



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 143 OF 2010

MICHAEL MWAI WACHIRA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An Appeal arising from the conviction and sentence imposed by Hon. S.M. Muketi, Chief Magistrate Nyeri in Criminal Case No. 3016 of 2007)

JUDGMENT

1. The Appellant MICHAEL MWAI WACHIRA was charged with the offence of obtaining money by false pretence contrary to section 313 of the Penal code. The particulars of which were that on the 4th day of October 2007 in Nyeri township of Nyeri District within Central Province jointly with another not before court with intent to defraud obtained cash Kshs.650,000/- from pastor JAPHAT KAMAU KARIUKI by falsely pretending that plot No. NYERI/MUNICIPALITY/BLOCK 1/649 belonged to them and that they were in position to sell the said plot to the said JAPHAT KAMAU KARIUKI which information they knew to be false.

2. He pleaded not guilty, was tried, convicted and sentenced to pay a fine of Kshs.100,000/- in default 12 months imprisonment. Being dissatisfied with the conviction and sentence he filed this appeal through Njuguna Kimani & CO Advocates and raised the following grounds of appeal:-

(i) The learned Chief Magistrate erred in law in convicting the appellant on insufficient, contradictory and uncorroborated evidence. A miscarriage of justice was occasioned to the Appellant.

(ii) The Learned Trial magistrate erred in law in failing to consider the evidence both for the prosecution and for the defence in their entirety and/or totality hence arriving at an erroneous finding. Prejudice was occasioned to the Appellant.

(iii) The Learned Trial magistrate erred in law in shifting the burden of prove to the Appellant and totally failed to consider and making a finding on the legal burden for the Appellant which he discharged under Section III of the Evidence Act Cap 80 Laws of Kenya. A miscarriage of justice was occasioned to the Appellant.

(iv) The Learned Trial magistrate erred in law in not appreciating that neither the arresting or the Investigating Officers were called to buttress the Complainant's case for this was a Criminal and not a civil case hence arriving at an erroneous finding that "JORAM" was a

creation of the Appellant. Prejudice and miscarriage of justice was occasioned to the Appellant.

(iv) The Learned Trial magistrate erred in law and in fact in totally ignoring the submissions made by the Appellant's counsel on both stages and the authorities cited thus arriving at an erroneous finding. Prejudice was occasioned to the Appellant.

3. When this appeal came for hearing Mr. Njuguna Kimani appeared for the Appellant while Mr. Cheboi appeared for the State and conceded to the appeal on the ground that the prosecution's evidence did not support the prosecution's case. Vital witnesses were not called, some key documents were not produced and that the trial court should have given the Appellant the benefit of doubt.

4. It should however be noted that this court is not duly bound to allow the appeal just because the state has conceded to the same but must reassess all the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that it did not have the advantage of the trial court in seeing and hearing witnesses.

5. On behalf of the Appellant Mr. Kimani submitted that the Appellant was convicted on insufficient and uncorroborated evidence. It was submitted that there was no evidence supporting the charge and therefore the same was defective. It was further submitted that the judgment did not meet the requirement of section 169 of Criminal Procedure Code.

6. It was further submitted that the witnesses PW 1 to PW 4 were in agreement that the Appellant was acting as a land agent and that the owner of the said land was one Jorum Theuri Kibicho who signed the agreement as the owner while the Appellant only signed as a witness and that the Appellant produced documents to support his defence.

7. It was further submitted that the evidence on record was not considered in their totality as per the case of OKALE & OTHERS V REPUBLIC and that the trial court found that Jorum was a creation of the Appellant whereas there was no evidence to support this. The magistrate therefore shifted the burden on the Appellant.

8. It was further submitted that on the Authority of JUMA NGODIA V R it was important for the prosecution to call the arresting or investigating officer who could have had laid basis on why they decided to take the Appellant to court and that the Appellant's submissions were never considered.

9. It was the prosecution's case that PW 1 Pastor Japhat Kamau Kariuki's church known as Revival Fellowship Church wanted to purchase a plot in Nyeri Town and therefore went to the Appellant who was a land agent with Matrix Chartered Services through a member called Nyamai where upon the Appellant showed them a letter of allotment from the Ministry of Lands and application for consent to transfer by Joram Theuri Kibicho. On the strength of the documents they negotiated a price of Kshs.900,000/- of which they were to make a down payment of Kshs.650,000/-.

10. The Agreement was signed by one MICHAEL KIBICHO vendor and witness by the Appellant and Pastor Njire and payment made to Matrix Commercial Services. After this the Appellant became elusive and could not be reached on phone causing them to suspect that there was a fraud. They therefore made a report to the police and the Appellant was subsequently arrested.

11. PW 2 AGNES NYARUAI confirmed that she is the one who took PW 1 to the Appellant. She further confirmed under cross examination that she was entitled to Kshs.20,000/- as a broker and that Joram Kibicho was present when the Appellant was given the cheque. DW 3 Francis Njine Njiku stated that the Appellant told them that he was selling the plot on behalf of Kibicho whom he met at the time of signing the agreement and under cross examination confirmed that the Appellant did not tell them that the plot he was selling was his. This evidence was also confirmed by PW 4 HELLEN WANJIKU MWARIRI.

12. PW 5 MACHORA MONGARE produced a search certificate for Nyeri Municipality Block 1/649 in

the name of Elizabeth Nyakubia Waititu and when put on his defence the Appellant gave unsworn evidence in which he stated that he was selling the plot on behalf of Joram Theuri with letter of authority dated 7/8/07 and that he signed the agreement as a witness. He further stated that all the documents he had were given to him by the seller Jorum who instructed the buyer to draw the cheque in his name.

13. In her judgment the trial court identified the issue for determination to be whether the Appellant was in the know and found that the Appellant introduced the complainant to Jorum. The cheque was written in his names and after that he became elusive which was not consistent with innocence.

14. From the evidence tendered herein the issue for determination is whether the prosecution's case against the appellant was proved beyond reasonable doubt and whether the trial court shifted the burden on the Appellant.

15. It is trite law that in criminal matter the burden of proof is always upon the prosecution to prove its case beyond reasonable doubt. In this matter the charge was obtaining money by false pretence by falsely pretending that plot No. NYERI/MUNICIPALITY/BLOCK 1/649 belonged to them and were in a position to sell.

16. All the evidence tendered by the prosecution shows that the Appellant did not at any time state that the plot was his. His defence was that he was selling the said plot as an agent of one Jorum Theuri Kibicho who was present at the time of signing the said agreement and whose instructions were formed by a letter of authority dated 7/8/07 and produced as DMF 1. There is no evidence tendered to support the trial magistrate's finding that it is the appellant who introduced the said Jorum to the complainant and therefore the learned magistrate fall into error.

17. It is also clear from the judgment that the trial magistrate shifted the burden on the appellant of proving the existence of a principal whereas it was the burden of the prosecution to prove the none existence of the said principal and therefore find that the Appellant was prejudiced.

18. I further agree with the submissions by Mr. Kimani that vital witnesses were not called and no explanation as to why investigating officer PC Benjamin Kuiwili did not come to court was offered and on the authority of JUMA NGONDI V R (1982 – 88) 1 KAR page 454 the only presumption is that his evidence would have been unfavourable to the prosecution.

19. I therefore find that the Appellant's conviction was not safe and therefore quash the same and set aside the sentence herein.

Dated and delivered at Nyeri this 27th day of June 2014.

J. WAKIAGA

JUDGE

Court: The judgment is read in open court in the presence of Mr. S.K. Njuguna for Mr. Kimani for the accused. Miss Maundu for the state. The fine paid by the appellant be refunded to him.

J. WAKIAGA

JUDGE

27/6/2014