



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 492 of 2009**

**MORRIS NJUGUNA MWIRIGI.....APPELLANT**

**VERSUS**

**ATTORNEY GENERAL.....REPUBLIC**

*(From original conviction and sentencing in Criminal Case No. 1516 of 2006 of Chief Magistrates Court at Nairobi, Hon. Lucy Nyambura on 24<sup>th</sup> July 2009).*

**JUDGMENT**

The appellant herein was charged with the offence of obtaining registration by false pretences contrary to **Section 320** of the **Penal Code**. The particulars of the offence are that on the 31<sup>st</sup> day of October 2001 at Ardhi House in Nairobi, within Nairobi Area Province with the intent to defraud, willfully obtained registration of land parcel No. NAIROBI/Block 63/787 falsely pretending that the land parcel was genuinely allocated by the Commissioner of Lands under **Section 35** of the **Registered Land Act, Cap. 300**.

At the close of the trial process, the trial magistrate found the prosecution had proved its case beyond reasonable doubt and therefore convicted the appellant and sentenced him to a fine of Kshs. 50,000 or in default to an imprisonment term of eight (8) months. Aggrieved by the conviction and sentence by the trial court, the Appellant filed an appeal on 6<sup>th</sup> November 2009 in which he advances the following grounds of appeal:

- a) The trial magistrate ignored the glaring contradictions in the prosecution case
- b) The trial magistrate erred by relying on speculation and conjecture that the Appellant obtained Land Parcel No. 63/787 by false pretence
- c) The trial magistrate failed to satisfy herself that the appellant was lawfully allocated Plot No. 63/787
- d) The trial magistrate put the Appellant on his defence even when the prosecution had not established a prima facie case
- e) The trial magistrate did not appreciate the Appellant's defence relating to the destruction of his evidence of ownership for the said land parcel subsequent to which a new title deed was issued against which no caveat was registered.

f) The trial magistrate failed to take into account that the Appellant was given the allotment letter when the land parcel was undeveloped, that the Appellant took no part in the survey and further that the neighbours had a grudge against the Appellant as they had an interest in the said land parcel.

g) The sentence imposed was excessive

This appeal was argued by way of written submissions. Miss Maina, the learned State Counsel for the Respondent opposed the appeal on the basis that there was sufficient evidence to support both the conviction and sentence. She submitted that the evidence was sufficient to show that the documents in possession of the Appellant were fraudulent as supported by the testimony of the **PW3**, the landsofficer.

This being the first appeal, it is the duty of the court “*to reconsider the evidence, evaluate it and draw its own conclusions in deciding whether the decision of the trial court should be upheld. Such re-evaluation must be apparent on the face of the record.*” (**Ongasia & 8 Others Republic, Gicheru, Omolo, and Tunoi, JJA. Court of Appeal, Kisumu.**)

The Appellant submitted that the charge was not proved beyond reasonable doubt according to the evidence adduced in court since the prosecution’s evidence did not support the charge of obtaining registration by false pretences. He challenged the prosecution evidence in that PW1’s testimony pointed to lack of approved plans for the development, while PW2’s evidence related to development on a vacant parking lot by the Appellant. PW3’s testimony did not relate to confirming the fraudulent registration in that he testified as to the genuine registration of Land Parcel 63/787 while PW4’s testimony did not point to the accused as the one who obtained registration by false pretences. PW6’s testimony as to the belief that the title deed was fraudulent was not supported by any evidence. The Appellant submitted that the trial court therefore erred in finding that the defence had a case to answer and finding he surveying caused the appellant to obtain a title deed. The Appellant also referred this court to several cases in support of his appeal.

The main issue for determination by this Court is whether the offence of obtaining registration by false pretences was proved to the required standard. At the onset, I wish to point out that the correct reference to make on the charges against the Appellant is **Section 320** of the **Penal Code** as opposed to **Section 313**. **Section 320** prescribes the offence of obtaining registration by false pretences as follows;

**“Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year”.**

The elements that the prosecution must therefore establish are:

- a) Willful procurement/attempt to procure
- b) Registration, licence or certificate under any law
- c) By any false pretence

From my independent evaluation of the evidence before me, it is not in doubt that the Appellant is registered as the leasehold interest holder of NAIROBI/BLOCK 63/787 under the **Registered Land Act**. Thus the issue for determination is not whether the Appellant had a legitimate title but whether the registration of this title was obtained by false pretences and whether the false pretence is attributable to the Appellant.

**Section 312** of the **Penal Code** defines false pretence as

**“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true.”**

The Appellant submitted that the trial court did not take into account the fact that he was given the allotment letter when the land parcel was undeveloped and that he took no part in the survey. The Respondent submitted that the Appellant engaged a private surveyor despite knowing that for a certificate of lease to be granted, the survey must be carried out by a government surveyor.

**PW3** and **PW4** testimonies are material in establishing the issues surrounding the issuance of title to the Appellant. **PW3**, an employee with the Ministry of Lands testified that he received a request for information from the CID Director regarding Land Parcel NAIROBI BLOCK 63/787. He confirmed that the land parcel was allocated to a business owned by the Appellant. He also testified that *'there was no evidence of prior allocation.'* Regarding the PDP upon which the survey in question was carried out and title subsequently issued, **PW3** testified as follows;

**“...on this plan, there were three plots for allocation i.e. A, B & C, the plan was approved on 25.11.1994. The plots were for residential purposes. It was in respect of Plot C marked as residential upon allocation the allottee accepted the offer. He paid on 19.1.2000 and 15.2.2000. Upon this payment, the allottee caused the plot to be surveyed. It was surveyed and given Block No. 63/787...The plot that was surveyed was not what we had allocated. PDP had plot NOC. On survey, what was used was a photocopy of the PDP which created another plot. The plot C on the photocopy was a car park.”**

The testimony of **PW3** brings out the irregularity upon which the prosecution relies in support of the charges. **PW3** testified to the existence of two PDPs, an original copy and a photocopy. It was his testimony that the survey was carried out on the basis of the second (photocopy) PDP, that when the irregularity was detected, communication was made to the City Director of Planning to this effect, although title had already been issued to the Appellant.

There is no doubt that there was an anomaly in the process that led to the issuing title to the Appellant. The survey that was carried out was premised on a wrong plan, thus the alleged variation in the land that was allocated as Plot C, a residential allocation in Kibera Nairobi, and land that was eventually registered in the name of the Appellant as Block 63/787 in Jamhuri Estate, Nairobi. It is also apparent that the second photocopy PDP was fraudulent to the effect that, as **PW3** testified *“...on the photocopy, plot C was changed to another location”* and during cross-examination that, *“Then Plot C was erased and surveyed elsewhere.”* The evidence of the existence of the two PDPs was not rebutted by the defence.

On the basis of **PW3**'s testimony I therefore respectfully differ with the trial magistrate that, *“There was evidence from **PW3** that the original PDP approved by the Commissioner of Lands specified the plot in question to be a car park(parking bay).* However, I am in agreement with regard to the finding that, *“the PDP used by the accused person and his private surveyor was changed and placed plot C in a different poster.”***PW3** testified that the original PDP that was approved was with respect to residential plots, one of which was Plot C that was offered to the Appellant.

The issue for further determination in order to establish the element of false pretence is whether the irregularity identified above was attributable to the Appellant. Again, I respectfully depart from the trial magistrate's reasoning that the Appellant was guilty on the basis that the PDP used by the Appellant and the surveyor was changed and placed plot C in a different poster.

While I am in agreement with the above observation, I depart from the conclusion of a finding of guilt on the basis of this reasoning. Despite establishing the existence of irregularity on the premise of two different PDPs, the prosecution failed to go further to establish that this irregularity was attributable to the Appellant. **PW3** stated that the photocopy PDP was obtained from the file in the Plans Office and acknowledged during cross-examination that,

**“Two sets of plans were given to me. I got it from the allocation file. I do not know who put the photocopy plans on the file.”**

**PW4**'s testimony also related to the survey in question. He testified that a survey had been carried out by

his assistant at Kibera area based on a letter of allotment on a Plot C owned by Rurago Enterprises. That after the survey was done and submitted, it was approved and a letter was done to release the map to the Commissioner of Lands to prepare title to the land parcel. **PW4's** testimony supports the evidence of **PW3** regarding Plot C in Kibera area but does not prove the existence of fraudulent acts.

The prosecution essentially failed to establish a nexus between the irregularity in the documentation and the Appellant. The evidence before me did not meet the requirements of the existence of elements of false pretence, namely (a) false representation of fact by the appellant and (b) knowledge by the appellant that the fact represented is false or untrue

On this basis I also disagree with the learned State Counsel submission that the Appellant had a duty to explain to the Court how he came to be in possession of the fake title documents in accordance with **Section 111(1)** of the **Evidence Act** which provides for instances when the burden of proof falls on the accused person. Firstly, the legitimacy of the title documents is not in question rather, the plan documents on the basis of which the survey was undertaken and title consequently issued. Secondly, it was not established by the prosecution that the fraudulent documents were in possession of the Appellant to warrant the invocation of **Section 111(1)** of the **Evidence Act** which therefore is not applicable to this case. The burden of proof rested on the prosecution to establish the existence of the elements of the offence in question. I take caution on this reasoning as provided for under **Section 111(2)** that

**“(2) Nothing in this section shall -**

**(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or**

**(b) .....**”

I therefore allow the appeal. The conviction is quashed and sentence set aside. If the fine was paid, the money shall be refunded to the appellant.

Orders accordingly.

**SIGNED DATED and DELIVERED in open court this 27<sup>th</sup> day of November 2012.**

**A. MBOGHOLI MSAGHA  
JUDGE**