



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 10 OF 2017

ERICK KIBET KILEL.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No. 699 of 2015 PM's Court Bomet – Hon Kiage – RM)

JUDGMENT

The appellant was convicted and sentenced to a fine of kshs.150,000/= in default 2 years imprisonment in respect of the 1st count.

On the second count he was sentenced to a fine of Kshs.150,000/- in default 2 years imprisonment for the offence of making a document without authority and obtaining money by false pretences.

The particulars in respect of the 1st count are that on the 11th day of February 2009 at Bomet Township within Bomet County, jointly with others not before the court and with intent to defraud, without lawful authority or excuse made a certain document namely, a land sale agreement for land registered as residential plot number 47 Bomet Town measuring 0.0579 acres, purporting it to be a genuine and valid document duly signed by Gabriel Korir (Deceased) and Jon K. Sigei.

The particulars on the 2nd count are that on the 14th day of February 2009 at Bomet Township within Bomet County, jointly with others not before the court, with intent to defraud obtained Kshs.420,000/= from Patrick Kipkoech Rotich by falsely pretending that you were in a position to sell him a plot.

The prosecution in this case called five witnesses in support of their case whereas the defence called two.

This being the first appellate court it has a duty to evaluate and consider the evidence on record so as to arrive at a just conclusion but also bearing in mind that it did not have the opportunity to observe the demeanour of the witnesses. Okeno V R 1972 EALR

Brief facts

On the 14th day of February, 2009 the complainant Patrick Kipkoech Rotich (PW4) proceeded to the offices of Koech Advocates & Co. Bomet Town. He was in the company of Erck Kilel (the appellant). The purpose was to enter into a sale agreement for LR No. Residential plot No. 47 Bomet Town. The appellant presented a letter of allotment bearing the names of Gabriel Korir and John Sigei. He further presented an agreement between himself and the two persons named in the letter of allotment. This agreement was dated 11th February 2009. At that stage he agreed to pay the appellant Kshs.220,000/= a part payment purchase price of the plot had been agreed at Kshs.420,000/=. Balance was payable upon proof of sale transaction between the appellant and the two people mentioned in the allotment letter. Balance of Kshs.200,000/= was paid at 14/2/2009. He was shown the plot he was purchasing. He was shown a beacon certificate dated 13th February 2009. Thereafter he fenced the land around the month of March of the same year.

Sometimes in the year 2014 he was approached by one Collins who informed him that the land he had allegedly bought belonged to Gabriel Korir and one John Sigei. He further informed him that his father passed on sometimes in the year 1996. He was shown a death certificate which indicated the date of death as 16th October, 1996. He was also shown a copy of an identification card.

When the complainant met John Sigei the co-owner of the plot he denied having sold the plot. When he noticed that he had been cheated he went and reported the matter to police.

John Kipngeno Sigei testified as PW2 and denied having sold the plot which he co-owned with Gabriel Korir who died in the year 1996 while the sale agreement is dated February 2009. The agreement bore his name and identity card but the signature was not his. He testified

that he did not know the whereabouts of the letter of allotment.

John Sigei admitted having received Kshs.100,000/= from a cousin of the Appellant one Stephen Cheruiyot.

The appellant gave a sworn statement in his defence and stated that in the year 1997 one John Sigei and Esther Tesot approached his mother in his presence and told her that the Municipal Council was demanding rates arrears. It was agreed that they make a visit to the municipal council offices to verify the situation. They confirmed that there were outstanding land rates in the sum of Kshs.40,000/= for the period between the years 1993 to 1997 for LR No. 47. It was agreed that the appellant buys the plot from John Sigei. They went and saw the District Land Surveyor one Mr. Rugut who confirmed that the plot belonged to John Sigei who was a former treasurer Kericho Municipal Council. It was agreed that the appellant pay the land rates in two equal installment of Kshs.20,000/=. This was in the presence of the town clerk. John Sigei gave the appellant the allotment letter and the map of the plot.

He further testified to have sold the plot to the complainant and handed over to him the original allotment letter, the original map and beacon certificate which documents were given to him by John Sigei. On 11/2/2009 he signed a sale agreement with John Sigei while in the offices of Tengekyon Advocates in Litein. It is the contention by the appellant that it was John Sigei who prepared the sale agreement and he is the one who included the name of Gabriel Korir.

The defence called as a witness Phillip Sitonik an engineer working with the county government of Bomet. He testified that he was aware that the appellant was paying sales for plot No. 47 Bomet Town which was registered in the names of Gabriel Korir and John Sigei. He did write a letter dated 27/5/2016 indicating that there were arrears in respect of plot No. 47 in the sum of Kshs.86,011 outstanding from the year 2009. He did concede that as per the demand notice dated 31/5/2016 the rate payer is shown as Gabriel Korir and John Sigei. He further testified that the name of the appellant was not in their records which still bear the names of Gabriel Korir and John Sigei

In the first count the appellant is charged under Section 357 (a) of the penal code which provides "Any person who, with intent to defraud or deceive-

(a) Without lawful authority or excuse makes, signs, or executes for or in the name or in account of another person, whether by procuration or otherwise, any document or electronic record or writing or

(b) Knowingly utters any document or electronic record or writing so made, signed or executed by another person is guilty of a felony and is liable to imprisonment for seven years."

The ingredients of the offence of making a document without authority are

- (1) There must be the intention of defrauding or deceiving.
- (2) The deed or act must be without lawful authority or excuse.
- (3) There must be signing executing for or in the name or on account of another person a document.

In the instant case, the document in question is a sale agreement dated 11th February 2009 which is shown to have been signed by Gabriel Korir and John Sigei who were the original allottees of plot No. 47 Bomet.

The appellant does not deny having presented the purported sale agreement which is dated 11/2/2009 to the complainant as proof of sale of the plot to him by the two allottees. It was as a result of that presentation that the complainant parted with Kshs.200,000/=

The sale agreement bears the names of Gabriel Korir and John Sigei. John Sigei testified in court (PW2) and stated that he never sold the said piece of land to the appellant and he denied having signed the purported sale agreement.

As for Gabriel Korir, the man passed on in the year 1996 while the sale agreement was shown to have been entered into in the year 2009. The appellant did not have any lawful authority from two allottees to make the document.

It's intention was to defraud or deceive.

In the second count the appellant was charged with the offence of obtaining the false pretence contrary to section 313 of the penal code which provides:-

"Any person who by false pretence, and with intent to defraud obtains from any other person, anything capable of being stolen, or induces any other person's to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.

The ingredients of the offence of obtaining by false pretence are:-

- (1) Acting with false pretence and with the intention to defraud.
- (2) Obtaining something capable of being stolen.

In the present case the appellant purported to sale to the complainant LR No. 47 Bomet for the purchase price of Kshs.420,000/=.

It is not in dispute that the appellant obtained the said moneys from the complainant.

The appellant did not have any good title or genuine ownership of LR No. 47 Bomet so as to purport to transfer same to the complainant. He obtained Kshs.420,000/= fraudulently by pretending that he was in a position as a rightful purchaser for the two allottees to transfer ownership to the complainant.

I am satisfied that the prosecution proved their case beyond reasonable doubt.

The conviction and sentence were lawful. Both are upheld the appeal is dismissed.

Judgement delivered dated signed this 29th/11/2017 in the presence of Mr. Barasa learned counsel for the prosecution. Appellant in person present. Court assistant – Rotich.

M. MUYA

JUDGE

29/11/2017