REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 33 OF 2017

[From the original conviction and sentence in Criminal Case No. 1035 of 2014 in the Chief Magistrate's Court at Narok, R. v. Fredrick Lenkononi Nampaso]

FREDRICK LENKANONI NAMPASO……...……...APPELLANT

VERSUS

REPUBLIC ………………………………........…RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 12 months imprisonment in respect of the offence of conspiracy to commit a misdemeanour contrary to section 394 as read with section 36 of the Penal Code (Cap 63) Laws of Kenya. He has also appealed in respect of a sentence of a fine of Ksh.7 Million in default 3 years imprisonment. Additionally, he has appealed against an order to refund Shs.850,000 to the complainant. Finally, he has also appealed against an order to refund a sum of Shs. 7 million to the complainant in default the complainant is at liberty to exercise his rights under section 334 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

2. The state has supported both the conviction and the sentence and the orders of refund.

3. The appellant was convicted on the evidence of the complainant John Geoffrey Bisley (PW1). The evidence of PW1 was that the appellant with another person falsely obtained money from him by purporting to sell him land parcel No. Cismara/Lemek/1447 which was not their land. The defence of the appellant was that he was only a broker to the sale transaction and he was only paid a commission in respect of his brokerage services.

4. The appellant in his amended petition of appeal to this court has raised 8 grounds. In ground 1, he has faulted the trial court for failing to find that he did not sign the sale agreement. In this regard he has stated that the name in the sale agreement is Nampaso Lekishon Id No. [particulars withheld] whereas his name is Fredrick Lenkanoni Nampaso Id No. [particulars withheld]. The evidence of PW1 is that it is the appellant who called him on his mobile phone and informed him that there was a parcel of land at Mara river for sale. Following that phone call, the appellant took PW1 and met one Kamakei Kaaria who introduced himself as the seller of that parcel of land. Thereafter, a sale agreement was executed between Kamakei Kaaria as the seller and PW1 as the buyer with the appellant signing the sale agreement as a witness. The issue that the appellant did not sign the sale agreement and that his name is different and bears a different ID. Serial No. were not put to PW1 when he testified under cross examination. Furthermore, PW1 testified that the appellant was well known to him. In the circumstances, I find that this ground of appeal is an afterthought and is hereby dismissed for lacking in merit.

5. In ground 2, the appellant has faulted the trial court in finding that Shs.300,000 was deposited into

account No. 0119338695500 which was held at Co-operative bank Narok branch on 4/4/2012, because this account was opened on 27/4/2012. The evidence of PW1 in this regard is that they went to the bank and deposited Ksh.300,000 into that account, whose account holders were Kamakei Ole Kaaria, Fredrick Nampaso (the appeallant) and Anthony Ole Nampaso, which was a joint account. According to the deposit slip, the money was deposited on 29/6/2012. The trial court which believed the evidence of the complainant (PW1) and his wife (PW2), did not make a finding to the effect that the money was deposited on 4/4/2012. According to the evidence of Jane Wambura Bisley (PW2) who is the wife of the complainant, they paid a deposit of Shs.300,000/= to the seller Kamakei Ole Kaaria. She further testified that they made the full purchase payment for the whole transaction over a period of 3 months. She was the one making the actual payments through Mpesa and bank deposits into the said bank account. In the circumstances, I find that this ground lacks merit and is hereby dismissed.

6. In ground 3, the appellant has faulted the trial court for failing to call key witnesses to adduce evidence. I find from the evidence of the investigating officer, No. 76828 PC Collins Okoth (PW 3) that a number of witnesses ought to have been called namely, the Land Registrar, the Document Examiner and an officer from the Co-operative bank Narok branch. I further find from the evidence of the investigating officer that he put in evidence many documents as exhibits without calling the makers of those documents as witnesses. I find that it is difficult to say with certainty that there was a failure of justice in the instant appeal in view of the defence evidence. The defence of the appellant was that he was just a broker who only received the commission when the said Karia sold the subject land to the complainant. He went further to deny receiving any money that was withdrawn from that account. It was also his evidence that it was Karia who instructed the complainant to deposit the money into that bank account. However, he admitted being a co-signatory to that account that was held by the said Karia and Anthony Nampaso. He went further to testify that he signed for the withdrawal of money from that account but did not pocket any money that was withdrawn from that account.

7. I have considered the evidence of PW1 and PW2 and that of the appellant and I find that it is common ground that the appellant participated in the negotiations leading into the signing of the agreement for sale which he signed as a witness and to the withdrawals of the money deposited in the subject bank account held at the Co-operative bank Narok branch. In the circumstances, the non- calling of these witnesses did not occasion a failure of justice in view of the appellant’s participation in the critical stages during the perpetration of this fraud. I therefore dismiss this ground of appeal for lacking in merit.

8. In ground 4, the appellant has faulted the trial court for believing the prosecution witnesses. This ground is closely tied up with ground 3. I find that the prosecution witnesses were properly found to be credible and the evidence of the defence corroborated that of the prosecution witnesses. In the circumstances, this ground of appeal lacks merit and is hereby dismissed.

9. In ground 5, the appellant has faulted the trial court in finding that the defence of obtaining money by false pretences was proved. This ground of appeal is similar to ground 6 in which the appellant has faulted the trial court for relying on the fabricated and contradictory prosecution evidence. I find from the evidence that the subject land did not belong to the co-perpetrator Kamakei Kaaria, who introduced himself to the complainant as the owner of the subject land namely Cismara/Lemeki/1447. There is evidence that the subject land was the property of a deceased person by the name Nkolenku Ole Karia. There is also documentary evidence that the subject land was under succession in court. And this is clear from prosecution exhibit 13. There is also the evidence of the complainant that Kamakei Kaaria had been found guilty and convicted of this fraud in a different court. In the circumstances, I find no merit in grounds 5 and 6 which I hereby dismiss for lacking in merit.

10. In ground 7, the appellant has faulted the trial court for basing its judgement on speculative material. I find that the trial court based its judgement on the evidence of the 3 prosecution witnesses (PW1, PW2 and PW3) which was credible. The court also analyzed the ingredients of the offence of conspiracy of obtaining money by false pretences and correctly found that the offence had been proved. In the circumstances, I find the judgement was based on the evidence tendered in the trial court. I further find that it was not based on speculation. That judgement complied with the law as set out in *Oketch Okale and Others v. R. (1965) EA 555,* in which it was held that the trial court must base its judgement on the

evidence tendered in court and on issues canvassed by the parties. In the circumstances I find that this ground of appeal is lacking in merit and is hereby dismissed.

11. In ground 8, the appellant has faulted the trial court in failing to specify whether the sentences were to run concurrently or consecutively. In sentencing the appellant, the court made the following orders:

> *1. The convict shall suffer 12 months imprisonment for the conspiracy.*
>
> *2. For the offence of obtaining money by false pretences noting the colossal sums involved Kshs.7 million - none of which has been refunded, he shall suffer 3 years imprisonment.*
>
> *3. Under section 178 of the Criminal Procedure Code, the court orders that he refunds Kshs. 850,000/= to the complainant as this was directly proceedings out of the withdrawals that he had made. He shall also be ordered, as a jointly liable offender, to compensate the complainant fully.*
>
> *- Ksh.7 million in default the complainant shall be at liberty to exercise section 334 of the Criminal Procedure Code to recovery of the said sum. Right of appeal 14 days.*

12. This mode of sentencing by the trial court is unusual. The offence with which the appellant was convicted was a misdemeanour whose punishment in terms of section 36 of the Penal Code (Cap 63) Laws of Kenya provides for a maximum sentence of 2 years imprisonment or with a fine or with both. The offence of obtaining by false pretences in terms of section 313 carries a maximum sentence of 3 years imprisonment. It is also classified as a misdemeanour. The offence with which the appellant was convicted was conspiracy of obtaining money by false pretences which carries a maximum sentence of 2 years. There was no separate offence committed of obtaining money in the sum of Ksh.7 million with false pretences in respect of which the court ordered the appellant to refund. The court went further and ordered the appellant to refund Shs.850,000/= to the complainant. It also authorized the complainant to levy distress in default of refunding Ksh.7 million. There is no evidence that these monies in the sum of Ksh.7 million and Shs.850,000/= were recovered and had been produced as court exhibits. It is a settled principle of law that a court should not make an order that is not enforceable. In the circumstances, it is difficult for the court to enforce the order in respect of the refund of those monies by way of levying distress in terms of section 334 of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, it is important to point out that there is no evidence that the appellant owned any parcel of land or movable goods that were capable of being attached and sold in execution of the orders made by that court. Orders that are not capable of being enforced such as the instant order have the potential of bringing the court into disrepute. They should not be made

13. Furthermore, it is also a settled principle of law that orders of compensation should only be made in relatively minor injuries that have been sustained by the complainant, according to *Terrah Mukindia v. R (1966) EA 425*. In that case, it was held that an order of compensation should be made where the complainant has suffered minor injuries, but if the injuries were grievous, the complainant should be left to file civil recovery proceedings for damages in a civil court. By analogy, the amount of money lost by the complainant in this fraud was a colossal sum of money running into a sum of Ksh.7 million. In the circumstances, an order for refund ought not to have been made in the circumstances of the case. Section 178 of the Criminal Procedure Code that was relied upon as the basis for ordering compensation was inapplicable in the instant appeal. The provisions of that section are applicable to property that has been recovered and produced in court as an exhibit, which was not the position in this case. And that explains why the restitution order that is made in terms of section 178 (1)(4) is suspended until the time for appeal has elapsed or in a case where an appeal is lodged until the determination of appeal.

14. This is a first appeal court. As a first appeal court according to *Okeno v. R (1972) EA 32*, I am required to scrutinize the evidence upon which the appellant was convicted and sentenced. I have done so.

15. When the judgement was set down for delivery on 28/6/2017, I issued a notice to show cause why the sentence should not be enhanced in terms of section 354(3) of the Criminal Procedure Code (Cap 75)

Laws of Kenya. And for that reason, I ordered the matter to be heard on 29/6/2017 to enable the appellant to respond to that notice.

16. In response to that notice, the appellant submitted that he has young school going children. He also submitted that the land transaction was genuine. He further submitted that the title deed in respect of the land was also genuine. Additionally, he submitted that the complainant had filed a civil suit against Kamakei Kaaria and himself amongst other persons seeking a refund of Shs.8.2 million which suit is pending in the Environment and Land Court in Nakuru.

17. Furthermore, he submitted that he had almost served 2 years of his sentence since he was sentenced to imprisonment on 9/10/2015. He also submitted that he was a breadwinner for his family. Finally, he submitted that he was diabetic. In view of all these factors, he urged the court to be lenient.

18. The state submitted that the sentence should be enhanced in view of the fact that the appellant and his co-accomplices defrauded the complainant of his money in the sum of Sh. 7 million. The state also submitted that the appellant has not refunded any money to the complainant. Furthermore, it also submitted that the court has powers to enhance sentence and in doing so, it has to take into account the conduct of the appellant. In support of her submissions, the state cited a number of authorities in support of enhancement of sentence. Those cases include the following:

> *R. v. Mohammed Ali (2001) eKLR* in which the High Court (Hayanga, J) enhanced a sentence of 2 years imprisonment. She also cited the case of *R. v. Ogwen Koyier (1978) eKLR*, a case in which a sentence was also enhanced in revision.

19. I have considered the submissions and the mitigation of the appellant. I have also considered the submissions of the state in support of enhancing the sentence. After taking into account both submissions and the mitigation of the appellant, I find that the sentence of 12 months imprisonment was manifestly lenient to the extent that it amounts to a miscarriage of justice. This was a well- planned fraud in which the complainant lost Ksh.7 million. Furthermore, the appellant has not compensated the complainant for the lost money. In the circumstances, I hereby set aside the sentence of 12 months imprisonment and the orders of restitution in the sum of Ksh.7 million and an order to refund Sh.850,000/=. In its place I hereby impose a sentence of 2 years imprisonment with a fine of Shs.500,000/= in default 12 months imprisonment.

Judgement delivered in open court this 25th day of July, 2017 in the presence of the appellant and Ms Nyaroita for Respondent.

J. M. Bwonwonga

Judge

25/7/2017