

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 92 OF 2019

(From Original Conviction and Sentence in Mumias PMCCRC No. 294 of 2016,

by Hon. TA. Odera, Senior Principal Magistrate, on 9th August 2019)

NICODEMUS BILASIO ONIANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon. TA. Odera, Senior Principal Magistrate, of cheating contrary to section 315 of the Penal Code, Cap 63, Laws of Kenya, and was accordingly sentenced to serve three (3) years in prison. The particulars of the offence charged were that the appellant, on divers dates between 27th March 2008 and 27th March 2016, at Mumias Township, within Mumias Sub-County, Kakamega County, with others not before the court, he obtained, by fraudulent tricks, Kshs. 240, 000.00 from Luke Saido Chitechi, by falsely pretending that he was in a position to sell to him 3 acres excised from North Wanga/Lung'anyiro/59, a fact that he knew was false.

2. He pleaded not guilty to the charge, and a trial was conducted, the prosecution called 5 witnesses. PW1 was the complainant. He described how the appellant sold land to him, he paid the agreed consideration, the agreement was reduced into writing by an advocate, but he was never put in possession of the land. Other persons ploughed the land, and many more came forward to claim that the same had also been sold to them. The land was never transferred to the name of PW1, and the purchase price was never refunded. PW2 was present when the appellant received the purchase moneys from PW1. PW3, a land registrar, confirmed that the land in question had been registered in the name of the appellant on 19th November 2007, which registration was subsequently cancelled. Succession was done to the property, then it was allocated, at confirmation, to 3 individuals. PW4, a forensics examiner, stated that the signature on the sale agreement was that of the appellant. PW5 was the investigating officer. The accused was put on his defence, he gave a sworn statement, where he said that he had sold the land to PW1, but asserted that he did not intend to defraud, and was still willing to have the same transferred to him.

3. Being dissatisfied with the conviction and sentence, the appellant appealed to this court, and raised several grounds of appeal. He avers that the evidence adduced could not sustain a conviction; the court ought not to have convicted, as he was in process of transferring the property to PW1; his mitigation was not considered and so was the fact that he was a first offender; and the sentence imposed was harsh and the court did not consider alternatives.

4. As a first appellate court, I am alive to the duty to re-evaluate the record of the trial court, and to draw my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the appellant and the witnesses during the trial. I am guided in that regard by the decision of the Court of Appeal in ***Okeno vs. Republic (1972) EA 32 (Sir William Duffus P, Law and Lutta JJA)***.

5. The appeal was canvassed by way of written submissions, placed on record by the appellant, which I have read through and noted the arguments advanced.

6. The first ground is that the evidence on record could not sustain a conviction. The record indicates that as at the time of getting into the sale agreement on 27th March 2008, the appellant was relying on a document which showed that the land in question had been registered in his name as at 19th November 2007. At the time the land belonged to a dead person, and representation to the estate had not yet been obtained. A grant of representation was obtained on 20th November 2007 and confirmed on 14th December 2009. At the time of the alleged sale, the land did not belong to him, but to a dead person, and succession to the estate of the dead had not even commenced. He sold a property he did not own, or which did not belong to him. He was unable to transfer it to the name of PW1, because he did not own it. He never put PW1 in possession, and when it became apparent that the appellant could neither put him in possession, or transfer it to him, he did not refund his money. PW1 did not have the land he was buying, nor the money he paid as consideration. That is the face of fraud. The evidence was sufficient for conviction of the appellant for the offence charged.

7. The second ground is that the trial court failed to consider that he was in the process of transferring the property to PW1. The issue is not the ability of the appellant to transfer the land, but whether he had that capability as at the date when the alleged sale took place. He did not own the land at the time he was purporting to sell it. The title to it had not yet vested in him, under the Law of Succession Act, cap 160, laws of Kenya, as he had not yet obtained representation to the estate of the deceased. At the time of sale, he had fraudulently caused the property to be registered in his name, and a title deed issued, which was subsequently cancelled. The appellant led no evidence to show that he was in the process of the having the property transferred to PW1. The trial court cannot be faulted.

8. The last two grounds are on sentence. The appellant submits that he is a first offender, whose mitigation ought to have been considered,

and a non-custodial sentence ought to have been considered. The record indicates that the court noted that the appellant was a first offender. Secondly, the court noted the mitigation made on behalf of the appellant by his advocate. Thirdly, the trial court noted that it had considered the mitigation, as against the nature of the offence, the circumstances, and prevalence of the offence in the jurisdiction. There is no basis for the appellant to say that the trial court did not consider his mitigation. The court was alive to the fact that he was a first offender, but considered that and his mitigation against other factors, such as the nature and circumstance of the offence, and its prevalence. The record is clear, there was an intent to defraud. The trial court was also best placed to determine whether a deterrent custodial sentence was necessary, after considering whether the offence was prevalent in the area or not. The trial court acted within the law, and it has not been demonstrated that it abused discretion.

9. Overall, I find no merit in the appeal herein, and I hereby dismiss the same. I uphold the conviction, and confirm the sentence imposed.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF SEPTEMBER, 2021

W MUSYOKA

JUDGE