



IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 9 OF 2019

BETWEEN

JOSEPH NDUNG’U MURUNYU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. L. M. Wachira, SRM

dated 25th September 2018 in Criminal Case No. 169 of 2016

at the Magistrate’s Court at Gatundu)

JUDGMENT

1. The appellant, **JOSEPH NDUNGU MURUNYU**, was charged, convicted and sentenced to pay a fine of Kshs. 100,000/- in the alternative serve one-year imprisonment for the offence of obtaining registration by false pretence contrary to **section 320** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charges were that on diverse dates between 22nd September 2015 and 30th October 2015 at Thika Lands Office in Thika Township within Kiambu County wilfully and unlawfully being an administrator procured for himself registration of land title deed namely Ngenda/Kimunya 1695 by falsely pretending that he was in a position to give a portion of land measuring 0.546 acres to one Mary Wambui Murunyu (deceased) a fact he knew to be false.

2. The appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal filed on 5th April 2019 and the written submissions filed on 8th September 2020. The thrust of the appellant’s appeal is that the prosecution failed to prove the ingredients of the charge beyond reasonable doubt. That the trial court misconstrued evidence against and shifted the burden of proof arriving at the wrong conclusion. He also pointed out that he was not capable of performing registration. The appellant also contended that the sentence was excessive.

3. The respondent filed written submissions. It conceded the appeal on the grounds that the witnesses were never recalled to give fresh evidence after amendment of the charge sheet.

4. As this is a first appeal, I am required to review all the evidence and come to my own conclusion as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see **Okeno v Republic [1972] EA 32, Kiilu and Another v Republic [2005] 1 KLR 174**). In order to proceed with this task, it is necessary to outline the evidence emerging before the trial court.

5. The appellant’s siblings, Beth Wanjiku Kirika (PW 1) and George Mburu Murunya (PW 2), testified that their father, Murunyu Gatonye (“Murunyu”), passed away on 12th March 2000 leaving the parcel of land; Ngende/Kimunya/1695. They told the court in 2011 their mother, Mary Murunyu, gave the title deed to the Appellant to enable him commence succession proceedings for Murunyu’s estate. He filed Gatundu Principal Magistrates Court Succession Cause 30 of 2011. In 2013, the court confirmed the grant wherein the Appellant received 0.715 acres while their mother received 0.546 acres.

6. PW 1 and PW 2 testified that their mother died on 5th September 2015. After the burial, they held a family meeting to discuss how they would distribute the subject property. The appellant informed them that he had inherited the whole parcel of land. The conducted a search on 22nd September which indicated that the suit property was still registered in their late father’s name. The appellant forcefully evicted PW 1 from their deceased mother’s portion of land. They went to report the matter to the chief but were informed that the suit property belonged to

the Appellant. PW 1 and PW 2 conducted a search on the subject property on 30th October 2015, it was registered in the appellant's name. They reported the matter to the DCI at Gatundu who carried out investigations who later arrested and charged the appellant.

7. The investigating officer, Corp. Evans Kipten (PW 3), confirmed that PW 1 and PW 2 reported that matter to the DCI, Gatundu South. He carried out investigations and went to Thika Lands Office where he obtained the green card of the suit property where he established that the property had been transferred to the appellant including their late mother's portion in contravention of the confirmed grant. He made a decision to charge the appellant.

8. Joseph Wangombe (PW 4), the Land Registrar, Gatundu, prepared a report in response to an inquiry by PW 3 which showed that Murunyu Gatonye was the original owner of the property in 1999. On 30th September 2015, the appellant lodged an application for transfer of the land into his name absolutely based on the certificate of confirmation of grant in Gatundu Magistrates Court Succession Cause No. 30 of 2011 which showed that the appellant was to receive 0.715 acres while Mary Wambui Murunya was to receive 0.546 acres. That the title deed was issued in the name of the Appellant on 30th September 2015.

9. The appellant denied the offence in his unsworn statement. He told the court that he was joint administrator with his mother. That his mother had told him to take over her portion of land when she died. In 2015, their mother died and he had a meeting with his siblings where he informed them of their late mother's decision and that none of his siblings objected. He further told the court that he went to an advocate who processed the title on his behalf.

10. Samuel Gicheru, DW 2, stated that he was related to the appellant and the complainants. He told the court that before their father died he had instructed that the land be divided among his two sons. He stated that before their mother died she stated that her portion of land was to be inherited by the appellant. Samuel Kiarie, DW 2, a village elder, stated that the appellant's mother visited his office in 2011 and told him that in the event of her death, the land registered in her husband's name was to be inherited by the appellant.

11. The respondent conceded the appeal on the ground that the trial magistrate erred in failing to allow the appellant to recall the witnesses for cross-examination when the charge was amended. After PW 1 and PW 2 had testified, the charge was amended from wilful misapplication of an asset forming part of the estate by a personal representative to the current charge.

12. The power of the court to amend charges is provided for at **section 214(1)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides as follows:

241 (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge sheet as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination. [Emphasis mine]

13. Under subsection (ii) of the proviso aforesaid, an accused may elect not to recall any witness who had previously given evidence. After the charge was substituted on 3rd November 2016, the appellant, through his advocate chose not to recall PW 1 and PW 2. He stated, "*In view of the substitution, we do not wish to recall any of the witnesses who have testified.*" I therefore reject the concession by counsel for the respondent.

14. The key issue raised regarding the charge of obtaining registration by false pretences **section 320** of the ***Penal Code*** provides as follows:

320. Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.

15. On the other hand, **section 312** of the ***Penal Code*** defines "*false pretence*" thus:

312. 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.

16. In order to succeed, the prosecution must prove a representation on matters of fact about the past or present; that representation must be false and it must have been made with the intent of obtaining the registration complained of and it must have been acted upon to the disadvantage of the complainant.

17. The charge against the appellant was that he procured for himself registration of Ngenda/Kimunyu/1695 by falsely pretending the he was in a position to give a portion of the land to Mary Wambui (deceased). The essential element of the offence is that the representation complained of is made to a person. The charge states that the representation made to the deceased was that she was to be given a portion of land measuring 0.546Ha. The fact is that the grant of representation for the estate of Murunyu was clear that the deceased was entitled to 0.546 acres. The grant was in her name and that of the appellant. Although she was a beneficiary, the land was not transmitted to her as she

died on 5th September 2015. It cannot be said that the appellant made a false representation to Mary Wambui as the subject property was registered in the appellant's property after her death. In other words, the appellant did not do anything to deprive Mary Wambui of her right when she was alive.

18. The trial magistrate pointed out that, "*the prosecution case is that the estate of the deceased was never transmitted to the beneficiaries on the confirmed grant.*" As I understand, the complaint by PW 1 and PW 2 is that the appellant procured a title contrary to the grant and effectively disinherited them. This is a wholly different case from saying that the appellant obtained registration by false pretence as alleged in the charge. The representations complained of were never made to PW 1 and PW 2. When she was alive, the deceased received her entitlement. The remedy for the appellant's actions, which were contrary to the law, must surely lie elsewhere.

19. The appeal succeeds for the reasons I have set out above. The conviction and sentence are hereby set aside. The fine paid by the Appellant shall be refunded to him.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 9TH DAY OF MARCH 2021.

M. KASANGO

JUDGE

Ms Njoroge instructed by Mbiyu Kamau and Company Advocates for the Appellant.

Ms Mbesa instructed by the Office of the Director of Public Prosecutions for the respondent.