



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO. 42 OF 2003

SERAPHINO NJOKA NGUGIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant herein has appealed against both conviction and sentence in Criminal Case No. 788/2002. He had been charged, convicted and sentenced of the offence of giving false information contrary to S. 129 (b) of the Penal Code.
2. Mr. Momanyi argued the at length and Mr. Omwega conceded the same and supported the Appellant.
3. The charge reads as follows;

“On the 13th day of July 2001 at the C.I.D office Mbeere in Mbeere District of Eastern Province informed No.217813 C.I. Joseph Ng’ang’a a person employed in the Public Service that one PATRICK MURIITHI NJOGU obtained the registration of land parcel number NTHAWA/RIANDU/961 which belonged to his late son JIM ERICK KINYUA through false pretences on 4th January, 1999, the information which you knew or believed to be false intending thereby to cause the said No.217813 C.I. JOSEPH NG’ANG’A to investigate a serious crime of obtaining registration through false pretences which the said C.I. JOSEPH NG’ANG’A ought not to have done if the true state of facts respecting such information was given to his”.
4. **Mr. Momanyi** argued that the charge as framed raises only one important matter; that the false information was that the Appellant’s son was dead by the time the transfer to the complainant was made. Evidence before the Lower Court clearly showed that this was not a falsity because indeed the son died in October 1997 while the land was transferred in 1998. To that extent, no offence was disclosed.
5. In any event, Counsel argued further that one Njue Njeru Advocate who signed the transfer form was never called to testify and this was fatal to the prosecution case. Reliance was thereby placed on **Bukenya and others -vs- Uganda (1972) E.A. 549.**
6. I was also told that the expert witness to wit the Document Examiner did not testify and following **Kazungu Kahindi –vs- R C.A. 97/1999,** such an omission would be fatal to the Prosecution’s case.
7. A number of contradictions regarding payments and receipt thereof were raised but in my view they are not relevant to the substance of the charge nor the Appeal itself.

8. One other thing but of relevance was that the Learned trial Magistrate from the evidence of Prosecution witnesses found that the whole transaction leading to the transfer of the land was illegal and yet he still found the Appellant guilty although there were other players who were not punished for their illegalities. These include the Chairman of the Land Control Board and the District Officer of the relevant area. I was urged to find that all these omissions should favour the Appellant.

9. I have read the Lower Court's record but before I get to it, I should break the charge into relevant bits and then see whether, in my view, the evidence tendered was proof beyond reasonable doubt that an offence was committed. The charge has these ingredients;

i) That the Appellant informed **C.I. Joseph Ng'ang'a** that **Patrick Muriithi Njogu** had obtained the registration of Nthawa/Riandu/961 by false pretences

ii) That the false pretences would be because the registered proprietor was long dead.

iii) That following the information given to him, **C.I. Joseph Ng'ang'a** went into great lengths to investigate the matter which he would not have done had the facts been truly put to him.

10. From the record, it is clear that Jim Eric Kinyua, son of the Appellant died in October 1997, so that the transfer from his name to PW2 in 1998 or thereabouts was an illegal act. Did PW2 then obtain registration by false pretences? Yes indeed. It is agreed by him in his evidence that he knew that the land he was buying belonged to a minor. He also knew that the Appellant who was acting as seller on his son's behalf was not the owner of the land. He also knew that the land could not be transferred until the minor attained 18 years. He said this in evidence, ***"When we were drawing the Agreement the son was about 16 – 17 years. On 21.7.1995, accused had transfer forms and Land Control Board forms. He requested me to sign my part and hand over to him. I signed them and handed them over to him. I left waiting for the boy to attain the age of majority. In the year 1997, the young boy passed away"***. He also therefore knew that with passing away of the registered owner, the status of the land and the illegal transactions prior to that fact would change.

11. PW 2 then collected his title deed in 1999 and the extract shows that he got his title on 4.1.1999 from the previous owner, Jim Eric Kinyua whom he knew was since deceased and could not transfer land directly to himself.

12. To come to my first point above and read with the second point it cannot be debated that Patrick Muriithi Njogu obtained title for the land by false pretences and the report of Jim Erick Kinyua being dead at that time cannot be said to have been false information given to C.I. Joseph Ng'ang'a.

13. Having come to this conclusion therefore, the actions taken by C.I. Joseph Ng'ang'a in my point number (iii) above was expected and it was his duty to do what he did.

14. I must say something about the Appellant; I have no doubt that he actively participated in the actions taken by PW2, Patrick Muriithi Njogu. I have no hesitation in holding that the evidence of PW 2, PW3, PW4, PW5, PW6, PW7, PW8, PW9 and the documents produced by PW10 without challenge from the Appellant shows that he was together with PW2, the masterminds of the tragedy that ultimately befell him.

15. They colluded to sell a minor's land using false documents and transferred it after his death and in his name. He cannot escape the blame for that but in my view, if he committed an offence together with PW2, it is another offence and not the one for which he was convicted.

16. I have shown that there was no basis for convicting him for giving false information to a Public Officer as the information he gave was true and self –incriminating. Self incrimination does not make the information false. It would seem to me that the learned trial Magistrate used that principle to convict. He misdirected himself. \

17. In spite of my misgivings about the Appellant's conduct, I am bound in the matter before me to allow the Appeal.

18. I shall set aside the conviction, quash the sentence imposed and Order the Appellant to be released unless he is otherwise lawfully held.

Orders accordingly.

Read in Open Court this 24th day of February 2005

I. LENAOLA

JUDGE

In the presence of:

Mr. Momanyi for Appellant

Mr. Omwega for Respondent

I. LENAOLA

JUDGE