REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 6 of 2008

SWALE AWADH SALIM ….......…………………..…..………. APPELLANT

VERSUS

REPUBLIC ……………..……………………………..………. RESPONDENT

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JUDGEMENT

The Appellant **SWALE AWADH SALIM** filed this present appeal against the conviction and sentence imposed upon him by the lower court on 18th January 2008. On 25th September 2006 the Appellant was arraigned before the Honourable Chief Magistrate Mombasa in **Criminal Case No. 3338 of 2006, REPUBLIC -VS- SWALEH AWADH SALIM**, where he was charged with the offence of **OBTAINING MONEY BY FALSE PRETENCES** contrary to S. 313 of the Penal Code. The facts of the charge stated as follows:-

> ***"SWALEH AWADH SALIM: On the 23rd day of May 2006 at K-Rep Bank, Moi Avenue Branch in Mombasa District within the Coast Province, jointly with others not before court, with intent to defraud obtained from BENSON WASILWA MUSABI a sum of Kshs.600,000/- by falsely pretending that the house you were selling to him on plot number 236/MN/11 belonged to you, a fact you knew to be untrue"***

The Appellant did at the first instance plead guilty to the charge. However upon being read the facts of the case by the learned prosecutor on 21st November 2006 he retracted his guilty plea. A plea of not guilty was then entered and the hearing of the case commenced on 6th February 2007 before Honourable R.N. Makungu Resident Magistrate, Mombasa.

The prosecution called a total of nine (9) witnesses in support of their case before the lower court. The brief facts of the prosecution case were that the complainant Ben Wasilwa Musabi was desirous of purchasing a house, and to that end he put the word out amongst his friends of this desire. In April 2006 one of his friends **MZEE JUMAA** told him of a house available for sale in the Mishomoroni area. The complainant went to the house and met a caretaker named **SIMON** who confirmed to him that the house was for sale. The said Simon then contacted the owner of the house who met up with the complainant at Mtopanga Post Office. This alleged owner was the Appellant who introduced himself to

the complainant as **ABUBAKER SALIM ALI**, and confirmed that he was the owner of the house and further that he was selling the same. The parties discussed and agreed on a price of Kshs.850,000/-. They decided to contact their respective lawyers to handle the sale. The complainant's lawyer was Ananda Advocate whilst the Appellant settled on Mulongo and Company Advocates. The Appellant's advocate drew up a sale agreement which was then sent to the complainant's lawyers to peruse. On 22nd May 2006 the parties met at the offices of Ananda & Company Advocates. The sale agreement was duly executed by both parties and thereafter they left to K-Rep Bank from where the complainant was to withdraw the initial payment of Kshs.600,000/-. The complainant in his evidence told the court that on 22nd May 2006 he withdrew a sum of Kshs.600,000/- from his account and in the presence of **MOFFAT WEBO** handed over to the Appellant Kshs.600,000/- in cash. It was agreed that the balance of Kshs.250,000/- would be paid once the Appellant handed over the water and electricity bills to the complainant. The complainant waited until 6th June 2006 but failed to hear from the Appellant. He then became suspicious and took the electric meter number to the Kenya Power & Lighting Company offices for verification. Upon presentation he was told that meter number B433088/2200605311 actually belonged to **TWAHA MOHAMED ABDULRAHMAN** and not to Abubaker Salim Ali the alleged owner of the house. Meanwhile the Appellant continued to write to the complainant's lawyer demanding to be paid the balance of the purchase price. Due to his suspicions the complainant reported the matter to CID Urban as the Appellant had by now switched off his phone and could not be reached. Police took up the matter and commenced investigations. It later transpired that the identity card bearing serial number 23510048 bearing the Appellant's photograph was not a genuine document and further that the property which the Appellant was purporting to sell and for which the complainant had paid him Kshs.600,000/- did not actually belong to the Appellant. The property actually belonged to **SALIM ALI SAID**, and that the Appellant had neither the capacity nor the authority to sell the same. The police thereafter arrested the Appellant who was then arraigned in court and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer. He gave an unsworn defence in which he denied the charges. On 18th January 2008 the learned Resident Magistrate delivered her judgement in which she convicted the Appellant, and after hearing his mitigation sentenced him to a prison term of seven (7) years. It is against this conviction and sentence that the Appellant now appeals.

Mr. Ondari Principal State Counsel appeared for the Respondent State whilst the Appellant acted in person. The Appellant chose to rely wholly upon his written submissions filed on 3rd November 2009 in support of his appeal. Mr. Ondari learned State Counsel made oral submissions urging the court to uphold both the conviction and sentence imposed by the lower court. I have had the opportunity to peruse the Appellant's written submissions and I note that his appeal can be reduced into three (3) main grounds –

(1) ***That his trial was rendered a nullity due to the breach of the Appellant's constitutional rights as guaranteed by S. 72(3) of the Constitution of Kenya.***

(2) ***That the prosecution evidence was so riddled with contradictions and irregularities as to render it incapable of being a sound basis for his conviction***

(3) ***That the seven (7) year sentence imposed by the learned trial magistrate was harsh and excessive in the circumstances.***

I propose to deal with each ground of this appeal individually –

This being a court of first appeal I am guided by the decision in the case of the Court of Appeal in **OKENO –VS-REPUBLIC [1972] E.A. LR 33** where it was held that:-

"vi It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld"

[see also **AJODE –VS- REPUBLIC [2004] EALR Vol. 2 81**]

In his first ground the Appellant alleges that he was detained in police custody for a period of eight (8) days before he was arraigned in court amounting to a breach of his constitutional rights as guaranteed by S. 72(3) of the Constitution of Kenya. S. 72(3) provides that any person who is arrested or detained upon reasonable suspicion of having committed an offence and who is not released:-

> ***"Shall be brought before a court as soon as is reasonably practicable … within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death …"***

In the instant case the Appellant had been arrested on 18th September 2006 (as clearly indicated in the charge sheet filed on 25th September 2006) on a non-capital offence. He therefore ought to have been arraigned in court within a period of twenty-four (24) hours. As it was the Appellant's first appearance in court (again clearly indicated on the charge sheet) was on 25th September 2006. This was a period of seven (7) days **after** his arrest and well beyond the twenty-four (24) hour period stipulated in the Constitution. However it is not every delay in bringing the suspect to court that will be declared a breach of his Constitutional rights. S. 72(3) provides that a suspect must be brought to court ***"as soon as reasonably practicable"***. The same section goes on to provide that –

> ***"the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this sub-section have been complied with."***

In his oral submissions Mr. Ondari Principal State Counsel insists that the Appellant was actually brought before a court as soon as it was reasonably practical to do so. He explained that upon his arrest the Appellant was found in possession of an identity card. The police needed time to verify this identity card with the Department of Registration of Persons in order to ascertain the true identity of the Appellant. Between the date of arrest 18th November 2006 to the date of first appearance in court 25th November 2006 there was a week-end. On those two days Saturday and Sunday the Appellant could not be arraigned before a court as in Kenya courts do not sit over the week-ends. Mr. Ondari submits that the fact of holding a suspect for over twenty-four (24) hours does not ipso facto entitle him to an acquittal. I could not agree

more. As courts we would be failing in our cardinal duty to society which is to ensure the dispensation of justice if we allowed suspects to secure their release based on mere technicalities. I am satisfied that the explanation tendered by the learned State Counsel is a reasonable explanation for the delay in arraigning the Appellant before court. In the case of **DOMINIC MUTIE MWALIMU –VS- REPUBLIC Criminal Appeal No. 217 of 2005** at page 8 the Court of Appeal held that –

> ***"The wording of S. 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on evidence."***

I am satisfied that the Appellant was indeed brought before court ***"as soon as reasonably practicable"*** as demanded by S. 72(3) of the Constitution. In any event even if there had been an unreasonable delay (which I have not found to be the case) this would not in and of itself be a reason to declare his trial null and void. The Appellant would still be at liberty to make use of the provisions of S. 72(6) of the same constitution to apply for compensation from the State. Finally I find that there has been no breach of the Appellant's constitutional rights would under S. 72(3) of the Constitution and I thereby dismiss this ground of this appeal.

The second ground which the Appellant relies upon are the inconsistencies and contradictions in the prosecution evidence which he alleges renders the prosecution case totally unreliable and incapable of supporting his conviction by the learned trial magistrate. I have carefully and anxiously perused the record of the trial in the lower court and I am unable to pick out any of these so called inconsistencies and contradictions. On the contrary my finding is that all nine (9) prosecution witnesses were clear and consistent in giving evidence. They corroborated each other in all material respects and remained unshaken under cross-examination by the Appellant. The complainant Ben Wasilwa, **PW2** Moffat Webo and **PW3** Ijumaa Maruna all positively identify the Appellant as the man who introduced himself to them as Abubaker Salim Ali the owner of the house for Sale. **PW4** Peter Juma Simiyu a clerk in the offices of Mulongo and Company Advocates who acted for the Appellant in the sale corroborates this evidence and he too positively identifies the Appellant as Abubaker the seller of the house for whom their firm acted. This evidence is corroborated even further by **PW8** Manasseh Ananda the lawyer who acted for the complainant (buyer) in this transaction who identifies the Appellant as the seller of the known as Abubaker Salim. All these witnesses had ample time and opportunity to see the Appellant well. The transaction was carried out over a couple of days and everything was done in the day-time. Most crucially the complainant and **PW2** positively identify the Appellant as the man to whom the complainant paid a sum of Kshs.600,000/- in cash as a down payment for the purchase of that house. They both testify that on 22nd May 2006 they went with the Appellant to K-Rep Bank where the complainant withdrew a sum of Kshs.600,000/- which he handed over to the Appellant in broad daylight inside the banking hall. The fact of this debit from the complainant's bank account is evidenced by the entries on his bank statement produced in court as **Pexb4**. In her judgement at page 6 line 19 the learned trial magistrate stated thus.

> ***"I have analyzed the evidence before me. The evidence against the accused person is overwhelming. All the prosecution witnesses positively identify the accused person as the Abubaker Salim, and the one whom they were transacting with all the time. This is a transaction that took place over some length of time and it is highly unlikely that this could be a case of mistaken identity. The accused person systematically set down in motion events and pieced together paperwork that fooled***

***PW1* and all the persons who dealt with the property, into believing that they are dealing with the real vendor."**

This finding on identification of the Appellant was in my view sound both in fact and in law. There was a clear and positive identification of the Appellant by all the key witnesses. I find there is no possibility of a mistaken identify.

The learned trial magistrate proceeds on page 7 line 6 of her judgement to find that –

"It has been shown that the plot, both in its physical location, and by its number never existed in his [the Appellant's] name. The true owner of plot No. 236/MN/II testified in court and it turned out to be a huge hectare of land with over 300 tenants!

The plot (physical) which the accused pointed out to the complainant and which it later transpired belonged to Abubaker Abdul-rahman and not Abubaker Salim [the Appellant herein]

This means that accused was not in a position to sell the land neither was he in a position to pass good title to PW1 and yet he went ahead and received money from him. It was never his intention that the land would pass over to PW1 and all the documents he produced upon request were used to instill false confidence in the complainant's mind."

Again I find that the trial magistrate has effectively captured the crux of the matter. The Appellant was not the owner of the land has had no capacity to sell or transfer title to the same. With full knowledge of these facts the Appellant nevertheless went ahead to receive from the complainant the sum of Kshs.600,000/-. The mens rea of the offence has in my view clearly been established – the intent to illegally and fraudulently obtain this money from the complainant by way of this false pretence. My re-evaluation of the evidence before the lower court satisfies me that the charge against the Appellant was proved beyond all reasonable doubt. In the case of **CHEMAGONG –VS- REPUBLIC [1984] KLR 612** the Court of Appeal did hold as follows:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court whether in a civil or a criminal case, unless it is based on no evidence or on a misapprehension of the evidence, or the judge [or magistrate] is shown demonstratably to have acted on wrong principles in reaching the finding he did."

In the present case the learned trial magistrate in her judgement has enunciated several findings of fact. I am not inclined to interfere with any one of her findings as in my view all were backed by the evidence adduced before the court. I find no evidence of unreliability in the prosecution case. The thread of evidence was clear. At page 8 line 1 of her judgement it is clear that the learned trial magistrate did give due consideration of the Appellant's defence. Her conclusion was that the prosecution had proved its case sufficiently. I am equally satisfied that the legal standard of proof was met. Therefore I do dismiss the second ground of appeal.

Lastly the Appellant appeals against his sentence on the grounds that it is harsh and excessive. The appellant was called upon to mitigate and finally the court sentenced him thus –

"Mitigation noted. Offence is very serious and involves colossal sums of money. Accused to serve 7 years imprisonment"

The Appellant had been convicted under S. 313 of the Penal code which provides that any person –

"convicted under this section is guilty of a misdemeanour and is liable to imprisonment for three years"

It is therefore clear that the seven year sentence imposed by the trial court was both unlawful and illegal as no such sentence is provided for by law. I must at this point stress that magistrates must endeavour always to carefully peruse the particular section of the law under which an accused before them has been charged and be sure to impose a sentence which is in accordance to that law. Clearly this sentence cannot stand. It has no basis in law. For this reason I do hereby set aside the seven (7) year sentence imposed upon the Appellant. In view of the fact that the Appellant was found to have no previous records but taking into account the fact that the complainant lost Kshs.600,000/- which was never recovered and, obviously must have been used by the Appellant to his own benefit I feel that a sentence of thirty (30) months imprisonment is appropriate in the circumstances. Therefore the appeal against sentence succeeds and the seven (7) year sentence is hereby set aside and substituted with a sentence of thirty (30) months imprisonment.

Dated and Delivered at Mombasa this 9th day of December 2009.

M. ODERO
JUDGE

Read in open court in the presence of:
Appellant in person
Mr. Onserio for State

M. ODERO
JUDGE
9TH DECEMBER 2009