REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 37 OF 2006

PETER MAINGI MITHEKO……..……..……..APPELLANT
VERSUS
REPUBLIC…….……..…….RESPONDENT

J U D G M E N T

Peter Maingi Mitheko hereinafter referred to as the Appellant was charged before the Senior Principal Magistrate's court Muranga with 2 counts under the penal code. **Count 1** was conspiracy to defraud **contrary to Section 317 of the penal code** and **Count 2** was a charge of obtaining land Registration by false pretences **contrary to Section 320 of the penal code.** Particulars on the 2 charges are as in the charge sheet and I need not repeat them for the purposes of this judgment. He pleaded not guilty on both counts and the matter proceeded to full hearing with the prosecution calling a total of 7 witnesses.

On his part the Appellant opted to make an unsworn statement of defence which was very brief and in which he denied having committed the offences he was charged with. He said that the land in question was sold to him by PW1, and that the Title Deed for the said plot was issued to him at the lands office.

After analyzing the evidence before him, the learned trial magistrate found the 2 charges proved beyond reasonable doubt. He therefore convicted the Appellant and fined him KShs.51,000 on each count in default of which he was to serve 12 months imprisonment on each count.

Being aggrieved by the said conviction and sentence, he filed this Appeal through Gacheru and Co. Advocates who were also his advocates during the trial before the subordinate court.

He proffered 9 grounds of Appeal but Mr. Gacheru dropped the 1st ground which related to the manner in which the plea was taken.

This being a first Appeal it is incumbent upon me to re-analyze and re-evaluate the evidence adduced before the trial court and arrive at my own conclusion. In doing so I should of course bear in mind that I did not see the witnesses as they testified and was not therefore able to assess their demeanor **(see OKENO VS REPUBLIC 1972 EA 32).**

In brief, land parcel number **LOC.19/RWATHIA/1083** measuring 0.81 hectares (2 acres) belonged to PW1, PW2 and PW3's father. He died in 1972 when these witnesses were very young. Their mother had also died earlier. They were left under the care of their uncle KIORIA KARINA who testified as PW5.

THE Appellant was their uncle. They did not file any succession proceedings immediately – maybe because of their tender age. According to PW1, he leased the land in question to the Accused herein and he would pay him some money for the lease. At one point however, the Appellant is said to have refused to pay the money claiming that he had bought the land not leased it. When PW1 informed his sisters, they decided to file a succession cause. They filed **Succession Cause No. 117/01** before the Muranga court. A Grant of letters of Administration was issued to PW1. When they went to the land Registry Muranga to commence the process of transferring the land to themselves, they discovered that the documents at the land Registry indicated that the parcel in question had been transferred to the Appellant way back in 1994. They reported the matter to the police and investigations started.

No Grant of letters of administration had been issued earlier and so the land could not have been transmitted either to PW1 or to anybody else. The police took over the matter. They went to the Land Registry and examined the copies of the extracts of the register for that parcel. Several discrepancies were

noted e.g. while the Title Deed which was recovered from the Appellant indicated that it was issued on 4.8.94, the copy of the register showed that it was issued to him on 4.9.94. There were also several cancellations in the register. The investigations officer one Cpl. Jacob Mureithi went to the lands office and questioned PW4 who used to be the Land Registrar in Muranga then. She confirmed that she had not signed any of those entries. Further investigations revealed that there were no documents lodged with the Land Registry as required in support of the Title Deed. There was no consent to transfer from the land Control Board or even an Application for the consent duly signed by the seller and buyer as required. No minutes of the Land Control Board showing the granting of the consent were traced. PW7 collected PW4's specimen signature and forwarded them to the Government document's examiner for examination and comparison. It was found that PW4 who was the Registrar then was not the one who had made the signatures she was purported to have made. PW7 after carrying out these investigations was satisfied that the offences in question had been committed and he therefore charged the Appellant with the 2 counts now before the court.

According to the Appellant however, he bought the land from PW1 and even went to the Land Control Board. Although he claimed that he entered into a sale agreement with PW1, he did not produce any sale agreement. Nor did he produce the minutes of the Land Control Board or the consent to transfer which he was required by law to lodge at the Land Registry before the Title Deed could be issued. The court will emphasize here that in expecting the Appellant to produce these documents, the learned trial magistrate was not shifting the burden of proof in any way. Under Section 107(1) of the Evidence Act

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists."

The Appellant was asserting that he bought the land from PW1. It was incumbent on him to prove the said sale and the entire legality of the said transaction by producing the said documents. I have considered the entire evidence adduced before the learned trial magistrate as analyzed above. I have also keenly considered the 8 grounds of appeal and the submission thereon by Mr. Gacheru learned counsel for the Appellant. I have also considered the submission by learned counsel for the state who has opposed the Appeal. My finding is that the learned trial magistrate did not err at all in arriving at the conviction of the Appellant. Learned counsel for the Appellant submitted that the Appellant had purchased the land from PW1. As stated earlier however, no such sale was proved. It behoved the Appellant to go beyond mere words and prove that indeed he had purchased the said land. He produced not a single document or witness to support the claim that he had bought the said land.

On Ground 5 of the petition, I find that the learned trial magistrate did not treat the case as a civil one. The provisions of the Evidence Act cited above relate to criminal proceedings not exclusively civil ones. I am also satisfied that the learned trial magistrate considered the Appellant's defence. Infact, he only said that he had bought the land. He did not produce any documents or other evidence in support of the purported sale and the magistrate refused to consider the same.

The facts or circumstances under which he obtained the Title Deed in question which was clearly forged were exclusively and exceptionally within the Appellant's knowledge and so by dint of Section 111 of the Evidence Act, the onus was upon him to prove those facts.

I must nonetheless say that PW1 was not very innocent in the entire transaction. He appears to have received some money which he could not clearly explain. My finding is that he was a conspirator with the Appellant and other persons in the Land Registry who were nonetheless not apprehended. That does not nonetheless exonerate the Appellant from criminal culpability. I am satisfied that there was more than sufficient evidence to support the 2 charges and he was therefore properly convicted.

On the ground of non compliance with Section 169(2) of the Criminal Procedure code, I note that the learned magistrate did clearly state that the conviction was on both counts as charged.

The charges and the particulars thereof were clearly indicated at the opening of the judgment and it was not therefore necessary to repeat them before concluding the judgment. No prejudice was occasioned to the Appellant by the said omission and the same is squarely covered by Section 382 of the Criminal Procedure Code.

In sum, my finding is that the conviction against the Appellant was safe. He was properly convicted on both counts. His Appeal must therefore fail. On the sentence given the gravity of the Appellant's action, I must say he was even lucky to have been given the option of a fine. The sentence was not excessive as to necessitate my interference with the same.

The Appeal on both conviction and sentence fails. The same is hereby dismissed.

W. KARANJA
JUDGE

Dated, signed and delivered at Embu this 3rd day of November 2010

In presence of:- Mr. Gacheru for Appellant & Ms. Matiru for State.