



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 63 of 2008

WASHINGTON WASHIALI KHWALE APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. E. O. OBAGA, SRM in Kakamega Chief Magistrate's Court in Criminal Case No. 56 of 2006)

J U D G M E N T

The appellant was charged with the offence of obtaining registration of land by false pretense contrary to **Section 320** of the **Penal Code**. The particulars of the offence were that the appellant *on the 13th of November 2003 at Kakamega land registry office in Kakamega District within Western Province, willfully procured a piece of Land East Wanga/Isongo/2503 by falsely pretending that the said parcel of land had been lawfully transferred to him by JACKSON OKUTOYI OLOKO.*

The appellant was convicted and sentenced to pay a fine of Kshs.20,000/= and in default to serve six (6) months imprisonment. The grounds of appeal are that the trial court imported bad faith and motive on the part of the appellant contrary to the evidence on record, the trial court failed to note that the transaction was okayed by the complainant, that the trial court erred in law by concluding that PW3 who attested the transfer document did not know the person who appeared before him whereas the evidence on record shows that they knew each other and that the prosecution did not prove its case beyond reasonable doubt.

Mr. Makali counsel for the appellant submitted that the complainant was selling the suit land to the appellant and all the relevant documents were presented for registration at the lands office. The District Officer who issued the consent testified as PW8 and confirmed that he issued the consent. The only dispute was that the complainant had not been paid the entire purchase price. That complaint did not amount to false pretense. The investigating officer confirmed that the complainant was only complaining about the balance of the purchase price and he only charged the appellant because he had not paid as he agreed. The dispute was civil in nature and the trial court found that it was not civil. The trial court erred in law by relying on the evidence by the evidence of an expert witness whose evidence was not binding to the trial court. Counsel relied on the cases of **SAMUEL MBUGUA KIBE V REPUBLIC Nairobi High Court Criminal Appeal No.197 of 1990**, **NYAGA V REPUBLIC [1975] EA 118** and that of **AKUTE V REPUBLIC [2006] 1KLR 488**. Mr. Orinda, State counsel opposed the appeal and submitted that although there was an agreement for sale the purchaser went prematurely and transferred the land to himself before the procedure was finalized. The fraudulent part of the transaction was that only a portion of the land was being sold but the appellant transferred the entire land to himself. The complainant did not appear before the board to obtain a consent to transfer and the appellant forged documents and presented them for registration.

The record of the trial court shows that nine witnesses testified for the prosecution. The complainant was **PW1, JACKSON OKUTOYI OLOKO**. His evidence is that he agreed to sell part of his land this being plot number **WANGA/ISONGO/2503**. The plot is about 1 acre and he was selling because he had to pay school fees for his children. The agreed purchase price was KShs.320,000/= and a portion of the land measuring 15 x 100 was to be left out for his daughter by the name Beatrice (PW2). On the 3.11.2003 he was given KShs.50,000/= and on the 4.11.2003 he was given another KShs.50,000/= leaving a balance of KShs.220,000/=. The balance was to be paid by way of installments of KShs.50,000/= in December 2003, KShs.50,000/= April 2004 and KShs.70,000/= December 2004. Before the transaction was over he was summoned by the chief via a letter dated 30.1.2004 whereby his family was complaining that he had sold the land without their consent. He went twice before the chief but the appellant did not appear. He went to the District land registrar only to find that the land had been transferred to the appellant on 13.11.2003. He reported the matter to the D.O. Office at Mumias. The appellant went to the D.O's office and wanted to pay him some money but he declined. The appellant counted the money and gave to the D.O. who asked him to take the money but he refused. He stormed out of the D.O's office protesting that he could not take the money because he had not agreed to sell his entire land. He denied that he appeared before the Land Control Board on the 10.3.2003 as at that time the discussions on the sale of the land had not started. He admitted that he was selling the entire plot save for a portion measuring 50x100. PW1 further testified that he asked the appellant to transfer the portion of 50x100 but he refused.

BEATRICE OKUTOYI, testified as PW2. She is a daughter to the complainant. Her evidence is that she was summoned to go to the area chief via letter dated 30.1.2004 but the appellant did not appear. The meeting was adjourned twice but still the appellant did not appear. She went to the land registrar but the appellant did not attend. On the 5.4.2004 they went to the D.O's office where the appellant remove some money and tried to pay her father. She protested and told the D.O. that the matter was before CID Kakamega. According to her PW1 had informed her that the sale price was KShs.270,000/= and he had refused only KShs.100,000/=. She retained the original sale agreement that was later given copies which were different from the original. **PW3, OSCAR WACHILONGA MUNYENDO**, testified that he is an advocate of the High Court of Kenya. On the 13.11.2003 he was working for the firm of Akwala & Company Advocates and the appellant together with PW1 went to the office to have the transfer of land attested. He signed the transfer document and he knew both the appellant and the complainant. He knew the complainant as he had other matters in the law firm including a succession cause.

PW4, PHILIP MUNYUKI MENGI, testified that a transfer of the suit property was registered in favour of the appellant on the 13.11.2003. All the relevant documents including an application for consent, a consent and a transfer were submitted to the lands office and the transaction was effected. **PW5, DICKSON MACHANJA** testified that he is a finger prints expert. He examined the sale agreement in respect of the suit property which had been thumb printed against sample finger prints impression of the complainant. He compared the two finger prints impression and concluded that they were identical. He then checked the documents bureau and found that the finger prints belonged to **JACKSON OKUTOYI OLUKWO**, the complainant.

PW6, RICHARD BIRICHANA KHAMALA, testified that he was an assistant land registrar based at Kakamega. On the 8.6.2003 the complainant and the appellant went to the Mumias District Officer where they presented an application for a consent. On 10.6.2003 the two appeared before the District Officer who approved the application. He prepared the consent to transfer form and took it to the District officer for signature. He then gave the consent to the appellant. According to him both parties appeared at his office on 8.6.2003 and 10.6.2003. **PW7, EMMANUEL KENGA**, testified that he was an Assistant Commissioner of Police. He examined two documents against the complainant's signature and could not find any agreement between the two sets. **PW8, ABEDNEGO MUTISYA MULI** was the District Officer, Mumias in 2003. His evidence is that he signed the letter of consent in respect to the suit property. He could not confirm whether the seller and the buyer appeared before him.

PW9, SGT. BENSON NAIBEI, was the investigating officer. He investigated the matter and produced all the exhibits. According to him, he came to learn that the appellant had not cleared a balance of KShs.170,000/=. The none payment of that amount prompted PW1 to complain against the

appellant. The complainant received KShs.100,000/= from the appellant but had not received the balance of KShs.170,000/=. It is his evidence that the dispute was civil in nature but he charged the appellant after getting instructions from the State Counsel.

The appellant was put on his defence. In his sworn evidence, he testified that he used to be a councilor. On the 1.5.2003 the complainant went to his house asking him to buy the suit land. He had no money but the complainant agreed to be paid by way of installments. The complainant is his neighbor and their houses are about 400 meters apart. He met the complainant's family including PW1's first wife in the company of the appellant's wife and one Christine Sakwa. The agreement was to buy the land less a portion measuring 50x100 which is about 0.05 Ha. The agreement was reduced into writing. The portion of 50x100 was to be reserved for PW1's daughter who had divorced her husband. The agreed sale price Kshs.270,000/=. He paid KShs.20,000/= upon signing of the agreement. They agreed to go to the Land Control Board at Mumias. He was to transfer the entire land to himself and thereafter retransfer the portion of 50x100 to the complainant's daughter. The Land Control Board sat on the 10.6.2003. They went to the board but the complainant arrived quite late after the board had completed its work. However, he found one board member and the District Officer. He explained their lateness to one Khamala who took them to District officer. The D.O. approved the consent and they were advised to collect after two weeks. On the 3.11.2003 he paid the complainant KShs.30,000/=. They went to Namatsi and Company advocates who witnessed a sale agreement. Mr. Namatsi explained the language to the complainant into Wanga language and witnessed the agreement. The original hand written agreement was then destroyed as it had been incorporated in the new agreement. The appellant further testified that he went to the Kakamega Lands office with the complainant where they got a transfer form. They then went to Akwala & Company Advocates to have the transfer witnessed and it is the complainant who advised him to go to that firm of advocates. Mr. Akwala was busy and they were referred to Mr. Munyendo advocate who was working in the firm of Akwala & Company advocates and he witnessed the transfer. He presented the documents to the lands office on the 13.11.2003 and he was issued with a title deed on the same date.

The appellant further testified that he later heard that the complainant was complaining that he had transferred the entire land to himself without retaining the portion meant for Beatrice and that he had not paid the whole purchase price. He was summoned before the District officer and he agreed to pay the balance which was by the KShs.120,000/=. He withdrew that amount from Kenya Commercial Bank Mumias Branch and went to the D.O.'s office. When the D.O. was counting the money Beatrice (PW2) stormed out of the office and asked her father not to touch the money protesting that the plot was not sold at the D.O.'s office. That was on the 5.4.2004. On the 22.4.2004 the complainant went to his house asking him for the money but he had spent part of it and paid him KShs.95,000/=. According to him only KShs.25,000/= is remaining. On the 21.5.2004 he was summoned to the Kakamega Police station and he was charged in Kakamega Criminal Case number 1354 of 2004 for using abusive language against Beatrice. It is his evidence that the complainant is literate and he resorted to have him thumb print the documents as he noted that his signatures were different. He requested the court to be allowed to send the documents to a private document examiner.

DW2, SAID WERE MBUYI, testified that he was a personal assistant to the appellant. He witnessed the first sale agreement between the parties and saw the appellant paying PW1 KShs.20,000/=. He accompanied PW1 and the appellant to the Land Control Board at Mumias on the 10.6.2003. The consent was given and on the 3.11.2003 he took some documents to Mumias for typing. They went to the offices of Namatsi and Company Advocates who witnessed the documents. **DW3, JAMES NAMATSI** testified that on the 3.11.2003 he refused the complainant and the appellant in his office. He knew the appellant and he witnessed the sale agreement. He also saw a hand-written agreement which the parties had made themselves. **DW4, CHRISTINE SHISIA SAKWA**, testified that the appellant is her cousin. At one time he was taken by the appellant and his wife to the suit land. The appellant told her that they wanted to put up a hotel on the plot.

The trial court concluded that the appellant was a liar and fraudulent person. He testified that he appeared before the land Control Board on the 10.6.2003 and found board members leaving whereas the consent letter indicates that the board meeting was held on the 11.6.2003. The court further found that the appellant purported to have paid further sums of the purchase price to the complainant which allegation

was not true. The transaction was registered on the same date and a title deed was issued to the appellant and that process smacked of fraud which was perpetuated in conspiracy with the lands officials.

From the evidence on record it is established that the complainant was selling part of his land to the appellant. Although PW1 testified that the purchase price was KShs.320,000/= it is clear from the sale agreement that it was KShs.270,000/=. It is part of the prosecution evidence that the transfer document was witnessed by PW3 Oscar Munyendo who knew the complainant. It is also on record that an application for consent was made which is dated 10.6.2003. The purchase price in that application is given as KShs.80,000/=. A consent to transfer was issued on the 11.6.2003 which consent indicates that an application was made dated 10.6.2003 and the consent was issued the following day. Similarly the purchase price is given as KShs.80,000/=. The transfer document is dated 13.11.2003 and it was witnessed by Munyendo Advocate. Although the expert witness PW7 testified that the signature on the transfer document could have been different from that of the complainant, that evidence does not corroborate the evidence of PW3 who testified that the signature was made by PW1 in his presence. It is the evidence of PW6 that the complainant and the appellant submitted an application for consent to transfer land and they appeared before the District officer on the 10.6.2003. The trial court found that the appellant was a liar as their meeting was held on 11.6.2003, that is to say one day later. However, the appellant's evidence in his defence is similar to that of PW6. There is no big difference as it could have been possible that the consent was signed the following day and it was dated 11.6.2003 yet the meeting could have taken place the previous day. The line of evidence is similar to that of PW8, Abedinego Mutisya Muli who was the Mumias district officer. He confirmed that he signed the consent letter so the difference of one day should not have been interpreted as fraud on the part of the appellant.

The appellant was charged with the offence of obtaining registration of land by false pretense. The prosecution evidence does establish that the complainant was selling the land to the appellant. Although the State counsel submitted that the appellant fraudulently registered the entire land before the transaction had been completed, it is established by the prosecution evidence that parties executed the relevant transfer documents and presented them to the lands office before the balance of the purchase price had been paid. That aspect of the transaction cannot be interpreted to be fraudulent or to amount to false pretense. It is the evidence of the complainant that when the appellant took some to the District Officer he stormed out of the office and protested and the reason for that was that he was not selling the entire land. That is the main complaint by PW1. His allegation that his family complained to the chief is not established as his daughter PW2 also testified that she was summoned to the chief's office. There is no evidence that PW1's family members complained to area chief and it is clear that it was the complainant who had made the report to the chief. It is possible that the appellant did not pay the balance of the purchase price to the complainant but that was not the charge before the court. The complainant could have pursued his balance through a civil case. The sale agreement does indicate in its paragraph 9 that the buyer (appellant) shall not oppose the subdivision of the portion of 50x100ft (0.05 Ha.) to Beatrice Amukangu Okutoyi from the portion purchased from the seller. That paragraph could have interpreted to mean that the appellant could have transferred the land into his name and then subdivide and transfer the 50x100ft portion to Beatrice Okutoyi.

In the end, I am satisfied that the complainant was selling the suit land to the appellant. The complainant duly executed the transfer document and applied for a consent to transfer. The transfer was witnessed by an Advocate of the High Court of Kenya. In his defence the appellant testified that he was willing to subdivide the land and transfer the 50x100ft portion to Beatrice. I do find that the prosecution did not prove the charge of obtaining registration by false pretense. The appeal is merited and the same is allowed. The amount of fine paid by the appellant shall be refunded to him.

Delivered, dated and signed at Kakmega this 29th day of May 2013

**SAID J. CHITEMBWE
JUDGE**