



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 11 OF 2020

SIMON MUGO RUTERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of stealing contrary to Section 268(1) as read together with Section 275 of the Penal Code (count 1); false swearing contrary to Section 114 as read together with Section 36 of the Penal Code (count 2); and obtaining land registration by false pretence contrary to Section 320 of the Penal Code (count 3). The matter proceeded to full trial and the appellant was convicted for count 2 and acquitted in counts 1 and 3. He was sentenced to probation for six (6) months.

2. Being dissatisfied with the said conviction and sentence, he filed the instant appeal challenging the same vide the petition of appeal filed on 7.08.2021 and wherein he raised six (6) grounds. Essentially, the appellant challenges the trial magistrate's decision on the basis that the trial court erred in law and in fact in arriving at findings which were against the weight of the evidence and in not setting out the issues for determination and stating the reasons for her findings on each of the issues (ground 1). He also raised grounds that the evidence by the prosecution was never sufficient to prove the offence of false swearing (grounds 2-6).

3. The appeal was canvassed by way of written submissions and wherein the appellant submitted that the prosecution's evidence did not prove the offence. That there was no prove that he (appellant) wrote the word "NIL" on the affidavit in question. The appellant further submitted that the trial court shifted the burden of proof to him when it found that the appellant did not deny that the affidavit was filed in the succession cause (Embu Succession 269 of 2002). Reliance was placed on the case of **Stephen Mungai Macharia –vs- R Criminal Appeal No. 1 of 1994.**

4. The respondent filed submissions in the appeal and where it was submitted that the evidence on record was sufficient to prove the offence.

5. The duty of this court as first appellate court is now settled thanks to a myriad of judicial pronouncements by the superior courts in Kenya. As a rule, this court has a duty (in exercise of its powers as first appellate court) to submit the evidence tendered before the trial court and **weigh conflicting evidence and draw its own conclusion. 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 court's finding 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 **Okeno-vs- Republic [1972] EA 32, Pandya -vs- Republic [1957] EA 336 and Kiilu & Another –vs- Republic [2005] 1 KLR 174.**)

6. I have considered the petition of appeal, the submissions of both counsels for the Appellant and the Respondent. I have also subjected the entire evidence to afresh analysis and evaluation and have drawn my own conclusions over the matter. I will avoid reproducing the same herein but will refer to the same in the course of this judgment. From the said analysis, it is my considered view that the main issue for determination is whether the prosecution tendered sufficient evidence so as to prove the elements of the offence facing the appellant.

7. The offence of false swearing is provided for under section 114 as follows:-

“Any person who swears falsely or makes a false affirmation or declaration before any person authorized to administer an oath or take a declaration upon a matter of public concern under such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour”

8. From the facts of this case, the elements of the offence which the prosecution ought to have proved are:-

- 1) *That there was false swearing*
- 2) *The swearing was before any person authorized to administer an oath*
- 3) *The swearing must be upon a matter of public concern*
- 4) *The swearing was under such circumstances that the false swearing if committed in a judicial proceeding would have amounted to perjury.*
- 5) *The swearing was by the accused (appellant herein)*

9. The evidence by PW2, PW3 and PW4 was to the effect that LR Ngandori/Nguviu/2016 belonged to their deceased father and after his demise, they filed a Succession Cause No. 59 of 2011 but which matter was never concluded for lack of funds. But when they acquired a green card in relation to the said land, they discovered that the same had been transferred to Simon Mugo Rutere (appellant herein). Upon being questioned the appellant stated that he bought one acre of the said land from the deceased. The evidence on record further is to the effect that the appellant obtained grant of letters of administration intestate in relation to the estate of the deceased.

10. Mr. Njeru Ithiga an advocate of the High Court (PW6) testified that he attested to an affidavit sworn by the appellant herein and wherein he swore that the averments were correct and within his knowledge. The said affidavits were produced as PExbt 11 and PExbt 12. PW7 testified that when he conducted investigations, he discovered that the appellant had filed Succession 269 of 2002 at Embu and that is how he got the property.

11. The appellant when placed on his defence testified that he had given money to the deceased intending to buy one acre of the land in dispute but the deceased passed on before he could transfer the same. That he commenced succession proceedings and no objections were raised and the grant was issued and confirmed wherein he was to get one acre as a creditor. That, though the transfer form (RL7) indicated that he was to get one acre, the land's registry transferred the whole land to him. That he reported the matter to the D.O and filed an application in court.

12. I have considered the above evidence and it is my view that the same was sufficient to prove the offence the appellant faced. I note that the appellant did not dispute that he indeed filed for letters of administration intestate to the estate of the deceased herein. He does not further dispute that he filed for confirmation of the said grant. This was consistent with the evidence of PW2-PW4 to the effect that the appellant applied for letters of administration and confirmation of the same. The prosecution produced evidence in form of exhibits in that respect. The appellant did not dispute the said documents or the contents therein.

13. From the evidence on record, the appellant's evidence in defense was that the Land Registry registered him with the whole land parcel. There is nowhere in the trial court's record where he disputed the said affidavit or even swearing of the same or the contents of the same. He did not dispute the evidence by the prosecution to the effect that the deceased was survived by other dependants. It can only be said that the indication by him on the affidavit that the deceased was survived by 'NIL' children was false. The affidavit in support of the application for confirmation of grant as such contained false statement.

14. It is my considered view as thus that the prosecution tendered sufficient evidence to prove that the appellant indeed committed the offence of false swearing. From the evidence, the affidavit included a false statement. The appellant did not dispute the fact that it was made before Mr. Njeru Ithiga- advocate and commissioner of oath as thus authorized to administer oaths. Further, the swearing on a matter of public concern. The appellant did not dispute as to him not having sworn the said affidavit nor did he dispute the said signature on the said affidavit. It can only be said that the averments in the said affidavit were made by him. Otherwise he confirmed that what was deposed in the affidavit was correct to the best of his knowledge. The statement, if it was made in a judicial proceedings, would definitely have amounted to perjury. Perjury is defined under section 108(1)(a) of the Penal Code as thus;-

“Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.”

15. The averments that the deceased had “NIL” children was a false statement and which the appellant knew to be false and the same is material to the intended proceedings as had the effect of determining the beneficiaries of the deceased.

16. It is my considered view that the prosecution tendered sufficient evidence to prove the offence.

17. I note that the appellant submitted to the effect that there was no prove that he (appellant) wrote the word “NIL” on the affidavit in question and that the court shifted the burden of proof to him when it found that the appellant did not deny that the affidavit was filed in the succession cause (Embu Succession 269 of 2002).

18. However, in my view, the issue as to whether the appellant was the one who wrote the word “NIL” could have been proved by many ways and not necessarily by way of expert evidence. The fact that the affidavit was never disputed, it was only safe and right to presume that the appellant was the author of the same. In my view, he owed a duty to rebut the said presumption by tendering evidence to the contrary. Having failed to do so, he therefore failed to dislodge the strong prosecution's evidence. The trial court did not shift the burden to the appellant but was satisfied that the prosecution evidence was sufficient.

19. I note that the appellant raised an issue in the petition of appeal to the effect that trial court erred in not setting out issues for determination and stating the reasons for its finding on each of the issues. However, he did not submit on this issue in his submissions. I have nonetheless taken time to look through the said judgment by the trial court and I note that the judgment meets the basic contents of a judgment. The trial court analysed the adduced evidence as it was duty bound to do under Section 169(2) of the Criminal Procedure Code. The appellant did not submit on this issue to make this court reason with him. In my view, the trial court was proper in the analysis of the evidence and applying the same to the offences the appellant was facing.

20. Considering the above therefore, it is my considered view that the evidence tendered by the prosecution was sufficient to prove the case to the required standards (that of beyond any reasonable doubts).

21. In the end, I find that the appeal has no merits and the same is hereby dismissed.

22. It is so ordered.

Delivered, dated and signed at Embu this 2nd day of November, 2021.

L. NJUGUNA

JUDGE

.....*for the Appellant*

.....*for the Respondent*