



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
(CORAM: CHERERE-J)
CRIMINAL APPEAL NO. E128 OF 2021
BETWEEN
PATRICK MUTUMA KANYAMU.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 2190 of 2018 in the Chief Magistrate's Court at Meru by Hon. T.M.Mwangi (PM) on 28.04.2021)

JUDGMENT

1. **SAMUEL NJARIA KIAMA** (Appellant) was charged with four counts. The 1st count of obtaining Kshs. 1.7 million by false pretences contrary to section 312 as read with Section 313 of the Penal Code; the 2nd count of making a document (search certificate for plot no. **NTIMA/NTAKIRA/xxxx**) contrary to section 357(a) of *the Act* and the 3rd count of uttering a false document (ID card No. 11027xxxx in the name of John Mwirigi Kirera) contrary to section 353 as read with section 349 *the Act*.

The prosecution's case

2. The prosecution called 8 witnesses in support of the case. PW2 Gideon Muthee upon being informed by his cousin PW1 Winnie Kinya that she wanted to buy land introduced Appellant to her. Appellant offered to sell **NTIMA/NTAKIRA/xxxx** to PW1. That after a search PEXH. 1 revealed that the land was registered in the name of John Mwirigi Kirera, PW1 agreed to buy the land for Kshs. 1,780,000 and they entered into a sale agreement dated 22.01.2018 which was executed by Kiogora Mugambi Advocate. It was her evidence that she paid a total of Kshs. 1,700,000/- partly in cash to Appellant in cash as demonstrated by acknowledgement receipts PEXH. 4, 5, 6 and 7 and partly to his wife Hellen Kathure by Mpesa as demonstrated by Mpesa statement PEXH. 8. Complainant stated she looked for Appellant to pay him the balance of Kshs. 80,000/- and failing to reach him on phone became alarmed and reported the matter to police.

3. Kiogora Mugambi Advocate confirmed that the sale agreement dated 22.01.2018 was executed by complainant and an old man and not with the Appellant. Appellant was subsequently arrested and when it became apparent that he was not John Mwirigi Kirera, he was charged.

Defence case

4. In his sworn defence, the Appellant denied selling land to complainant or receiving money from her.

5. *In a judgment dated 28.04.2021*, Appellant was convicted of the 1st and 3rd counts and was sentenced to 33 months in both counts.

The Appeal

6. The conviction and sentences provoked this appeal in which Appellant mainly contends that the prosecution case was not proved.

Analysis and Determination

7. On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the

judge or magistrate with such materials as it may have decided to admit. (See Kariuki Karanja Vs Republic [1986] KLR 190).

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant the State having not filed any.

9. Concerning the 1st count, PW1 and PW2 were categorical that the person that offered to sell LR. NTIMA/NTAKIRA/xxxx to PW1 and received money from her was none other than the Appellant. It later turned out that Appellant was not John Mwirigi Kirera who was the registered owner of the said land.

10. The learned trial magistrate after considering that the Appellant had interacted with PW1 and PW2 in various meeting correctly found that it was the Appellant that obtaining money from PW1 pretending that he was owner of LR. NTIMA/NTAKIRA/xxxx which he was not. I therefore find that learned trial magistrate rightly disregarded the evidence by the advocate who executed the agreement that the sale was between PW1 and an old man and not with the Appellant.

11. Whereas there is evidence by PW1 and PW2 that Appellant had in his possession an ID card No. 110270525 in the name of John Mwirigi Kirera, the 3rd count is defective for failure by the drawer to name the person to whom it was uttered.

12. From the foregoing, From the foregoing, I consider the burden of proof as having been discharged beyond reasonable doubt as postulated in Miller v Minister of Pensions [1947] ALL ER 373, “That degree is well settled. It needs not to reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave the only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

13. In the end, I find that the conviction of the Appellant on the first count was well founded.

14. Section 313 of the Act under which Appellant was charged states that:

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years

15. The Appellant herein was sentenced to serve 2 years and 9 months’ imprisonment. The Court of Appeal in Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 stated as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. (See also Wanjema v. Republic [1971] E.A.493.”

16. Guided by the foregoing authority, I find that the circumstances of the case do not justify any interference with the sentence imposed by the trial court.

17. In the end, the conviction on the 3rd count is quashed and the sentence set aside. On the other hand, the conviction on the 1st count is upheld and the sentence of 33 months’ imprisonment confirmed

DELIVERED AT MERU THIS 09TH DAY OF DECEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For

State

-

Ms.

Mwaniki