Tusker Building in Nairobi within Nairobi Area, jointly obtained Ksh 3,500,00/- by falsely pretending that he would sell Omar Mohamed Abdule a parcel of land bearing grant number LR. 63978 and 63979

The particulars of Count X were that on the diverse dates between 9th of September, 2008 and the 26th of September, 2008 at Tusker Building in Nairobi within Nairobi Area, jointly attempted to obtain from Omar Mohamed Abdule Ksh. 30,450,000/by falsely pretending that he would sell a parcel of land bearing grant number LR. 63978 and 63979 as genuine and valid document for the sale of the said parcel of land.

The Appellant was convicted in respect of all counts and sentenced to serve a total of five years imprisonment; 3 years imprisonment for Counts 1 to V and Count VIII which would run concurrently plus 2 years imprisonment for Counts IX and X which would also run concurrently. The court further ordered that the sentences in Counts IX and X would run consecutive to the sentence in Counts I to V and VIII. Having been dissatisfied with the decision of the trial court, he preferred the instant appeal. His grounds of appeal in summary are that the case was not proved beyond a reasonable doubt, that the evidence was insufficient and not credible, that the case was riddled with inconsistencies and contradictions, that the trial magistrate failed to consider his defence, and that his right under Article 50 (4) of the Constitution was violated.

Submissions

The Appellant submitted that the evidence did not support the charge. He cited that the charges reflected that the offences were committed on diverse dates which fact was contrasted by the evidence on record. He submitted that PW13 never bought the land and obtained a fictitious title. He added that there was no explanation given as to the reason why the case took three years to investigate. The Appellant also contended that PW7 who was meant to show who rightfully owned the land failed to do so as well as who paid the necessary land rates. Additionally, the Appellant was adamant that the documents apparently scrutinized by the Land's Office officials could not be relied upon as the said officials neither appeared in court nor recorded statements with the Police.

The Appellant went on to submit that the case was riddled with inconsistencies and contradictions. He cited the failure of the names of PW3 and PW4 to consistently appear on the exhibits produced by both of them, namely Exhibit 11 (A) and (B) which were the certified copies of both the original titles. He also faulted the failure of PW13 to give the names of the brothers he alleged co-owned the property with him.

The Appellant added that the case was not proved to the required standard because his specimen signature was not collected by either PW14 or PW15 and neither were the alleged signatures shown to him for verification. He asserted that his signatures were collected three years after his arrest which was suspicious. He also submitted that no specimen signatures were collected from the complainants putting into question how it was concluded that they were the rightful owners of the land. He submitted that it was apparent that PW13 and his brothers colluded to change the registration of land in the registry. This is because they failed to show the records and receipts on how they acquired the land in the first instance.

It was the Appellant's submission that his conviction was erroneous in that the charge sheet was amended three years after the commencement of the case with a view to availing additional fabricated witnesses. Furthermore, the court did not comply with Section 214 of the Criminal Procedure Code after the amendment. Consequently, his right to a fair trial under Article 50(4) of the Constitution was violated. Even then, the prosecution failed to avail land transfer forms so as to establish how he was linked to the additional charges. In that regard, he submitted that the prosecution failed to demonstrate that he had any intention to fraudulently obtain or attempt to obtain money falsely. That instead his actions were executed in good faith.

Finally, the Appellant submitted that his defence was not considered. He added that the trial court in convicting him shifted the burden of proof on him. He urged the court to allow the appeal.

The State conceded to the appeal. Learned State Counsel, Miss Sigei submitted that Section 214 of the Criminal Procedure Code was violated when the charge sheet was amended. This was with respect of the failure of the learned trial magistrate to inform the Appellant that after the amendment he had a right to demand that either the case begins afresh or recalls the witnesses who had already testified. It was her submission that in that case a retrial would be ordered. She however was of the view that the same would not serve justice as the Appellant was due to complete his sentence in April, 2018. She urged the court to set him free.

Determination

The first issue the court would wish to address before going into the merits of the case is whether Section 214 of the Criminal Procedure Code was violated, the relevant part being sub section (1). It reads;

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

The charged sheet was amended on 20th May, 2011 and after both accused persons pleaded the court recorded the proceedings as under;

Court- Plea of not guilty entered in respect of the accused persons on all counts. Accused persons asked if they are ready to proceed today in view of the substitution reply

1st accused- I'm ready to proceed today.

Mr. Omolon for 2nd accused- I'm also ready to proceed.”

The law is clear in Section 214 that the accused may demand a recall of witnesses after amendment of a charge sheet. However, it is crystal clear that the Appellant was not notified of his rights on the same. The obligation to so inform an accused of the requirements under this provision squarely lies with the court. At no point did the trial court undertake this obligation, thereby vitiating the entire trial. I therefore declare the trial a mistrial, which defect can only be corrected by way of ordering a retrial.

A retrial cannot however be undertaken before certain factors have been considered as was set out by the Court of Appeal in the case of ***Mwangi vs. Republic [1983] KLR 522*** as follows;

“...several factors have therefore to be considered. These include:

- 1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
- 2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
- 3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
- 4. A retrial should be ordered where the interest of justice so demand.***

Each case should be decided on its own merits.”

In the present case, the evidence on record points towards the guilt of the Appellant. He is the one who acquired the fake consents from the land office that enabled PW1 to place the deposit of Ksh 3,500,000. PW14 also conducted a search in the Lands Office and discovered a name that was contrary to the Appellant's. The Appellant knew very well that the land did not belong to him.

That notwithstanding, a closer introspection into the case would be necessary to determine whether if a retrial is ordered the same would most likely result in a conviction. The main issue to grapple with is whether the offences were proved beyond reasonable doubt. The first offence was forgery which is defined under **Section 345 of the Penal Code** as;

“...the making of a false document with intent to defraud or to deceive.”

The Appellant made the fake title deeds of the two properties while purporting to be the actual owner. He also made fake letters of consent and rent clearance certificates for the same properties. This was confirmed by PW14 and PW15 who confirmed with PW3 who was the Senior Registrar of Titles as well as PW4 who was the Registrar at the Ministry of Lands that the signatures borne on the title deeds and consents were not theirs. They also confirmed with PW7 the Head of Audit at the Ministry of Lands and PW10 who was the Assistant Commissioner of Lands that their signatures on the rent clearance certificates were not theirs either.

PW13 took all these documents to PW9, the document examiner with the specimen handwriting and signatures of the above mentioned witnesses as well as with those of both accused persons. The conclusion was that the signatures on the documents did not match the specimen signatures provided by PW3,4,8 and 10. They were not issued by the Land Office. It is clear then that documents were not original. A search conducted by PW14 showed that the land did not belong to the Appellant.

The second offence was uttering false documents contrary to **Section 353 of the Penal Code** which defines it as;

“Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.”

The false document in question is the rent clearance certificate. It was the evidence of PW6 that he applied to the City Council to get the rates clearance certificate so that he could furnish the same to PW1. He paid a bankers cheque totaling Ksh 731,500/-. The clearance certificate was marked Mfi 14 (A) and (B).

The Appellant asserted that he went to the Ministry of Lands and was issued with a clearance certificate and an invoice of Ksh. 73,050/-. He cleared the outstanding rates and was given a receipt and clearance certificate. On the face of the evidence, both the Appellant and PW6 corroborate the narrative that they went and paid the relevant rates.

The testimony of PW11 who was then a Chief Accountant in charge of the Rates Department declared that in as much as the rates had been cleared, they had not issued a rates clearance certificate for either of the properties. The rates clearance certificate that the Appellant had was therefore not the original one.

The third offence was obtaining by false pretences contrary to **Section 313 of the Penal Code**. It is defined thereunder as;

“Any person who by any false pretences, and with intent to defraud, obtains from any other person anything capable of being stolen, or includes any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.”

Taking into account the report of the document examiner, the Appellant clearly had forgeries that were meant to serve the purpose of the originals; to dupe an unsuspecting buyer. The Appellant got the fake documents with the intention of defrauding PW1 of Ksh 35,000,000/. He already managed to get Ksh 3,500,000 which was a down payment. The documents were created for this purpose only.

The fourth offence was attempting to obtain by false pretenses contrary to **Section 313 as read with Section 389 of the Penal Code**. The *actus reus* herein is represented by the Appellant's failure to fully obtain the bankers cheque drawn in his name amounting to Ksh 30,450,000/-. The Appellant would have been the beneficiary had the payment gone through. I find that the evidence too proved this offence.

The Appellant did raise the issue that his specimen signature and handwriting were not collected before the document examiner could give his report. The Appellant contends that PW14 who was the second investigating officer did not collect his specimen, thereby casting doubt how the document examiner's report reflected that his specimen was collected.

PW14 who took over investigations from PW15 did agree with the Appellant that he never collected his specimen. PW15 did acknowledge that he collected the said specimen from the 2nd accused person at the time. There is no record in the proceedings of the officers acknowledging they received the Appellant's handwriting and signature specimen yet the document examiners report showed their presence. Be that as it may, it is the view of this court that the crucial specimen signatures and hand writings of the officials required to execute the documents were examined, the basis on which the court has upheld the conviction of the Appellant on the charges of forgery.

The other that arose was whether there was proof that PW13 owned the property in question. On conducting the search at the Land's Office, PW15 discovered that the owner of the properties was Mr. Fenci of Tile and Carpet Centre. A search conducted on the 20th of March, 2011 showed that both properties LR. 20518 and LR 20519 belonged to Vinaychandra Bipin Sanghrajaka and Nishut Bipin. This was a true copy of the original certificate of title in respect of the said properties. It is therefore certain that the land was indeed co-owned by PW13. This ground of appeal therefore fails.

Taking full consideration of the evidence adduced in court as well as the conclusions reached by the trial court, it is evident that the Appellant is squarely guilty of all the offences he was accused of. A retrial would thus most likely result in a conviction.

I now consider the second factor, whether any prejudice would be occasioned to the Appellant if a retrial were ordered. The answer is in the affirmative for the reason that he has almost served his sentence. He was sentenced on the 11th of April, 2013. Prior to this, he had been issued with bond on the 25th of November, 2008 which was later revoked when he did not appear in court on the 28th of April, 2010. On the 22nd of September, 2010, the Prosecutor confirmed that the Appellant had been serving a sentence in Criminal Case 681 of 2008 at Kamiti Maximum Prison. He was later produced in court on the 27th of September, 2010. On the 4th of July, 2012, he was released in Criminal Appeal 419 of 2008 at Milimani High Court after Hon. Justice Mbogholi found that his sentence should have been served concurrently. He was released from Kamiti on the 19th of July, 2012. His bond that was previously cancelled was reinstated as he awaited judgment and subsequent sentencing on the 11th of April, 2013 in the instant case. He is due to be released in April 2018. Clearly, a retrial would not serve its purpose.

In the result, this appeal partially succeeds. I uphold the conviction of the Appellant. On sentence, I find that he has served sufficient sentence. I order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nairobi this 27th day of February, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant in person.*
- 2. Miss Akunja for the Respondent.*