



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT CRIMINAL APPEAL NO 330 OF 2013

(Appeal against original Conviction and Sentence in Thika CM Criminal Case No 203 of 2009 – L W Gicheha, SRM)

RICHARD MURIUKI KIMARUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant in this appeal, **Richard Muriuki Kimaru (alias Ngugi Njuguna)** was convicted after trial of the following offences -

(i) Making a document without authority contrary to **section 357 (a)** of the **Penal Code** (Counts I, III, IV and VI).

(ii) Procuring execution of a document by false pretence contrary to **section 355** of the Penal Code (Counts II and V).

(iii) Uttering a false document contrary to **section 353** of the **Penal Code** (Counts VII and VIII).

(iv) Obtaining money by false pretence contrary to **section 313** of the **Penal Code** (Counts IX, X, and XI).

He was sentenced as follows –

(a) Counts I to VIII – fined KShs 50,000/00 in each count and in default of each to serve 1 year imprisonment in each count.

(b) Count IX – fined KShs 1,020,000/00 and in default to serve 1 years imprisonment.

(c) Count X – fined KShs 620,000/00 and in default to serve 1 year imprisonment.

(d) Count XI – fined KShs 1,920,000/00 and in default to serve 1 year imprisonment.

2. The Appellant did not pay any of the fines and is serving the default sentences (cumulatively 11 years imprisonment). He has appealed against all the convictions and sentences.

3. In the grounds of appeal attached to his petition (filed in person) the Appellant has complained –

(i) That PW1 and PW2 never produced any agreement duly signed.

(ii) That the evidence adduced by all the witnesses was contradictory and untrue, and could not found any of the convictions.

(iii) That not a single document linked the Appellant to the offences charged, and none was proved to the required standard.

(iv) That the sentences passed were “too harsh and excessive”.

4. At the hearing of the appeal the Appellant put in amended grounds of appeal. Apart from elaborating some of the original grounds of appeal the Appellant added the following –

(v) That essential witnesses were not called by the prosecution without any explanation.

(vi) That his sworn defence was wrongly rejected.

(vii) That the trial court did not comply with section 169(2) of the Criminal Procedure Code.

5. Together with the amended grounds of appeal the Appellant filed written submissions upon which he fully relied. I have read and considered them.

6. Learned prosecution counsel supported all the convictions and sentences. It was his submission that each charge was proved beyond reasonable doubt, and that the sentence meted out in respect to each offence was lawful and well merited.

7. This being a first appeal it is my duty to evaluate all the evidence placed before the trial court and arrive at my own decision regarding the same. To this end I have read the testimonies of all the witnesses (including the Appellant) and examined all the documents admitted in evidence. However, as I did not see and hear the witnesses, I must give due allowance for that fact.

8. 15 witnesses testified for the prosecution. All the offences that the Appellant stood charged with were connected to a land sale transaction he entered into with the first complainant, GEORGE MWANGI KIIRU (PW1) and his wife, GRACE NJERI MWANGI (PW2) using a false name, in which he purported to sell to them a parcel of land that he did not own. He entered into a sale agreement with PW2 using a name that was not his which was prepared by an advocate, STEPHEN NJOROGE NDUNG’U (PW3) and which was signed by PW2 on her own behalf and on behalf of her husband (PW1) as well as by the Appellant. PW3 witnessed the signing. He uttered and used a false national identity card and other documents that he executed in furtherance of the fraud.

9. The Appellant was paid a total of KShs 3.5 million by the first complainant upon the strength of all the false documents that he made and uttered. He received two payments by cheque from the first complainant and two payments by cash. There was clear evidence that the cheques were deposited into a bank account opened and operated by the Appellant using the fake/false name (testimony of PW4). He subsequently withdrew the funds.

10. PW7 was a document examiner. He verified beyond reasonable doubt that the Appellant prepared and signed the false documents concerned (bank documents, transfer documents, etc.).

11. PW13 verified the Appellant’s true national identity card and the false identity card that he used in the entire elaborate fraud.

12. Though an identification parade was conducted by PW15, the same was really not necessary in the circumstances of the case. The Appellant was fully identified by PW1, PW2, PW3, PW4, PW5, PW8, PW9, PW10 and PW11, to whom he presented himself in person at one time or the other during the elaborate fraud. His identity was thus not an issue at all.

13. The owner of the identity that the Appellant stole, NGUGI NJUGUNA, testified as PW6. He established beyond reasonable doubt that he was the owner of the parcel of land that the Appellant purported to sell to the first complainant and his wife.

14. The Appellant's sworn testimony consisted in the main of the circumstances of his arrest. The rest of it was essentially submissions and comments upon the testimonies of the prosecution witnesses. In effect he denied all the charges.

15. Having closely examined all the evidence placed before the trial court, I am satisfied that each and every charge the Appellant faced was proved beyond reasonable doubt by both oral and documentary evidence. His defence was properly rejected by the trial court. I find no merit in the Appellant's appeal against the convictions, and the same is dismissed.

16. As for the fines imposed for each offence, all were at the discretion of the court and were not excessive given the circumstances of the offence. However, regarding the default sentences, the trial court erred in respect to count I to VIII. In those counts the fines were KShs 50,000/00 each. The default sentences therefore ought to have been 6 months imprisonment. See **section 28(2)** of the *Penal Code*. The default sentences in counts IX, X and XI (1 year imprisonment for each) were proper. The default sentences in respect to counts I to VIII are hereby set aside and a default sentence of six months imprisonment for each of those counts imposed.

17. Under **section 28(1) (c) (i)** of the *Penal Code* sentences in default of payment of fines must be served cumulatively. The Appellant shall therefore serve a **cumulative sentence of seven (7) years imprisonment**. He is of course still at liberty to pay the fines, in which case **section 28(3)** of the *Penal Code* shall apply.

18. To that limited extent only is the appeal against the sentences allowed. As already stated the appeal against the convictions is dismissed.

DATED AND SIGNED AT MURANG'A THIS 22ND DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 23RD DAY OF SEPTEMBER 2016