



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 40 OF 2018

CHARLES GITONGA KIOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Sentence in Nanyuki CM Criminal Case No 1130 of 2016 – L Mutai, CM)

J U D G M E N T

1. The Appellant herein, **CHARLES GITONGA KIOI** (who was 2nd accused in trial court), was convicted after trial of **forgery of a document of title to land** contrary to **section 350(1)** of the **Penal Code** (count I) and **obtaining money by false pretence** contrary to **section 313** of the same Code (count II). On 17/07/2018 he was sentenced to 17 years imprisonment on count I and to 2 years imprisonment in count II, the sentences to run concurrently. He appealed against both conviction and sentence.

2. The Appellant's co-accused, **GEORGE GACHARA MBITIRU** (1st Accused) was similarly convicted and sentenced. He was also convicted in count III of **personation** contrary to **section 382(1) & (2)** of the Penal Code and sentenced to one year imprisonment, to run concurrently with the other sentences. A third co-accused jumped bail before the trial was completed.

3. At the hearing of this appeal on 17/12/2019, this court was not aware that George Gachara Mbitiru had also appealed, and learned counsel for the Appellant stated that it appeared that he had not appealed.

4. On 17/04/2020 this appeal was allowed in its entirety. The convictions were quashed and the sentences set aside. It was directed that the Appellant, Charles Gitonga Kioi, be set at liberty unless otherwise lawfully held. Reasons for allowing the appeal as above were to be given in a judgment to be delivered on notice. This is that judgment.

5. Regarding count I, the definition of forgery is to be found in **section 345** of the Penal Code. That definition is –

“...the making of a false document with intent to defraud or to deceive.”

6. **Section 349** of the Code creates the general offence of forgery and provides its punishment. **Sections 350, 351** and **352** of the Code create special kinds of the offence of forgery depending on the kind of document forged and provides various punishments therefor. This includes the forgery of a document of title to land contrary to section 350(1) with which the Appellant and his co-accused were charged with in count I.

7. Ideally the statement of offence in count I should have been -

“Forgery contrary to section 349 as read with section 350(1) of the Penal Code.”

The omission of section 349 however, could not have occasioned any prejudice to the Appellant and his co-accused as it was manifestly clear from both the citation of section 350(1) and the particulars of the offence that they were charged with forgery of a document of title to land. The omission of citation of section 349 from the statement of offence was therefore a defect curable under **section 382** of the **Criminal Procedure Code**. I respectfully disagree with the learned counsels for the Appellant and the Respondent that the defect was fatal as it could not have, and in fact did not, occasion a failure of justice.

8. Having said the above, I have read through the record of the trial court in order to evaluate on my own the evidence placed before that court and arrive at my own conclusion regarding the same. This is my duty as the first appellate court. I have borne in mind however that I

neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

9. According to the testimony of the complainant (PW1) all that the Appellant did in the entire transaction was to introduce the complainant to the owner of the land. He (the Appellant) was a broker. The complainant and the owner of the land then proceeded to an advocate's office where a sale agreement between them was drawn up and executed, witnessed by the advocate. The complainant then paid the Appellant his brokering fee of KShs 30,000/00.

10. It later transpired that the purported owner of the land was the 1st accused, a conman who had forged the document of title to the land in his name. The real owner of the land was deceased.

11. There was no evidence that the Appellant knew that the 1st accused was a conman who had forged the document of title to the land. There was no evidence that the Appellant assisted the 1st accused in any way in forging the document of title, or in uttering it, or that he participated in defrauding or deceiving the complainant. He had merely introduced him to the 1st accused who had represented to him (Appellant) that he had a parcel of land which he owned and wished to sell.

12. As for count II of obtaining money by false pretence, there was no evidence that the Appellant received the purchase price or any part thereof from the complainant. The Appellant was not even present when the complainant paid over the money to the 1st accused in an advocate's office. He received only his brokering fee, not the deposit of KShs 250,000/00 towards the purchase price.

13. Upon my own evaluation of the evidence placed before the trial court, the Appellant was an innocent broker who was caught up in the 1st accused's scheme to defraud the complainant. He was not involved in it. The two charges of forgery of the document of title to land and obtaining money by false pretences were not proved against him to the required standard. The convictions are entirely unsafe.

14. It was for the above reasons that I allowed his appeal in its entirety on 17/04/2020.

DATED AND SIGNED AT NANYUKI THIS 8TH DAY OF JUNE 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 10TH DAY OF JUNE 2021