



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 88 OF 2011

ABONG BILDAD ONYANGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2019 of 2009 in the Chief Magistrate's court at Nairobi – K. A. Bidali (SPM) on 25th March 2011)

JUDGMENT

1. This appeal arises out of the conviction of the appellant, **ABONG BILDAD ONYANGO**, on four counts of forgery contrary to **Section 350(1)** of the **Penal Code** and on two counts of uttering a false document contrary to **Section 353** of the **Penal Code**. He was sentenced to serve 10 (ten) years imprisonment on each of the counts. In addition he was convicted on six counts of obtaining money by false pretences contrary to **Section 313** of the **Penal Code**, and sentenced to serve 2(two) years imprisonment on each. The sentences were ordered to run concurrently, which means that the appellant is serving a total of 10 (ten) years imprisonment.

Brief Particulars

2. The particulars in **counts No. I and II** were that on the 8th day of July 1993 at Nairobi, jointly with others not before the court with intent to defraud they forged a certain Provisional Certificate of Title I.R. 55522 and I.R 55521 purporting them to be genuine Provisional certificates of title issued by the Registrar of Titles Nairobi.
3. **Count III and IV** stated that on or about 27th February 2009, jointly with others not before court, with intent to defraud forged certain Transfers of land instruments purporting that the registered owners of land reference 14971/9 and 14971/6 with titles No. 55522 and 55521 Eberhard Zeyle and Ruth Njeri Zeyle appeared and executed the said transfer instruments in his presence.
4. **Count V and VI** stated that on or about 3rd October 2008, at ACK Gardens First Avenue in Nairobi with intent to defraud (or deceive) knowingly and fraudulently uttered certain forged Provisional Certificates of title I.R. 55521 and I.R 55522 to Pamela Ager of Oraro and Company Advocates purporting them to be genuine Provisional Certificates of Title issued by Registrar of Titles Nairobi.
5. The particulars further stated that at Equity Bank KNUT Branch Mfangano Street in Nairobi, with intent to defraud he obtained money from Don Ogalloh Riaroh as follows:

In count VII: Kenya shillings sixteen million (Kshs.16,000,000/=)

on 23rd September 2008.

In count VIII: Kenya shillings seven million five hundred thousand (Kshs.7,500,000/=) on 9th December 2008.

In count IX: Kenya shillings five million one hundred twenty thousand (Kshs.5,120,000/=) on 8th July 2008.

In count X: Kenya shillings four million one hundred fifty thousand (Kshs.4,150,000/=) on 27th November 2008.

In count XI: Kenya shillings two million two hundred thousand (Kshs.2,200,000/=) on 22nd July 2008.

In count XII: Kenya shillings one million eleven thousand (Kshs.1,011,000/=) on 27th November 2008.

By falsely pretending that he was in a position to sell the said Don Ogalloh Riaroh, pieces of land in Karen known as I.R. 55521 and 55522 respectively, a fact he knew to be false.

Grounds of Appeal

6. The appellant filed an appeal on grounds that the trial court did not consider the one year and two months he was in remand prior to his conviction, the offence of forgery was not proved; there was no proof that he obtained money from the complainant; finger prints and specimen signature or handwriting were not taken for comparison with any other documents and that there was no evidence of offer of sale to the complainant.
7. The state opposed the appeal through learned counsel Miss Maina urging that there was sufficient evidence on record to support both the convictions and the sentences. Miss Maina argued that the evidence of the Document Examiner proved that the appellant's handwriting was found in the forged documents. She also urged that the offences of obtaining by false pretences were proved because the appellant purported to sell a property to **PW1** whose owner **PW2**, had not instructed him to sell and that he withdrew the Kshs.35 million which was deposited pursuant to the transaction and did not refund it when called upon to do so. She therefore urged the court to dismiss the appeal.
8. As the first appellate court my duty is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion, but to make my own findings and draw my own conclusions. See - **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR 649**. I have therefore re-evaluated the evidence remaining alive to the fact that I did not have the advantage which the trial court had, of seeing or hearing the witnesses as they testified.

Case Summary

Prosecution Case

9. The prosecution's case was that the complainant, **PW1**, instructed the firm of Oraro & Company Advocates to undertake a conveyancing transaction on his behalf with regard to a plot in Karen, which was advertised to be sold by one Eberhard Zeyle through a bill board. They negotiated a price of Kshs.36.6 million to be paid over a period of six months by cheque. A sale agreement was signed in his lawyer's office and Pamela Ager a lawyer in the said firm was his witness. The

seller had already signed his part in **PW1**'s absence. The money was to be deposited in the stake holder's account until the sale was completed, whereupon it would be transferred to the vendor's account.

10. Pursuant thereto the complainant paid the purchase price through six cheques. He never met the Vendor nor the appellant who was the Vendor's lawyer in person throughout the period of the negotiations. The purchase price was agreed on phone and he deposited his cheques with Oraro & Co Advocates. He only learnt later that the titles forwarded by the Vendor for lodgement were forgeries, hence this case.

Defence Case

11. The appellant gave unsworn testimony and stated that in the month of June 2008, a property agent by the name of Hamisi requested him to undertake a conveyancing transaction of a property in Karen. After a week they met at Karen shopping Centre in the company of the would be Vendor Zeyle Eberhard, a white man who worked with AMREF. The said Vendor later called the appellant and informed him that he had negotiated a sale agreement on the said property with one Don Riario whose lawyers would be Oraro & Company Advocates. The client delivered two copies of the titles to him which he forwarded to Pamela Ager of Oraro & Company Advocates and she subsequently confirmed that the titles were in order. He prepared a sale agreement which the Vendor signed and thereafter he forwarded it to Oraro & Co. Advocates for their client to sign.

12. He was subsequently issued with two cheques for the 20% deposit, and he forwarded them to the Vendor upon request. That upon receipt of a letter dated 23rd July 2008 confirming that payment for the land had been made, he released to Eberhard Kshs.5.8 million in cash. On 31st July 2008 further deposits were made directly into his account and each time he met Eberhard, he would hand over the money to him in cash and he would in turn, sign a petty cash voucher in acknowledgment of receipt.

13. The appellant testified that he received passport photographs of Ruth Zeyle, wife to Eberhard Zeyle together with other documents, but never met her throughout the transaction. It was after the finalisation of the payments and the lodgement of the documents that learned counsel Pamela Ager informed him that the documents had been found to be fraudulent. He tried to reach Eberhard in vain and he was finally arrested and charged.

14. The appellant testified that in the whole transaction he paid to Eberhard Zeyle a total of Kshs.35 million, keeping Kshs.1 million as his fees. That he however lost the petty cash vouchers that Eberhard signed in acknowledgment of receipt of those monies.

15. From the evidence adduced it is not disputed that **PW2** and **PW3** were the genuine joint owners of two parcels of land reference I.R. 55522 and I.R. 55521 and that sometimes in the year 2008 they had intentions of selling them. It is indeed admitted that **PW2** and **PW3** were paid the full purchase price of Kshs.50 million for the said pieces of land by **PW8** Rev. Judy Mbugua, through their respective advocates and that they in turn transferred the land to her. It is also admitted that the advocates for **PW1** were Oraro & Company Advocates and specifically M/s. Pamela Ager.

16. It is also not disputed by the appellant that he operated account No. 0350292650835, Bildad Onyango Abong trading as Abong Bildad Onyango Advocates and that he was the sole signatory thereto, nor that the said account received the various cheques drawn by the complainant, totalling to about Kshs.36 million which was the agreed purchase price less Kshs.619,000/=. It is further admitted that thereafter the appellant withdrew Kshs.35 million from the proceeds of the said sale from the aforementioned account and that **PW1** never met the appellant during the transactions.

17. From the foregoing the only question to be determined is whether the appellant was acting in the course of his professional duty as an advocate or he acted fraudulently in the transaction.

18. The appellant's evidence was that he first came into contact with this matter in June 2008 when a

property agent named Hamisi visited his office and inquired whether the appellant would be willing to act for a vendor who wished to sell a property in Karen area. He agreed and a week later he met with both the property agent and the would be Vendor at Karen shopping Centre.

19. The appellant stated that the said Vendor was a white man of German extraction who worked with AMREF (**PW2**) and who negotiated the purchase price with **PW1** himself before he then forwarded the relevant documents to the appellant. That there was another meeting at which the appellant brought the sale agreement he had prepared to **PW2** who perused and approved it. He admitted that he never met **PW3** the Vendor's wife throughout the transaction.
20. The appellant's defence must however be analysed in the context of the rest of the evidence on record. Both **PW2** and **PW3** the Vendors on whose behalf the appellant purported to be acting denied that they had ever met the appellant or instructed him to act in their behalf in this matter or at all. Both witnesses disowned the signatures attributed to them in the transfer documents.
21. The evidence was corroborated by that of **PW11** who stated that upon examining the questioned documents and comparing the signatures therein with the specimen signatures obtained from **PW2** and **PW3** he did not find any agreement. It is therefore clear that it is the two witnesses who were telling the truth when they stated that they did not instruct the appellant to act in their behalf.
22. In any case it beats logic why **PW2** and **PW3** who said their lawyers were Makhandia and Makhandia Advocates and Sijeny and Sijeny Advocates respectively, would engage a third lawyer when the sale transaction they were engaged in had been successfully completed and they had been paid the purchase price Kshs.50 million in full.
23. Exh. 2 and Exh. 3 were the title deeds to land reference Nos. **14971/9** and **1497/6**. Both **PW4** and **PW5** confirmed that they were forgeries. **PW4** was the Registrar of Titles whose signature would ordinarily be on such title deeds. He told the court that although the signature appearing in those two documents was similar to his it nonetheless was not his signature.
24. **PW5** also a Registrar in the Ministry of Lands, compared the two exhibits referred to above with the backup records and found that the stamp impressions on the faces thereof were not genuine. The handwriting in the exhibits was different from that in the search certificates which was unusual. Exh. 2 contained some unfamiliar entries, and bore anomalies in the signature. It also had some numbers missing. Exh. 3 bore unfamiliar handwritings and signatures. It bore the amount of the charge which was unusual.
25. **PW11**, the Document Examiner testified that several documents were submitted to him for examination with regard to this case. Upon examination he found similarities in the signatures in the documents marked A1-A5, A10 & A11 the questioned documents and those marked B16-B24, the specimen handwritings of the appellant. In cross-examination he confirmed that the questioned signatures agreed with the specimen signatures of the appellant. The documents marked A1-A5, A10 and A11 were the transfer documents and the sale agreement respectively.
26. The appellant's averments that he was acting in the course of his professional duty are also not in consonant with his actions. He testified that he released the money paid pursuant to this transaction to **PW2** on the authority of **PW7** the advocate for the purchaser. To this end he produced a letter dated 23rd July 2008 Dexh1, said to be a letter signed by **PW7** as proof. **PW7** on the other hand denied having issued such instructions to the appellant to release the money.
27. **PW7** denounced the signatures in Dexh1 as forgeries. She also pointed out that the letter purported to emanate from her carried a different logo and was on a different letter head from Exh 20 and Exh 21 which were the genuine letters she had sent to him. Even if the court were to believe that Dexh1 emanated from **PW7** it is difficult to comprehend why the appellant would accept it and act on it while its letter head and logo differed from the rest of the correspondence he received from the firm of Oraro and Company Advocates. From the foregoing I humbly agree

with the findings of the trial court that the advocates for the purchaser did not authorise the release of those funds.

28. The other important pointer to the appellant's intention to defraud is that, in his own admission he withdrew all the money deposited in the stakeholder's account pursuant to this transaction. His defence was that he paid the said money to **PW2** in cash who signed petty cash vouchers in acknowledgement of receipt

29. The appellant produced Dexh 3a, 3b, 3c and 3d, copies of Petty Cash vouchers from his firm to confirm the payments. The authenticity of these documents cannot however, be confirmed in view of other documents relating to this transaction, which were found to be forgeries and the evidence of **PW2** that the appellant was a stranger to him. The appellant's nonchalant claim that:

"I made payments to Eberhard but lost the petty cash vouchers. I paid him a total of about Kshs.35 million."

was astounding to say the least.

30. The court is alive to the fact that this is a criminal case and the burden of proof rests without shifting upon the prosecution. The appellant is therefore under no burden to prove his innocence. The prosecution having however proved and the appellant having admitted that **PW1** paid Kshs.36 million into his account, that duty shifted onto him to give a reasonable explanation of what fate befell the funds thereafter.

31. Kshs.35 million is a lot of money to withdraw over the counter and pay as petty cash. The story of lost petty cash vouchers appears contrived and not worth of belief. It cannot suffice to explain the disappearance of such a sum of money. It is instructive to note that thereafter the appellant closed his office according to **PW10** the investigating officer and retreated to his village back in Oyugis, from where the police tracked him and arrested him. It is instructive to note also that the account No.292650835, Equity Bank into which the missing funds were deposited was opened on 16th July 2008, only a month and a half before the transaction in question was carried out. **PW9** confirmed that the appellant was the sole signatory thereto and all withdrawals from the said account were in cash.

32. Each of the foregoing ingredients analysed above taken on its own does not prove the appellant's guilt. Taken together however, they display a pattern which goes to show the existence of mens rea on the part of the appellant and debunks his assertion that he was merely acting in the cause of his professional duty as an advocate.

33. After subjecting the evidence to afresh scrutiny the court has reached the conclusion that the record shows that the prosecution did prove that the appellant forged the documents which are the subject matter in **counts No. I, II, III, and IV** in the circumstances defined by **Section 350(1)** of the **Penal Code**.

34. In **count V** and **VI** **PW7** acted upon the certificates forwarded to her by the appellant when she instructed **PW1** to pay Kshs.36 million for a non-existent sale transaction. A person is deemed to have uttered a false document with intent to deceive contrary to **Section 353** of the **Penal Code** where another person has, upon that document, taken action which he or she would not otherwise have taken, or would have refrained from taking had he or she known the document to be false.

35. The prosecution proved the seven possible ingredients of the offence of obtaining by false pretence in **counts VII, VIII, IX, X, XI** and **XII** respectively, beyond reasonable doubt. The prosecution proved that there was a false presentation of the sale of two pieces of land being **I R 55521** and **55522** in Karen. That the presentation was made by the appellant by his words and conduct to **PW1** through his lawyer **PW7** when he forwarded the forged certificates and transfer documents.

36. The representation was on a matter of fact which was present and on-going that is, the transaction for the sale of land. The appellant was well aware of the falsehood because he was the author of some of the offending documents himself. Further the false representation of the appellant caused the giver, **PW1**, Mr. Don Ogalloh Riaroh to part with the thing which was obtained, in this case, a staggering Kshs.36 million.
37. The court therefore finds that the evidence of the prosecution in each of the twelve counts was overwhelming and that the defence testimony did not cast any reasonable doubt thereon.
38. On the sentence the appellant complained that the trial court did not consider the one year and two months which he spent in remand prior to his conviction. **Section 350(1) of Penal Code** in which he was convicted in **count I to count IV** provides for a term of life imprisonment upon conviction while **Section 353** of the **Penal Code** in which he was convicted in **count V and VI** provides for punishment similar to that provided for forging the document in question. The record reflects that the appellant was sentenced to serve 10 (ten) years imprisonment on each of those counts. In addition in the six counts for which he was convicted for obtaining money by false pretences contrary to **Section 313** of the **Penal Code**, the law provides for a sentence of upto 3 (three) years imprisonment. The appellant was sentenced to serve 2(two) years imprisonment on each.
39. The sentences meted out above were ordered to run concurrently, which means that the appellant is serving a total of 10 (ten) years imprisonment. The sentences are therefore neither unlawful nor can they be said to be excessive in light of the circumstances of this case.
40. For the foregoing reasons the court finds no justification to interfere with the findings of the lower court in any of the counts. Reasons wherefore the appeal is dismissed in its entirety.

SIGNED DATED and DELIVERED in open court this **14th** day of May **2014**.

L. A. ACHODE

JUDGE