



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL No.462 OF 2002**

**(From Original Conviction and Sentence in Criminal Case No.135 of 2002 of the Senior Resident Magistrate's Court at Kwale – L.N. Mbatia, Ms – S.R.M.)**

**ELIJAH MUTUKU MUTINDA.....APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant **Elijah Mutuku Mutinda** was tried jointly with one **Peter Kinyua** on a charge containing two counts namely: Firstly, Stealing contrary to Section 275 of the Penal Code. The particulars of this charge were that during the month of September 2001 at Diani Location in Kwale District within the Coast Province, jointly stole a title deed of Land Parcel No. Kwale/Diani/1264 valued at Kshs.125 the property of Barry Michael Rowland and Elijah Mutuku Mutinda. Secondly, Stealing by Agent contrary to Section 283(c) of the Penal Code.

The appellant's co-accused, Peter Kinyua Ngatia was acquitted of the offences which I think the trial Senior Resident Magistrate correctly acquitted the aforesaid because there was no cogent evidence proving the charge against him. However, the Learned Senior Resident Magistrate convicted the appellant on both counts and sentenced him to serve prison terms of 2 years and 3 years in Counts 1 and 2 respectively. The sentences were to run concurrently.

The Learned Senior Resident Magistrate also made an order in respect of Count 1 to the effect that the Kwale District Land Registrar was ordered to remove the name of the appellant Elijah Mutuku Mutinda and put in his place the name of the complainant's wife Martha Katunge Musee on Title Number Kwale/Diani/1264.

The appellant now seeks to appeal against both convictions and sentences and raises five grounds of appeal namely:-

- (i) That Learned Trial Magistrate erred in law and fact in finding that there were valid charges before and in proceeding with the trial on the basis of defective charges.
- (ii) That the Learned Trial Magistrate erred in law and fact in allowing herself to be involved in the investigation of the and in collecting exhibit before the trial thereby losing her impartiality to the prejudice of the appellant.
- (iii) That the Learned Trial Magistrate erred in law and in fact in failing to note that as a proprietor, the appellant cannot steal a Title Deed lawfully in his possession

(iv) That the Learned Trial Magistrate erred in law and fact in finding that all the ingredients of the charge had been prove.

(v) That the sentence was excessive in the circumstances.

The appellant was represented by Mr. Magolo, who opted to argue all the grounds of appeal together. His argument were that the charge was defective in that the appellant had a claim or right over the title he was charged to have stolen. Secondly, that the appellant and the complainant appear to be partners and what is in dispute was that of establishing how much each partner is entitled. Finally, that the appellant did not get a fair hearing before the trial court.

The respondent was represented by Mr. Gumo, who did not oppose the appeal on the grounds that first, the appellant was charged with the wrong section of the law i.e. S.275 of the Penal Code instead of Section 273 of the Penal Code. His argument was that the appellant must have had an interest over the property or Title hence it was not possible for him to be convicted under Section 275 of the Penal Code. Secondly, that the trial court did not act independently in handling the trial. It participated in collecting evidence and investigating the case even before the commencement of the trial of case. Thirdly, that the nature of dispute could have been easily been solved by a civil suit instead of criminal proceedings.

The facts leading to this appeal may be summarized as follows:- That the complainant, Mr. Barry Michael Rowlands is a British Citizen who opted to spend his retirement years in Kenya. He met the appellant and became friends. The complainant gave a total sum of Kshs.3,500,000/- to the appellant via Barclays Bank Ukunda which amount was to be used to purchase a plot and put up a residential house for the use of the complainant. It was also the prosecution case at the trial that the appellant was given another sum Kshs.200,000/- in form of cash. The appellant managed to purchase Plot No.1171 from one Wainaina Kigwu who was prosecution witness No.7 and that Plot No.1171 was registered registered in the joint names of the appellant and the complainant because the law forbade a noncitizen to own agricultural land but can only do so if he or she jointly owned with a citizen and that is how the appellant's name was registered as a coowner of Plot No.1171. In the meantime the complainant got married to one Martha Matunge Musee who appeared as prosecution witness No.2. The complainant instructed the appellant to have his (appellant's) name removed from the register as a co-owner and in his place replace with the one of his wife. However, before the instructions were carried out, the complainant had financial difficulties and it became necessary for him to sub-divide Plot No.1171 into two to enable him sell one portion and remain with the other.He therefore instructed the appellant and the second accused Mr. Peter Kinyua Ngatia to carry out the sub-division and have one Title come out in the name of the appellant for easy disposal and the other in the joint names of the appellant and the complainant. This later instruction was carried out and Title No.1171 gave rise to Titles No.1264 in the joint names of the appellant and the complainant and Plot No.1265 in the names of the appellant. The appellant sold Plot number 1265 but never remitted the money to the complainant. The appellant did not also hand over title No.1264 to the complainant even upon demand but opted to be evasive. The matter was then reported to the Police and the appellant was arrested and then charged with the aforementioned two counts.

The appellant's defence before the trial court was that he bought Plot No. Kwale/Diani/1171 and his partner (the complainant) was to built a house on it and then they could sell. The appellant denied that the complainant contributed any money in purchasing the aforesaid plot. The appellant also stated that the complainant gave him a sum of Kshs.3,500,000/= to construct the house and not for the buying of the plot. The appellant also admitted having sold Plot No.1264 but with the approval of the complainant.

It is important to note that Count II of the charge has no particulars as opposed to Count I. Section 137(a)(iii) of the Criminal Procedure Code states:-

***“The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this code, not open to objection in respect of its form or contents if it is framed in accordance with this code – inter alia after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: provided***

***that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those required.***

It is clear from the abovementioned provision of law that it is mandatory for the particulars of the offence to be stated in the charge sheet. Count II before the trial court states:-

***“Stealing by Agent contrary to Section 283(c) of the Penal Code.”***

In normal circumstances such a defect may not in fact occasion a failure of justice to an accused person if it is quite clear what he has to meet but it is safer to have the charge properly drawn. It would appear the appellant was not represented throughout the trial before the lower court and would not therefore have been expected to notice the defect in the charge. To my mind the defect in Count II is incurable and the trial in respect of the aforesaid count was a nullity in that the charge did not specify the time, date, manner and nature of the alleged theft. This has obviously caused a failure of justice on the part of the appellant and I will not even belabour to consider the other grounds of appeal in respect of Count II. In the circumstances therefore, the proceedings before the Trial Magistrate in respect of Count II ought and should be declared a nullity and I so declare this a nullity trial and the appellant’s conviction and sentence in respect of the aforesaid Count II is quashed and set aside respectively.

Count I relates to general punishment for theft. The learned trial Senior Resident Magistrate, with due respect, acted beyond her jurisdiction provided for under Section 275 of the Penal Code when she ordered for the removal of the name of the appellant from Title No. Kwale/Diani/1264. Section 275 of the Penal Code reads:-

***“Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”***

The Learned Senior Resident Magistrate made the following order inter-alia in her judgment:-

***“In respect of the 1 st Count, the Land Registrar, Kwale, is hereby ordered to remove the name of the 1 st accused, Elijah Mutuku Mutinda and replace it with that of Martha Kagunge Musee on Land Title No. Kwale/Diani/1264.”***

The trial court did not receive an application for the issuance of such an order. However, Section 177 and 178 of the Criminal Code gives the trial court wide discretionary powers to order for restitution but the execution of such orders is restricted under Section 178(4) of the Criminal Procedure Code which states:-

***“The operation of an order under this section shall (unless the court before which the conviction takes place directs to the contrary in any case in which the title to the property is not in dispute) be suspended -***

***(a) in any case, until the time for appeal has elapsed; and***

***(b) in a case where an appeal is lodged, until the determination of the appeal, and in cases where the operation of any such order is suspended until the determination of the appeal, the order shall not take effect as the property in question if the conviction is quashed on appeal.”***

Hence I will deal with the appeal against the conviction and sentence in Count I which will obviously affect the execution of above orders of restitution. Count I of the charge relates to theft of Title number Kwale/Diani/1264 by the appellant. Theft is defined under Section 268(1) of the Penal Code as follows:-

***“A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person, other than the general or special***

**owner thereof, any property, is said to steal that thing or property.”**

In the circumstances of the case before the trial court, can the appellant be said to have committed an offence of theft under Section 275 of the Penal Code? However, before dwelling on the answers to the above question, it is important to deal with the role the trial court played in conducting the trial. It would appear the Trial Senior Resident Magistrate descended into the arena when she issued orders to retrieve Title No. Kwale/Diani/1264 from the appellant and later on produced as Exhibit No.8 by the Investigating Officer who was PW.8 Pc. George Mbindyo. It should be noted that the trial court denied the appellant bond pending trial on condition that he had to produce the aforesaid title. The Learned Senior Resident Magistrate notes this fact in her judgment:-

***“1st accused’s then counsel one Mr. Oruko appeared in court on 29 th January, 2002 and applied for bond on behalf of the 1 st accused. He also undertook to produce the title that was in issue which the 1 st accused had promised to hand over to him as soon as he was out on bond. On that undertaking the court granted 1 st accused bond.”***

I concur with the submission of the Learned State Counsel that the Learned Trial Senior Resident Magistrate did not give the appellant a fair trial. Her mind was already biased and she took the role of the Investigating Officer which is wrong in law. The following statement extracted from the judgment confirms my finding:-

***“On 8.2.2002, yet another counsel one Mr. Mulei appeared in court and stated that the said title was in his office. He undertook to produce it in court on 12 th February, 2002. On 12 th February, 2002, neither he nor 1st accused appeared in court and a Warrant of Arrest was issued. On 27.2.2002, the 1 st accused presented himself in court and stated that he had been looking for money to redeem the title among other things. This is how Title No.Kwale/Diani/1264 was finally retrieved.”***

It is clear from the above statement that the partiality of the Trial Magistrate was prejudiced and biased against the appellant. I will not bother to go into the details of the other grounds of appeal. In the circumstances therefore, this appeal is allowed. The conviction is quashed and sentence set aside and the appellant is set free unless otherwise lawfully held and the order canceling the name of the appellant from the Register of Plot No. Kwale/Diani/1264 is hereby annulled.

**Dated at Mombasa this day of 2003.**

**J. K. SERGON**

**J U D G E**

**15/5/2003**

Before Hon. Justice Sergon.

Miss Mwaniki for the Respondent.

Mr. Magolo for the appellant.

Judgment Read in the presence of both the State Counsel and the appellant’s Counsel.

**J.K. SERGON**

**J U D G E**