



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CRIMINAL APPEAL 60 OF 2009
SAMUEL WAMBUGU KANAKEAPPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

Samuel Wambugu Kanake Alias Joseph Wachira Mwithi is the Appellant herein. He was charged before the Kerugoya Principal Magistrate's Court with the following 4 counts.

- CT 1 -Obtaining money by false pretences contrary to Section 313 of the Penal Code.**
- CT 2 &
CT 3 -Personation contrary to Section 382 of the Penal Code;**
- CT 4 -Making a document without Authority contrary to Section 357 (a) of the Penal Code.**

Particulars on all 4 counts are as in the substituted charge sheet dated 6/5/08 but I find it unnecessary to repeat the same for purposes of this judgment. The Appellant denied all the charges and the matter went to full trial with the prosecution calling a total of 6 witnesses in support of its case. On his part, the appellant testified on oath and called no witnesses. The learned trial magistrate found him guilty as charged on all 4 counts and convicted him accordingly. He was sentenced to serve 3 years imprisonment on each of the 4 counts. The sentences were nonetheless to run concurrently. Being aggrieved by the conviction and sentence, he filed this appeal proffering 5 grounds of Appeal as hereunder.

- 1. The learned magistrate erred in law and fact by failing to appreciate that the evidence adduced did not support the charge.**
- 2. The learned trial magistrate erred in law and fact in failing to appreciate that the advocate called as prosecution witness denied any involvement in**

writing the alleged sale agreement.

3. *The learned trial magistrate erred in law and fact in failing to appreciate that the conviction was against the weight of evidence adduced.*

4. *The learned trial magistrate erred in law and fact in failing to appreciate that the co-existing circumstances destroyed the inference of the appellant's involvement in the alleged offences.*

5. *That the sentence was manifestly harsh and excessive regard being made to all circumstances of the case.*

He urges the court to quash the conviction and set aside the sentence.

Interestingly, when the Appellant moved the court for bail pending Appeal, learned counsel for the state conceded the application saying that the Appellant had good chances of success. He in fact analyzed and discredited the evidence adduced before the trial court and largely contributed to the success of the bail pending Appeal application.

When the Appeal came for hearing whatsoever, the state counsel then on record opposed the appeal and urged the court to dismiss the same.

Be that as it may, the law enjoins me to re-analyze and re-evaluate the evidence adduced before the trial court and make my own inference as to whether the said evidence is sufficient to support a conviction. In so doing, I should bear in mind that I have the disadvantage of not having seen the witnesses testify and was not able to assess the demeanor etc.

(see OKENO -VS- REPUBLIC 1972 EA 32)

In a nutshell; the evidence before the trial court was that the complainant one Paul Munene was looking for a piece of land to buy in Kerugoya area in 2005. His brother who testified as PW2 approached some brokers in the names of Wandathi and Karimi to look for a suitable plot. They later reported to him that one Joseph Wachira Mwithi had a plot to sell. They gave him the land owner's cell phone number and he called him and confirmed that he had a suitable plot for sale. He informed the complainant and introduced him to the seller. They met and went and saw the land. They even negotiated and agreed on a sale price of KShs.190,000. In his evidence in chief, the complainant said they went to the offices of Mr. Kinyua & Co. Advocates where they entered into an agreement of sale. On cross-examination however, he said they went to the firm of Rukenya Murigu & Co. Advocates. They both signed the agreement in his presence and the complainant was given a signed transfer form. It will be noted however that

the said Advocate i.e. Amos Rukenya Murigu denied having seen the agreement in question. He denied having signed the document as a witness and also denied that the rubber stamp that was supposed to authenticate his signature was from his office. He told the court that he indeed asked the investigating officer to investigate the matter further in order to verify his signatures but the officer did not do so.

When the complainant presented the copy of the title deed he had been given by the seller to the land office, he was informed that the same was a forgery. Investigations at the department of registration of persons at the National Registration Bureau Headquarters also revealed that ID No. 58226601 allegedly belonging to the seller was non-existent. Further investigations revealed that **Plot No. INOI/KAMONDO/2140** which the complainant believed he had paid for actually belonged to one Joseph Wachira Mwithi whose ID card now is 10497717 and not to the person posing as the seller.

The said seller was looked for and the Appellant was arrested in Nairobi and brought back to Kerugoya where he was charged with the offences in question.

The Appellant nonetheless, denied that he was the one who had purported to sell the plot in question to the complainant. He said that his was a case of mistaken identity, and that he did not commit the offences he is charged with. He said he did not even know the complainant before.

As conceded by Mr. Omwega who appeared for the state earlier on this appeal, the Investigations Officer carried out very shoddy investigations. He did not send the appellant's signatures to the documents examiner for comparison with the signatures on the agreement or on the other documents he is said to have made.

A simple comparison of the signature on the agreement would have gone a long way to either implicate or exonerate the appellant from blame and more so after the advocate who was alleged to have attested the signatures denied any knowledge of the agreement.

I observe that the learned trial magistrate did concede that the Investigating Officer had blundered in not taking the agreement for an examination of the signatures. Indeed, he said in his judgment that he would ignore the said agreement. He nonetheless went on to find that PW1 and PW2 appeared to be honest men and he therefore believed their testimony. He made a finding that the 2 had stayed with the appellant for many hours when they went to see the land and also when they made the agreement.

My considered view however is that the evidence of PW1 and PW2 who were brothers, in

absence of the agreement and/or any other witness did not meet the threshold of "**beyond reasonable doubt**" as stipulated in criminal law. The 2 brokers who are said to have introduced the complainant to the Appellant were not called as witnesses before the trial court. Had they been called, they could have corroborated the evidence of PW1 and PW2 and laid the matter to rest. It is also noted that the transaction was in October 2005 and the Appellant was arrested 9 months later i.e. July 2006. For one who had met the other as strangers for a few hours only for 1 day 9 months earlier, the likelihood of mistaken identity is not too remote. The evidence analyzed above in its entirety does not in my firm view prove the case beyond any reasonable doubt. The prosecution evidence was weak and this fact should have earned the Appellant the benefit of doubt and had him acquitted. I find that the conviction against the Appellant was not safe. His Appeal therefore succeeds. The same is hereby allowed. The conviction against him is hereby quashed and the sentence set aside.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 17th day of June 2010.

In presence of:- The Appellant and Mr. Wohoro for the State.