



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 77 OF 2013

CHARLES KARUGO NDUMIA ALIAS CYRUS WAIRI KINYINGIAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 1038 of 2010 in the Senior Principal Magistrate's court at Kerugoya – HON. S.N.Ndegwa (SRM))

JUDGEMENT

The appellant ***Charles Karugo Ndumia alias Cyrus Wairi Kanyingi*** had been charged jointly with another namely ***Nyaga Magondu Mwaniki*** with the offence of conspiracy to defraud contrary to **Section 317** of the **Penal Code**.

The particulars thereof alleged that on the 13th day of October 2010 at Wanguru township in Kirinyaga County, jointly with others not before court with intent to defraud, they jointly conspired to defraud Bark's Limited of kshs 600,000 claiming that they had a parcel of land NO. **MWEA/MUTITHI/SCHEME/1234** to sell to the said Bark's Limited.

The appellant was also separately charged in four other counts with the following offences

Count 2 - Obtaining money by false presences contrary to **Section 313** of the **Penal Code** particulars being that on the 13th day of October 2010 at Jane Munene Advocate's office within Wanguru Township in Kirinyaga County, jointly with others not before court, with intent to defraud, the appellant obtained a sum of kshs 500,000(five hundred thousand) from Bark's Limited by falsely pretending that he would sell to it a parcel of land LR No **MWEA/MUTITHI/SCHEME/1234** a fact he knew to be false.

Count 3 – Making a document without authority contrary to **Section 357(a)** of the **Penal Code** particulars being that on unknown dates within the Republic of Kenya, with intent to defraud and without lawful authority or excuse, the appellant made a document namely title deed for LR no. **MWEA/MUTITHI/SCHEME/1234** purporting it to be a genuine title deed issued by the Registrar of Lands Kirinyaga.

Count 4 - making a document without authority contrary to **Section 357(a)** of the **Penal Code** in that on unknown dates in the Republic of Kenya, with intent to defraud and without lawful authority or excuse,

the appellant made a certain document namely identity card No 0754786 serial No 201183106 purporting it to be a genuine identity card issued by the Registrar of Persons.

Count 5 - Personation contrary to **Section 382** of the **Penal Code** particulars being that on 13th day of October 2010 at Jane Munene Advocate's office within Wanguru Township in Kirinyaga County, with intent to defraud, the appellant falsely represented himself as Cyrus Wairi Kanyingi the holder of Identity card No. 0754786 to the said Jane Munene Advocate.

After full trial, the appellant was convicted of all the charges preferred against him but his co-accused was acquitted of the first count under **Section 215** of the **Criminal Procedure Code** for lack of sufficient evidence.

Upon conviction, the appellant was sentenced to a blanket six years imprisonment for all the counts. He was dissatisfied with the convictions and sentence hence this appeal.

In his petition of appeal, he raised seven grounds in which he mainly complained that the learned trial magistrate erred in law and in fact in failing to appreciate that the evidence adduced by the prosecution did not link him to the offences charged; that the evidence was contradictory and that his constitutional rights under **Article 49(f)** of the **Constitution** had been violated having been kept in police custody for more than 24 hours. He also complained that the learned trial magistrate erred in failing to consider his sworn defence.

When the appeal came up for hearing, the appellant appeared in person and made oral submissions in which he urged the court to find that he had been wrongly convicted; that his appeal was merited and ought to be allowed.

The state was represented by learned state counsel M/S Macharia who opposed the appeal submitting that the evidence adduced before the trial court was water tight and overwhelming; that the evidence proved the guilt of the appellant as charged in all counts beyond any reasonable doubt and that the appeal should be dismissed for lack of merit.

On sentence, the learned state counsel conceded that the learned trial magistrate erred in imposing upon the appellant a blanket sentence of six years but in her view, the error could be corrected by this court under **Section 382** of the **Criminal Procedure Code**.

Briefly, the prosecution case was that PW1 and PW3, directors of a Company known as Barks Limited were interested in purchasing a parcel of land known as **MWEA/MUTITHI/SCHEME/1234** located at Makutano. Through the assistance of PW4 and the appellant's co-accused, they were introduced to the appellant who introduced himself to them as the registered owner of that parcel of land and indicated that he was offering the said parcel of land for sale.

According to the evidence of PW7 Jane Wangechi Munene who is an advocate of the High Court of Kenya, the appellant had previously gone to her Wanguru Office on 21st September 2010 in the company of a lady known as Grace K. Mburu and deposited with her title deed for land LR NO. **Mwea/Mutithi/Scheme /1234** (herein after referred to as the suit land) as security for payment of a loan of KSh 70,000 allegedly advanced to him by Grace. The appellant had introduced himself to her as **Cyrus Wairi Kinyingi** holder of identity card No. 0754786, the registered owner of the land whose title was being charged as security. The title deed deposited with her bore the same names.

PW1 and PW3 recalled that on 11th October 2010, they met the appellant who presented himself as **Cyrus Wairi Kanyingi (Cyrus)** and they agreed to meet on 13th October 2010 to execute an agreement for the sale of the said land. And on 13th October 2010, PW1, PW3 and PW4 met with **Cyrus** and a lady known as **Beatrice** whom he introduced as his wife. They met in PW7's office and on their instructions, PW7 prepared an agreement for sale of the suit land which they all executed.

The purchase price was agreed at kshs 600,000 and in the presence of PW4 and PW7, **Cyrus** who the witnesses identified to be the appellant herein received a down payment of kshs 500,000 in cash from PW1 and PW3. **Beatrice Wairi** and **James Gitari Kimani** (PW4) signed the agreement as witnesses to the sale.

The parties to the agreement also executed transfer documents prepared on their instructions by PW7 and left her with copies of their identity cards, pin number and passport size photographs in order to process transfer of the land from **Cyrus** to **Bark's limited**.

However, when the transfer documents and the title deed were presented to the Land Registrar Kirinyaga for registration, they were rejected as fake documents.

The matter was reported to the police. The appellant was subsequently arrested and charged with the offences for which he was tried and convicted.

The original title deed for the suit land in the names of **Cyrus Wairi Kinyingi**, the sale agreement and transfer forms duly executed by the parties, the Land Control Board Consent and acknowledgements executed by Grace K. Mburu and Cyrus Wairi Kinyingi of I/D No 0754786 as security for payment of a loan were all produced in evidence as exhibits in support of the prosecution case.

The appellant in his defence gave a sworn statement and did not call witnesses. He denied having committed the offences as alleged. He introduced himself as **Charles Ndumia Karugo** and denied that he was ever involved in any transaction involving the sale of the suit land as alleged by the prosecution witnesses.

I have considered the submissions made in this appeal by the appellant and M/S Machaira for the state.

I have also re-examined and re-evaluated the evidence adduced before the trial court as I was required to do, this being the first appellate court and in so doing, I was alive to the fact that unlike the trial magistrate, I did not have the advantage of seeing and hearing the witnesses.

Having analysed the evidence on record and having read the judgment of the learned trial magistrate delivered on 18th August 2011, I find that the trial magistrate did not clearly specify in her judgment the counts in respect of which she had convicted the appellant. The trial magistrate after analysing the evidence adduced by the prosecution against that offered by the appellant just stated;

“I thus find the 1st accused guilty as charged”

Considering that the appellant who was the 1st accused before the trial court had been charged in several counts, the learned trial magistrate ought to have specified the counts in which the appellant had been convicted or acquitted if he had been acquitted of any count. Failure to clearly indicate the counts on which the appellant had been convicted was an error which contravened the provisions of **Section 169 (2)** of the **Criminal Procedure Code** which states;

“In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”

This is however not an error which can vitiate the appellant's trial as in my view, it did not occasion him any prejudice. The appellant knew the charges he was facing since they were clearly set out in the charge sheet.

From the judgment of the learned trial magistrate and particularly the statement reproduced above, it is apparent that besides having been convicted in respect of count 2, count 3 and count 4 in which he had been charged alone, the appellant was also convicted in count 1 in which he had been charged jointly with another with the offence of conspiracy to defraud.

As stated earlier, the appellant's co-accused was acquitted in the course of the trial for lack of sufficient evidence. And since the offence of conspiracy to defraud must of necessity be committed by two or more persons acting in concert to execute a common intention to defraud, it is difficult to see how the appellant could have been convicted of the offence alone while his co-accused had been acquitted for lack of evidence.

In any event, the recorded evidence did not actually show that the appellant had conspired with his co-accused to defraud Barks Limited of kshs 600,000. In the circumstances, I find that the appellant's conviction in count 1 was not backed by any evidence and it cannot be sustained. I therefore quash the appellant's conviction in count 1.

As regards count 2, count 3 and count 4, I find that the evidence adduced against the appellant was credible, consistent, straight forward and overwhelming.

PW1, PW3, PW4 and PW7 all testified that the appellant while falsely pretending to be **Cyrus Wairi Kinyingi**, the registered owner of the suit land promised to sell the suit land to Barks Limited through its directors for a purchase price of ksh.600, 000. He executed a sales agreement to that effect (exhibit 3) and received in cash ksh.500, 000 as down payment. It later transpired that the suit land did not as a matter of fact belong to him but was owned by PW2 who was certified by PW5 the Land's Registrar Kirinyaga as the true owner of the land having been lawfully registered as its owner on 11th October 2005. PW2 stated in his evidence that he had not offered the said land for sale.

PW5 also recalled that on 11th November 2010, he had examined the title deed presented to PW1, PW3, PW4 and PW7 as proof of the appellant's alleged ownership of the suit land and he had confirmed from records in the lands registry that the title deed was not genuine. It had not originated from the Lands Registry in Kirinyaga, the office legally mandated to issue title documents. There cannot therefore be any doubt that the said title deed was a false document made without lawful authority or excuse with intent to defraud.

Similarly, PW6 a finger prints expert from the office of the Registrar of Persons confirmed in his evidence that the identity card No.00754786 presented to the prosecution witnesses by the appellant had not been lawfully issued by the office of the Registrar of Persons the office legally authorized to issue identity cards to Kenyan citizens. That identity card had been lawfully issued to PW2 but not the appellant.

PW6 recalled that the specimen of the appellant's thumb print forwarded to him for analysis by the investigating officer (PW8) revealed that the appellant had been lawfully issued with ID Card No.05513901 in the name of **Charles Ndumia Karugo**. The appellant in his defence conceded that this is his true name.

The key prosecution witnesses in this case (PW1, PW3, PW4 and PW7) did not know the appellant before the events leading to his prosecution unfolded and they had no reason to give false evidence against him. PW5, PW6 and PW8 were independent witnesses in this case and they similarly had no reason to give false evidence against the appellant. The appellant in his defence did not allude to any.

Their evidence considered as a whole prove beyond doubt that the appellant deliberately passed himself off as the true owner of the suit land in order to convince PW1 and PW3 to whom he had offered the land for sale that he had capacity to sell the suit land to Barks Limited for a price of ksh.600, 000 while he knew that he did not have capacity to sell the land since it did not belong to him. In furtherance of that false pretence, he fraudulently received ksh.500, 000 from PW1 and PW3 as evidenced by the sale agreement exhibited before the trial court.

Though there was no direct evidence proving that the appellant is the person who had unlawfully made the title deed and the identity card used in the false transaction, there is evidence that it is the appellant who had presented the said documents to PW7 purporting them to be genuine documents to be used in the sale transaction and he must be taken to be either the person who unlawfully made the documents or

aided and abetted in their making which makes him a principal offender within the meaning of **Section 20** of the **Penal Code** . From the recorded evidence, it is clear that he must have participated in the making of the false documents since his image appeared in the false identity card and he is the one who had possession of the false title deed made in the names of the person the appellant impersonated in order to defraud Barks Limited.

The appellant had in his grounds of appeal complained that the learned trial magistrate erred in law and in fact in failing to consider that his constitutional rights under **Article 49(f)** of the **Constitution** had been violated as he was allegedly kept in police custody for more than 24 hours. He charged that he was arrested on 1st November 2010 and arraigned in court on 3rd November 2010.

It is important to note that this complaint was not raised before the trial court where it ought to have been raised as the court of first instance. Such preliminary points of law ought ideally to be raised at the earliest opportunity. Be that as it may, the charge sheet shows that the appellant was arrested on 3rd November 2010 and was produced in court on 4th November 2010 which was within the time frame limited by the constitution.

However, whether he was arraigned in court within the twenty four hours allowed by the constitution or not is in my view immaterial for purposes of this appeal since the Court of Appeal has held in **JULIUS KAMAU MBUGUA VS. REPUBLIC CRIMINAL APPEAL NO.50 of 2008** that contravention of a constitutional right does not have to result in a trial being declared a nullity; that the remedy for an accused person who feels aggrieved by such a contravention is a claim for damages in a civil suit. Nothing therefore turned on this ground of appeal.

In view of the foregoing, I am satisfied that the evidence on record was sufficient to prove the charges preferred against the appellant in count 2, count 3 and count 4 beyond any reasonable doubt. In the premises, I have no doubt that the appellant was properly convicted in those three counts. I consequently dismiss the appeal against convictions in count 2, count 3 and count 4.

On sentence, I concur with the learned state counsel that the learned trial magistrate erred in passing an omnibus sentence on all the counts without specifying the sentence passed with respect to each count.

The learned trial magistrate ought to have passed sentence against the appellant separately for each count and thereafter direct whether the sentences were to run consecutively or concurrently.

Secondly, in so far as the sentence was meant to apply to all the counts in which the appellant had been convicted, the sentence was also illegal because it exceeded the sentence prescribed by the law for the offences of obtaining by false pretences and the offence of personation. The two offences are misdemeanors and they attract a maximum sentence of three years and two years respectively.

The High Court is empowered by **Section 354 (3)** of the **Criminal Procedure Code** to alter findings by the trial court or reverse a sentence imposed by the trial court if it finds that there is sufficient ground for so doing or if the sentence imposed on the appellant was illegal like in the present case.

In the circumstances, the appeal against sentence succeeds. I accordingly set aside the sentence imposed by the learned trial magistrate. The record shows that the appellant was not a first offender and taking that fact into account, I substitute the sentence imposed by the trial court with the following sentences;

In count 2 – the appellant will serve 3 years imprisonment.

Count 3 – the appellant will serve four years imprisonment.

Count 4 – the appellant will serve 4 years imprisonment.

Count 5 – the appellant will serve 2 years imprisonment.

The sentences will run concurrently and will take effect from the date of conviction. It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGYA THIS 12TH DAY OF FEBRUARY 2014

in the presence of:

The appellant

Mr Sitati for the state

Mbogo Court Clerk