



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Criminal Appeal 148 of 2009

AMOS SIKUTA MASINDE.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **AMOS SIKUTA MASINDE** (together with another already before court) was charged on two counts as follows:-

Count I: Soliciting for a benefit contrary to section 39 (a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars of the offence are that on the 16th day of August, 2006 at Bungoma Lands Office in Bungoma District within Western Province, jointly, being a person employed in the Public body to wit District Lands Registrar and being private Assistant Surveyor with Geometer Land Surveyor, respectively, corruptly solicited for Kshs.83,000/= from Jamila Rani Bachoo as an inducement so as to register land parcel NO. EAST BUKUSU/S.KANDUYI/11713 in the name of the said JAMILA RANI BACHOO.

Count II: Receiving a bribe, contrary to Section 39 (3) (a) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The particulars of the offence are that on the on the 16th day of August, 2006 at Bungoma Lands Office in Bungoma District within Western Province, jointly, being a person employed in the Public body to wit District Lands Registrar and being private Assistant Surveyor with Geometer Land Surveyor, respectively, received Kshs.83,000/= from Jamila Rani Bachoo as an inducement so as to register land parcel NO. EAST BUKUSU/S.KANDUYI/11713 in the name of the said Jamila Rani Bachoo.

The Appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted and sentenced in both count I & II and fined Kshs.100,000/= in default to serve twelve months imprisonment in each count. The appellant was aggrieved by both the conviction and sentence and appealed to this court.

In his Petition of appeal, the appellant raised four grounds as follows:-

“1. The trial magistrate erred in law and fact in finding the appellant guilty when the evidence was insufficient to support a conviction.

2. That the learned trial magistrate erred in law and fact in convicting the appellant when the evidence adduced did not disclose any offence known in law.

3. The learned trial magistrate erred in law and fact in convicting the appellant when the evidence of the prosecution witnesses was contradictory.

4. The learned trial magistrate erred in law and fact in convicting the appellant when the charge was defective in substance.”

During the hearing of the appeal, Mr. Khakula, learned counsel for the appellant submitted on all the four grounds of appeal. Mr. Orinda for the State opposed the appeal.

This being the first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate’s court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see Okeno v Republic [1972] EA 32*).

I have carefully re-evaluated the evidence adduced before the trial magistrate and also considered the submissions made by Mr. Khakula on behalf of the appellant and by Mr. Orinda on behalf of the State.

The Prosecution case is that the complainant, PW1, JAMILA RANI BACHOO, a business lady in Nairobi had bought a house on parcel NO. E/BUKUSU/S. KANDUYI/11713 in Bungoma for Kshs.2.7 million on 9th May 2006 from one ROBERT WAFULA WANJALA. The complainant wanted to transfer the property to her name and sought the advice of a District Land Surveyor one MR. ONGANYI who advised her that the property needed to be transferred from the name of the 1st seller MERCY KERRE NABAYI to the name of the second seller, ROBERT WAFULA WANJALA who the complainant had bought the property from. That stamp duty for the first transfer was calculated at Kshs.19,000/= which money she gave to the said Mr. Onganyi. No receipt was issued. The complainant went back to Nairobi and returned a couple of months later. The complainant learnt from that Mr. Onganyi that the title Deed was not ready because she had not filled in some forms. The complainant complied and filled in the necessary forms.

The complainant had demolished the house on the property she had bought to pave way for a new modern house. Stamp duty for the second transfer was assessed at Kshs.17,280. The complainant did not pay the Kshs.17,280. When the complainant went back for her title Deed, the said Mr. Onganyi who was with the appellant informed her that he was having problems as the Land Registrar wanted Kshs.84,000/= .

According to the complainant, the appellant told her that she would not get the title Deed without the cash. That the appellant thereafter telephoned her several times telling her that the title Deed was ready and that the Land Registrar wanted the money. The complainant who had already reported to KACC reported the matter to the police also.

A trap was laid out and the appellant and the Land Registrar were arrested. That the Kshs.83,000/= treated money used in the trap was recovered from the appellant.

The appellant in his sworn statement of defence had testified that he is a private surveyor in Bungoma. According to the appellant it was the complainant who requested his assistance in the processing of the title. That the complainant gave him the transfer documents and Kshs.83,000/=. However, upon stepping out of the complainant’s car where he had gone to meet the complainant he was arrested. The appellant denied that he was to give the money to the Land Registrar.

The evidence of the complainant (PW1) is that it was the appellant who told her that the Land Registrar wanted Kshs.84,000/=. That the appellant had told her that she could not get the title Deed in the absence of the cash. That the appellant called her several times stating that the Land Registrar wanted money and that the title Deed was ready. According to the complainant, it is then that she decided to contact the Police. The complainant had earlier on contacted KACC. The complainant's evidence gives the details of how a trap was set up for the appellant who ended up being arrested by the police upon receipt of Kshs.83,000/= treated money from the complainant.

The complainant's evidence regarding the report and the arrest is corroborated by the evidence of the police officers who participated in the setting up of the trap and the arrest. That PW2, PC WAFULA SIMIYU, PW3, PC BENSON OLUOCH, PW4, PATRICK METO and PW8, CPL. PAUL KIILU. These four police officers have given a corroborative account of evidence on how they laid the trap with the treated money and arrested the appellant with the Kshs.83,000/= soon after he had received the same from the complainant.

The appellant in his sworn statement of defence stated that it was the complainant who had requested him to assist in the transfer and gave him the document and the Kshs.83,000/= to process the same. According to the appellant, the Kshs.83,000/= was for payment of stamp duty. I would agree with the trial magistrate that the defence by the appellant was not plausible. There is no explanation why the complainant would turn around and involve the police if indeed she had requested for assistance from the appellant. According to the complainant it is the appellant who had made the demand for the money from her. The complainant's evidence is that she did not know the appellant prior to the said land transaction. Stamp duty had already been assessed at Kshs.19,000/= for the transfer from the 1st seller and Kshs.17,280/= for the transfer from the second seller. Armed with this information, the complainant would have no reason to give out another Kshs.83,000/=.

The evidence of PW5, WILFRED NYABERI, a Land Registrar in Bungoma who later processed the complainant's title deed confirmed that the stamp duty payable was Kshs.17,280/= - Upon re-evaluating the evidence on record, I do not agree with the submissions by Mr. Khakula, advocate for the appellant that the appellant was convicted on hearsay evidence and contradictory evidence. Having been caught red handed and arrested with the treated money, the defence case leaves no possibility of being true. The cited case of **Ouma v Republic CRA (1986) KLR** is therefore distinguishable from the appellant's case. One Mr. Nganyi the District Land Surveyor who was initially assisting the complainant in the transfer of the title Deed was not called to testify. However, there is sufficient evidence from the prosecution side even without calling the said District Land Surveyor.

I do not agree with the submissions by the defence counsel that the acquittal of the other person jointly charged with the appellant rendered the charge defective. It does not also render the evidence against the appellant insufficient. It simply means that the person who was jointly charged with the appellant was given the benefit of doubt by the trial magistrate. According to the evidence of the complainant, the Land Registrar, one KENNEDY EDWARD MOSE who was jointly charged with the appellant, declined to take the money when she took the same and told her to go outside and give the money to the appellant. When the complainant walked outside, it is her evidence that she found the appellant outside and it is then that they proceeded to the complainant's motor vehicle for the handing over of the money.

I have stated above why this court does not see any reasons why the complainant would turn around and accuse the appellant if she had given him the Kshs.83,000/= to process the title Deed for her. There are no reasons to doubt the complainant's evidence. The complainant's evidence reveals a well orchestrated plan by the appellant and the Land Registrar. The soliciting and receiving of the money by the appellant therefore falls within the definition of bribery by agents as provided for under Section 39 of the Anti-corruption and Economic Crimes Act No. 3 of 2003.

The prosecution case was proved beyond any reasonable doubts. The appellant's conviction was safe and the sentence within the law. I find no merits in the appeal and dismiss the same. The conviction and sentence imposed by the trial magistrate is upheld.

Judgment delivered, dated and signed at Kakamega on the 22nd day of March, 2012

B. THURANIRA JADEN
J U D G E