



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 50 OF 2017

BONIFACE MUEMA NGITI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Chief Magistrate's Court

Criminal Case No. 337 of 2015 of the Learned Chief Magistrate

Mr. Murage, Esq. and dated the 9/10/2017)

JUDGEMENT

1. The appellant Boniface Muema Ngiti was charged jointly with another with the offence of fraud on sale of property contrary to section 318 of the Penal Code. The particulars being that on the 9/12/10 at Kitui township, within Kitui County with the authority of Mwanzia Muema Boniface being the owner of Land L.R. Kyangwithya/Mulundi/697 jointly sold the said land to Bernard Muema Kisavi for Kshs.130,000/- and defraud him by failing to transfer the title of the said land to him.

2. The appellant denied the charge and matter went into full trial. The appellant was found guilty after full trial and was convicted and sentenced to serve 2 years' imprisonment.

3. He was aggrieved by the aforesaid decision thus he lodged instant appeal and set out 5 grounds –

i. The Learned Chief Magistrate erred in law and misdirected himself on the facts when he relied on inconsistent and contradictory evidence of the prosecution witnesses to convict the appellant.

ii. The Learned Chief Magistrate erred and misdirected himself on the law and the facts when he applied selective bits of the evidence in convicting the appellant while disregarding the exonerating evidence.

iii. The Learned Chief Magistrate erred and misdirected himself on the law and the facts when he convicted the appellant of the offence of fraud on sale of property knowing the land was registered in deceased person's name.

iv. The Learned Chief Magistrate erred and misdirected himself on the law when he failed to appreciate that the agreement for sale of the subject land was done with full knowledge of both parties that it was thereafter to undergo succession as the agreement was only voidable and not fraudulent.

v. The sentence imposed against the appellant was excessive under the circumstances of the case.

4. Parties were directed to file submissions to canvass appeal.

APPELLANT'S SUBMISSIONS

5. The appellant submitted that section 318(b) of the Penal Code provides that:

“any person who, being a seller or mortgagor of any property, or being the advocate or agent of any such seller or mortgagor with intent to induce the purchaser or mortgagee to accept the title offered or produced to him, and with intent to

defraud; or

(b) falsifies any pedigree on, which the title depends or may depend...is guilty of a misdemeanor and is liable to imprisonment for two years.”

6. The appellant submitted that for one to be held criminally liable under this section of the Penal Code, he must have induced the purchaser to accept the title offered or produced to him, while knowing that the title is falsified. No such evidence was adduced by the prosecution against the appellant.

7. The evidence adduced was to the effect that the appellant had entered into a sale agreement with the complainant for a portion of the appellant's late mother's land, and that the title thereof was to be transferred after succession of her estate.

8. The complainant was also to pay the balance of the purchase price of Kshs. 30,000/- which was never paid, thereby prompting the appellant as the administrator of his mother's estate to decline transferring the property to the complainant. There was no evidence of defraud.

9. The appellant further submitted that the charges were also defective as the appellant did not falsify any title documents to the subject property and the trial court was in error to convict the appellant as charged.

10. It was the appellant's submission that both parties to the sale agreement were fully aware that the subject property was to undergo succession proceedings before transfer to the complainant. The complainant was under an obligation to pay the balance of the purchase price, which according to the appellant, refused to pay.

11. The terms of the contract were not met by the complainant and the appellant should not have been held liable for defrauding him because the complainant was indeed in breach of the contract.

12. The appellant submitted that the offence under which he has been charged is a misdemeanor that carries a maximum imprisonment term of two years.

13. There was evidence that the appellant was a first offender. There was also a favorable probation report for a non-custodial sentence for the appellant who was then aged 67 years.

14. The appellant lastly submitted that the trial court was in error to impose the maximum sentence provided for in law as it manifestly disregarded the principles of sentencing.

RESPONDENT'S SUBMISSIONS

15. It is the respondent's submission that the trial court did not rely on inconsistent and contradictory evidence. The evidence by PW5 points to a transaction on a sale of land to which money changed hand in the form of purchase price and as such, the same cannot be challenged.

16. In the case of *Twehangane Alfred vs Uganda Criminal Appeal No. 139 of 2001 (2003) UGCA* and *Erick Onyango Odeng vs Republic (2014) eKLR* the court held that:

“With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradiction unless satisfactorily explained will usually not necessarily lead to the evidence of witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

17. The respondent further submitted that the trial court did not apply selective bits of evidence and that indeed the prosecution proved its case.

18. On whether the trial court convicted the appellant of the offence of fraud on sale of property knowing well the land was registered in deceased person's name, the appellant submitted that he was charged with the offence of fraud on sale of property contrary to section 318(b) of the Penal Code which provides that:

“Any person who, being a seller or mortgagor of any property, or being the advocate or agent of any such seller or mortgagor with intent to induce the purchaser or mortgagee to accept the title offered or produced to him, and with intent to defraud; or

(b) falsifies any pedigree on, which the title depends or may depend...is guilty of a misdemeanor and is liable to imprisonment for two years.”

19. The law defines the word “defraud” as illegally obtain money from someone by deception. It is clear from the transaction that took place on the 9th December 2010 that all parties were aware that the land belonged to a deceased person (Musangi) who had bequeathed it to the appellant's son (Musyoka) and who expressly consented to it being sold to the complainant for Kshs.130,000/- hence material facts were disclosed.

20. The respondent further submitted that the trial court did not fail to appreciate that the agreement for sale of the subject land was done in full knowledge of both parties that it was thereafter to undergo succession as the agreement was only voidable and not fraudulent and indeed all parties entered into the agreement with full knowledge that it was to undergo the process of succession before transfer would be effected.

21. Lastly, the respondent submitted that the sentence imposed by the trial court was not excessive as the trial court was persuaded by section 318(b) of the Penal Code in arriving at the sentence.

EVIDENCE TENDERED

22. In his evidence PW1 the complainant told the trial court that on 8/12/10 he was at his home when the appellant's wife approached him and his son wanted to sell their land. Later the appellant and his son by name Mwanzia Muema met complainant with his wife.

23. They informed complainant that Mwanzia Muema had been given land by his step grandmother which they wanted to sell to him. This was Land L.R. Kyangwithya/Mulundi/697. They told him they wanted to sell the land to offset a debt they owed.

24. Mwanzia Muema who had been given land by his step grandmother wanted to go and buy land elsewhere. Thereafter they had a meeting in presence of the chief and 2 elders. The price was agreed at Kshs.130,000/-. They recorded an agreement. Appellant had been given authority to sell land by the son which had been reduced into writing. It was produced as exhibit 1. The sale agreement with complainant was produced as exhibit 2.

25. After the agreement, PW1 paid Kshs.100,000/-. He later paid the balance of Kshs.30,000/-. He helped to start the succession case. The grant came out in appellant's name. He however transferred the land to Dominic Musyoki Muema who was the 2nd accused person instead of the complainant. Complainant reported the matter to police. Appellant was later arrested and charged with this offence. PW2 complainant's wife testified in similar manner. PW4, Silvester was a witness to the sale agreement.

26. When called upon to defend themselves, both accused denied the offence. The appellant told the trial court that he sold his son's land to the complainant. His son had given him authority. Complainant paid Kshs.100,000/- and was left with a balance of Kshs.30,000/=. He stated that he was ready to refund the money. Accused 2 denied any involvement in the sale of the land. His father (the appellant) did the succession case for his grandmother and had one portion registered in his name.

ISSUES, ANALYSIS AND DETERMINATION

27. After going through the evidence on record and parties' submissions, I find the issues are; whether **the prosecution proved its case beyond reasonable doubt? Whether the sentence was excessive?**

28. In his evidence PW1 the complainant told the trial court that on 8/12/10 he was at his home when the appellant's wife approached him and his son wanted to sell their land. Later the appellant and his son by name Mwanzia Muema met complainant with his wife.

29. They informed complainant that Mwanzia Muema had been given land by his step grandmother which they wanted to sell to him. This was Land L.R. Kyangwithya/Mulundi/697. They told him they wanted to sell the land to offset a debt they owed.

30. Mwanzia Muema who had been given land by his step grandmother wanted to go and buy land elsewhere. Thereafter they had a meeting in presence of the chief and 2 elders. The price was agreed at Kshs.130,000/-.

31. They recorded an agreement. Appellant had been given authority to sell land by the son which had been reduced into writing. It was produced as exhibit 1. The sale agreement with complainant was produced as exhibit 2.

32. After the agreement, PW1 paid Kshs.100,000/-. He helped to start the succession case. The grant came out in appellant's name. He however transferred the land to Dominic Musyoki Muema who was the 2nd accused person instead of the complainant.

33. Complainant reported the matter to police. Appellant was later arrested and charged with this offence. PW2 complainant's wife testified in similar manner. PW4, Silvester was a witness to the sale agreement.

34. When called upon to defend themselves, both accused denied the offence. The appellant told the trial court that he sold his son's land to the complainant. His son had given him authority. Complainant paid Kshs.100,000/- and was left with a balance of Kshs.30,000/=.

35. He stated that he was ready to refund the money. Accused 2 denied any involvement in the sale of the land. His father (the appellant) did the succession case for his grandmother and had one portion registered in his name.

36. From the evidence of both complainant and the appellant there is no doubt that appellant entered into a sale agreement to sell land to complainant. The appellant received Kshs.100,000/-, balance of Kshs.30,000/- was to be paid at the completion of the transfer.

37. The trial court convicted the appellant of the offence of fraud on sale of property knowing well the land was registered in deceased person's name .The appellant was charged with the offence of fraud on sale of property contrary to section 318(b) of the Penal Code which provides that:

“any person who, being a seller or mortgagor of any property, or being the advocate or agent of any such seller or mortgagor with intent to induce the purchaser or mortgagee to accept the title offered or produced to him, and with intent to

defraud; or

(b) falsifies any pedigree on, which the title depends or may depend...is guilty of a misdemeanor and is liable to imprisonment for two years.”

38. The law defines the word “defraud” as illegally obtaining money from someone by deception. It is clear from the transaction that took place on the 9th December 2010, that all parties were aware that the land belonged to a deceased person (Musangi) who had bequeathed it to the appellant’s son (Musyoka) and who expressly consented to it being sold to the complainant for Kshs.130,000/- hence material facts were disclosed.

39. The trial court did not fail to appreciate that the agreement for sale of the subject land was done in full knowledge of both parties that it was thereafter to undergo succession as the agreement was only voidable and not fraudulent and indeed all parties entered into the agreement with full knowledge that it was to undergo the process of succession before transfer would be effected.

40. After the agreement, PW1 paid Kshs.100,000/-. Complainant helped to start the succession case. The grant came out in appellant’s name. He however transferred the land to Dominic Musyoki Muema who was the 2nd accused person instead of the complainant. This was deception which amounted to fraud which is illegally obtaining money from someone by deception.

41. The court finds no merit on appeal on conviction and same is dismissed. On sentence the offence under which he had been charged with was a misdemeanor that carries a maximum imprisonment term of two years.

42. There was evidence that the appellant was a first offender. There was also a favorable probation report for a non-custodial sentence for the appellant who was then aged 67 years.

43. The court finds that, the trial court was in error to impose the maximum sentence provided for in law as it manifestly disregarded the principles of sentencing.

44. Thus the court makes the following orders;

i. The appeal on conviction is dismissed and conviction is upheld.

ii. The appeal on sentence succeeds and same is set aside and in lieu the appellant to serve 12 months’ probation at Mulundi Chief’s Office.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE