REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 80 OF 2019

ABDILLAH OMAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

Criminal Case No. 5997 of 2016 by Hon. E. Mutunga (SRM) dated 28th June2019)

Coram: Hon. R. Nyakundi

….For Appellant

Accused in Person

Judgment

The Appellant was charged with developing a structure without first obtaining a development permission contrary to section 30(1) as read with section 30(2) of the Physical Planning Act Cap 265. The particulars of the offence were that on 12th August 2016 at about 2:00pm at Plot No. 1502/II/MN Bamburi Area within Mombasa County, being a developer, developed or permit development of an illegal structure on a service lane used by the general public on a road reserve and blocking access for the abutting plots. The said construction was done illegally without any approvals from the planning department Mombasa County.

At the end of the trial, the Appellant was convicted and sentenced to pay a fine of Ksh. 100,000/- in default to serve two years in jail. Aggrieved by the sentence and the conviction of the trial court, the Appellant through his advocate, lodged an appeal on the following grounds:

1) ***That the learned trial Magistrate erred in law and fact in by finding the Appellant guilty on evidence of PW1, PW2 and PW3 which was contradictory inconsistent and manifestly biased.***

2) ***That the learned trial Magistrate erred in law and fact in convicting the Appellant relying on items marked for identification (MF1) but never tendered as exhibits.***

3) ***That the learned trial court Magistrate erred in law and fact by failing to give any or any sufficient consideration to the defence case and in wholly believing the prosecution's case without assigning any reason for so doing.***

4) ***That learned trial Magistrate erred in law and fact in failing to take into account the evidence by the Appellant that he had obtained all the requisite and relevant permits.***

5) ***That the learned trial Magistrate erred in law and fact in convicting the Appellants whereas the prosecution had not proved its case to the required standard of proof which is of beyond reasonable doubt.***

6) ***That the learned trial Magistrate misdirected herself in law relating to the standard of proof.***

7) ***That he Honourable trial Magistrate erred in law and in fact in shifting the burden of proof from the Respondent to the***

Appellant.

8) ***That in any event the sentence was manifestly excessive in the circumstances.***

9) ***That the Honourable Magistrate erred in law and in fact in finding that the Appellant had constructed on Plot 1502/II/MN without the requisite permits without any evidence to support such a finding.***

10) ***That the Honourable Magistrate erred in law and fact in finding that the appellant had contravened section 30(1) as read with section 30(2) of the Physical Planning Act Cap 265, Laws of Kenya without evidence to prove the same.***

11) ***That the Honourable Magistrate erred in law and in fact in placing too much reliance on the evidence of arresting officers (county askaris) in convicting the Appellant which evidence was incoherent, unsubstantiated and false.***

12) ***That the learned Magistrate erred in law and in fact by imposing the maximum fine when viewed against the nature of the offence and circumstances of the case.***

13) ***That the learned Magistrate erred in law and in fact when imposing the maximum fine on the accused by failing to consider the mitigation factors put forward by the accused person.***

14) ***That the learned Magistrate erred in law by taking irrelevant factors into consideration when sentencing.***

Background

PW1 George Mureithii, a county police officer informed the court that on 12th August 2016 they went to Bamburi Mwisho where the construction of a permanent house was ongoing without a permit.

In cross-examination, he stated that he had been instructed to arrest the Appellant but admitted that they never did any investigations and that they did not confirm if the Appellant had the permits.

PW2 Charles Gregory Adeya was a building inspector in the lands department of the County Government of Mombasa. He stated that on 12th August 2016 he received a report that the Appellant had built on a service lane. He prepared and served on the Appellant a notice giving him 21days notice to comply. After 21 days there was no change and they issued another notice. PW2 informed the court that no construction was to be done on the service lane as it served other plots. He stated that there was a petrol station that was built on the service lane but it had approvals.

In cross-examination, he stated that he gave the Appellant 21days notice on the 11th August 2016 but admitted that the Appellant was arrested on 12th August 2016. He admitted that the Appellant should not have been arrested as the notice had not expired.

PW3 Margaret Kageshe, the Divisional Commander at Mombasa County Enforcement recalled that on 12th August 2016 she was with PW1 and Farah when they were informed of an illegal construction. On the same day they went to the construction site and arrested some people. She informed the court that they had served a notice on 11th August 2016 intended to stop further construction since he did not have approval documents. She produced the notice as P. Exhibit 1.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the Appellant was placed on his defence. The Appellant chose to give a sworn statement and informed the court that he had obtained permits from planning development and had been authorized to build the land. He stated that the land was not on a road reserve and that he had a letter dated 20 th July 2017from Abu Salim the Chief Officer Planning which he produced in court as D. Exhibit 1 showing that the plot was not a road reserve. He also produced a survey by the County as D.Exhibit 3 indicating that his house had not blocked any road. He claimed that the petrol station adjacent to his plot had an access road and had used their permit to take his land. He stated that he complied with all requirements and county approvals before constructions. He alleged that there was malice and that he was in court because he was fighting the rich.

In cross-examination, he informed the court that he never received the notice from Mombasa County.

Submissions

The Appellant filed his submissions dated 2nd March 2020 on the 3rd March 2020 while the Respondent filed its submissions dated 16th March 2020 on the 24t March 2020. The matter came up for hearing on 2nd September 2020 where parties highlighted their submissions.

Appellant's submissions

Mr. Salim, counsel for the Appellant submitted that prosecution had failed to prove its case beyond reasonable doubt as the evidence was contradictory, inconsistent and vague. He stated that the prosecution had failed to prove that the Appellant had no permission to construct on the said property. He quoted the case of **JOO vs Republic [2015] eKLR.**

Counsel submitted that the prosecution had failed to call a witness from the County Department of Lands, Planning and Housing to confirm whether or not the Appellant had been issued with proper permission despite the trial court giving them several chances to call the officers. He contended that the trial Magistrate in his judgement required the Appellant to produce evidence of the permits from the Mombasa County shifting the burden of proof to the Appellant. He relied on the case of **Republic vs Joseph Shitandi & another [2014] eKLR.**

Mr. Salim further submitted that the trial court had relied on documents marked for identification but which were never submitted in evidence and did not form part of the record as was held in **Kenneth Nyaga Mwige vs Austin Kiguta & 2 others [2015] eKLR**

On sentence, Mr. Salim urged that the sentence was excessive as the court had failed to consider in its mitigation that he was a first time offender and he was the sole breadwinner of his family. He cited the case of **Musa Salim vs Republic [2005] eKLR.**

Respondent's submissions

Mr. Muthomi for the Respondent submitted that the prosecution had proved that the Appellant had initiated a development within the local authority of the county and that he had no approval to initiate such a development. He relied on the case of **Thomas Joseph Onyangi vs Republic [2008] eKLR.**

On whether the trial court shifted the burden of proof, counsel submitted that the Appellant averred that he had the permits for the planning department authorizing construction and was required to produce those approvals and permits to substantiate his assertions. He urged that the trial Magistrate observation did not amount to shifting the burden of proof but was a logical and expected action.

Further, Mr. Muthomi submitted that the documents were clearly labelled as exhibits indicating that the documents were properly handed over to the court. That the trial Magistrate's failure to note the documents as exhibits was not prejudicial to the Appellant.

On the sentence, counsel submitted that the court would not normally interfere with the discretion of the trial court unless certain circumstances existed. He urged that the Appellant was a director of Environment working for the County Government of Tana River was knowledgeable and was to be a mirror of society. He submitted that the sentence was proper and justified. He relied **Gaston January Stephen vs Republic (2017) eKLR; Macharia vs Republic [2003] EA 559; Livingston Kakooza vs Uganda SC Criminal Appeal No. 17 of 2003; Republci vs Jayani & Another KLR [2001] KLR 593; Yusuf Dahar Arog vs Republic High Court Criminal Appeal No. 110 of 2006** and **Bernard Kimani Gacheru v Republic [2002] eKLR.**

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the issue for determination is whether the prosecution proved its case.

The Appellant was charged under section 30(1) as read together with section 30(2) of the Physical Planning Act which section reads as follows:

> ***30(1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.***
>
> ***(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both.***

In considering the standard of proof required to substantiate the offence under section 30 of the Physical Planning Act, **Ngugi J** in **Robert Kamau Kamiti v Republic [2018] eKLR** stated that: -

> ***The offence created under section 30(2) is an offence of strict liability: no mens rea is required. The Prosecution is only required to prove the actus reus: that the Accused Person carried out a development without a development permit. Under the County Governments Act, "local authority" in the Physical Planning Act now refers to the County Government. The only question to ask, then, is whether the Appellant had a development permission from the County Government of Kiambu.***

The Appellant has alleged that the court requiring that he produce the permits is tantamount to shifting the burden of proof from the prosecution to himself. Section 111 of the Evidence Act that provides that: -

> **When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**
>
> **Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the accused person shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by**

either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

In the current case, the prosecution evidence was that there was an ongoing construction of by the Appellant at Bamburi Mwisho and that the construction lacked the necessary approvals as indicated by the enforcement notice (P. Exhibit1). The prosecution had discharged its burden of proof.

The Appellant in his defence did not deny that he undertaking construction but stated that he had obtained all the necessary approvals for the department of planning. He then produced before the court a letter (D. exhibit1) that stated that his plot was on a disused access road. He also produced a survey plan (D. Exhibit3) that stated that the construction did not block access for other plots.

The Appellant having averred that he had obtained the requisite approvals were required to produce the in court. Section 33 of the Physical Planning Act provides that the permit shall be in writing informing the applicant of any approval. There is no evidence placed before the court that shows any such permission being given to the Appellant. Based on the foregoing it is my finding that the offence was proved beyond reasonable doubt.

The Appellant submitted that the trial magistrate had relied on documents that had not been produced as exhibits. I have reviewed the judgement of the trial Magistrate and relied on P. Exhibit 1. From the lower court record PW3 produced the notice marked as Exhibit 1 when giving evidence on 7th December 2018. This ground is baseless and the same is rejected.

On sentence, the trial magistrate in sentencing the Appellant took into account the Appellant's submission and fined him Ksh. 100,000/- which is the maximum amount payable under the section 30(2) of the Physical Planning Act.

It is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances. In **Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000** the Court of Appeal stated thus:

> ***"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 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."***

The Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** gave guidelines with regard to mitigating factors and pronounced itself thus: -

> ***"To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> ***(a) age of the offender;***
>
> ***(b) being a first offender;***
>
> ***(c) whether the offender pleaded guilty;***
>
> ***(d) character and record of the offender;***
>
> ***(e) commission of the offence in response to gender-based violence;***
>
> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant."***

Paragraph 23.9.4 of the Judiciary sentencing policy guidelines outlines the determination of a sentence where there are mitigating and aggravating circumstances and states: -

In view of aggravating and mitigating circumstances, the determination of the term of the custodial sentence shall be as follows:

> ***4. Presence of both aggravating and mitigating circumstances: Where both exist, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance. Where aggravating circumstances outweigh the mitigating circumstances, then the court should proceed as if there is a single aggravating circumstance.***

In the present case, the Appellant submitted that he was a first offender and that he had stopped construction and was on his way to obtain the

permit. The trial Magistrate did not give any reasons for meting out the maximum fine payable. I find that the sentence was excessive in the circumstance.

I hereby uphold the conviction of the trial court however on sentence I substitute the fine payable to Ksh. 60,000/- in default of which he shall serve 6months imprisonment.

Orders accordingly.

Judgment delivered, dated and signed at Malindi this 9th day of December, 2020.

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R. NYAKUNDI

JUDGE