



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 507 of 2007

JOSEPH NDIRANGU NDIANGUI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from a Judgment of the High Court of Kenya
at Nyeri (Ombija, J) dated 27th June, 2003*

in

H. C. Cr. A. No. 325 of 2002)

JUDGMENT OF THE COURT

Joseph Ndirangu Ndiangui, the appellant herein, was charged before the Resident Magistrate’s Court at Nyeri with the offence of impersonation contrary to **section 382 (2)** of the Penal Code in Count 1, and obtaining by false pretences contrary to **section 313** of the Penal Code in Count 2. The particulars of the charge against the appellant according to the charge sheet were as follows:

Count 1: *“On the 15th day of May, 2001, at Nyeri Lands Office, in Nyeri District within Central Province, with intent to defraud obtained a title deed for Tetu/Muthuaini/391 from land Registrar by falsely pretending that he was the right person to acquire the said Title Deed for the said parcel No. Tetu/Muthuaini/391 which had been earlier bought by Ndirangu Macharia from Njuguna Karuiru.”*

Count 2: *“On the 15th day of May, 2001 at Nyeri Lands Office in Nyeri District of Central Province, with intent to defraud obtained a title-deed for Tetu/Muthuaini 391 from the Land Registrar by falsely pretending that he was the right person to acquire the said Title-Deed for a plot earlier bought by Ndirangu Macharia.”*

The appellant pleaded not guilty to both the charges, and after hearing a total of 12 witnesses, ten for prosecution and two for the defence, the learned Magistrate (M. N. Omosa) found the appellant not guilty of the offences, and acquitted him of both the charges. Here is how the learned Magistrate rendered himself:

“PW 3 who is the wife of the deceased and PW 4 Charles Nderitu Njuguna both confirmed that they filed succession cause No. 34/2002 in Nyeri High court. They both went to the High Court proceeded

with succession and the cause was confirmed. As at the time the case was proceeding nobody had applied to have grant nullified in (sic) the basis of giving wrong information. In the petition, the accused is described as the purchaser. No application has been made to revoke the grant so far given. Accused gave sworn statement of defence and stated that he bought the farm at Kshs.100,000/=. He paid the money in installments. He called 3 witnesses who were present when he paid all the money.

It is true from the evidence that the accused and the PW 4 and PW 3 went to the High Court filed succession cause No. 34/2000 which they have not revoked. Accused has proved that he bought the land from PW 3 and PW 4.

I find that the accused followed the right channel to acquire whatever he had. He never committed the offences he is charged under and I consequently acquit him under section 210 of CPC.”

Being aggrieved by that decision, the respondent Republic successfully appealed to the High Court which reversed the lower court’s decision, found the appellant guilty of both the charges, and proceeded to sentence him to one year imprisonment on Count 1, and one year on Count 2, both sentences to run concurrently. Here is how the learned Judge (Ombija, J) rendered himself:

“On or about the year 2000 the appellant gave false information to PW 4 (Charles Nderitu Njuguna) that he was the son of PW 1 (Ndirangu Macharia). That his father was dead. That his father Ndirangu Macharia bought land from the father of PW 4. He requested PW 4 (Charles Nderitu Njuguna) to assist him to get the title deed in his name and subsequently he would sell the land to PW 4. In anticipation of the sale PW 4 assisted the respondent which culminated in the obtaining of the subject title deed. Purporting to have a good title the respondent sold the subject land to PW 4 at a consideration. All this was based on a false premise.

In my view the mode of acquisition of the subject parcel of land amounted to a criminal offence. It mattered not that the respondent could have applied for revocation of the grant.

True, the complainant could do two things:-

- 1) apply for revocation*
- 2) pursue criminal proceedings*

It was upon the complainant to elect which cause of action to proceed with. He chose the criminal proceedings which was perfectly in order. In any event even if the respondent was convicted his conviction alone would not revoke the grant issued to the respondent. The complainant would still have to apply for revocation of the grant as a separate transaction.”

It is that decision that led to this final appeal before this Court. The appellant had, of course, served his one year sentence, but desired to proceed with the appeal. He filed a memorandum of appeal, outlining the following three grounds:

“1. That the learned judge erred in law when he failed in his duty as a first appellate court to re-evaluate the evidence a-fresh and therefore arrived at the wrong decision.

2. That the learned judge erred in law failing to note that the trial in the lower court itself was illegal as it was conducted by a senior sergeant, a Mr. Kigera who was not a qualified prosecutor.

3. THAT the learned judge erred in law in exhibiting bias towards the appellant without giving him the benefit of doubt.”

At the hearing before us, the appellant, who was unrepresented, simply relied on his three grounds of appeal, arguing essentially that the learned Judge did not re-evaluate the evidence before him and did not give him a fair hearing. With regard to ground 2, he acknowledged that he did not raise the same

before the High Court.

Mr. J. Kaigai, learned Assistant Deputy Public Prosecutor, for the respondent, strongly argued that the evidence against the appellant was overwhelming that he gave false information to the Chief (PW 5) that led to the unlawful issue of a title deed, and that there was no merit in this appeal.

We have examined the record carefully and concur with the submissions of the learned Assistant Deputy Public Prosecutor that indeed there is no merit in this appeal. The learned Judge rightly found that the complainant, Ndirangu Macharia (PW 1) had bought the suit land in 1960 long before the appellant was even born. Macharia built two houses on it, and lived there since 1960. Unfortunately, he had not effected the transfer in his name. The appellant took advantage of the situation, gave the Chief false information that he was the son of Njuguna Karuiru, the deceased previous owner of the suit land, and obtained Letters of Administration, which he used to obtain title to the suit land. When the complainant, the true owner, was threatened with eviction from his own land, he initiated criminal proceedings against the appellant. In finding the appellant innocent, it would appear that the learned Magistrate erroneously assumed that the complainant ought to have applied for revocation of the Grant of Letters of Administration issued to the appellant instead of pursuing criminal proceedings against him. The learned Judge, in reversing that decision, observed that the complainant had a “choice” between pursuing the issue of revocation, or criminal charges, and he chose the latter option. With great respect to both the courts below, we are of the view that the issue here is not one of choices – the complainant had a right to pursue all his rights simultaneously – to initiate criminal proceedings against the appellant, and to also apply for revocation of the Grant of Letters of Administration. In any event, the learned Judge eventually came to the right conclusion that on the basis of the evidence before the lower court, the prosecution had proved beyond reasonable doubt that the appellant was guilty of the two charges. We also affirm that decision, and find that this appeal has no merit, and dismiss the same.

Orders accordingly.

Dated and delivered at Nyeri this 6th day of February, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR