REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 142 OF 2015

(From Original Conviction and Sentence in Criminal Case No. 2085 of 2013 of Chief Magistrate's Court at Kakamega)

JUMA OKHALA OPARANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon J Ong'ondo, Senior Resident Magistrate, of stealing contrary to Section 268 of the Penal Code, Cap 63, Laws of Kenya, and was accordingly sentenced to two (2) years imprisonment.

2. The initial charge was for obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the charge were that on diverse dates between 10th December 2002 and 20th February 2003, at Kharanda Village Sidikho Sub-Location, Bunyala West Location, in Navakholo District, within Kakamega County, with intent to defraud the appellant had obtained Kshs. 90, 000.00 from Charles Barasa Wamani by falsely pretending that he would sell him a portion of land measuring one and half acres to be excised off Bunyala/Sidikho/1760, a fact that he knew was false.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court had to conduct a trial. The prosecution called five (5) witnesses.

4. The complainant, Barasa Wenani, testified as PW1. He explained that he entered into a sale of land agreement with the appellant on 10th December 2002, that he paid the full purchase price of Kshs. 90, 000.00 whereupon the appellant took him to the Land Control Board, and a consent to transfer was given Surveyors were brought in who subdivided the land. Problems crept in after that, when the appellant uprooted a boundary and refused to have PW1 take possession. The dispute was taken to the local District Officer (DO) who referred it to the local Land Disputes Tribunal, which tribunal referred the matter to the High Court. Thereafter the matter was placed before the clan where the appellant allegedly said he was not willing to sell the land, and was to rescind the sale and pay the buyer Kshs. 450, 000.00. The clan gave him a time stipulation within which he was to pay failing which the land was to be given to PW1. He refused to pay, and the matter was reported to the police who charged the appellant with the offence of obtaining money by false pretences. On cross-examination, he conceded that at the time the transaction was entered into there was pretence or fraud. He conceded too that he had taken possession of the land and had harvested cane from it.

5. Peter Masinde Masabu (PW2), was one of the persons who witnessed the sale. He conceded that PW1 had taken possession of the land and had planted cane. He also testified to the fact that the appellant had offered to rescind the sale by paying a sum of Kshs. 450, 000.00 to PW1. Jackson Wakhisi (PW3), was also privy to the sale. He stated that the parties went to the land board, but a misunderstanding erupted thereafter. He asserted that the case was not one of obtaining by false pretence as there was land available for sale. Nicholas Wanjala (PW4) was the chairman of the appellant's clan before whom the appellant pledged to pay Kshs. 450, 000.00 to PW1 upon rescission of the land sale. Police Constable Patrick Wafula (PW5) was the police officer who investigated the matter.

6. The appellant was put on his defence. He gave a sworn statement. He conceded the sale of the land, receipt of the sale price money, the approval of the Land Control Board, the survey work on the land for subdivision purposes and the fact that PW1 took possession and planted cane. He asserted that the clan was forcing him to pay Kshs. 450, 000.00, yet the land was available for PW1 to take possession of. He alleged that he was willing to give the land to him, but PW1 was unwilling. He wanted the money instead. He stated that when a cheque was raised for refund of the money, PW1 declined to receive it.

7. After reviewing the evidence, the trial court was persuaded that there was no obtaining by false pretences as the land sought to be sold existed. However, the court was of the view that the appellant was still criminally liable, for he had received money in exchange for land. He did not transfer the land to PW1 and did not refund the purchase price either to him. He kept both the money and the land, and therefore there was intent to deprive PW1 of his money. The court invoked section 189 of the Criminal Procedure Code, Cap 75, Laws of Kenya, to find that the appellant's conduct amounted to stealing contrary to section 268 of the Penal Code as read with section 275 of the Penal Code.

8. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised serval grounds of appeal. He cited several grounds that are listed in his petition of appeal on record.

9. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

10. The appeal was canvassed on 27th September, 2018. The appellant, through counsel, relied on written submissions that he placed before me, while Mr. Juma, Prosecution Counsel, made oral submissions, wherein he opposed the appeal on grounds that he advanced and elaborated. All these are on the record.

11. The appellant was convicted of the offence of stealing and not obtaining by false pretences, that then would mean that the appeal before me turns on offence of stealing. What I should consider is whether the trial court erred in convicting the appellant.

12. The facts upon which the trial court based its conviction were that the appellant had received a sum of Kshs. 90, 000.00 from PW1 on the understanding that he was to sell to him a piece of land. In the end, the appellant did not sell the land, and did not refund the sale price. He kept both the land and the money. It was concluded that there was intent to deprive PW1 of his money, and therefore there was theft.

13. The offence known as theft or stealing is defined in section 268 of the Penal Code. It revolves around depriving the complainant of his property. The *actus reus* for it constitutes either the taking of the property or its conversion. The *mens rea* for it is the intent to permanently deprive the owner of his property. Essentially it's about the accused person dealing with the property in question in a manner which is inconsistent with the owner's title, and especially in a manner that demonstrates an intent to permanently deprive the owner permanently of the property.

14. The facts of this case are clear that the appellant did not come by possession of the money in question unlawfully. The taking was therefore not unlawful. The parties had contracted, and the money was placed in the hands of the appellant lawfully as consideration. The offence is not alleged to have been committed through taking. The argument is that the contract fell through for some unclear reason. The contract having failed, it is argued, the appellant ought to have refunded the sale money he had received from PW1. As he had not transferred the land the subject of the contact nor paid the money, it is concluded, he had an intent to shortchange PW1. By holding on to money that he ought to have refunded he was exhibiting an intent to permanently deny PW1. Since the money had come into his possession lawfully, his failing to pay it back amounted to its conversion to his own purposes, which established stealing.

15. From the material before me, it is clear that the parties had entered into a land sale agreement. Money changed hands and PW1 took possession. Steps were taken towards subdivision and excision of the land from the mother title, but then something went wrong and the sale fell through. At that stage, two options were open to PW1, to either move the court for specific performance where the appellant would be compelled to transfer the land to him, or to treat the sale as having failed and to pursue recovery of the price. It would appear that rather than go to court, he decided to pursue the matter through the provincial administration, who advised that he should move the land tribunal. When he approached the land tribunal, he was advised, quite properly, that he ought to go to court. He apparently did not. Instead, the matter was moved to the clan where the appellant was apparently given two options, to either pay Kshs. 450, 000.00 to PW1 or otherwise transfer the subject land to him. It was the push to have the sum of Kshs 450, 000.00 paid up that led up to the police and the criminal court.

16. Does the material before me establish the offence of stealing by the appellant? Has he converted the purchase price and deprived PW1 permanently of it? It would appear that the appellant was convicted of stealing Kshs. 90, 000.00 yet the amount that PW1 was pursuing was Kshs. 450, 000.00. The question the trial court should have considered was whether the appellant had refused to pay Kshs. 90, 000.00 or was he not running away from paying Kshs. 450, 000.00 which was not the amount that he had received from PW1. The trial court did not address itself to the sum of Kshs. 450, 000.00, yet both sides testified about it. It was the failure to pay Kshs. 450, 000.00 that was reported to the police. The appellant appears to have been uncomfortable about paying the said sum. Quite clearly, there was a dispute as to what was due from or payable by the appellant.

17. The other matter that the court should have considered was that the appellant, according to PW1, had been given an option to pay Kshs 450, 000.00 or have the land transferred to PW1. The appellant did not pay the Kshs. 450, 000.00 so the other option was open to PW1, have him transfer the land. He could only achieve that by filing an appropriate suit. The question is why stick to payment of the money and ignore the second option. The second question would be why involve the police to recover Kshs 450, 000.00 before attempting to pursue the second option. Clearly, there were issues to be resolved. The matter was not at an end. The appellant should have been expected to pay only after those issues had been resolved. It cannot therefore be concluded that he had an intent to keep PW1 away from his money.

18. The third issue that the trial court did not take into account is that PW1 did actually take possession of the land. He worked it, and harvested cane from it. It is not clear for how long, but there is common ground about the possession and the harvesting. That raises the issue of *mense* profits. PW1 benefited from the land for some time, was that fact not to be taken into account as and when the question of the refund of the purchase price were to come up.

19. After considering all the facts and circumstances, I am of the view that trial court erred in convicting the appellant of theft. It was not proved that he had converted the money to his own use. There was a dispute about the sale which had not yet been resolved. It would have

been only after the resolution of the dispute one way or the other that he could be accused of unjustly holding on to PW1's money. In any event, the dispute was purely a civil one, and the police ought not to have been involved in a pure civil dispute between citizens. The relief available to PW1 lay with moving the Environment and Land Court appropriately to recover the land that the appellant was selling to him, or the High Court or the subordinate courts to recover the sale price paid if he had chosen to treat the sale as having failed or having been abandoned.

20. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Kakamega CMCCRC No. 2085 of 2013 was unsafe. I shall accordingly allow the appeal, quash the said conviction and set aside the sentence imposed.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS7th DAY OF February, 2019

J. NJAGI

JUDGE