



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1 OF 2013

PIUS WANGULA MUHATIA.....1ST APPELLANT

BILLY ELIAS NYONJE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Introduction

1. The appellants herein Pius Wangula Muhatia and Billy Elias Nyonje were jointly charged with 4 counts, one of conspiracy to defraud and three of forgery before the trial court at Kakamega which found them guilty as charged, convicted them and sentenced them to a fine of Kshs.20,000/=on each of the four counts or in default to serve six months in jail. The sentences were to run consecutively.
2. In count 1 they were charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code. The particulars of this offence were that on diverse dates between 10th day of September, 1996 and 28th October, 1996 at an unknown place in Vihiga County in Vihiga District within Western Province, jointly with others not before court conspired together to defraud one Gladys Uside Vadanga of her piece of land parcel No. North Maragoli/Chavakali/1133 by forging official land board forms.
3. The second count was forgery of official documents contrary to Section 351 of the Penal Code. The particulars on this count were that on the 10th day of September, 1996 at Sabatia area in Vihiga District within Western province jointly with others not before court and with intent to defraud the two appellants forged an official document namely Application for Consent of Land Control Board form purporting to have been signed by Gladys Uside Vadanga.
4. The third was also on forgery of official documents contrary to Section 351 of the Penal Code, the particulars being that on the 4th day of November, 1996 at Sabatia area in Vihiga District within Western province, jointly with others not before court with intent to defraud forged an official document namely Land Transfer Form purporting it to have been signed by Gladys Uside Vadanga.
5. In count iv, the two appellants were charged with forgery of official document contrary to Section 351 of the Penal Code, the particulars thereof being that on the 4th day of November, 1996 at Sabatia area in Vihiga District within Western Province, jointly with others not before court with intent to defraud, forged an official document namely Land Transfer Form purporting [it] to have been signed by Gladys

Uside Vadanga.

6. Count 5 was obtained by false pretences and this count only touched Pius Wangula Muhatia. The particulars of this charge were that on the 4th day of November 1996 at Vihiga District Lands Office, Vihiga District within Western Province with intent to defraud Pius Wangula Muhatia willfully procured for himself a registration of land parcel No. North Maragoli Chavakali/1133 by false pretences.

7. The appellants were dissatisfied and/or aggrieved by the conviction and sentence and filed twelve grounds of appeal as outlined in the petition of appeal dated 2nd day of January, 2013.

8. As this is a first appeal, this court is expected to examine and evaluate the entire evidence afresh before determining whether the findings and conclusions made by the learned trial magistrate can be allowed to stand. Such re-examination and re-evaluation of the evidence by this court is intended to ensure that the trial court's findings are supported by both the law and the evidence on record. In the case of *Koech & another – vs – Republic* [2004] 2KKR 322, THE Court of Appeal held, inter alia that "As this was a first appeal, the High Court was mandated to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent decision on whether or not to uphold the conviction of the appellants. The court has to bear in mind the fact that it did not see the witnesses as they testified and therefore it could not be expected to make any findings as to the demeanour of the witnesses. The court is further mandated to consider the grounds of appeal put forward by the appellant." I entirely agree with the Court of Appeal.

The Submissions

9. The appeal was canvassed both orally and by way of written submissions. During the highlighting of the written submissions, Mr. Akwala Advocate, on behalf of the appellants submitted that the prosecution had miserably failed to prove the charge facing the appellants to the required standard.

10. Regarding the 4 counts of conspiracy to defraud, counsel submitted that the charges were all vague and did not specifically state which forms had been forged by the appellants and if any forgery had taken place, which the appellants denied, the manner in which the alleged forgery had taken place. It was counsel's contention that the evidence placed before the trial court by the prosecution was of no value.

11. With regard to the second and third counts, counsel submitted that there was no evidence to support the allegation that the appellants had committed the alleged forgeries. In this regard, counsel submitted that no single member of the Sabatia Land Control Board was called to testify to that fact. Counsel, being convinced that there was no evidence in support of the charge urged this court to make a finding of not guilty on both counts II and III of the charge sheet.

12. In Count IV the appellants were charged with forging Land Transfer form in respect of L.P North Maragoli/Chavakali/1123. Counsel submitted that Count IV was also not proved to the required standard. Counsel's contention was based on the premise signed the land transfer form should have been called as a witness to verify the execution of the land transfer form or in the alternative, the said advocate should have been charged with collusion. Counsel also contended that the prosecution should have called an officer from the Lands Office to give evidence in respect of Count I and that one Mary Mmbone who is alleged to have executed some of the forms should have been charged alongside the appellants, or been called as a witness.

13. Counsel also submitted that the learned trial Magistrate shifted the burden of proof when it faulted the appellants for not calling Mary Mmbone as a witness. I should hasten to state here that the burden of proof in Criminal cases is always on the prosecution and never shifts to the accused person. Finally, counsel submitted that the document examiner's evidence touching on the alleged specimen signature of the first appellant did not like the first appellant to the alleged offence.

14. Counsel urged the court to allow the appeal against both appellants quash the conviction and set aside the sentence.

15. The appeal was opposed on grounds that if there were any defects in the charge sheet, such defects were curable under the provisions of Section 382 of the Criminal Procedure Code which provisions are to the effect that “ No finding sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge proclamation ,order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.....” Counsel submitted that in the instant case, there was no failure of justice and prejudice to the appellants.

16. Concerning counts II and III Prosecution counsel Mr. Ngetich submitted that all the prosecution witnesses gave evidence which clearly proved the offence of forgery. Counsel contended that it is not for the appellants to say who or who should not have been called as a witness by the prosecution. He submitted that the evidence adduced by those who were called to testify sufficiently proved the offence of forgery.

17. With regard to counts II, III and IV, counsel submitted that the appellants were properly charged with others not before the court and that in the circumstances, the failure on the part of the prosecution to avail those others was not fatal to the prosecution case. Counsel also submitted that the appellant’s contention that a nolle Prosequi to be or had been entered in the matter was not proved as no details of such nolle were availed in court, nor was the issue of the nolle raised during the trial.

18. Finally and on the issue of sentence, prosecution counsel submitted that though the issue of sentencing was one of discretion on the part of the trial court the sentences imposed upon the appellants by the trial court were extremely lenient considering the fact that a conviction for forgery calls for a term of 7 years imprisonment as compared to the 6 months imposed by the trial court. Counsel urged the court to dismiss the appeal and to enhance the sentence from 6 months to 7 years imprisonment.

The Prosecution Case

19. The prosecution called a total of seven (7) witnesses. PW1 Gladys Uside Vadanga (Gladys) testified, that she sold land to the 1st appellant for Kshs.75,000/= which was paid in two instalments. Her original title was No. 162 which was later divided into two namely 1012 which she retained and 1011 which she sold to the 1st appellant. There was an agreement to this first transaction which was witnessed. She had no issue with this first transaction.

20. Gladys stated that in the process of this first transaction, she had given the 2nd appellant her title deed which was not returned to her. She testified that she had also given a portion of her land to PW3, David Ogalla Kenyatta (David) who was to educate her son. This land was a portion behind the one the first appellant purchased. When David started develop[ing his portion of the land he was stopped by the 1st appellant who had obtained an injunction.

21. This prompted Gladys to enquire from the Kakamega law Courts where she found out that the 1st appellant had obtained the injunction after Changing Gladys’ portion of land from 162 to 1133. This revelation was a shocker to her as she had not sold that portion of land to any other person. She reported the matter to the police and the CID took over investigations. The investigations showed that the signatures on the document alleged to have sold plot 1133 were not hers.

22. According to Gladys, the first sale was also witnessed by PW2, George Kenyatta Ogalla (George) who later on heard that plot No. 1133 had been sold to the 2nd appellant stated that he was not a party to this second transaction. George confirmed having witnessed the first transaction. Jackline Shikutwa (Jackline) a secretary to the 2nd appellant confirmed having prepared transfer documents in respect to land parcel No. N/Maragoli/Chavakali/1133 as instructed by the 2nd appellant.

23. PW5 was Samuel Nyareso Mugomi (Samwel). He stated that he was approached by police who inquired about land Parcel No. N/Maragoli/Chavakalu/1133. He testified that the said parcel had not been

deliberated upon by the Land Control Board Sabatia as per the minutes of 14.11.96 and that the transfer forms “PEX3” and application for consent from LCB “PEX 6” dated 10.9.96 “PEX7 letter dated 19.9.1996 had not been deliberated upon. During investigations PW6 fCorporal Nicholas Mayaka found that land parcel No. 1133 was fraudulently registered in the 1st appellant’s name after an alleged subdivision of land parcel No. 1006. He also said he forwarded all the questioned documents, handwriting and signatures of the complainant and the 2nd appellant to the document examiner and thereafter preferred the charges against the appellants.

24. The forensic document examiner was Atipus Nyanjwa PW7. He produced his report dated 26.3.2002 PEX7 (a) and (b). At the close of the prosecution case the trial court put the two appellants on their defence.

Defence Case

25. In his unsworn evidence the first appellant claimed to have purchased two plots from the complainant the same being Nos 1007 and 1133 through the wife. DW2 in his sworn statement confirmed having met the complainant in his office together with the 1st appellant’s wife. The 2nd appellant confirmed that he subdivided the complainant’s land. The first sale was with the 1st appellant’s title which was North Maragoli/Chavakali/1007. He claimed that the complainant instructed him again to further subdivide her portion of land being North Maragoli/Chavakali/1006 but found that the said land had already been subdivided into five portions. He claimed that Land Parcel North Maragoli/Chavakali/1133 was purchased by the 1st appellant’s wife and that he is the one who secured her a title deed. In his testimony he claimed that at some point the complainant would sign her documents and/or use her thumb print. He denied forging the D.O’s signature and the minutes of the Land Control Board.

Determination

26. The critical issues for this court’s consideration are as follows;

- (a) Whether the charge on count I was vague for failure to indicate the forms that had been forged.
- (b) Whether there was evidence to support counts II and III
- (c) Whether the trial court shifted the burden of proof to the appellants.
- (d) Whether the offence of obtaining by false pretences Contrary to Section 320 of the Penal Code were proved beyond reasonable doubt.

27. A look at the charge sheet at count I shows that the same clearly states that the conspiracy was aimed at defrauding the complainant of her piece of land, being North Maragoli/Chavakali/1133 by forging Official Land Board forms. The charge was very clear. It stated the plot number and indicated therein that the documents forged were land Control Board forms. The appellants were introduced to various forms during the trial which included the application of consent (exhibit P6) the letter of consent (Exhibit P7) and the land Transfer form (Exhibit P3). From the evidence on record there was a nexus between the 1st appellant, his wife and the 2nd appellant in the transactions leading to the complainant’s land being transferred without her knowledge. After making a clean transfer in the first transaction, Gladys surrendered her title for subdivision, but the said title was never returned to her, which means that the two appellants never intended to return her title deed to her. Her land was nevertheless subdivided by the surveyor who is the 2nd appellant herein. In his evidence the 2nd appellant claimed that he had received instructions from the complainant to further subdivide her parcel of land again. I find this not to be true because the complainant who is semi-literate had already given a portion of the said land to David who in turn would educate her son because she was not financially stable. I do not therefore believe that she could not have gone back on her promise to David as she appeared desperate to see her son taken to school. David would pay fees for her son as he used the land.

28. The fact that the 2nd appellant did not return the title deed to the complainant after the first transaction speaks volumes. Questions abound as to the reasons why the 2nd appellant instructed Jackline to prepare transfer forms for land parcel No. 1133. According to the documents, the land was sold to the 1st appellant and not to his wife Mmbone as the appellants would like this court to believe. The title deed is in the name of the 1st appellant and not his wife. It is my considered view that the 1st and 2nd appellants' united motive was very clear and that was to defraud Gladys of her land parcel. The 2nd appellant claimed that he retained title deeds belonging to the complainant because she owed him money. There was no evidence of such debt and accordingly I reject this theory by the 2nd appellant, the reason being that he was the one who would prepare documents for sale and even go all the way to prepare sale agreements. This court can only infer that the 2nd appellant is the one who received money on behalf of the complainant, some of which he used to subdivide the complainant's parcel of land. The complainant testified and demonstrated that she did not know that her land had been sub-divided again after she completed the first transaction with the 1st appellant. It came as a shocker to her. Had it not been for the 1st appellant moving the court for orders of injunction she may not have known of the fraudulent transfer of her portion of the land.

29. Upon careful perusal of the record, I am satisfied that the trial court was clear in its judgment that there was no shadow of doubt that the complainant was the 1st registered owner of the land parcel No. 161 which was sub-divided to create land parcel 1133. The trial court was also right in holding that the 2nd appellant fraudulently acquired land parcel 1133 going by the contents of the green card which was produced as Exhibit 1-12. It is the appellants who knew that the complainant's title deed had not been returned to her and so they could manipulate it as they wished.

30. I therefore find that the appellants were not only dishonest, but were also not transparent in the activities they undertook concerning the complainant's dealing with them. They took advantage of the complainant who is a widow but unfortunately their acts were discovered and thwarted when the 1st appellant injuncted David. I find that the trial court properly exercised its mind and found the appellants guilty of all the offences.

31. Regarding the evidence, I am satisfied that the evidence in this case was overwhelming. There was no need for the prosecution to have called any other person because the conspiracy was committed by the 1st and 2nd appellants with other persons not before the court. From the evidence on record, They never involved the lands registry nor did they involve the land control board. As properly stated by Samuel, the documents that the two appellants used to transfer the land were forged and sneaked into the lands records. These records remained underground until forensic investigations were done. It is therefore my considered view that the evidence which proved that the signature of the complainant was forged as shown in the report by PW7 the handwriting experts PEX7 (a) and (b) was good and convincing evidence.

32. I also add here that the prosecution proved its case beyond reasonable doubt. The trial court did not shift the burden of proof to the defence. The appellants were found to have a case to answer and when pit on their defence, they opted to give their defences which did not shake the prosecution case against them. The 2nd appellant admitted to have prepared the documents of transfer but claimed that he was under instructions from Gladys, an allegation that was vehemently rejected by Gladys. I find no reason to doubt the testimony given by Gladys as well as the testimony by Samuel, and accordingly reject the 2nd appellant's defence.

33. Lastly I find that the offence of obtaining registration of land by false pretence contrary to Section 320 of the Penal code was proved to the required standards. There is the title deed prepared by the 2nd appellant which is in the names of the 1st appellant in respect of land which Gladys maintained that she never sold. Samuel's evidence also shows that land parcel N/Maragoli/Chavakali/1133 was not deliberated upon as an agenda item at the meeting of 04.11.1996 as shown in the minutes of 4.11.1996 of Sabatia Land Control Board Minutes 703 LCB 703/96. This evidence was not shaken in any way by the defence.

34. On sentence I do agree with the submissions by the prosecuting counsel but add that since the sentences were to run consecutively and the same having already been served, there is no need to enhance the same as requested by the prosecution counsel. What should be stressed here however is that the trial court should in future confirm the correct sentences to impose for the various offences.

Conclusion

35. For the above reasons the appeals are found to be without merit and the same be and are hereby dismissed. Right of appeal within 14 days.

Orders accordingly.

Judgment delivered read and signed in open court at Kakamega this 25th day of July, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Munyendo (present).....For Appellants

Miss Tarus.....For state

Polycap.....Court Assistant