Republic v Ongeri & another (Criminal Appeal 390 of 2018)
[2023] KECA 337 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KECA 337 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 390 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 24, 2023

BETWEEN

REPUBLIC ..... APPELLANT

AND

LINAH MULAKI CHEYWE ..... 1ST RESPONDENT

SAMUEL ONGERI ..... 2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Eldoret, S.M Githinji, J) dated 5th December 2018) IN HC. CRA NO. 101 OF 2017)

JUDGMENT

1 The appeal before us is a second appeal against the judgment of S.M. Githinji J, dated December 5, 2018, in which Samuel Ongeri and Linah Mulaki Cheywe (the respondents herein) had been initially charged at the Chief Magistrate's Court in Eldoret with the offence of obtaining money by false pretences contrary to Section 313 of the *Penal Code* cap 63 of the Laws of Kenya.

2 The particulars of the offence were that on diverse dates between July 3, 2009 and August 31, 2009, in Eldoret West District within Uasin Gishu County, jointly with intent to defraud, obtained from Wellington Musungu the sum of Kshs 580,000/= by falsely pretending that they were in a position to sell to him a parcel of land No. Tulwet/Kesses Block 4 (Lelmokwo) 59 measuring 4.046 ha, a fact they knew to be false.

3 The respondents denied the charge after which a trial ensued. In a judgment delivered on 11th November 2016, Hon. S.N. Telewa (the then Resident Magistrate,) acquitted the respondents pursuant to Section 215 of the criminal Procedure Code having found that the appellant had failed to prove its case against the respondents beyond reasonable doubt.

4 Being aggrieved with the aforesaid acquittal and findings, the appellant moved to the High Court on appeal and vide a judgment delivered on December 5, 2018, S. M Githinji J found the appeal to be lacking in merit and dismissed the same in its entirety and affirmed the findings of the trial court.

5 Unrelenting, the appellant has now filed this appeal vide a Memorandum of Appeal filed in pursuance to the Notice of Appeal dated 14th December 2018. In the Memorandum of Appeal, the appellant has raised 6 grounds of appeal as follows:

1. That the learned judge erred in law and fact in dismissing the appellant's appeal on account of inconstancies in the evidence tendered at the trial court yet there were none.
2. That the learned judge erred in law and fact in failing to order a retrial.
3. That the learned judge erred in law and fact in failing to find that the trial court did not properly evaluate the evidence produced by the prosecution and subsequently acquitting the respondents.
4. That the learned appellate judge erred in law and fact in basing his judgment on the fact that the appellant leased land parcel number Lumakanda 58 which did not form part of the evidence at the lower court as the land in question was Tulwet/Kesses Block4 (Lelmokwo)/59.
5. That the learned 1st appellate judge never at all perused the proceedings from the lower court file thus arriving at the arbitrary decision to dismiss the appellant's appeal.
6. That the court failed to re-evaluate the overwhelming evidence on record tendered by the prosecution as well as the submissions thereby dismissing the appellant's appeal."

6 Briefly, the background to this appeal is as follows; PW1 was Wellington Musungu. He testified that he knew the 1st respondent who was introduced to him by the 2nd respondent as the person who was to sell land to him. He further testified that on July 3, 2009, his friend called Erick (PW2), called him and informed him that there was land going for Kshs 70,000.00 to 100,000.00 which belonged to the 1st respondent.

7 He later conducted a search, entered into an agreement with the 1st respondent and paid Kshs 580,000.00 via bank transfer and stayed in the land for a couple of days when he noticed that the land had been sold to two other people. He then reported the matter to the police.

8 PW2 was Erick Kibet Magut. He testified that he knew the 1st respondent as a neighbor and that he had informed him that there was land that he wanted to sell. That, he then proceeded to the 1st respondent's house in the company of PW1 and the 1st respondent told them he had 1 ½ acres while the 2nd respondent had 2 ½ acres which they were selling jointly and the price agreed was Kshs 145,000.00 per acre. It was his further evidence that PW1 later informed him that the 1st respondent had refused to transfer the land to him.

9 PW3 was PC Samuel Juma, the investigations officer in this case. He investigated the case and recorded witness statements following which he charged the respondents with the offence of obtaining money by false pretenses.

10 The respondents in their defence gave sworn statements of defence and denied having committed the offence and called one witness. DW1 stated in his evidence that DW2 was his in-law and that she had been leasing land at Kshs 116,000.00 per year. He denied having entered into any agreement for sale of land with PW1. DW2 corroborated DW1's evidence that she had leased the land to PW1 in the year 2008 for a period of 5 years for the sum of Kshs 580,000.00. She denied having ever sold land to PW1.

11 When the matter came up for plenary hearing on 5th December 2022, Ms Sakari learned counsel appeared for the appellant and sought to rely entirely on her written submissions dated November 9, 2021. Mr. Wabomba on the other hand for the respondents equally sought to rely entirely on his written submissions dated 9th November, 2021.

12 It was submitted for the appellant that whereas the respondents argued that the agreement with PW1 was for lease and not sale of land, the evidence tendered by the prosecution before the trial court vide a sale agreement dated 9th of September 2020, clearly showed that was a sale of land transaction at a price of Kshs 140,000.00 per acre and that Kshs 580,000.00 was the down payment thereof.

13 It was further submitted that the said agreement was witnessed by the 1st respondent who appended his signature and provided his identification number, a fact not disputed by the 1st respondent. It was contended that the respondents duped PW1 to believing that the sale agreement was genuine and thus PW1 parted with his hard earned money as the consideration, yet, the respondents knew very well that the land was in possession of other persons.

14 On the other hand, it was submitted for the respondents that both courts below made concurrent findings that the appellant's case was muddled with inconsistencies and that this Court had no reason to depart from those concurrent findings unless it was demonstrated that those findings on the face of the evidence on record were plainly wrong. Consequently, we were urged to find that the 1st appellate court properly re-evaluated the evidence tendered in the trial court and came to the right conclusion that the respondents' acquittal was safe.

15 We have considered the record, the rival written submissions, the authorities cited and the law.

16 The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of section 361 (1) (a) of the *Criminal* Procedure Code, we are mandated to consider only matters of law. In *Kados vs. Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..." (Emphasis added).

17 In *David Njoroge Macharia vs. Republic* [2011] eKLR it was stated that under section 361 of the *Criminal Procedure Code*:

> "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic [1984] KLR 213)."

18 Having carefully and anxiously perused the record, the following two main issues arise for our determination:

1. Whether the learned judge erred in law and fact in failing to find that the trial court did not properly evaluate the evidence produced by the prosecution and subsequently acquitting the respondents?

2. Whether the learned judge erred in law and fact in failing to order a retrial?"

19 It is now trite that a second appeal to this Court should only be confined to matters of law only by dint of the provisions of section 361 (1)

(a) of the *Criminal Procedure Code* cap 75 of the Laws of Kenya.

20 In the instant case both the trial court and the High Court arrived at concurrent findings and in our opinion rightly so, that the appellant's case was riddled with inconsistencies and material contradictions. PW1 for example in his evidence in chief, stated that he was introduced to the 1st respondent by the 2nd respondent as the person who was to sell the land to him. He went on to contradict his earlier statement by testifying that on July 3, 2009{{^}}, PW2 called him and told him that there was land being sold for Kshs70,000.00 to Kshs 100,000.00, which was being sold by the 1st respondent.

21 In cross examination he stated that he was buying 10 acres each going for Kshs 140,0000.00 and paid Kshs 580,000.00. He further contradicted himself by testifying that as per the agreement the land was being sold to him by the 2nd respondent.

22 PW2 on the other hand contradicted PW1 by testifying that the 1st respondent told them that he had 1 ½ acres while the 2nd respondent had 2 ½ acres which they were selling jointly and that he consideration was Kshs 145,000.00 per acre.

23 The learned trial magistrate who had the opportunity of seeing the witnesses testify stated as follows:

> The complainant says he was buying 10 acres at a consideration of Kshs 140,000/= per acre but he paid Kshs 580,000/= he doesn't say whether this was an outstanding (sic) but, as is ordinary if that was the case then he ought to have paid Kshs 1,400,000/=. That is Kshs 140,000/= x 10. He remains silent on this. He goes on contradicting himself by stating that he was purchasing land from the 1st accused Samuel Ongeri but the sale agreement was between him and the 2nd accused Linah Mulaki. He however produced a sale agreement between him and Linet Mulaki my understanding is that Linet and Linah are two different people. Furthermore, the investigating officer says the complainant told him he was buying land measuring 10 acres but as per the copy of title deed given to him it is 4 acres....."

24 Additionally, the learned judge while revaluating the evidence on record stated as follows in his judgment:

> There are also glaring inconsistencies and contradictions between the evidence of PW1 and PW2. PW2 alleged that when the 1st respondent took them to view the land, he stated that he had 1.5 acres and the 2nd respondent 2.5 acres and they were selling it jointly. They negotiated and agreed at 145,000/- per acre. PW1 never disclosed anywhere of land that was being sold to him jointly by the two respondents. He also on cross examination disclosed an acre was to go for 140,000/-.
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> These inconsistencies and contradictions were not resolved by the time of closure of the prosecution case."

25 From the evidence on record we are unable to interfere with the concurrent findings by the two courts below to the effect that the appellant's evidence was riddled with material contradictions and inconsistencies. The findings of the two courts below were based on evidence and neither were they based on misapprehension of the evidence. Further, it has not been demonstrated that the two courts below acted on wrong principles while arriving at these findings.

26 It is also not lost on us that vide an Amendment introduced by the Security Laws (Amendment) Act No.19 of 2014, the then section 348A of the *Criminal Procedure Code* cap 75 of the Laws of Kenya was amended and replaced with section 348A (1), to give the State a right of appeal against an acquittal both on matters of fact and law as opposed to matters of law only as was the case previously. This Court in the case of *Republic v Danson Mgunya* [2016] eKLR, while extensively discussing the effect of the aforesaid amendment stated extensively thus:

> "The second point is that although we have concluded that legislation conferring a right of appeal to this Court against an acquittal by the High Court in the exercise of its original jurisdiction is neither in violation of the principle against double jeopardy nor otherwise unconstitutional, nevertheless it is to be expected that the Director of Public Prosecutions will not use the amendment to prefer all and sundry appeals against acquittals by the High Court. In our view, this is a right that must be exercised in exceptional circumstances, the kind that loudly cry out for appellate justice. As the survey above has demonstrated, in many Commonwealth jurisdictions, even where a right of appeal against acquittal by the superior courts is allowed, it is very circumscribed, for example by the requirement that it is only by leave; or it is limited to issues of law only; or a successful appeal does not affect the acquittal and has only prospective effect; among others. The Director of Public Prosecutions must therefore consider putting in place clear policy on the exercise of this right of appeal to distinguish it from the automatic appeal to the High Court in acquittals by the subordinate courts." (Emphasis supplied)."

27 More recently in Maina & 4 others v Republic (Criminal Appeal 4 & 132 (Consolidated) of 2020) [2021]eKLR, this Court again rendered itself thus:

> "We have carefully considered the submissions and given this appeal anxious consideration. We have also studiously engaged with the many authorities that were cited by the parties before us. Even though it was not adverted to directly, there is no doubt that a particular difficulty presented by this appeal is the conceptual and practical incongruity inherent in an appeal against acquittal. We think that when an accused person has been acquitted by a competent court exercising its usual jurisdiction, and which appears to have exercised its mind reasonably and not perversely on the analysis of the evidence before it, the idea of "reasonable doubt" takes a real and significant meaning that logically spawns unease about appeals from a resultant acquittal. It is no wonder then that appeals against acquittal were previously closely circumscribed by law. The right was previously created by Section 348A of the CPC but in telling terms"
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> "348 A. when an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law."

28 We fully associate ourselves with the above sentiments expressed by this Court and reiterate the same. From the circumstances of this case, we are of the considered opinion that this is not one of the cases pursuant to which the appellant can prefer an appeal against an acquittal as enunciated in the Mgunya case (supra).

29 We have absolutely no doubts in our minds that in light of the material inconsistencies and discrepancies of the evidence before the trial court, the same leaves a lot to be desired and we have no reason whatsoever to depart from the concurrent factual findings of fact of the two courts below.

30 Finally, the learned judge was faulted for failing to order a retrial. Firstly, we note that the appellant did not even attempt to address us on this issue in its written submissions. The basis upon which a retrial could be ordered has therefore not been laid.

31 This Court in the case of *Ahmed Sumar vs. R* (1964) EALR 483 stated as follows as regards to when an order of retrial may be ordered;

"In general a retrial will be ordered only when the original trial was illegal or defective it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered...." (Emphasis added).

32 Similarly, this Court and more recently in the case of *Samuel Wahini Ngugi v. R* (2012) eKLR: -opined thus;

> "The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
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> "It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'

33 We fully associate ourselves with the above sentiments and from the circumstances of this case and the appellant having failed to lay any basis upon which a retrial could be ordered, this ground fails in its entirety.

34 The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

35 It is so ordered.

DATED AND DELIVERED AT NAKURU ON THIS 24TH DAY OF MARCH, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR