



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 41 OF 2009

JOSEPH WAHOME MUTURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Karatina Senior Resident Magistrates' Court Criminal Case No. 553 of 2006 (Hon. L. Mbugua) delivered on 12th February, 2009)

JUDGMENT

The appellant was initially charged with four separate counts of offences related to fraud; in the first of these counts, he was charged with a co-accused with the offence of conspiracy to commit a felony contrary to **section 393** of the **Penal Code**. According to the particulars of the offence, on the 13th day of June 2006 at Karatina Township in Nyeri District within Central Province, the appellant and the co-accused together with others not before court conspired to commit a felony, namely obtaining money by false pretences amounting to Kshs 1.2 million.

In the second count, the appellant was charged the offence of making a document without authority contrary to **section 357 (a)** of the **Penal Code**; in this count, it was alleged that on the 13th day of June 2006 at Karatina in Nyeri District within Central Province, with intent to deceive and defraud and without lawful authority or excuse, the appellant made a certain document namely a National Identity Card No. 87352621 purporting to be an identity card issued by the Registrar of Persons.

According to the third count, the appellant faced the offence of making a document without authority contrary to **section 357 (a)** of the Penal Code; it was alleged in the particulars that on the 13th day of June 2006 at Karatina township in Nyeri District within central province, with intent to defraud, the appellant made a certain document namely, land title deed No. INOI/KARIKO/150 purporting to be a title issued by the Commissioner of Lands.

The final of count of the original counts against the appellant was that of uttering a false document contrary to **section 353** of the Penal Code; here, the particulars were that on the 13th day of June 2006 at Karatina Township in Nyeri District within Central Province, the appellant knowingly and fraudulently uttered a certain Title Deed INOI/KARIKO /150 and a National ID/Card No. 87352621 to Gacheche Wa Miano and Company Advocates purporting them to be the title and identity card of Stephen Chania Muriu.

At some stage during the trial the charge sheet was amended to include additional 5th and 6th counts against the appellant; these were respectively uttering a false document contrary to section 353 of the Penal Code and failing to register contrary to section 14(1) (a) of the Registration of Persons Act, Cap.

107. According to the particulars in the 5th count, on the 13th day of June, 2006, at Karatina Township in Nyeri District within Central Province, the appellant knowingly and fraudulently uttered a forged national identity card No. 87352621 to Gacheche Wa Miano advocates purporting it to be an identification card issued by the Registrar of Persons. In the sixth count, it was alleged that on the same date at Karatina Township in Nyeri District within Central Province having attained the age of 18 years the appellant was found not to have registered as a Kenyan citizen.

The learned magistrate convicted the appellant and his co-accused on the 1st count and sentenced them to 7 years imprisonment. The appellant was also convicted of the rest of the counts and sentenced to serve one year in prison for each of the counts except the 5th count for which he was sentenced to three months imprisonment; the sentences were to run concurrently. No sentence was meted out on the sixth count.

Being dissatisfied with the magistrates' court decision, the appellant appealed to this court on the following grounds:-

1. The learned trial magistrate erred in law and in fact in convicting the appellant on a defective charge that did not fully disclose the offence in count 1 as envisaged by Section 393 of the Penal Code.
2. The learned trial magistrate erred in law and in fact in convicting on the 1st account based on evidence that did not at all support the charge in that count.
3. The learned trial magistrate erred in law and in fact convicting the appellant on contradictory evidence.
4. The learned trial magistrate erred in law and in fact in reaching a conclusion that was not supported by the evidence.
5. The learned trial magistrate erred in law and in fact in convicting the appellant on counts 2,3,4,5 & 6 without any direct evidence on the same.
6. The learned trial magistrate erred in law and in fact in convicting the accused person on evidence that was not to the required standard of beyond reasonable doubt on all counts.
7. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellant.
8. The learned trial magistrate erred in law and in fact in totally ignoring the defence tendered by the appellant.
9. The learned trial magistrate erred in law and in fact in failing to afford the appellant a chance or right of appeal after the ruling delivered on 12th February 2009 just before the judgment was read.

At the hearing of the appeal the counsel for the state conceded that the appeal was merited and that it ought to be allowed; however, this being the first appellate court I have the legal obligation to assess the evidence afresh and determine whether the learned magistrate came to the correct factual conclusions. I am of course aware that it was the trial court that had the advantage of seeing and hearing the witness and thus I have to make a provision for my deficiency in that regard.

As far as the evidence went, **Michael Gitonga Njeru (PW1)** was a commission agent who was approached by the appellant's co-accused, Peter Maina Wanjohi, on 11th February, 2006 and told him that he had land to dispose of at Rukanga in Mwea. They eventually sold the land after which Njeru (PW1) asked Wanjohi to look for another parcel of land for his customer in the United States. Wanjohi found the land but told Maina that its owner, whom he identified as Stephen, was away in Nairobi and therefore if there were any documents for his execution, he, Wanjohi would take them to him for that purpose.

Accordingly, Maina gave him what I understand to have been a standard contract form for Stephen's signature; in that contract Stephen is alleged to have agreed to dispose of his land at Kshs 1.2 Million out of which Wanjohi was to get Kshs 80,000/= as his commission. Wanjohi returned the contract to Njeru, allegedly signed by Stephen.

Apart from the signed contract, Wanjohi also brought Stephen's national identity card, number 87392621 which bore the name Stephen Chania Muriu. When Njeru conducted a search on this parcel of land, he confirmed that indeed the land was registered in the name of the purported seller; being satisfied of the ownership of the land, Njeru asked Wanjohi and the land's owner to proceed to the office of Gacheche Wa Miano advocates at Karatina where he would make the payments and exchange ownership documents; he also asked them to come along with the title deed.

As agreed, Njeru found Wanjohi and the 'owner' of the land in the advocate's office; this 'owner' gave him the title deed for parcel No. **INOI/KARIKO/150** bearing the name Stephen Chania Muriu of ID. **No. 87352621**. Njeru was to make a down payment of Kshs 500,000/= on the material day which was the 13th June, 2006; however, just as he was reading the agreement, the police came in and arrested Wanjohi and the 'owner' of the land. Apparently, Njeru had alerted the police to be on the lookout because he suspected Wanjohi and the purported owner to be fraudsters. His suspicions were aroused when they previously failed to avail the title deed despite his persistent requests for it and only turned up with it at the advocate's office.

It turned out that the appellant was passing off as the owner of the land and that though he had in his possession an identification card of one Stephen Chania Muriu, he was not this particular person.

The advocate's secretary, **Beatrice Kaku (PW2)** testified that indeed she prepared a sale agreement for the sale of land; she prepared the agreement at the instructions of three people who came to her office on 13th June, 2006 at about 9.00 am. The buyer in that agreement was indicated to be Michael Njeru (PW1) while the seller was Stephen Chania Maina. The purchase price was Kshs 1.2 Million and the subject was land parcel **No. INOI/KARIKO/150**. Kaku identified the identification card and the title deed that the three men came with. Apparently the advocate was away but he directed the secretary to type the agreement for them; she also received instructions from both the buyer and the seller.

Of the three people who came to their office, Kaku identified the appellant as the seller of the land while Njeru (PW1) was the buyer.

Zechariah Chania Kiragu (PW3) testified that he was the son of Stephen Chania Muriu; he produced a death certificate certifying that his father had died on 14th July, 2005. He also produced a surrender form showing that upon the demise of his father he had surrendered his national identification card to the Registrar, apparently, of births and deaths. **Land Parcel No. INOI/KARIKO/150** belonged to his deceased father and he produced the title deed in proof of this fact. He confirmed that the title had always been in his custody and at no time had it been released to any other person. Kiragu denied that his father's land was on sale. When he was shown the identification card that was retrieved from the appellant, he confirmed that all the particulars in it were his father's except for the photograph and the signature.

Police Constable Njuguna Mbugua (PW4) testified that Njeru (PW1) made a report to the police at Karatina on 13th June, 2006 that there two people who were selling him land but that he was suspicious that the title documents they had were not genuine; he also reported that those would-be sellers were waiting for him at the offices of Gacheche Wa Miano, advocate, for purposes of effecting the transaction. The officer, accompanied by his colleague, Inspector Ndubai and the complainant proceeded to the advocate's offices but advised the complainant to proceed ahead of them and only alert the officers if he found the suspects there. The complainant did as instructed and called the police when he found the appellant and his co-accused in the offices of the advocate; they found the appellant seated next to the secretary while his co-accused had walked out to photocopy the title deed and the identification card. The officer went out of the office and noticed someone carrying a title deed; he tracked him to the advocate's office. He turned out to be the appellant's co-accused.

The police recovered from the appellant an unsigned agreement dated 20th February, 2008, an identification card bearing the names of Stephen Chania Muriu and a certificate of official search for land parcel No. **INOI/KARIKO/150** dated 30th March, 2006; they recovered the identification card and the title deed from his co-accused. The secretary (PW2) showed them the agreement she had typed for the parties' execution. The appellant and his co-accused were the arrested.

In their investigations, the police took the suspects' fingerprints and forwarded them to the principal registrar to verify their identity; they got a response to the effect that they could not trace the appellant's fingerprints but as far as his co-accused was concerned, his identity was established to be that which he had given the police.

The officer also established that the owner of the subject land had died and that the certificate of title in respect of this particular land had been issued in 1972; he highlighted the differences in the title which he recovered from the appellant's co-accused and the title he recovered from the deceased's son; according to him, the two titles were different in texture, the seals were different and that one title was old and the other one was new.

An officer from the Land Registrar's office at Kirinyaga, Cyrus M. Karonji, testified that the seal on the impugned title did not emanate from his office and that the signature on it was also different from that on the green card.

The appellant gave unsworn testimony in which he denied the charges against him; in particular, he testified that he was in the advocate's office at the material time only for the purpose of collecting his money from his debtor whom he identified as his co-accused. He denied having been found in possession of any document and that the documents in issue were found in possession of another person who was arrested and later released by the police.

As noted counsel for the state conceded the appeal on the grounds that first, the offence of obtaining by false pretences is not a felony; it is a misdemeanour and is so defined under section 313 of the Penal Code; second, the second count was improperly framed since the evidence showed the offence of uttering and not making the document in issue; third, the third count was defective in the sense that the words lawful excuse were omitted from the charge; and finally, there was a duplicity of charges, of uttering the title deed and the identification card.

The appellant's counsel submitted in the same breath but added that the documents upon which the charges were pressed against the appellant were never subjected to forensic examination. Counsel relied on the decision of **Kamunya versus Republic (2009) 1 EA** where it was held that any criminal charge against a person must state explicitly the nature of the offence charged and that it must refer to the specific law that creates the offence. Counsel also cited the decision in **Achoki versus Republic (2002) EA 288** where the Court of Appeal held that failure to use the words "unlawful and without" consent in a charge of rape was fatal to a conviction under the relevant section.

I agree with the counsel for the state that the charge of conspiracy in the first count was inconsistent with the particulars. While the appellant together with his co-accused were charged with a conspiracy to commit a felony, the purported felony, which was obtaining money by false pretences, is not known as such under section 313 of the Penal Code; this section defines this offence as a misdemeanour. It states:-

313. Obtaining by false pretences

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

The learned magistrate clearly misdirected herself on the law when she held that the appellant and his co-accused had conspired to commit a felony and convicted them accordingly when the offence they

are alleged to have conspired to commit was a misdemeanour.

The appellant's counsel and the counsel for the state were also in agreement that the same mistake was repeated in the second count; however, I do not share their view that the charge was improperly framed and that the appellant ought to have been charged with the offence of uttering the document rather than that of making a document. In my humble view, the particulars are consistent with the charge and all the prosecution needed to do was to provide evidence that the documents were not made by the persons who were purported to have made them and the evidence of a document examiner and that of the principal registrar would have been helpful in this regard. In my opinion the conviction on this particular count would fail not necessarily because the charge was faulty but because there was no proof beyond reasonable doubt that the appellant had made the documents.

As for the third count, the charge did not include the words "*without lawful authority or excuse*" in the particulars. In the absence of these words it cannot be said that the appellant was charged with an offence under section 357(a); he was simply charged with an offence not known in law and just as was held in **Achoki versus Republic (supra)** the appellant here was wrongly convicted for this particular offence.

The fourth and fifth counts related to the offence of uttering a title deed and an identification card respectively. The missing link in these charges was the evidence that the documents which the appellants uttered were not genuine. The documents were signed and it was important to present evidence that indeed they were not signed by the persons who purportedly signed them or that they were signed by the appellant with intent to defraud or to deceive.

As for the sixth count, there was no evidence that the appellant was not registered; all the investigations officer told the court in respect of this aspect of the charges against the appellant was that the latter's finger prints could not be traced. Without proof that lack of a record of fingerprints of any person implies that the person has not been registered in accordance with the Registration of Persons Act, the trial court could not assume that the appellant was not registered; it had to be proved to the required standard that the appellant was not registered and in the absence of such proof the conviction of the appellant on this count was not safe.

I would for the reasons given allow the appeal; the conviction of the appellant on all the counts is quashed and the concurrent sentences set aside. He is therefore set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 17th day of June, 2016

Ngaah Jairus

JUDGE