



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 27 OF 2017

EDWARD NJIRU NDWIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was dissatisfied by the judgment of Embu Senior Resident Magistrate where he was convicted jointly with a co-accused one Anisa Gichuku M’Njiru of the three counts. Count 1 was of conspiracy to defraud contrary to Section 317 of the Penal Code. Count II and Count III were of obtaining money by false pretenses contrary to Section 315 of the Penal Code. He was sentenced to a fine of KShs.150,000/= in each count and in default three years imprisonment.

2. In the petition of appeal, the appellant lists ten (10) grounds which are hereby condensed into two:-

- (a) That the case was not proved to the standards required in criminal cases (grounds 1-7).
- (b) That the learned magistrate construed a civil action into a criminal case.

3. The prosecution called seven witnesses. Precisely, the evidence was that on 20/09/2013 the complainant PW1 was introduced to the co-accused Anisia Gicuku M’Njiru by his brother.

4. The co-accused needed money to take her child abroad for further studies. On her request, she was advanced KShs.100,000/= by PW1 and gave the title of land L.R. Ngandori/Nguviu/3034 as security. The land was registered in the name of the appellant who was the husband to Anisia the co-accused. PW1 called the appellant on phone who confirmed the agreed need of the soft loan and its terms. The money was to be refunded after two (2) months with an interest of KSh.85,000/=.

5. The co-accused later called PW1 and said that she and her husband were desirous of selling a plot $\frac{1}{4}$ of an acre to PW1 which was duly demarcated out of L.R. Gatari/Weru/ 7707 by PW3. The consideration was agreed at KSh.400,000/=.

6. An agreement was signed by the parties in the office of Njeru Ithiga & Co. Advocates. The advocate testified in this case as a witness. On execution of the agreement KShs.285,000/= was acknowledged which included the amount advanced plus interests. The balance of KShs.115,000/= was payable after obtaining Land Board consent. This step was taken by the parties and further sums of KShs.76,000/= and 11,000/= were paid through the advocate. The total consideration paid was KShs.395,000/=.

7. The appellant and his co-accused later failed to transfer the land to the complainant as agreed. The matter was reported to the police which resulted in the charges in this case.

8. Parties argued this case by way of submissions. The appellant argued that the charge was defective in its submissions.

9. This was not one of the grounds of appeal. It was explained in the submissions that the magistrate confused the 1st accused with the 2nd accused on page 41 of the record. The appellant argued that this translated the magistrate proceeded with the wrong charge which discrepancy is not curable under Section 382 of the Criminal Procedure code.

10. The issues for determination in this appeal are as follows:-

- (1) Whether the charges are defective.
- (2) Whether the learned magistrate erred in his finding that the three offences of which the appellant was convicted had been proved

beyond reasonable doubt.

(3) Whether the magistrate erred in convicting the appellant in the criminal case that was founded on land sale agreement.

11. I have looked at the typed proceedings on pages 41 and 42. The magistrate took the defence of the 2nd accused Anisia Gicuku first and that of the 1st accused followed. From the handwritten proceedings, it is clear that the magistrate had referred to Anisia Gicuku as the 1st accused but later cancelled "1st" and wrote "2nd" and signed against the amendments. The correction in the original proceedings cured the error. In the typed proceedings, Anisia is the 2nd accused which is correct while the 1st accused is the appellant. The order in the typed proceedings show that the defence of the 2nd accused was taken first, followed by that of 1st accused. I find nothing wrong with this order of arrangement.

12. My considered opinion that there is no error requiring correction Under Section 382 of the Criminal Procedure Code. The proceedings both typed and the handwritten are in order for they reflect the defence of the accused person recorded therein. I find no confusion or contraction that would render the proceedings defective.

13. The appellant did not point out any anomaly or defect in the charge sheet. The charge sheet contains the names of the 1st accused as Edward Njiru Ndwiga and that of the 2nd accused as Anisia Gicuku M'Njeru. I find no defect in the charge sheet.

14. The prosecution's evidence as summarized in the foregoing paragraph shows that the complainant was approached by the 2nd accused to lend her a soft loan of Kshs.100,000/= and keep as security the title of Ngandori/Nguviu/3034 registered in her name Anisia Gicuku. As shown by the search certificate dated 28/01/2016. PW1 did not know the co-accused but was introduced to her by PW3 who knew the two accused persons.

15. The soft loan of Kshs.100,000/= refundable in two months with interests was advanced. The co-accused later offered to sell land. PW1 after confirming with the appellant agreed to buy the ¼ acre plot at Kshs.400,000/= out of L.R. Gaturi/Weru/7707 registered in the name of the 1st accused.

16. PW3 the surveyor was engaged to sub-divide the land into ten plots L.R. 9265 – 9275. The total paid was Kshs.395,000/= but the plot was not transferred as agreed.

17. PW1 said he talked to the 1st accused on phone to confirm that he and his co-accused needed the soft loan. On a second occasion, PW1 called a second occasion, PW1 called the 1st accused confirming that he was selling the plot as communicated by his wife, the 2nd accused. On both occasions PW3 the brother of PW1 and who knew the co-accused and the appellant before the incident. The complainant confirmed that the appellant and his wife had agreed to carryout the transactions.

18. The evidence of PW3 was that he was instructed by th appellant to sub-divide L.R. Gaturi/Weru/7707 into 10 ¼ acre plots which he did. The land was registered in the name of the appellant. PW3 further testified that he was aware that one plot was being sold to PW1. He later learnt that the deal did not materialize.

19. PW4 the counsel who drew the agreement testified that the vendor of the pot to be excised from L.R. Gaturu/Weru/7077 was registered in the name of the appellant. He said both parties appeared before him and signed the agreement. Payments in installments were paid through his office leaving a balance of Kshs.39,000/=.

20. PW6 the document examiner in his report testified that the agreement was signed by the appellant and the co-accused. The appellant was the vendor while the co-accused signed in her capacity as a witness of the appellant. The appellant also signed the acknowledgement of Kshs.56,000/= and acknowledged therein that he had already received Kshs.361,000/= by that date. It is therefore not true as claimed by the appellant in his defence that he never signed the agreement or any other document for sale of the land.

21. PW7 testified that the title to the land was released to the co-accused to take to the lands office for execution of transfer. It did not reach its intended destination because the co-accused disappeared with it probably with the intention of denying the investigator the opportunity to peruse it as he proceeded with the investigations.

22. The appellant produced a bank slip that he slip that he transferred Kshs.430,000/= to his wife to pay the debt. The debt was never settled.

23. The agreement entered into by the appellant and the complainant was for sale of land. PW1 conducted a search and confirmed that the land existed and that it was free from encumbrance. The parties then entered into an agreement drawn and executed before a qualified advocate. PW4 testified that he witnessed the parties affix their signatures. Each of the parties has one witness who signed the agreement. The money was paid and acknowledged through the advocate.

24. The document examiner PW6 confirmed the signatures of the appellant and his co-accused on the agreement. The defence of the appellant that he was he was at his place of work on 14/11/2013 the date the agreement was signed was disapproved by the worksheet he produced. It showed that he reported at work in Nairobi at 4.28 p.m. The agreement must have been signed before he traveled to Nairobi. The evidence of PW4 that the parties appeared before him and executed the agreement corroborated that of other witnesses.

25. The appellant was the owner of the land and PW4 being a professional and qualified as an advocate could not have executed the agreement with a fake vendor. It is the duty of an advocate to verify the identity of the parties before he proceeds in drawing an agreement.

26. The defence of the appellant that he did not sign the agreement was rightly rectified by the learned magistrate.

27. The complainant was said to have filed a civil case against the co-accused Anisia Gicuku to recover the money he paid in the failed transaction CMCC No. 119 of 2014. PW1 did not deny this allegation although no documents were produced.

28. I now come to the crux of the matter being whether the appellant was rightly charged in the criminal case. I have already stated that a legally binding agreement was made between the parties. PW1 confirmed that the land existed and the title was free of any encumbrances. At the time the parties proceeded to execute the sale agreement, there was no indication that the appellant had no intention to sell the land to PW1 and later execute the transfer.

29. PW4 who witnessed the execution of the agreement said in his evidence that there was no justification to report the matter to the police. The law provides that any money received in a contract is recoverable from the recipient in a civil action. PW1 did not seek this remedy in court against the appellant. He has a right to recover the sum paid in the process of the failed transaction including all his expenses and legal fees. This remedy is still open to the complainant.

30. I find that it was a misdirection on the part of the magistrate to convict the appellant with the criminal charges. PW1 carried out due diligence on the land and entered into a valid agreement. In this scenario, the charges of conspiracy to defraud and obtaining by false pretences could not stand. The evidence adduced by the prosecution on the existence of the agreement and the payments made was water tight but goes towards proving a civil claim of recovery of money paid.

31. The magistrate relied on the evidence of the failed transaction and of the conduct of the appellant and the co-accused in convicting the appellant. There is no evidence to support conspiracy to defraud or obtaining by false pretences.

32. For these reasons, I reach a conclusion that the criminal charges in this case were unwarranted against the appellant. It was a misdirection in law and fact for the magistrate to convict the appellant of the three counts without proof to the standards required in a criminal case.

33. I find that the convictions were not supported by cogent evidence and as a result were unsafe. I hereby quash the convictions in respect of counts I, II and III against the appellant and set aside the sentences. Any fines paid to the state shall be refunded.

34. The appeal is merited and it is hereby allowed.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF MAY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ngige for Mugambi for appellant

Ms. Mate for respondent

Appellant present