



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO. 59 OF 2014

(Appeal originating from the conviction by Hon. A. O. Obura (Mrs) in Kilifi PM. Cr. Case No.1088 of 2010)

MOHAMED SANGA TSUMA.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with demanding property upon a forged testamentary instrument contrary to section 358 of the Penal Code. He was also charged with perjury contrary to section 108 of the Penal Code. There was a 3rd count of making a false statement to the Registrar of Deaths contrary to section 363 of the Penal Code. A fourth count of giving false information to a person employed in the public service contrary to section 129 (b) of the Penal Code. There was a 5th count of false swearing contrary to section 114 (a) of the Penal Code. The offences involved the acquisition of a death certificate, processing of a grant through a Succession Cause and claiming a property of a deceased person.

The appellant was convicted of all the counts and sentenced to serve 2 years imprisonment. The grounds of appeal are that the trial court erred in law by delivering two rulings on the same matter, that section 214 of the Criminal Procedure Code was not complied with, that the charge sheet was defective, that the case was not proved beyond reasonable doubt and that the appellant's defence was not considered. Mr. Lewa counsel for the appellant filed a written submissions in determination of the appeal. I have gone through the written submissions and the submissions mainly elaborate on the above grounds. It is submitted that on 29/7/2013 the trial court made an order summoning several crucial witnesses who did not testify. This shows that the court was in doubt and it ought to have acquitted the appellant. It is alleged that some witnesses testified without the defence having seen their statements. There was an amendment to the charge-sheet which was fatal to the case. Several past cases have been cited by counsel for the appellant. The state opposed the appeal and relied on the record.

Before the trial court, 8 witnesses testified. PW1, Jostine Charo David testified that he is the son of the late Kenga Jefa who died in 1970 at Mtepeni, Mtwapa. He lived there with his brother John Jefa and Ramadhan Sanga (deceased). The appellant is his cousin. On 4th of May 2010, he took a letter from the area chief and went to the lands office. They were told to pay Ksh.33,000/= to process their late father's title deed. They paid that amount, but were told that the appellant had claimed the property. They had lived on the land for 25 years before they moved to Malindi. They had not processed their father's death certificate. They had not allowed the appellant to claim the land.

PW2, Mathias Juma Lewa was the Assistant Chief, Kanamai sub-location, Mtwapa. On 14/5/2009 at

around 9.00 a.m. the appellant went to his office requesting for a letter to enable him procure some documents from the registration office. He gave him the letter the appellant wanted. Three days later, the appellant took to him some forms for his signature which he did. The forms were for registration of deaths. He was later called by the police to record his statement. He did not know the appellant before. PW3 John Jefa Tsuma is a brother to PW1. The appellant is his cousin. He heard that the appellant was claiming their father's land. The appellant claimed that the land belonged to his father. The appellant is a neighbour.

PW4, Halima Hamid was the Assistant Chief Kudutani sub-location. She was approached by PW1 and PW3 about the father's land plot no.5 Kitutani settlement scheme. She gave them a letter to enable them get a death certificate and pursue a succession cause. Thereafter, she did not know what happened but was summoned by the police and informed that someone else had already obtained a death certificate. She was given the appellant's name who she knew to be someone from her sub-location. PW5, Wabuche Ketty was a court clerk at the Kilifi Law Courts. He produced a succession file no.41 of 2009. The applicant was Mohamed Sanga Tsuma, the appellant. The grant was issued on 29/6/2010 and the appellant filed an application for confirmation of the grant. The appellant stated that he was the deceased's son.

PW6, Lawrence Mathenge was the Kilifi District Registration Officer. He received an application for registration of death of Kenga Jefa. The applicant was the appellant who was asked to swear an affidavit. The appellant was given the forms and he returned them together a copy his identity card. The death was registered on 24th June 2009 and a death certificate was issued to the appellant. PW7 Felix Mwawasi is a land adjudication officer. He testified that he knew about Mtwapa Settlement Scheme. Plot No.5 was allocated to Jefwa kenga. The appellant took letters of administration issued in succession cause no.41 of 2009. The land had by then allocated to the deceased's children PW1 and PW3. The documents were referred to a Nairobi office.

PW8 Corporal Patience Mungere was based at the Kilifi Police Station. She investigated the case after the deceased's children went to the office and reported the matter. She recorded in her statement and obtained all the documents that appellant had processed. She caused the appellant to be charged with the offences. The appellant was put on his defence and gave un-sworn testimony. He testified that the deceased was his uncle, a brother to his father. PW1 and PW3 are his cousins. The suit land is located at Timbe Timbe, Mtwapa. In 2009, no-one was owning the land. He had previously stayed on the land with PW1 and PW3. Later PW1 and PW3 went to live in Malindi in 1976. The suit land borders his land. An advocate by the name Maina subdivided the suit land and took a portion of the land. He denied that he obtained a death certificate of the deceased, a letter from the assistant chief or filed the succession cause.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. Counsel for the appellant contends that the court issue two rulings on whether the appellant had a case to answer or not. The record shows that the prosecution closed its case on 10/6/2013. Submissions were to be done on 24/6/2013. On that date, the prosecution informed the court that it wanted to re-open its case and had witnesses. The defence objected and the trial court upheld the objection. The trial court was to deliver its ruling on 29/7/2013. Instead of delivering the ruling on 29/7/2013, the court indicated that it had considered the seriousness of the charges, there was need to exercise judicial authority under section 150 of the Criminal Procedure code and call more witnesses. The trial magistrate issued summons for the area Assistant Chief, the Kilifi district Registrar of Births and Deaths, the Court Executive Officer, the Investigating Officer as well as a Document Examiner.

Section 150 of the Criminal Procedure Code provides as follows:

***“A court may, at any stage of a trial or other proceedings under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.*”**

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

It is true that the court summoned extra witnesses instead of delivering a ruling, it summoned more witnesses. Section 150 of the Criminal Procedure Act allows the court to do what it did. The trial court noted that the appellant was going to be given an opportunity to cross-examine the witnesses. Indeed, counsel for the appellant cross-examined the witnesses. I see no reason to allow the appeal on this ground. What was done was procedural.

Mr. Lewas further maintains that section 214 of the Criminal Procedure Code was not complied with. The section relates to amendment of charges in case of variance of evidence and charge sheet. The record shows that the amendment was to delete letter (b) from the section used to charge the appellant. The prosecutor on 24/3/2011 informed the court that they intended to amend the charge sheet and delete the letter (d) after section 358 since there is no section 358 (b). The matter had not started to be heard at that time. The trial court noted in its judgment that count one was to be read over to the appellant but it was not. I do agree with the findings of the trial court that the non-taking of the amended charge after the letter (b) was deleted did not prejudice the appellant. In any case the appellant was not going to plead guilty. He also knew that he was being charged on count one under section 358 (b). I do find this ground of appeal to be based on technicalities. The court had not started taking evidence and the issue of variance of evidence and charge sheet did not arise.

The other grounds of appeal involve the prosecution evidence and the defence. It is clear from the evidence that the appellant obtained a letter from PW2 which enabled him to apply for death certificate as well as file the Succession Cause. The letter was produced in court. Although the letter did not indicate the appellant's name, it did refer to him as an applicant for registration of death. PW6, Lawrence Mathenge testified that it was the appellant who applied for the late registration of death. The application form was produced as Pexh.4. It shows that Mohamed Sanga Tsuma was the applicant and that he is the deceased's son.

There was count II relating to perjury and count v relating to false swearing. The two counts involve the Succession Cause. The succession file no.41 of 2009 was produced in court. I have seen the file and it was processed by an advocate. The relevant gazette notice no.10298 dated 7/9/2009 indicate that Mohamed Sanga Tsuma had filed the succession cause. A grant was issued on 4/12/2009 to the appellant. It was confirmed on 29/6/2010.

The defence evidence was to the effect that the appellant never went to PW2 to get the introduction letter, that he never applied for the death certificate or filed the succession cause. Given the prosecution evidence, I do find that the defence evidence did not raise any doubt on the prosecution case. The evidence against the appellant is in documentary form. He gave out a copy of his identity card to PW6 and the same was produced as evidence. He never denied that it was not his identity card.

The applicant is an uncle to the deceased. He knew the deceased's children were living in Malindi. He could have as well indicate in all the relevant forms that he was not the deceased's son but an uncle. The prosecution evidence is quite direct and proves the commission of all the counts the appellant was facing. The appellant was accorded a fair hearing and was represented by an advocate. The recalling of more witnesses did not prejudice his defence.

The appellant was sentenced to serve two years imprisonment. The sentence for all the counts is running concurrently. Taking the circumstances of the case, I do find that the sentence is not excessive. However, I do find that the appellant has learnt a lesson. He has now served seven (7) months in prison. I do set aside the sentence to the period already served.

In the end, the appeal on conviction lacks merit and is hereby disallowed. The two year imprisonment

sentence is set aside and replaced with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 25th day of June, 2015.

SAID J. CHITEMBWE

JUDGE