



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 45 OF 2013

PHILIP KIPNGENO LANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the convict and sentence of Hon. J. Kasam, Senior Resident Magistrate, Sotik dated 30th August 2013)

JUDGMENT

Philip Kipngeno Langat, the appellant herein, was tried on a charge of five counts before the Bomet Principal Magistrate's court. In the first three counts, the appellant faced a charge of perjury in violation of **Section 108** of the **Penal Code**. In count IV the appellant faced a charge of obtaining a parcel of land by false pretences in violation of **Section 313** of the **Penal Code**. In the fifth count, the appellant underwent a trial for the offence of theft by a person having an interest in the thing stolen contrary to **Section 273** of the **Penal Code**. After undergoing a full trial, the appellant was acquitted in count I but was convicted in counts II -IV and sentenced to a fine of Kshs.50,000 in each count in default to serve two years imprisonment. Being dissatisfied, the appellant preferred this appeal. Through the firm of Matwere & Co.Advocates, the appellant put forward the following grounds:

1. **That the learned trial Magistrate erred in both law and in fact in failing to find that all the ingredients of the offence of perjury contrary to Section 108 of the Penal Code (Cap 63 Laws of Kenya) in count 2, and 3 of the charge sheet had not been proved by the prosecution to the required standard and degree.**
2. **That the learned trial Magistrate erred in both law and in fact by holding that the Appellant intended to deceive, and did so in respect of a matter that was material in Sotik PMCC no.70 of 2010 even when the prosecution had failed to prove the offence of perjury in count 2, and 3 of the charge sheet with evidence of two witnesses.**
3. **That the learned trial Magistrate erred in law and in fact by holding that the appellant had not paid to the complainant a further sum of Kshs.150,000 in addition to the 1st instalment of Kshs.80,000 when evidence before court clearly showed that the same had been paid.**
4. **That the learned trial Magistrate erred in both law and in fact in holding that the appellant had been refunded the purchase price when evidence before court clearly showed that the appellant had not collected the same.**

5. That the learned trial Magistrate erred in both law and in fact in holding that the appellant had stolen the original title deed for LR No.Kericho/Sotik township/289 dated the 21st day of July, 1997 when evidence on record clearly showed that the said title deed had been handed over to the appellant by the complainant at the time of executing the sale agreement.
6. That the learned trial Magistrate erred in both law and in fact in failing to find that all the ingredients of the offence of obtaining a parcel of land by false pretence contrary to Section 313 of the Penal Code (Cap 63 Laws of Kenya) in count 4 of the charge sheet had not been proved by the prosecution to the required standard and degree.
7. That the learned trial Magistrate erred in both law and in fact in holding that appellant had fraudulently transferred L.R.No.Kericho/Sotiktownshi/289 when documentary evidence clearly pointed out that the transfer was done pursuant by a court order and documents.
8. That the learned trial Magistrate erred in both law and in fact in failing to find that Count 2,3,4 and 5 of the charge sheet was fatally defective and that facts therein did not support any of the offences that the appellant had been charged with and/or were at various with the offences that the Appellant had been charged with.
9. That the trial learned trial Magistrate erred in both law and in fact in convicting the appellant on contradictory evidence of the prosecution witnesses without weighing the conflicting evidence.
10. That the learned trial Magistrate erred in both law and in fact in disregarding the evidence of the appellant. His witness and exhibits without giving any reasons as to why she thought or found the evidence of the Appellant, that of his witness or exhibits as being untruthful.
11. That the learned trial Magistrate erred in both law and in fact by reading the judgement and convicting the appellant in the absence of his council thereby prejudicing the appellant.
12. That the learned trial Magistrate erred in law and in fact in summarily rejecting the Appellant's factors in mitigation and thereby arrived at a sentence that was manifestly excessive in the circumstances.
13. That the learned trial Magistrate erred in law and in fact by giving a sentence that was manifestly excessive and contrary to the law in respect in count 2,3,4 and 5 of the charge sheet.
14. That the appellant shall seek leave of this honourable court to adduce evidence during the hearing hereof.

When this appeal came up for hearing, Miss. Kivali learned prosecution counsel conceded the appeal on the basis that there was no cogent evidence to sustain a conviction.

Before considering the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. The prosecution's case is supported by the evidence of nine witnesses. It is the evidence of John Kiprono Chumo that on 28/11/2008, he sold a parcel of land known as L.R.no. Kericho/Sotik township/289 to the appellant for Kshs.280,000 and that the duo executed a formal agreement before Mr. J.K.Kirui, an advocate of this court. PW1 said the appellant paid a deposit of Kshs.80,000 and the balance was to be paid on or before 2nd December 2008. When the payment of the balance was not forthcoming, PW1 said he got advise to refund the deposit of Kshs.80,000 with an extra sum of Kshs.5,000. The complainant further stated that the title deed was left in the advocate's office. PW1 said he was later summoned by the police over his refusal to effect the transfer of the land to the appellant despite having received Kshs.150,000. PW1 stated that, that is when he discovered the appellant had filed a complaint against him with the police. **Jane Chelangat Mweke** (PW2) confirmed having received a banker's cheque for Kshs.85,000 from PW1 but the same has never been collected by the appellant. PW2 denied knowledge of payment of Kshs.150,000 to the firm of J.K.Kirui & Co.Advocates by the

Appellant. **John Kibet Keter** (PW3), a real estate agent confirmed brokering the agreement between PW1 and the appellant. He said that the appellant put up a structure on the land. He also confirmed that Kshs.150,000 was not paid to PW1 as alleged. PW3 further stated that PW1 had resold the land to someone else when the appellant failed to settle the outstanding consideration. **Benard Kipngeno Tanui** (PW4) said he is aware PW1 rescinded the contract. **Paul Tonui** (PW5), the District Land Registrar, Bomet confirmed having caused gazette notice no.4864 to be published to announce the loss of title L.R.no. Kericho/Sotik township/289. PW1 is said to have reported the loss of title. The appellant was prompted to lodge a caution over the title claiming purchaser's interest. The cautioner later went to withdraw the caution and title transferred to him. **Mr. J.K.Kirui** (PW7) the advocate for both parties confirmed having prepared and witnessed the execution of the agreement. PW7 said that the seller (PW1) told him there were two titles over the land in question hence the rescinding of the agreement. He confirmed that money had been refunded to the Appellant. PW7 also stated that the original title was left with him but the agreement could not be implemented because it was frustrated. PW7 also confirmed that no title documents were lost. PW7 stated he was later shocked when he learnt that the appellant had stated on oath that he had paid the purchase price in full yet he had not done so. An application to set aside the exparte judgment given vide Sotik P.M.C.C. no.70 of 2010 was filed argued by J.K.Rono (PW8) but was dismissed. PW1 being dissatisfied, filed Kericho H.C.C.A no.31 of 2011 which is still pending. The Investigating Officer (PW9) gave a summons of the case. After going through the documents gathered through the investigations, a charge of perjury, stealing and obtaining by false pretences were preferred against the appellant.

When placed on his defence, the appellant admitted the existence of the sale transaction. The appellant also admitted that he paid Kshs.80,000 as a deposit and that the balance was to be paid on 2/12/2008. He stated that he paid Kshs.150,000 through his wife (DW2) leaving a balance of Kshs.50,000 which amount would be paid when a transformer mounted on the land is removed. The appellant further admitted that PW1 gave him the original title deed. The appellant averred that he was forced to file Sotik P.M.C.C.C no.70 of 2010 when PW1 failed to effect transfer. Judgment was entered in favour of the appellant when PW1 failed to enter appearance nor file a defence. After taking into account the evidence, the learned trial magistrate formed the opinion that the appellant had not committed perjury, when he testified before the trial court in Sotik P.M.C.C.C no.70 of 2011. The appellant was however found to have lied when he claimed he had paid the purchase price in full and that the vendor refused to sign transfer when he testified in the civil suit.

Having set out in brief the case that was before the trial court, I am now obliged to consider the merits of the appeal. I have already stated that Miss.Kivali, conceded the appeal on the ground that there was no sufficient evidence to sustain a conviction. I have carefully gone through the material placed before the trial court and I do not think the case was so hopeless as Miss.Kivali would like this court to believe. The evidence in my view were strong and water tight and was therefore capable of sustaining a conviction if properly admitted. Mr. Langat, learned advocate for the appellant made a powerful submission which is to the effect that the complainant had abused the criminal law process yet the dispute is purely a civil matter. Miss.Kivali did not address this court over the issue. I have carefully re-evaluated the case that was before the trial court. There is no doubt in my mind that what precipitated the case is the sale of land agreement executed by the complainant (PW1) and the appellant (DW1) in which PW1 offered to sell to the appellant L.R.no.Kericho/Sotiktownship/289. A misunderstanding between the parties arose giving rise to the filing of Sotik P.M.C.C.C no.70 of 2010 which was heard exparte and judgment given in favour of the appellant. There is also no dispute that the decree arising from the aforesaid case was used by the appellant to have L.R no.Kericho/Sotik township/289 to be transferred to him. It is also not in dispute that the complainant (PW1) attempted to set aside the exparte judgment before the Sotik Principal Magistrate's court but did not succeed. Being aggrieved, PW1 filed an appeal before this court to impugn the order dismissing his application. The appeal is still pending for hearing. In the circumstances, can it be said that it was proper for he complainant to press for criminal charges against appellant? In my view, I do not think the criminal charges were preferred against the appellant for purposes of upholding criminal law. I think the charges were preferred against the appellant to pressurise him to settle the land dispute. In my view, the prosecution of appellant was an abuse of the criminal process hence it amounted to harrasment and was contrary to public policy. The issues relating to the land transaction between the complainant and the appellant can be sorted out through the civil process and specifically Kericho

H.C.C.A no.31 of 2011 which is still pending for hearing and determination. On this singular ground, the appeal is allowed. The order on conviction is quashed and the sentence is set aside. The appellant namely **Philip Kipngeno Langat** if he is serving the default sentence is set free forthwith unless lawfully held. Any fines that may have been paid should be refunded to the appellant.

Dated, signed and delivered in open court this 31st day of July, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Mutai holding brief for Mr. Matwere

Mr. Mutai for Director of Public Prosecutions