IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), KARANJA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 2 OF 2016

BETWEEN

MICHAEL MUKUTI MUTHUNGU…..……..... APPELLANT

AND

REPUBLIC……...…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi by (Kimaru J.) dated 1st October, 2015

in

H.C.CR.A NO. 11 OF 2015)

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JUDGMENT OF THE COURT

[1] **Michael Mukuti Muthungu** (the appellant) and another were charged before the Chief Magistrate's Court in Kiambu with two counts of forgery contrary to **Section 345** of the Penal Code and four counts of obtaining money by false pretences under **Section 313** of the Penal Code.

Having denied all six charges, the matter proceeded to full hearing with the prosecution calling a total of eleven witnesses in support of the case. The appellant and his co-accused testified on oath but called no witnesses. In the end, they were both found guilty and convicted on all counts and each sentenced to serve 3 years imprisonment, which sentences were to run concurrently.

[2] Aggrieved with the decision, the appellants appealed that judgment at the High Court in Nairobi.

Bearing in mind that this is a second appeal and only issues of law fall for our determination, we shall briefly recapitulate the circumstances of the case from the hearing before the Chief Magistrate, the first appeal before the High Court and eventually consider and determine if the appeal before us has merit.

[3] In a nutshell, the circumstances that led to the arrest and charging of the appellant were that **Daisy Mwendia Ben,** (PW1), and her husband, **Martin Ndwiga,** (PW2) were in the real estate business. They would buy property, develop it and then sell it at a profit. As they were scouting for empty parcels of land to buy, they saw one that they got interested in. They were introduced to one **Mwema** who was said to be

in contact with the owner of the plot. They left their cellphone numbers with Mwema with instructions that he was to pass them on to the owners of the property for them to contact Daisy and the husband.

[4] The purported owners are said to have contacted Daisy later and they arranged for a meeting in Nairobi. The said sellers are said to have presented themselves at the meeting. They were the appellant herein and his co-accused. Negotiations started, the purchase price of Kshs. 2.6 million was agreed upon and an advocate, one James Murage was contacted and a sale agreement was drafted. According to Daisy, at the point where they were to sign the agreement of sale, the appellant produced an identity card which bore the **Number [particulars withheld]** issued to **Isaac Muthama Kimilu.**

The appellant had not carried passport size photographs which were supposed to be attached to the agreement and so he excused himself to go and take the photographs and bring them back, but he took too long and so Daisy left.

[5] The money was supposed to be paid the following day. The same night Daisy received an email from the appellant (Isaak Kimilu) giving authority to Muteti, the co-accused to receive the money on his behalf, saying he had to travel to Juba urgently. The following day, they picked up the transaction from where they had left and paid Ksh.650,000 to Muteti (co-accused) who signed for it and gave his Identity Card **No. [particulars withheld]** and signed an acknowledgement for the money, but in the name of Isaac Kimilu. According to Daisy, a balance of Ksh. 30,000 sent to Alex through his phone No. 072X-XXXXX revealed his name as Isaac Muthama Kimilu. Some more money was paid as the parties waited for the Land Control Board Consent to be procured.

[6] Thereafter, the complainant was informed that the Land Control Board consent to transfer the property had been obtained and it had been taken to their lawyer's office awaiting their further instructions. When they asked the lawyer to proceed with processing the transfer, they realised that none of the purported sellers had availed their passport photographs as required by law for the transfer forms to be executed. They tried to contact the two *'sellers'* through the phone numbers they had given but the lines were off. They went to the Machakos Land Registry to check if the Title Deed and the consent to transfer were genuine. They found out the rude reality that both documents were fake. The Land Registrar testified to that effect before the trial court. They realised that they had been duped. They therefore reported the matter to the police station. The two suspects were thereafter arrested and charged before the Chief Magistrate with various charges as stated earlier.

[7] Forensic investigations on the documents signed and presented by the so-called sellers revealed that the documents were fake. According to the investigator **Ngerison Njue** (PW11) even the identity card presented by the appellant which was in the name of Isaac Muthama Kimilu was found to be fake. His proper identity card was found to bear number **[particulars withheld]**, while the identity card the appellant had presented as his was found to belong to one **Christopher Oketch Oduor**. The real owner of the land, recorded a statement confirming he had not sold the land. In total, the complainants were conned of Ksh. 2.6 million.

[8] Having heard the evidence presented before the court, the learned magistrate found that the two accused persons had acted in concert in obtaining a forged letter of consent and presented it to the advocate. They were also found to have received the money, under the pretence that they were the real owners of the property in question. The learned judge found all the charges proved and convicted them accordingly.

[9] Both accused persons, preferred an appeal before the High Court, challenging both conviction and sentence. The learned Judge (**Kimaru, J.**) after meticulously going through the entire evidence adduced before the High Court afresh, along with the grounds of appeal raised, arrived at the following conclusion:-

> ***"Taking into consideration the totality of the evidence adduced by the prosecution witnesses, this court cannot fault the decision reached by the trial court that prosecution did indeed prove to the required standard of proof that the appellants participated in the forgery of the two documents***

with a view to duping the complainant to pay them money for the purported sale of the suit property.

The respective defences of the appellants constitute mere denials that does not *(sic)* ***dent the otherwise strong evidence adduced by the prosecution witnesses. The appeal against conviction lacks merit and is hereby dismissed."***

[10] It is against that decision that the appellant filed the Memorandum of Appeal on 30th June 2016 in which he has proferred four grounds of appeal as hereunder:-

(i) The learned Judge erred in law in failing to reconsider and re-evaluate the evidence on record;

(ii) The learned Judge erred in failing to hold that the failure by the prosecution to call Mr. Isaa Kimilu, Mr. Murage and Mr. Muema, whose evidence was material in establishing as to whether the appellant committed the offence, and adverse inference ought to have been drawn against the prosecution.

(iii) The learned Judge erred in failing to find that no evidence having been found linking the appellant to the charge the appellant's appeal ought to have been allowed;

(iv) The learned Judge erred in finding that the appellant was sufficiently identified.

The appellant entreats this court to allow this appeal and set aside the conviction against him.

[11] As we have stated often, by dint of **Section 361(1)** of the Criminal Procedure Code, our remit as a Court on 2nd appeal is to only deal with issues of law. We must also defer to concurrent findings of fact by the two courts below unless it is apparent from the evidence on record, that no reasonable tribunal could have reached that conclusion. Additionally, this Court is beholden to accept the findings of fact of the two courts below, provided they are based on acceptable and clear evidence which was adduced at the trial.

In **Karingo v R (1982) KLR 213 at p. 219,** this Court stated:-

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja -vs- R, (1956) 17 EACA 146)."

See also **M'Riungu v Republic [1983] KLR 455**.

[12] Learned counsel for the appellant, **Mr. Maina** in his oral submission before us expounded on the above grounds. He submitted *inter alia* that the learned Judge ignored the fact that some crucial witnesses were not called as witnesses; that the learned Judge of the High Court had failed to properly re-evaluate the evidence adduced before the trial court; that the appellant had not been properly identified by the witnesses and ultimately that the charge had not been proved beyond reasonable doubt. He urged us to allow the appeal.

[13] On his part, learned Senior Assistant Director of Public Prosecutions, **Mr. O'Mirera** opposed the appeal. He maintained that the High Court properly re- evaluated the evidence and there was concurrence of both courts on the credibility of the witnesses. He submitted that the fact that some of the witnesses were not called was not fatal to the prosecution case, and that the evidence of the Land Registrar PW3 – **Niko Nzuki Mutiso** was sufficient to found a conviction .He urged us to dismiss the appeal.

[14] We have considered these articulate submissions of counsel, the grounds of appeal and the applicable law.

On ground (i), in our view the learned Judge meticulously went through the entire evidence, reappraised it and came up with his considered decision. That is evident from the judgment. The learned Judge has in his judgment confirmed that he reconsidered the entire evidence adduced before the trial court before arriving at his decision. From our own assessment, we are satisfied that indeed the learned Judge complied with the requirement to reanalyse and re-evaluate the evidence before the trial court and he came up with his independent decision.

On the issue of the lawyer who drafted the agreement for sale not being called as a witness, we are of the considered view that his absence from the proceedings was not fatal as all he was going to say was (PW1) and her husband what Daisy were saying.

As opined by the learned magistrate and accepted by the High Court, the buyers did not know the appellant before; they had no grudge against them; they had no reason to fabricate the charges against him. Those were concurrent findings of fact by both courts below which in our view were sound and which we find no justifiable cause to interfere with.

The same case applies to the young man called Mwenda who gave the complainants' telephone numbers to the appellant. That is all he did. There was no doubt that the appellant called the phone numbers in question. Again, those are findings of fact, and Mwenda's evidence would not have added any value to the appellant's case.

[15] It should be noted though, that **Kenneth Gitonga** (PW6), an important witness testified and denied having signed the Land Control Board consent. His evidence was that he had been transferred from Machakos and was working in Isiolo by 8th April, 2011 when the *'consent'* was said to have been signed. His evidence was weighty enough to determine the fate of Count 4.

In our view, it was also not necessary to call the registered owner of the land. He had nothing to do with the transaction. He had his Title Deed; he was not party to the transaction leading to the arrest of the appellant; there was no doubt that the Title Deed presented by the appellant was a forgery as confirmed by the Land Registrar. His evidence was not necessary and his absence did not in any way affect the weight of the prosecution evidence. The registered owner of the phone to which the Mpesa money was sent was also not a necessary witness as the appellant and his co-accused were not charged with identity theft, which is a totally different offence. We are not persuaded that the two courts below fell into error in the assessment of the evidence before them. Grounds (i) and (ii) of the appeal must therefore fail.

[16] On the ground three, the complainant identified the appellant, who presented himself as Isaac Kimilu. He is the one who is said to have instructed Alex – his co-accused to proceed on his behalf claiming he was held up in Juba.

The learned magistrate made a finding of fact that all the payments made to Alex, were sanctioned by the appellant herein. He also made a finding that the law Clerk **Lydia** (PW4), had confirmed that it was the appellant who had surrendered the fake Title Deed to the lawyer's office, a finding confirmed by the High Court. We cannot fault these concurrent findings of fact. Count 3 therefore comes a cropper.

[17] On the last ground on identification of the appellant, there was evidence that Daisy and her husband had dealt with the appellant for a considerable amount of time during their first meeting. They went to the advocate's office together; they were speaking face to face in broad daylight and there was no evidence adduced to even remotely suggest that the circumstances prevailing at the time of their meeting could have rendered identification difficult.

After the appellant was arrested in respect of other complaints, Daisy went to the police station and was able to identify the appellant's co-accused at an identification parade with no difficulty at all. She also identified the appellant at the police station.

[18] On this aspect, the learned Judge after re-evaluating the evidence before him made the following finding:

"This court holds that both appellants were positively identified by the complainant and her husband because they dealt with them at close quarters for a period of more than two months before the appellants presented to the complainant a forged letter of consent in respect of the suit parcel of land …"

We find the findings of the two courts below on identification sound. We find no basis for our interference. That ground too must fail.

In all therefore we find this appeal devoid of merit and dismiss it accordingly and we uphold the conviction and sentence of the trial court.

Dated and delivered at Nairobi this 19th day of October, 2017.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR