



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.2 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. E.O. JUMA (SPM) delivered on 25th November 2016 in Kibera CM. CR. Case No.2375 of 2011)

WILLIAM ARIANDA ANDERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, William Arianda Andere was charged with five (5) offences under the **Penal Code**. He was charged with one (1) count of **making a document without authority** contrary to **Section 357(a)** of the **Penal Code**. The particulars of the offence were that on 3rd June 2011 at an unknown place within Ongata Rongai Township in Kajiado County, the Appellant, with others not before court, with intent to defraud and without lawful authority or excuse made title deed no.LR/ KJD/OLCHORO-ONYORE/1156 purporting it to be a genuine title deed issued by the Land Registrar, Kajiado. The Appellant was further charged with one (1) count of **uttering a document with intent to defraud** contrary to **Section 353** of the **Penal Code**. The particulars of the offence were that on the 3rd June 2011 at Ongata Rongai Township in Kajiado County, the Appellant knowingly and fraudulently uttered a forged title deed no.LR/ KJD/OLCHORO-ONYORE/1156 to Martha Karwirwa Anthony. He was also charged with three (3) counts of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the third offence were that on 3rd June 2011 at Mwiti and Company Advocates offices in Ongata Rongai Township in Kajiado County, the Appellant jointly with others not before court with intent to defraud obtained from Martha Karwirwa Anthony a sum of Kshs. 11,000 by falsely pretending they were in a position to sell a piece of land namely LR KJD/OLCHORO-ONYORE/1156 a fact they knew to be false. The particulars of the fourth offence were that on 3rd June 2011 at Kenyatta market within Nairobi County, the Appellant, jointly with others not before court with intent to defraud, obtained from Martha Karwirwa Anthony a sum of Kshs. 80,000 by falsely pretending they were in a position to sell a piece of land namely LR KJD/OLCHORO-ONYORE/1156 to her a fact they knew to be false. The particulars of the fifth offence were that on 6th June 2011 at KREP Bank, Wood Avenue, Kilimani branch within Nairobi County, the Appellant, jointly with others not before court, with intent to defraud, obtained from Martha Karwirwa Anthony a sum of Kshs. 2,609,000 by falsely pretending they were in a position to sell a piece of land namely LR KJD/OLCHORO-ONYORE/1156 to her a fact they knew to be false or not true.

When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charges. After full trial, he was convicted on all five counts. He was sentenced to pay a fine of

Kshs.200,000 or serve one (1) year imprisonment in default of payment on the count of **making a document without authority**. On the count of **uttering a document with intent to defraud**, the Appellant was sentenced to pay a fine of Kshs. 50,000 or serve six (6) months imprisonment in default of payment and on each count of **obtaining money by false pretenses**, he was sentenced to pay a fine of Kshs. 400,000 or serve one (1) year imprisonment in default of payment. The sentences were ordered to run consecutively. The Appellant was aggrieved by his conviction and sentence and has 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 the trial magistrate did not consider his defence. He was also aggrieved that the trial magistrate did not appreciate that there were discrepancies in the prosecution's case. He faulted the trial magistrate for failing to apply his mind to the high threshold of proof required in a criminal case. According to the Appellant, the prosecution failed to adduce any evidence linking him with the alleged offences. He averred that the trial magistrate erred in basing his findings on the testimony of the investigating officer and on assumptions premised on untendered evidence. He further averred the trial magistrate erred in failing to find that the prosecution had not established its case against him to the required standard of proof beyond any reasonable doubt. He further faulted the trial court for failing to find that the documents relied upon by the prosecution exonerated him from culpability. The Appellant also took issue with the fact that crucial witnesses were not called to testify in the case. Finally, he challenged the prosecution's failure to produce the purported original title in respect of the suit property as exhibit. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant was represented by Mr. Onindo, learned counsel. The Respondent was represented by the Learned State Counsel, Ms. Aluda. Both parties made oral submission in support of their respective positions. Counsel for the Appellant reiterated that the evidence led by the prosecution did not establish the Appellant's guilt to the required standard of proof beyond any reasonable doubt. He argued that although the prosecution alleged that the appellant has passed a fraudulent title deed to the complainant, it failed to prove that the particular title deed was indeed a fraud. According to the learned counsel, there was no evidence on record showing that the particular title deed was different from a genuine title deed that was issued. He further argued that the fact that the purported owner of suit property was not also called as a witness to testify in respect of her ownership of the property confirmed that element of fraud had not been sufficiently proved by the prosecution to the required standard of proof beyond any reasonable doubt. He therefore urged the court to allow the appeal.

Ms. Aluda for the State opposed the appeal. She made submissions to the effect that the prosecution had established its case on the charges brought against the Appellant to the required standard of proof. According to the Learned State Counsel, the issue during trial was whether the title deed held by the Appellant was fraudulent. She submitted that although the title deed bore the Appellant's name, the original owner, one Josephine Wanjiru Mwangi who was still in possession of the original title deed in her name, denied ever transferring the property to the Appellant. She further submitted that an inspection of records at the Lands Registry established no records of a transfer of title from the said Josephine Wanjiru Mwangi to the Appellant had been made. According to the learned State Counsel, the Appellant knew that his title deed was false when he entered into the sale agreement with the complainant. She added that the fact that he switched off his phone and disappeared after receiving the entire purchase consideration from the complainant clearly showed that the whole transaction was a fraud. She submitted that the elements of knowledge and fraud had been proved by the prosecution. She urged the court to disallow the appeal.

This court shall consider the submission made by the parties to this appeal after briefly setting out the facts of this case. The complainant, PW1 Martha Karwirwa purchased the suit property registered as LR/KJD/OLCHORO-ONYORE/1156 from the Appellant by virtue of a sale agreement dated 3rd June 2011. She produced the sale agreement into evidence as **Prosecution's Exhibit No. 2**. The complainant testified that she was introduced to the Appellant by one John Muiruri whom she referred to as a broker in the land transaction. She testified that the broker showed her the suit property and told her that it was up for sale for Kshs.3,000,000/-. She expressed interest in the property and asked to meet with the owner of the

property. The complainant testified that she later met the Appellant who was said to be the owner of the property at the broker's office. They went to view the property together. She negotiated the purchase price and the Appellant agreed to sell it at Kshs.2,700,000/-. They went to her advocates' office, Messers Mwiti & Company Advocates to draw a sale agreement.

The sale agreement was drawn by PW2 Nahashom Mwiti Mbugua on 3rd June 2011. PW2 attested to having witnessed the signing of the sale agreement by the complainant and the Appellant in respect of the suit property. He testified that he obtained from the Appellant the original title deed for the suit property (**PEXH 6**) in the name of the Appellant, copies of his identity card no. 8706073 (**PEXH 3**) and personal identification number A001909016V (**PEXH 4**). He also prepared transfer forms (**PEXH 7a&b**) in respect of the transaction which were duly executed by both the complainant and the Appellant and obtained the Appellant's passport size photographs (**PEXH5**). According to PW2, the complainant was to pay the purchase price to the complainant on the same day. He testified that his work was restricted to preparing the sale agreement and the transfer documents. He therefore handed over the documents to the complainant to effect the registration.

The complainant testified that she paid Kshs.11,000/- to the Appellant to cover for his legal fees for the transaction before they left the advocate's office. They went to KREP Bank, Kenyatta Market branch where she was to transfer the money to the complainant. They however found the bank closed. She testified that the Appellant became agitated thinking that he would not be paid. She therefore withdrew Kshs.80,000/- from her ATM and paid him. She testified that the Appellant insisted that he needed an undertaking by her bankers that the money would be transferred to his bank account. She testified that she obtained the undertaking from the bank (**PEXH 8**) which she gave the Appellant. She filled an RTGS Form (**PEXH 9a**) instructing the bank to transfer Kshs.2,609,000/- from her company's (Nairobi Elite Day Care Limited) account no. 003020026970 to the Appellant's bank account no. 0350193228075 at Equity Bank, KNUT House Branch. She also drew a cheque (**PEXH 9b**) in the name of her company for Kshs.2,609,000/- addressed to KREP bank. The company's bank statement (**PEXH 10**) indicated the funds were transferred into the Appellant's bank on 6th June 2011.

The complainant testified that after paying the Appellant, she proceeded to Kajiado County Land Registry on 7th June 2011 to register the transaction. She presented the transfer documents together with a copy of the title deed at the registry but was informed that the transaction could not be effected as a Caution had been lodged over the property on the same day. She testified that she obtained a certified copy of the green card (**PEXH 11**) confirming the same. She then called the broker to inform him of the developments. They tried to reach the Appellant through his phone. The complainant testified she got hold of the Appellant. He told her that he was unable to meet her as he had travelled to Busia. The Appellant later switched off his phone. She was therefore unable to reach him. She testified that she called the bank to see if she could reverse the payments to the Appellant but she was informed that the Appellant had already withdrawn the money.

PW5 Salayo Nurunya worked at the Kajiado County Land Registry at the time. He recalled that on 7th June 2011 an elderly lady by the name Josephine Wanjiru Mwangi arrived at the registry to conduct a search on the suit property. He testified that upon perusing the records at the registry, he established that the suit property had allegedly been transferred to the Appellant on 30th May 1990. He conveyed the information to the lady and she refuted that she had transferred the property at all. He testified that she showed him an original title deed issued on 27th November 1986 in her name and a certificate of official search in respect of the property. They checked their records and found that there were no transfer documents transferring the property to the Appellant. This prompted the Lands Registrar to register a caveat on the property. They advised the lady to report the matter to the police.

The complainant reported the incident to Kiserian Police Station and later at the CID headquarters in Nairobi. PW6 CIP Samuel Agutu was assigned to investigate the case. He testified that in the course of conducting his investigation, he obtained the green card (**PEXH 11**) in respect of the suit property which showed that a caveat had been registered over the property by one Josephine Wanjiru Mwani who was said to be the owner of the property. He testified that he received a letter dated 31st July 2012 (**PEXH 12**)

from the Kajiado County Land Registrar confirming that that the registry did not have records showing the transfer of the property into the Appellant's name. PW6 further testified that he obtained opening accounts records from Equity bank, Knut branch (**PEXH 17**) to establishing that account no. 0350193228075 was in the name of the Appellant. He also obtained a bank statement for the account (**PEXH 18**) confirming that Kshs.2,609,000/- was deposited into the account on 6th June 2011. The Appellant was arrested and charged with the offences. When the Appellant was put on his defence, he did not defend himself neither did he adduce any evidence in his defence.

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 before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (**see Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the submission made before this court during the hearing of the appeal. There are several issues for determination by this court: the first issue is whether the Appellant was the registered owner of the suit property. According to a Land Registry official who testified as PW5, the suit parcel of land was registered in the name of one Josephine Wanjiru Mwangi. The records indicated that although the Appellant appeared to have the title of the suit parcel of land, there was no evidence, in form of a transfer, indicating that the said Josephine Wanjiru Mwangi had transferred the suit property to the Appellant. When the Appellant was informed of this discrepancy, instead of cooperating with the complainant with a view to assisting her have the suit parcel of land transferred to her, the Appellant went underground. The Appellant did not give an explanation of how he came to obtain the title of the suit parcel of land when the same had not been legally transferred from the said Josephine Wanjiru Mwangi. The Appellant urged that the prosecution was required to produce the original title of Josephine Wanjiru Mwangi to establish its claim that indeed she was the owner of the suit parcel of land. This court is of the view that this argument would have been valid if the Appellant had cooperated with the complainant from the time that she initially experienced difficulty in having the suit property registered in her name. On re-evaluation of the evidence adduced, it was clear to this court the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant knew that he was not the legal owner of the suit parcel of land and further that he knew that he was duping the complainant when he obtained the said sum of Kshs.2.7 million from her. He had no legal title to the suit parcel of land which he could legitimately pass to the complainant.

The second issue for determination is whether the prosecution established to the required standard of proof that the Appellant received the said sum of Kshs.2.7 million from the complainant. The complainant testified that upon executing the agreement, she paid the Appellant the sums of Kshs.11,000/- and Kshs.80,000/- in cash and transferred the sum of Kshs.2,609,000/- from her account at KREP Bank, Kenyatta Market Branch to the Appellant's at Equity Bank, KNUT House Branch by electronic transfer. Documentary evidence produced by the complainant supported her claim that she had indeed transferred the said sums of money to the Appellant. The Appellant did not seriously dispute that he had received these sums of money. It was his case that he had legitimately received the said sums of money from the complainant after he had sold the suit parcel of land to the complainant. This court, having found that the Appellant did not have title to the suit parcel of land which he could legally pass to the complainant, holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant obtained the said sums of money by falsely pretending that he was in a position to sell the suit property to the complainant, a fact he knew was not true or the case.

The complaint by the Appellant that the prosecution failed to call all the relevant witnesses and thus prejudiced his defence does not hold because the prosecution is under no obligation to call any witnesses that the Appellant felt was relevant to support his defence. Nothing in law prevented the Appellant from calling the witnesses whom he deemed were relevant to establish his defence. It was the Appellant's defence that he was indeed the registered owner of the suit property. If that is the case, nothing would

have been difficult than for the Appellant to produce transfer documents evidencing his assertion that the suit parcel of land had been transferred to him by the “**previous**” legal owner. In that regard, the defence put forward by the Appellant therefore was incredible and did not dent the otherwise cogent, consistent and strong evidence that was adduced by the prosecution.

In the premises therefore, this court holds that the prosecution established the five counts that were brought against the Appellant to the required standard of proof beyond any reasonable doubt. The Appellant’s appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant was ordered to pay the total sum of Kshs.1.45 million or in default he was to serve the default sentence of 4?2 years imprisonment. This court cannot fault the exercise of discretion by the trial magistrate. However, taking into consideration the fact that the Appellant did not pay the fine, and taking into account that the maximum custodial sentence for the offences for which the Appellant was convicted is three (3) years imprisonment, this court hereby sets aside the sentences meted out by the trial court and substitutes it with a sentence of this court sentencing the Appellant to serve three (3) years imprisonment. The sentences shall take effect from 25th November 2016 when the Appellant was convicted by the trial magistrate’s court. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF MARCH 2017

L. KIMARU

JUDGE