



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Criminal Appeal 268 of 2002

THOMAS MASAMBU AMUHAYA ----- APPELLANT

V E R S U S

REPUBLIC ----- RESPONDENT

J U D G E M E N T

The appellant was charged with two counts on the first charge, and one count on the second charge.

The first count was for Conspiracy to Defraud contrary to **section 317** of the Penal Code. It was the prosecution's case that the appellant conspired with others, who were not before the court, to defraud the late Shitogo Shigutwa of his land **L.R. NO. KAKAMEGA/CHEPTULU/211**.

On count 2, the prosecution asserted that the appellant had obtained Registration of Land by false pretences contrary to **section 320** of the Penal Code.

That count is inter-linked to count 1 because the appellant is said to have caused parcel No. 211 to be sub-divided, giving rise to parcels Nos.1005, 1006 and 1007.

The whole process of sub-division and registration of the resultant parcels, was said to have been undertaken by the appellant, by false pretences.

The second charge was that the appellant was guilty of Failing to Produce the Land Title Deed without reasonable cause contrary to **section 155 (3)** of the Registered Land Act.

When the prosecution had closed its case before the trial court, the learned trial magistrate placed the appellant on his defence on the first count only. The appellant was acquitted on count 2 of the first charge, as well as on the 2nd charge.

After he had put forward his defence, the trial court gave its due consideration to the whole case and then delivered its judgement. In the said judgement, the appellant was convicted for the offence of conspiracy to defraud contrary to **section 317** of the Penal Code.

Being dissatisfied with the conviction, the appellant lodged an appeal to this court.

When canvassing the appeal, Mr. Nandwa, learned advocate for the appellant submitted that the charge

facing the appellant was defective. The alleged defect was said to arise from the fact that a person who is dead cannot be defrauded.

The evidence adduced before the trial court revealed that Shitogo Shigutwa, the complainant, had passed away in 1986. Notwithstanding that fact, the charge sheet stated that the appellant had conspired to defraud the complainant on 3rd August 1998.

Given that the complainant died about twelve years before the events giving rise to the charge, it is not possible that he could have been the victim of the alleged fraud. At worst, it is the estate of the late Shitogo Shigutwa which could have been the victim.

In any event, the learned trial magistrate made an express finding of fact, that;

“It is not in dispute that the accused purchased a portion of the subject land from one Lukes Indunya Shitogo for a consideration of 135,000/=. PW1 who complained to the Land Registrar was present and is a signatory to the agreement as a witness. He is also on record to have attended a Land Control Board meeting that consented to the sub-division of the land.”

Notwithstanding those steps which were taken by the appellant, the learned trial magistrate went ahead to conclude as follows;

“One wonders how the land was registered in the name of the accused. The land was originally in the name of the deceased and no succession was done. As such no consent could have been obtained. If it was obtained, then it was obtained by deceit.

The only conclusion that I can draw is that the accused used the back door to secure registration. He must have conspired with a person working at the land registry to secure registration of the documents.”

As the appellant had not been put to his defence for the offence of obtaining registration by false pretences, it is very curious indeed that the trial court thereafter made a finding, which was akin to finding him criminally liable in that respect.

The trial court then went on to say;

“Though the accused is entitled to a portion of the subject land he ought to have followed the proper procedure.”

To my mind, there is nothing at all on record, to show that the appellant followed the wrong procedure. I say so because in a criminal case, it is not the accused person who is required, by law, to prove his innocence. The law clearly imposes upon the prosecution, the obligation to prove its case against the accused person beyond any reasonable doubt.

In the course of his trial, the accused person is entitled to keep silent, in the face of the allegations and evidence adduced against him. If he should choose to remain silent or to give only a partial answer to the allegations, that cannot be held against him.

It was thus an error of law, on the part of the trial court to hold, as it did, that because the appellant did not tell the court how he got possession of the title deed, the only conclusion that can be drawn is that he had used the back door to obtain registration.

That cannot be the only conclusion in this case because the prosecution witnesses said that there was a Sale Agreement and also a consent from the Land Control Board.

As the appellant submitted, a buyer of land would not, in law, have a role in making an application to the Land Control Board, for the sub-division of land, and subsequently for the transfer of the portion that he

had purchased. That role would ordinarily be performed by the seller.

In this case, the seller was a brother to PW1, who, in turn, was a witness to the signing of the Agreement. PW1 thereafter even attended before the land control board, when the said board gave its consent to the sub-division.

As the documents which were lodged at the Lands Office were missing, the doubt as to the contents thereof should have gone to the benefit of the appellant herein. It was therefore an error of law, for the trial court to have concluded that the absence of the necessary documents could be a sound foundation for holding that the appellant was culpable.

Finally, when PW1, **DAUDI SHIKUTWA**, testified, the prosecutor was Senior Sergeant Sirengo. As at that time (19th October 2001), it was a requirement under **section 85 (2)** of the Criminal Procedure Code, that a police officer could only be a qualified public prosecutor, if he was at least, of the rank of an Assistant Inspector.

In effect, Senior Sergeant Sirengo was an unqualified public prosecutor. Therefore, by undertaking even that little portion of the prosecution, he rendered the entire trial a nullity.

In the light of all the foregoing, the learned Senior State counsel, Mr. Karuri, conceded the appeal. In my considered view, the decision to concede the appeal was prudent in the circumstances.

Accordingly, and for all the reasons stated herein, the appeal is allowed. The conviction is set aside and the sentence vacated.

However, I must point out that this judgement is not to be considered as determining the legality or otherwise of the title which the appellant had acquired for a portion of the land that was the subject matter of the criminal case against him. So far, this decision only absolves the appellant from criminal liability for the offences for which he was charged and tried. I say no more.

FRED A. OCHIENG

J U D G E

Dated, Countersigned and Delivered at Kakamega, this 27TH day of July,, 2009.

SAID J. CHITEMBWE

J U D G E