



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 61 OF 2015

EMIEL NJERU NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR. 1924 of 14 at Embu Chief Magistrate's Court by Hon. V.O. Nyakundi – RM on 20th July, 2015)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence which were imposed upon him by the court of the Resident Magistrate at Embu on 20th July 2015 as follows:

1. Count 1: obtaining money by false pretences contrary to section 313 of the Penal Code and was sentenced to 2 years imprisonment.
2. Count 2: conspiracy to defraud contrary to section 317 of the Penal Code and was sentenced to 2 years imprisonment.
3. Count 3: forgery contrary to section 350 and was sentenced to 25 years imprisonment.
4. Count 4: making a document without authority contrary to section 357 of the Penal Code (Cap 63) Laws of Kenya and was sentenced to 5 years imprisonment. The sentences of imprisonment were ordered to run concurrently.

2. The state through Ms Mbae has supported both the conviction and sentence recorded against the appellant.

3. The appellant was convicted on the evidence of Samuel Muriithi Mbiru (PW 1) who was the complainant. The evidence of PW 1 was that it is the appellant who told him that there was land parcel No. Kagaari/Ugweri/T.14 at Ugweri Market. He then took him there and the complainant then proceeded and agreed with the purported seller Lucy Muthoni Nthiga, who turned out to be a fraudster and is still a fugitive, who is at large. It is his further evidence that the appellant told the complainant that the title deed to the land was genuine.

4. A sale agreement was drawn and signed by the parties and was witnessed by the appellant. The appellant showed the complainant a title deed which was put in evidence as exhibit 2. Exhibit 2 upon

examination by the document examiner, C.I. Alex Mwongera (PW 3) was found to be a forgery. The Land Registrar Joseph Mulinge Munguti (PW 4) testified that the signatures appearing on exhibit 2 were not his signatures.

5. Furthermore, the genuine Lucy Muthoni Nthiga (PW 2) testified that she did not sell her parcel of land to any person.

6. The appellant has raised 8 grounds of appeal. In ground 1, he has stated the unchallengeable fact that he did not plead guilty. In ground 2, he has faulted the trial court for convicting him on evidence that was riddled with contradictions, which he says violated section 163 of the Evidence Act (Cap 80) Laws of Kenya. I have considered the evidence of the prosecution witnesses including that of the complainant (PW 1) and that of Lucy Muthoni Nthiga (PW 2) and I find no contradictions in their evidence. This ground of appeal is without merit and is hereby dismissed.

7. In ground 3, the appellant has faulted the trial court both in law and fact for convicting him without considering that there existed a grudge between him and the complainant. In this regard, I have considered the evidence of the complainant and it is clear from that evidence including the evidence given under cross-examination and I find that the issue of the grudge was never put to the complainant. I find this to be an afterthought and for this reason, this ground of appeal fails and I hereby reject it.

8. In ground 4, the appellant has faulted the trial court for failing in law and fact to consider that crucial witnesses were not summoned to give evidence, which he says violates sections 144 to 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, I have considered the evidence tendered at trial and I find that there was a sale agreement to which the appellant was a witness that was prepared in the firm of Messrs Githinji Karuri Advocates. In view of the agreement for the sale of the land, I find that it was not necessary to call the advocate who prepared the sale agreement and his secretary whom the trial court found to be an accomplice. In the circumstances, I find no merit in this ground of appeal and I hereby dismiss it.

9. In ground 5, the appellant has faulted the trial court both in law and fact for failing to find that no documents were produced in court to confirm the charge of fraud. In this regard, I find that the prosecution produced a certificate of the official search as exhibit 1. It also produced the sale agreement - exhibit 4, the forged title deed – exhibit 2, and the Document Examiner's report – exhibit 7. All these documents abundantly indicate the fraud perpetrated by the appellant. This ground of appeal is without merit and I hereby reject it.

10. In ground 6, the appellant has faulted the trial court both in law and fact for failing to consider that the evidence tendered at trial was only from relatives of the complainant and has further stated that that showed that the case against him was framed. In this regard, it is important to point out that in terms of **section 143 of the Evidence Act (Cap 80) Laws of Kenya**, a fact in issue may be proved by one witness or a number of witnesses as long as those witnesses are found to be credible. The trial court after considering the evidence of the prosecution witnesses found their evidence to be credible and I have also come to the same conclusion after re-assessing their evidence. The court found the evidence of the appellant to be incredible and in view of the evidence tendered at trial, that finding of fact by the trial court is amply supported by evidence. This ground of appeal is without merit and is hereby dismissed.

11. In ground 7, the appellant has faulted the trial court both in law and fact for convicting him without considering his plausible defence which, he says is in violation of section 169 of the Criminal Procedure Code (Cap 75) Laws of Kenya. I find from the evidence and the judgement of the trial court that that court framed the issues for determination in respect of each of the 4 counts upon which the appellant was convicted and found ample evidence in support of those counts. In believing the prosecution witnesses, the trial court also found that the evidence of the appellant was incredible. In the circumstances, the judgement complied with section 169 of the Criminal Procedure Code. I therefore find that there is no merit in this ground which I hereby dismiss.

12. In ground 8, the appellant has faulted the trial court both in law and fact in failing to consider that the

prosecution case was not proved beyond reasonable doubt. I find that the charges against the appellant were proved beyond reasonable doubt.

13. This is a first appeal. As a first appeal court according to *Peters v. Sunday Post Ltd (1958) EA 424*, I am required to reassess the entire evidence tendered at trial and make my own independent conclusions. After doing so, I have come to the conclusion that the appellant was convicted on ample evidence.

14. In sentencing the appellant, the trial court took into account the mitigation of the appellant including the fact that he was a first offender. That court went further to find that the offences upon which the appellant had been convicted were rampant in that locality. It also considered that the complainant had not recovered his money in the sum of Kshs 300,000/-. The court then concluded that a deterrent sentence was called for. After considering the circumstances of the offences and the sentencing principles applied by the trial court, I find that the sentence was manifestly excessive in respect of count 3 in which the appellant was sentenced to an imprisonment term of 25 years. I therefore reduce this term of imprisonment to 10 years. I confirm the sentences imposed in counts 1, 2 and 4 all of which will now run concurrently.

15. The appellant's appeal is dismissed in respect of the convictions in all the four counts. However, his sentence in count 3 is reduced to 10 years imprisonment to run concurrently with the other sentences in count 1, 2 and 4.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 4th day of JANUARY 2017

In the presence of the appellant and Ms. Mati for the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

04.01.17