REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 338 OF 2004

BARGOI SYANDOI NGIRIA……...……..APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The appellant, Bargoi Syandoi Ngiria, was charged with two others who were acquitted by the trial court, with several offences under the Penal code. The appellant was charged with three counts of forgery of a land title deeds contrary to Section 350(1) of the Penal Code. The particulars of the said charges were that between the 16th and the 23rd of August 2002, the appellant forged the land titles in respect of parcels numbers Nakuru/Nessuit/1516, Nakuru/Nessuit/124 and Nakuru/Nessuit/127 and falsely presented them to Phillip Kibor Mulei, Ruth Jerotich Murei and Lorna Metto respectively purporting them to be genuine and valid land title deeds. The appellant was further charged with four counts of obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars of the said charges were that in the month of August 2002, the appellant with the intent to defraud obtained Kshs 60,000/= from Francis K. Tarus by falsely pretending that it was fees for processing land documents in respect of parcel number Nakuru/Nessuit/1516, 124 and 127. The appellant was also charged with obtaining the sum of Kshs 140,000/= from Francis Kipsang Rutto and William Kipsigei Rutto by fraud after pretending that he was in a position to sell them land. The appellant pleaded not guilty to the charges. After a full trial, the appellant was found guilty as charged on all the seven counts. He was sentenced to serve two years imprisonment on each of the seven counts. The sentences were ordered to run concurrently. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has raised a total of five grounds in support of his appeal; He was aggrieved that the trial magistrate had erred in finding that he had had direct contact with the complainants; He faulted the trial magistrate for finding that he had received money from the complainants; He was aggrieved that the trial magistrate had convicted him based on insufficient evidence and on the evidence of dock identification. The appellant was finally aggrieved that he had been sentenced to a custodial sentence that was harsh and excessive in the circumstances. At the hearing of the appeal, Mr Gumo, the Assistant Deputy Public Prosecutor conceded to the appeal. He submitted that the prosecution had not established the charge of forgery by reason of the fact that an handwriting expert had not been called to testify on the purported forgery that was committed by the appellant. He further submitted that the prosecution had not proved the case of obtaining by false pretences that faced the appellant. Mr Mugambi, Learned Counsel for the appellant agreed with the submission made by the Assistant Deputy Public Prosecutor. He submitted that there was no evidence which had been brought out to prove the offence of forgery; The prosecution had not established that the appellant had made the document or alternatively that he had used it to commit deceit. On the charges of obtaining by false

pretences, Learned Counsel submitted that there was no independent evidence to support the contention by the complainants that they had paid the money to the appellant. He further submitted that no document or instrument linking the appellant to the fraud was found in his possession. He urged the court to allow the appeal.

I will address the issues raised on this appeal after briefly setting out the facts of this case. PW2 William Kipsigei Arap Rutto testified that he was looking for a parcel of land to purchase at Nessuit. He met the appellant in 1997. He indicated to him (PW2) that he was in a position to sell land to him. He purchased ten acres. He paid the appellant Kshs 70,000/=. The appellant signed a transfer form and gave it to PW2. PW2 erected a house of the parcel of land that was sold to him by the appellant. Some people came and demolished it, claiming that they were the owners of the land. He was not issued with a title deed. PW3 Corporal Francis Tarus testified that he was informed that there was a parcel of land which had been set aside by the Government to settle Ndorobos. He was introduced to the appellant. The appellant informed him (PW3) that he was in a position to facilitate him to be allocated land at Nessuit. The appellant asked PW3 to pay Kshs 20,000/= being the processing fees. PW3 did not have the money. He was however able to negotiate the amount downward to Kshs 15,000/=. PW3 paid the appellant. The appellant issued him with Title No. Nakuru/Nassuit/1519.

PW3 was excited. He informed his boss, Phillip Kibor Mulei (PW4) who also became interested in being allocated the parcel of land in question. He gave Kshs 45,000/= to PW3, who delivered the said amount to the appellant. PW4 was given three titles by the appellant. One title was in his name while the two other titles were in the names of his daughters Ruth Jerotich Murei and Lorna Metto. The title deeds that were issued to him in the name of his daughters were title number Nakuru/Nessuit/124 and Nakuru/Nessuit/127 respectively. Later PW4 saw a story in the newspapers that there were fake titles being issued in Nakuru. He made a report to the P.C.I.O. Nakuru. Investigations were commenced by PW6 Inspector Duncan Macharia and PW7 Inspector Christops Omwocha. They went to the lands office. They saw PW5 Andrew Akello, the then District Lands Registrar, Nakuru and PW1 Dismas Kwalia, a Surveyor then based at the Provincial Survey's Office Nakuru. PW6 was able to establish that the title deeds issued to PW3 and PW4 were not genuine. They were fake. Neither did the green cards in respect of the said parcels of land purported to be sold to the complainants in this case exist. PW1 confirmed that although some of the parcels of land purportedly sold to the complainants existed on the ground, they had been registered in other peoples names and not the complainants.

PW2, PW3 and PW4 stated in evidence that they had not been allocated the parcels of land in question by the Government, but had purchased the same from the appellant. PW1 produced the survey plan of Nessuit area and the list of allottees of the said scheme in evidence. The said list did not contain the names of the complainants. The specimen signatures and the forged title deeds were produced in evidence by PW7. They did not connect the appellant with the forgeries. When the appellant was put on his defence, he denied that he was paid the money by the complainants. He denied that he had ever issued the titles in question to them. He also denied that he had entered into any transaction with them as regards the parcels of land in question. This is a first appeal. The duty of the first appellate court in criminal cases was restated in the case of Charles Mwita –versus- Republic C.A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal held that: (at page 5) "In Okeno v R [1972]E.A. 32 at page 36 the predecessor of this Court stated:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –v- R [1957]EA. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions, (Shantilal M. Ruwalla –v- R [1957]EA 570) it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."

The above sets out the duty of the first appellate court. We are of the view that it is upon the first

appellate court to carry out that duty by actually re-evaluating the evidence. It is not enough for the first appellate court to merely state that it has re-evaluated the evidence. Indeed, in Gabriel Njoroge v. Republic [1988-85]1 KAR 1134, at page 1136 this Court said:-

"As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v. R. [1957] E.A 336, Ruwala v. R [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and non-directions on material points are matters of law."

In the instant appeal, the appellant was basically charged with two set of offences; that of forgery of the land title deeds and secondly, that of obtaining by false pretences. In respect of the first set of charges, the prosecution was required to prove that the appellant had made the said land title deeds with the intent to defraud or deceive. The prosecution was mandated to establish that it was the appellant who had forged the land title deeds in question. From the evidence adduced by PW7, who produced the report of the document examiner, it was not established that the appellant had made the said documents with the intent to deceive or defraud. The charge of forgery against the appellant in the three counts under Section 350(1) of the Penal Code must therefore fail. Although PW3 testified that he was given the said title deeds by the appellant, other than his said evidence, there was no other evidence adduced by the prosecution to connect the appellant with the forgery. In the absence of such evidence connecting the appellant to the forgery, his appeal against his conviction on the three charges must succeed. The appeal against his conviction on the three counts under Section 350(1) of the Penal Code is therefore allowed, his conviction quashed and the sentences imposed set aside.

On the charges of obtaining by false pretences, PW2, PW3 and PW4 testified that they paid the appellant various sums of money after the appellant had assured them that he was in a position to sell land to them. PW2 paid the appellant the sum of Kshs 70,000/=. He was shown a specific parcel of land by the appellant. When he (PW2) went to settle on the land and erected a house thereon, some people who claimed to be the owners of the said parcel of land demolished his house. The appellant had given PW2 a transfer form and assured him that he was the owner of the said parcel of land. As regard PW3 and PW4, the appellant obtained a total sum of Kshs 60,000/= from them. He was able to give four title deeds in their names. PW3 and PW4 were induced to part with the money when they were assured by the appellant that they would be issued with the title to the parcels of land that they had purportedly purchased. The title deeds that were issued to PW3 and PW4 appeared genuine. PW3 and PW4 had no reason to disbelieve the appellant.

According to Section 312 of the Penal Code, false pretences is defined as "Any representation, made by words, writing or conduct of a matter of fact, either past or present; which representation is false in fact and which the person making it knows to be false or does not believe to be true, is a false pretence." Section 313 of the Penal Code provides that

"Any person who by false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years."

In the instant case, I have re-evaluated the evidence adduced by the prosecution and the defence offered by the appellant. I do find that the prosecution established that indeed the appellant obtained money from the complainants (PW2, PW3 and PW4) after promising them that he was in a position to obtain title deeds to the parcels of land in question. He induced them by falsely pretending that he was in a position to give them titles to land. The appellant knew this fact to be false. Indeed he went ahead and altered false documents to PW3 and PW4 so that he could induce them to part with the money. The defence offered by the appellant that he did not know the complainants was thus implausible. Upon re-evaluating the evidence adduced, I do find that the prosecution established beyond any reasonable doubt that indeed the

appellant made false presentations to the complainants and thereby obtained money from them. The appellant was not in a position to deliver the land in question. He induced the complainants by uttering false documents. I therefore find that the prosecution proved the charges against the appellant on count IV, V and VII. I am constrained, with due respect to the Assistant Deputy Public Prosecutor, to disagree with his submission that the charges of obtaining by false pretences were not proved. For the above stated reasons, the appeal by the appellant on the above charges is dismissed.

On sentence meted out, I have considered the fact that the appellant has been convicted of a misdemeanour. He is a first offender. The sentence of two years imprisonment imposed by the trial magistrate was excessive in the circumstances of this case. I however agree with the trial magistrate that the appellant deserved a custodial sentence. I will therefore set aside the sentence imposed by the trial magistrate and substitute it with an appropriate sentence of this court. The appellant is ordered to serve nine (9) months imprisonment on each of the three counts that he has been convicted. The said sentences are ordered to run concurrently. The sentence shall take effect from the 15th of December 2004 when the appellant was convicted by the trial magistrate.

It is so ordered.

DATED at NAKURU this 3rd day of June 2005.

L. KIMARU

JUDGE