



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.98 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. S. Jalang'o – SRM delivered on 8<sup>th</sup> July 2016 in Makadara CM. CR. Case No.2967 of 2010)*

**PETER KIMANI WAWERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Peter Kimani Waweru was charged with seven (7) counts under the **Penal Code**. He was charged with **forgery** contrary to **Section 349** of the **Penal Code**. The particulars of the offence were that on 25<sup>th</sup> March 1999 at unknown place in Nairobi County, jointly with others not before court, with the intent to defraud, forged a certificate of lease No.Nairobi Block 117/347 purporting it to be genuine and valid certificate of lease issued by the Registrar of Lands. He was charged with another count of **forgery** contrary to **Section 349** of the **Penal Code**. The particulars of the offence were that on 30<sup>th</sup> June 2010 at unknown place in Nairobi County, jointly with others not before court, with the intent to defraud, forged a letter of consent Form 2A for Plot No.Nairobi Block 117/347 purporting it to be genuine and valid letter of consent made and issued by the District Officer Nairobi. He faced a third count of **forgery** contrary to **Section 349** of the **Penal Code**. The particulars of the offence were that on unknown dates in the year 1998 within Nairobi County, the Appellant jointly with others not before court, with the intent to defraud, forged a National Identity Card No.0939980 Serial No.214265731 in the name of Paul Karenju Wambugu purporting it to be genuine and valid national identity card issued to him by the Registrar of Persons.

The Appellant was further charged with three (3) counts of **uttering false documents** contrary to **Section 353** of the **Penal Code**. The particulars of the offence were that on 30<sup>th</sup> June 2010 at Gardens Chambers Office in Nairobi County, the Appellant knowingly and fraudulently uttered three (3) documents namely; a forged certificate of lease for LR No. Nairobi/Block/117/347, a forged letter of consent Form 2A for LR. No. Nairobi/Block/117/347 and a forged National Identity Card No. 0939980 Serial No.214265731 in the name of Paul Karenju Wambugu to Alice Jonathan Tsiyeri, an advocate of the High Court of Kenya purporting it to be genuine documents issued respectively by the Registrar of Lands, the District Officer Nairobi and the Registrar of Persons. The Appellant was finally charged with the offence of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on diverse dates between 26<sup>th</sup> June 2010 and 30<sup>th</sup> June 2010 at Moi Avenue in Nairobi County, the Appellant, jointly with others not before court, with the intent to defraud, obtained Kshs.1,050,000/- from Bernard Otoki Moirongo by falsely pretending that he was in a position to sell a parcel of land LR. No. Nairobi Block 117/347 to the said Bernard Otoki Moirongo, a fact he knew to be false.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted of all the seven (7) counts and sentenced to pay a fine of Kshs.30,000/- or in default he was to serve six (6) months imprisonment on each count. If the Appellant failed to pay the fines, the custodial sentences were ordered to run consecutively. In addition, the Appellant was ordered to compensate the complainant in accordance with the **Victim Protection Act**. The order of compensation was ordered to take precedence over the fine. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of unproven and contradictory evidence of the prosecution witnesses. He took issue with the fact that crucial witnesses were not called to testify in the case thereby denying him an opportunity to establish his innocence. He faulted the trial magistrate for failing to take into account the evidence of the handwriting expert which contradicted the thrust of the prosecution's case. The Appellant was of the view that the evidence adduced by the prosecution witnesses raised reasonable doubt that he had committed the offence that he was charged with and therefore he ought to have been acquitted. He was aggrieved that the trial magistrate had failed to take into consideration the fact that he had spent seven (7) years in remand custody while awaiting trial and further that he was old and ailing before sentencing him to serve a sentence that he considered to be harsh and excessive. He took issue with the fact that his rights in accordance with **Section 200** of the **Criminal Procedure Code** were not explained to him when the convicting magistrate took over the proceedings from the previous magistrate who ceased to have jurisdiction. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentences that were imposed upon him.

During the hearing of the appeal, the Appellant told the court that fake documents were produced by the prosecution to support the case against him. He complained that his rights to be accorded fair trial were breached when he was not given a chance to be represented by an advocate. He complained that his request to have the case start *de novo* was not acceded to when the convicting magistrate took over the proceedings from the previous magistrate who had ceased to have jurisdiction. He told the court that his case took seven years to be heard and concluded. He was accordingly prejudiced. He urged the court to re-evaluate the evidence and reach an appropriate determination allowing his appeal.

Ms. Atina for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which established the Appellant's guilt to the required standard of proof. The prosecution had produced both oral and documentary evidence which established that the Appellant had impersonated the registered owner of the suit parcel of land and subsequently thereafter forged documents in order to enable him dupe the complainant into believing that he was the genuine registered owner of the suit parcel of land. The complainant paid the purchase consideration to the Appellant in the belief that he was the registered owner only later to learn that he had been conned. She submitted that the Appellant was properly convicted on the charges that were brought against him. She urged the court not to interfere with the sentence that was imposed upon him because it was legal.

Before giving reasons for its determination of this appeal, it is imperative that the facts of this appeal be set out, albeit briefly. The complainant in this case Bernard Otoki Moirongo teaches in one of the public universities. He testified as PW1. He told the court that he approached PW2 Kiprotich Bii, a land broker to look for him a parcel of land within Kahawa Sukari area because he was interested in purchasing one. The complainant gave this request to PW2 because he had previously assisted him to get a suitable parcel of land which he had purchased. After a while, PW2 called him and informed him that he had got a piece of land at a place called Kiwanja within general area that the complainant was interested. The complainant and his wife PW3 Sophia Otoki, accompanied by PW2 and one David Ndirangu, visited the plot. The complainant and his wife liked the plot. They were informed that the plot owned by one Paul Karenju Wambugu. The complainant was introduced to the purported owner by David Ndirangu. The purported owner happens to be the Appellant. The complainant demanded to see the title document of the property. The Appellant showed him a copy of the title deed, his identity card and his PIN certificate. The title deed was in respect of a parcel of land referred to as LR. No. Nairobi Block117/347. It was in the name of Paul Karenju Wambugu.

The complainant negotiated with the Appellant and struck a deal. The Appellant agreed to sell the suit parcel of land to the complainant for the sum of Kshs.1.1 million. The complainant requested the Appellant to accompany him to his lawyer so that an agreement could be written. On 26<sup>th</sup> June 2010, the Appellant appeared before PW4 Alice Gulenywa, Advocate where an agreement was written. The Appellant was paid the sum of Kshs.1,050,000/- in two instalments of Kshs.500,000/- and Kshs.550,000/- respectively. The Appellant surrendered to PW4 what appeared to be the original title in respect of the suit parcel of land. He also presented to PW4 the original identity card identifying himself as Paul Karenju Wambugu. He further presented to PW4 an original copy of the consent of the Land Control Board issued by the District Officer Nairobi. The balance of Kshs.50,000/-, it was agreed, would be paid upon the property being transferred to the complainant.

On 2<sup>nd</sup> July 2010, the complainant visited the plot. He found two men in the process of sub-dividing the plot. He inquired from them what they were doing on the land. One of them, identified himself as Bernard Karenju, the son of Paul Karenju Wambugu. He told the complainant that Paul Karenju Wambugu was deceased. The complainant was shocked. He tried to call the Appellant on his mobile phone. He could not reach him. He reported the matter to the police at Kiamumbi Police Station. Subsequent thereafter, he learned of the whereabouts of the Appellant. PW7 PC Julius Aroni of CID Kasarani was assigned to investigate the case. He arrested the Appellant and later had him charged. It was upon his arrest that it was discovered that the Appellant's actual identity was Peter Kimani Waweru and not Paul Karenju Wambugu. The documents retrieved from PW4 were taken to a document examiner. The same were examined by Chief Inspector Jacob Oduor based at the Directorate of Criminal Investigations. He confirmed that indeed the documents were forgeries. The document examiners report was produced on his behalf by PW6 Inspector Ivy Akinyi Scot.

When the Appellant was put on his defence, he denied committing the offence. He explained that the person who was involved in the crime was not himself but rather one Nderitu. It was his evidence that he was framed with the charges. He denied receiving any money from the complainant. He denied impersonating any person.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is aware that it did not hear nor see the witnesses as they testified and therefore cannot make any comments regarding the demeanour of the witnesses. (See **Okeno –vs- Republic [1972] EA 32**). The issue for determination by this court is whether the prosecution established to the required standard of proof the charges that were brought against the Appellant.

There are several issues that came to the fore for determination by this court. The first issue is whether the Appellant's right to fair trial were infringed as claimed in his submission on account of an alleged denial of him to exercise his right to have the case start *de novo* after the convicting magistrate took over the proceedings from the previous magistrate. **Section 200(3)** of the **Criminal Procedure Code** requires that before a magistrate takes over proceedings from the previous magistrate, he must inform the accused of his rights to have any of the witnesses, who had previously testified, to be recalled. The reason for this right is so that the magistrate taking over the proceedings, can where appropriate, be given the opportunity to assess the demeanour of the witnesses who had previously testified. On perusal of the court's record, this court finds the Appellant's complaint to be without merit. On 8<sup>th</sup> October 2015 when Hon. S. Jalang'o (SRM) took over the proceedings from Hon. E. Nyongesa (SRM), the Appellant was informed of his right under **Section 200(3)** of the **Criminal Procedure Code**. The Appellant informed the court that he wished to have the matter proceed from where it had reached. The Appellant therefore waived his right to have the witnesses who had previously testified recalled. That ground of appeal lacks merit and is hereby disallowed.

On the merits of the appeal, upon re-evaluation of the evidence adduced before the trial court, and in light of the submission made on this appeal, this court makes the following findings:

- (1) The prosecution established to the required standard of proof beyond reasonable doubt that the Appellant is Peter Kimani Waweru and not Paul Karenju Wambugu.

(2) It was further established that the Appellant impersonated the said Paul Karenju Wambugu by presenting an identity card and a PIN certificate to the complainant and PW4 in the name of the said Paul Karenju Wambugu.

(3) The Appellant presented to the complainant and PW4 a certificate of lease and a letter of consent from the Land Control Board purporting it them to be original documents in respect of parcel No. LR. No. Nairobi Block 117/347, a fact the Appellant knew to be false.

(4) The Appellant received the sum of Kshs.1,050,000/- from the complainant under the pretext that he was in position to sell to him the suit parcel of land to him.

(5) The Appellant did not have title to the suit parcel of land.

(6) It was established that Paul Karenju Wambugu was deceased at the time the Appellant impersonated him.

(7) That the Appellant forged the documents for the sole reason that it would have enabled him to obtain money by false pretences from the complainant.

(8) That the defence offered by the Appellant was not only far-fetched but was a feeble and ultimately unsuccessful attempt to exonerate himself from the crimes that he had committed.

In the premises therefore, this court found no merit with the Appellant's appeal against conviction. The Appeal against conviction is dismissed.

As regard sentence, this court is of the view that the Appellant is on firmer ground. Since his arrest and arraignment before court, the Appellant was in remand custody. It took seven (7) years for the trial to be concluded. The Appellant was sentenced to serve a further three and a half (3<sup>1/2</sup>) years in prison. He has served approximately 2 years of that term. This court is of the considered opinion that the Appellant has been sufficiently punished. Had the trial court taken into account the period that the Appellant was in remand custody prior to his conviction in accordance with **Section 333(2)** of the **Criminal Procedure Code**, the Appellant would not have remained for a further period in prison since the maximum period that he could have been sentenced for each of the offences is three years imprisonment. As regards compensation, the complainant can pursue the same before the Civil Court. For the above reasons, the Appellant's custodial sentence is commuted to the period served. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**