



REPUBLIC OF KENYA

Okhwatenge v Republic

**Court of Appeal, at Kisumu
March 13, 1991**

Hancox CJ, Gachuhi & Cockar JJ A

Criminal Appeal No 96 of 1990

**(Appeal from a Judgment of the High Court of Kenya at Kakamega (Mbogholi - Msagha, J)
dated 5th July, 1990 in HC CR App No 300 of 1989)**

Criminal Practice and Procedure – lapse of time – whether invalidates a charge.

Criminal Law – false pretence – charge of procuring registration of land by false pretences - Penal Code (cap 63) section 320 - whether prosecution for the offence can be brought after lapse of a long time – section 219 Criminal Procedure Code.

The appellant was charged and convicted of procuring registration of land in his name by false pretences contrary to section 320 of the Penal Code and sentenced to six months imprisonment.

The evidence against the appellant was that he was entrusted to take care of the suit property which was bought by the complainant in 1962. However sometime in 1987 he applied for rectification of the register and in consequence, the proprietorship section of the register was altered to reflect his own name. The alteration however did not bear a genuine seal with the Land Registry embossment on the bottom left hand corner. The appellant's main ground of appeal was that neither the trial magistrate nor the learned first appellate judge gave any or adequate consideration to the discrepancies and conflicts in the evidence of the several prosecution witnesses. He also contested the length of time that had elapsed.

Held:

1. It is settled that any false pretence has to be proved substantially as laid, and despite the length of time that elapsed.
2. The charge is still valid if it can be proved even by inference as it is not covered by the limitation for summary offences set out in section 219 of the Criminal Procedure Code.
3. The inferences that can be drawn after the lapse of time create immeasurably more difficulties for the prosecution and for the Court which is required to see all round the proved facts and their ascertain whether they establish guilt beyond reasonable doubt.
4. Notwithstanding that there was no direct evidence of registration in 1969 all the proved facts of the case were such that it was safe to draw the inference beyond reasonable doubt that the appellant had procured registration of the plot by pretending that he was the owner of it.

Appeal dismissed.

Cases

1. *Rex v Kipkering arap Koskei and Kimure arap Matatu* (1949) 16 EACA 135
2. *Oguyo, Jared Onanda v Republic* Criminal Application No 6 of 1986 (KSM)

Statutes

1. Penal Code (cap 63) section 320
2. Criminal Procedure Code (cap 75) sections 177, 178(7), 219
3. Registered Land Act (cap 300) section 143(1)

Advocates

Mr Khakula for the Appellant

Mr Bwonwonga for the Republic/Respondent

March 13, 1991, the following Judgment of the Court was delivered.

The facts giving rise to this appeal reveal a set of unusual circumstances and relate to a charge which is comparatively rare in the experience of this Court, namely procuring registration of land in the name of the appellant by false pretences under section 320 of the Penal Code.

It would appear from the record of the trial court that a piece of land in Bungoma town which was then unregistered but which subsequently became Plot No South Kanduyi/East Bukusu/381, was sold by Muchona Njeri (PW2) to the complainant on 23rd January, 1962, for Kshs 500/=. A handwritten agreement reciting the sale was made at the time and produced in court, apparently as MF 11 and later Ex 1 though it appears to us that there may be a duplication of exhibit numbers as regards Ex 1 and Ex 4.

The only independent witness to the transaction was one Fleicho Malati who wrote out the agreement but he could not be traced and did not testify. No translation of the agreement appears in the record of either of the lower courts, but we have ourselves caused a translation to be made. It is as follows:

“I am Munjuma Njiure. Today date I have sold my shamba for Kshs 500/= only to Lady Demutiria Nanyama. I don't have any complaint with her at all. The size of the shamba is 35 x 42 yards (thirty five by forty two yards). This is my agreement with this lady. I do not have any complaints and I have agreed to sign (or thumb-print) before two witnesses, one witness from my side and the other witness from Lady Nanyama Demutiria.

Seller: Mr Munjuma Niyama Njiure

Buyer: Demetiria Nanyama

Witness: Nichoeal Wanyama

Witness: Vincent Mulati

According to the complainant, who is illiterate, she built a house with four rooms on the land which in 1965 she let to the appellant and three others who paid Kshs 30/= and Kshs 35/= per month in rent respectively. After her husband died in 1966 she move to Naiteri and left the appellant as her agent to receive the rents. She visited Bungoma from time to time for the rent. In 1969 the appellant told her that

he had registered the plot in her name, a statement which she apparently accepted and made no inquiries until the necessity of providing for her first born arose in 1986. She wished to have the land registered in his name and hence went to the Land Registry in Bungoma in 1986 only to discover that her name was not on the register. In due course she went to the CID and investigation was made.

The following year, in August, 1987, the appellant also went to the Land Registry at Bungoma. The Land Registrar, PW 3, gave evidence from his records. He did not know either of the parties but said that on 25th May, 1987, the appellant applied for rectification of the register and, in consequence, the name appearing in the proprietorship section of the register (Exhibit 2), namely Baskali Wasike, was altered to read the name which now appears on the which purported to be the Title Deed, Ex 1 Pascal Wasike Okhwatenge, which is the name appearing in the charge sheet. As the learned first appellant judge remarked this does not bear a genuine seal with the Land Registry embossment in the bottom left hand corner.

It will be observed that neither Joshua Abae, PW3, nor anyone else was called from the Land Registry office at Bungoma to swear that the appellant called there and made the representation stated in the particulars of the charge, namely that on or about 2nd January, 1969 he falsely pretended that he had bought the land in question from the complainant.

It is well settled that any false pretence has to be proved substantially as laid, and despite the length of time that elapsed between January, 1969, and the date the appellant was brought to court in February, 1988, not far short of twenty years, the charge if still valid it if can be proved, even by inference, as it is not covered by the limitation for summary offences set out in section 219 of the Criminal Procedure Code. Obviously the inferences that can be drawn after that lapse of time create immeasurably more difficulties for the prosecution and for the Court, which is required to see all round the proved facts and then ascertain whether they establish guilt beyond reasonable doubt, or, as it is put in cases of circumstantial evidence, that the proved facts are incompatible with innocence and explainable on no other reasonable hypothesis than that the accused person committed the crime charged.

(Rukipkering Arap Koske (1949) 16 EACA 135).

The case was argued by Mr Khakula on behalf of the appellant, following his second Memorandum of Appeal, on the basis that neither the trial magistrate nor the learned first appellate judge gave any or adequate consideration to the discrepancies and conflicts in the evidence of the several prosecution witnesses. Mr Bwonwonga in his reply for the Republic did concede that the Land Registrar was not a witness deserving credit, but it will be recognised that the evidence was confined to the events of 1987 when someone, presumably the appellant (though he did not know either party), sought rectification of the register.

Apart from producing the exhibits from the register Ex 2, and the suspect Title Deed, Ex 1, he merely said that his records showed (as they do) that Baskali was the first registered owner in 1969. Presumably the rest of his evidence, where he recited various things done by appellant, was also given from his records. It is manifest that the entries numbered 1,2 & 3 are to be taken in context, since they relate to the same piece of land and therefore there can be very little doubt, in our judgement, that the appellant was the person who sought rectification. It will be observed in this connection that the combined application for and Certificate of Official Search, Ex 3, have no bearing on the rectification, although they happen to have been made within a month. We fail to see, therefore, how the lack of credit said to be attributed to PW 3 can have affected the essential issues one way or another.

The other conflict to which Mr Khakula drew our attention was in the evidence of the complainant regarding her residential status. According to her she left Bungoma township after her husband died in 1966 and went to Naitiri, and the importance of this was Mr Khakula submitted, that had she not changed her residence, and has stayed in Bungoma, she would not have needed to employ the appellant, or indeed anyone, as an agent to manage the property for the obvious reason that she would have been present to receive the rents for herself. This aspect was not put to her in cross-examination. The discrepancy here is that CPL Opiyo, the Investigating Officer, said the complainant told him she had been staying in and

around Bungoma.

We cannot detect any serious conflict between those two portions of the evidence. True, there was no evidence as to the distance between Bungoma and Naitiri, but the phrase in and around Bungoma “was not related to any particular period, and if there was a conflict the then counsel for the appellant left it where it was and made no attempt to clarify the statement.

Mr Khakula referred us to the well known authorities as to the duties of the trial court and the first Appellate Court to analyse and resolve conflicts of evidence, notably *Jared Ondanda vs Republic* (1986) 7 KCA 13, in which the second holding is as follows:

The first Appellate Court is under a duty to resolve any discrepancies or conflicts in the evidence at the trial and to decide the issues raised as failure to discharge this duty makes it difficult for the Court of Appeal to decide which evidence the trial and first Appellate Courts would have accepted.”

We entirely accept and follow this as a correct statement of the law, but we cannot accept in this case that neither of the lower courts failed in the duty cast upon them. Both of them considered the appellant’s defence that he had purchased the land for Kshs 600/= and the house on it for Kshs 1,000/- from the complainant; a matter which she had denied in cross-examination. Both courts found that the appellant had not purchased either and that the complainant was the rightful owner.

The Court will not lightly disturb the concurrent findings of facts of the trial court and the first Appellate Court, particularly where, as here, it is evident that the minds of both were directed to the essential issues.

Notwithstanding that there was no direct evidence of the registration in 1969, in our judgment entry No 1 has to be read in context with entries 2 & 3 and those entries and all the proved facts of the case were such that it was safe to draw the inference beyond reasonable doubt that the appellant had procured (or obtained, as the marginal note states) registration of the plot by pretending that he was the owner of it (and, since this was his story in court) that he had brought it from this illiterate lady who, no doubt, trusted him. The concurrent findings of fact are that he had not bought the plot, from which it follows that his pretence that he had done so was false. We are satisfied and findings are correct. It is sad, perhaps, that, under section 143 (1) of the Registered Land Act cap 300 no order can be made to rectify a first registration on the ground of fraud or mistake, but that is irrelevant to the question which we have to decide in this appeal, save to say that the magistrate’s order for forfeiture of the title deed and copy of the register was made without any statutory basis, and was illegal and wrong. It may be, as the judge said, that the order was the logical result of the magistrate’s findings but this in our view did not give him jurisdiction to make the order. The restitution sections of the Criminal Procedure Code, sections 177 at 209, and particularly section 178 (7), cover goods and other movable property only.

In the result we dismiss this second appeal against conviction, and we are not permitted to interfere with the custodial sentence of six months’ imprisonment, but, were we so permitted, we would have expressed the view that it was well merited.