

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 287 of 2003

ENOS DISHON TUNYA)

JARED ASWANI OMBOKO)APPELLANTS

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The Appellants, Enos Dishon Tunya and Jared Aswani Omboko, were convicted on 23.12.03 of the offence of obtaining Land Title Deed by false pretences c/s 313 of the Penal Code and each sentenced to serve a term of imprisonment of three years by W. K. Kahindi, DMII, in Vihiga Criminal Case No. 305 of 2001. Aggrieved by the conviction and sentence, they appealed. On 26.05.04, I admitted them to bail pending appeal.

In their Petition of Appeal dated 29.12.03 filed in court on 30.12.03, the Petitioners put forward six grounds of Appeal in which, in a nutshell, they attacked the prosecution evidence on the basis of which they were convicted as being insufficient, and submitted that the sentences meted out to them were excessive.

I have perused the record of appeal carefully. The appellants are entitled to a fresh reconsideration of the evidence as this is a first appeal. On 8.3.01 when the Appellants were called upon to plead, the prosecutor was one Osur, a police Constable.

The prosecution of the case which commenced on 10/8/01 and in which a total of six prosecution witnesses gave evidence was concluded on 2/12/03. It was conducted by Police Constable Osur and S. Sgt. Sirengo. Inspector of Police one Momanyi conducted the case only on 21/11/01 when PWV gave evidence. Under section 85(2) of the Criminal Procedure Code, Cap 75, a person below the rank of Assistant Inspector of Police is not qualified to be a public prosecutor for the purpose of any case.

The bulk of the case against the Appellants was conducted by PC. Oscar and SSgt. Sirengo both of whom were unqualified persons. The Inspector of Police, namely I.P. Momanyi, only appeared in court once on 21/11/01 when the evidence of PWV was taken. This did not legitimize the prosecution by the unqualified persons. Prosecution must be conducted throughout by a qualified person. Where an unqualified person assumes prosecutorial role, albeit for only a short while, the entire prosecution becomes vitiated. Similarly where a qualified person conducts the bulk of the prosecution case and an unqualified person steps in to conduct part of the prosecution, the entire prosecution is also vitiated. The prosecution of the Appellants in this case was a nullity.

It is the duty of every magistrate to ensure at all times that the prosecutors appearing before them are of the rank of Assistant Inspector and have been appointed as public prosecutors. Failure by a trial magistrate to ensure that section 85(2) of the Criminal Procedure Code is adhered to will result in nullification of the case which has taken time and resources to mount. The incidents in which unqualified persons continue to appear to prosecute in the lower courts are gaining ground and it is now necessary for every magistrate to ensure that a prosecutor is qualified in terms of section 85(2) of Cap 75 at every stage of the case.

As the prosecution of the Appellants was conducted by unqualified persons, and was a nullity, I hereby quash the conviction and set aside the sentences against the Appellants.

Dated, signed and delivered at Kakamega this 24th day of February, 2006.

G. B. M. KARIUKI

J U D G E