



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.78 OF 2013

ELFAS SHISIA WAMBETSAAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal airing from the decision of E.O. Obaga, SRM in Kakamega CMC.Cr. Case Case No.1597 of 2006 delivered on 27/04/2009)

J U D G M E N T

Introduction

1. The appellant herein, Elphas Shisia Wambetsa was charged together with Richard Khamala with various offences before the Chief Magistrate's Court at Kakamega. In Count 1, they were jointly charged with conspiracy to defraud contrary to Section 317 of the Penal Code. The particulars being that on the 17th day of October 2002 at Lunza sub location in Butere/Mumias district of the Western province, jointly with others not before Court conspired to defraud off Emuhando Catholic Church land parcel Marama/Lunza/486 purporting the said Emuhando Catholic Church had authorized sub division of the said land.
2. In Count II, Richard Khamala was charged with making a false document contrary to Section 347 (a) of the Penal Code, and in Count III, the said Richard Khamala was charged with forgery contrary to Section 345 as read with Section 349 of the Penal Code. Richard Khamala was acquitted of these two counts at the close of the Prosecution case.
3. In Count IV, the appellant was charged with obtaining registration by false pretences contrary to Section 320 of the Penal Code the particulars being that on the 17th day of December 2003 at District Lands Office in Kakamega District of the Western province, with intent to defraud, willfully procured for himself registration of Land parcel No.MARAMA/LUNZA/2782 under the registered Land Act, Chapter 300 Laws of Kenya by falsely pretending that it was genuinely transferred to him by Emuhando Catholic Church.
4. The appellant denied the charges but after a full trial during which the Prosecution called 8 witnesses, the trial Court was satisfied that the Prosecution had proved its case against the appellant on Count IV beyond any reasonable doubt. He was found guilty as charged and convicted accordingly. He was fined kshs.30,000/= or in default to serve 6 months in prison.

The Appeal

5. The appellant being aggrieved by both conviction and sentence brought this appeal on the following 7 grounds:

1. **The trial Magistrate correctly acquitted the appellant on the first 3 counts facing him for lack of evidence but erred in law and by fact in convicting him on the count of obtaining title by false pretence when there was still no evidence in support of that count.**
 2. **The Trial Magistrate contradicted himself when he found that the appellant had not conspired with anybody to defraud or forged any official document and then convicted the appellant for obtaining title by false pretence.**
 3. **The Trial Magistrate erred in law when he failed to make any or any proper finding on the issue of lack of crucial witnesses especially from the land control board to support the prosecution's case.**
 4. **The Trial Magistrate properly acquitted the 1st accused who worked in the land Control Board that handled the transaction but erred when he found the appellant guilty of obtaining title by false pretence using documents from the same land control Board.**
 5. **The Trial magistrate erred when he failed to question on the issue of who was the complainant before him as the proper complainant was the Catholic Church Kakamega Diocese had not made any complaint to the police.**
 6. **The Trial Magistrate chose to disregard the evidence of the surveyor who surveyed the parcel of land in dispute in broad day light and in the presence of all relevant parties.**
 7. **The Trial magistrate's decision as arrived at in a cursory and/or perfunctory manner, was biased and indefensible and occasioned a miscarriage of justice.**
6. The appellant therefore prays that the appeal be allowed conviction quashed and the sentence set aside.

The prosecution Case

7. The Prosecution evidence relevant to Count IV of which the appellant was found guilty and convicted was given by PW5, Paul Olando Odiénya and PW7, Number 32154 Police Constable Reuben Tamba as well as PW8, Philip Kisaka, Land Registrar, Kakamega. PW6, Dickson Makula Omulubi also gave evidence concerning Count IV. PW1, Vande Loalili testified that Emuhando Catholic Church owned land parcel No.Marama/Lunza/486, which parcel of land was fraudulently sub-divided into Marama/Lunza/1282 and Marama/Lunza/2784 with land parcel Marama/Lunza/1282 being registered in the name of the appellant. PW4, Francis Olunga Namasaka an employee of the then Butere/Mumias County Council testified that on 20th April 2001, land parcel No.Marama/Lunza/486 was transferred to Emuhando Catholic Church.
8. Paul Olando Odiénya, PW5 testified that sometime in the year 2003, a mutation form was taken to him by one Billy Nyonje of Olweny & Associates Kakamega office for signature. He signed the form after due consultation with his boss. PW5 also stated that the mutation form was accompanied by requisite consents duly signed by officials of Emuhando Catholic Church. PW6, Dickson Makula Omulubi also confirmed that L.P. No.Marama/Lunza/486 belonged to Emuhando Catholic Church the same having been allocated to the Church way back in the 1960's.
9. Number 32154 Police Constable Reuben Tamba investigated the complaint by Emuhando Catholic Church that the land had been fraudulently subdivided into L.R. Nos Marama/Lunza/1281 and 1282 and after a purported Land Control Board consent given at the meeting of the Board held on 12/06/2003. He further testified that L.R. Marama/Lunza/1282 was transferred to the appellant a year before consent was applied for and given and before actual sub division. PW7 also testified that the advocate who allegedly certified the transfer form Emuhando Catholic Church to the appellant did not exist. It was also PW7's testimony that when he checked with Butere DO's office to ascertain if a Land Control Board meeting had been held to give the consent, he established that no such a meeting had been held. It was after all these investigations that the appellant was arrested and charged.
10. PW8, Philip Kisaka the District Land Registrar, Kakamega told the trial Court that L.R. No.Marama/Lunza/486 measured 1.6Ha and was registered in favour of Emuhando Catholic Church on 20th April 2001. On 17th December 2003 the title was closed on subdivision which created L.R. Nos.Marama/Lunza/1281 and 1282. That on 17th December 2003, Emuhando Catholic Church transferred L.R. No.Marama/Lunza/1282 to the appellant and title was issued on the same day. PW8 produced search certificates in respect of both L.R. Nos. Marama/Lunza/1281

and 1282, together with the Mutation forms in respect of the two parcels as well as consent from Butere Land Control Board to transfer L.R. Marama/Lunza/1282 from Emuhando Catholic Church to the appellant. According to PW8 and also PW7, the transfer was signed by Philip Outa on behalf of Emuhando Catholic Church with the church seal duly affixed to the transfer.

The Defence Case

11. The appellant chose to remain silent when he was called upon to defend himself.

The Submissions and issues

12. The parties filed and exchanged written submissions dated 13th October 2014 and 23rd November 2015 respectively. I have carefully read through the submissions. I have also carefully read through the judgment of the learned Trial Court. From all the above the issues that arise for determination are, whether:

- a. The trial Court shifted the burden of proof to the appellant
- b. The Prosecution proved the case against the appellant beyond reasonable doubt or whether the case against the appellant was based on speculation.

Analysis and Findings

13. With regard to the first issue Counsel for the appellant submitted that the trial Court shifted the burden of proof from the Prosecution to the appellant. In this regard, Counsel for the appellant submitted that the Prosecution had failed to prove what was “fishy” about the transaction that resulted in the transfer of the impugned title to the appellant. I have myself carefully gone through the evidence on record as is required of me and as laid down in the case of **Okeno –vs- Republic [1972] EA 32**. It is my considered view that the allegations that the burden of proof was shifted to the appellant are not true. There is clear evidence on record that all the persons of authority of Emuhando Catholic Church neither gave nor witnessed any consent being given first of all for the sub division of L.R. Marama/Lunza/486 into two portions and or the subsequent transfer of L.R. Marama/Lunza/1282 into the appellant’s name. The appellant has contended that since there is evidence that the seal of Emuhando Catholic Church was appended to the transfer document then all was well. Far from it. There is one person by the name Philip Outa who went underground from the time the illegal transfer of LR Marama/Lunza/1282 was unearthed so that mere presence of a seal does not in itself mean that there was nothing wrong with the process. What I am saying here is that at no time did the trial Magistrate shift the burden of proof to the appellant. The appellant did not in any even give any evidence to rebut the testimonies of the Prosecution witnesses that none of the Church officials of Emuhando Catholic Church including PW1 went to the Land Control Board to seek and/or obtain the requisite consent for sub division and transfer.

14. An issue has been raised by the appellant regarding the mutation forms which are said to have been in order and therefore valid for purpose of transferring L.R Marama/Lunza/1282 to the appellant. PW5, Paul Olando Odienya told the Court that he signed the Mutation form brought to him by Billy Nyonje of the Kakamega office of Olweny & Associates on the pretext that whoever had visited the site before preparing the Mutation form had died. Though PW5 agreed that there were no anomalies in the Mutation form, I find that upon reconsideration of the evidence there was some underlying anomaly in having the Mutation form signed by someone who had not visited the scene. Secondly and as stated by PW5, it is a requirement that the proprietor of the land be present during survey. None of the Prosecution witnesses said they were present during the survey of L.R. Marama/Lunza/486 before the same was subdivided into Marama/Lunza/1281 and 1282. In my view the resulting transfer was shrouded in some cloudy environment created by the appellant to facilitate the transfer of L.R. Marama/Lunza/1282 into the appellant’s name. That registration was done by way of false pretence when the appellant pretended that the transfer had been genuinely done by the leadership of Emuhando Catholic Church. In any event, the evidence shows that the transfer was done before the Land Control Board consent was obtained.

15. What does the above evidence lead to? I think that the above evidence clearly shows that the

Prosecution proved its case against the appellant beyond any reasonable doubt. The ingredients of the offence under Section 320 of the Penal Code are as follows:-

- Intent to defraud
- Willful procurement
- False pretence

16. In the instant case, the appellant intended to defraud Emuhando Catholic Church of its parcel of land being L.R. No.Marama/Lunza/486 by keeping the whole process of transfer secret to himself, Secondly he willfully processed the registration in his favour by falsely pretending that the transfer of the land in question had been done properly in accordance with the law and with the approval of Emuhando Catholic Church. In the circumstances, I am satisfied that the trial Court was right in reaching the conclusion that the Prosecution had proved its case against the appellant beyond any reasonable doubt. There is evidence on record showing that the person who signed the Mutation form did so without even visiting the site, a clear indication that there was something going on concerning the land in question which the Church was not meant to know. If PW5 or anybody else from the firm of Olweny & Associates had visited L.R. No.Marama/Lunza/486 for purposes of preparing the Mutation form, Emuhando Catholic Church would have questioned what the person was doing on the land.

17. There is also evidence on record showing that the “advocate” who attested that Emuhando Catholic Church had appeared before him to sign the documents did not in fact exist. Thus the Prosecution proved that by undertaking all these secret processes, using persons who did not exist the appellant intended to defraud Emuhando Catholic Church of its land. Further I am satisfied that the appellant willfully procured the registration of LR. Marama/Lunza/1282 by falsely pretending that Emuhando Catholic Church had applied for and obtained Land Control Board consent for subdivision and transfer and also that Emuhando Catholic Church had appeared before Embalambala “advocate” of Vihiga to sign the transfer.

Conclusion

18. The above being the case, I find the appellant’s appeal to be wanting in merit. The same is hereby dismissed on both conviction and sentence. I confirm the judgment of the learned trial Magistrate as pronounced on 27th April 2009. Right of Appeal within 14 days from today.

19. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 25th day of February 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Munyendo (present) for appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat - Court Assistant