



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 17 OF 2009

BETWEEN

JOHN IRUNGU KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang, J) dated 9th February, 2009

In

H.C. Cr. A. No. 397 of 2007)

JUDGMENT OF THE COURT

The appellant, JOHN IRUNGU KARIUKI, was arraigned before the Chief Magistrate’s Court at Makadara where he was charged with two counts of obtaining money by false pretences contrary to **section 313** of the Penal Code; a third count of making a document without authority contrary to **section 357 (a)** of the Penal Code and a fourth count of uttering a false document contrary to **section 353** of the Penal Code.

On the first count the particulars were that the appellant on the 25th November, 2004 at Morara & Company Advocates in Nairobi, with intent to defraud, obtained from Wilfred Kamunge Mathenge the sum of Kshs.300,000/- pretending that he was in a position to sell a plot at Umoja Innercore sector 111 plot C – 70 a fact he knew to be false.

It was specified in the second count, that the appellant on 22nd December, 2004 at Morara and Company Advocates aforesaid with intent to defraud, obtained from Wilfred Kamunge Mathenge the sum of Kshs.100,000/- pretending that he was in a position to sell a plot in Umoja Innercore, sector 111, plot C-70 , a fact he knew to be false.

In count three it was alleged that the appellant herein acting together with others at large and without authority or excuse, at an unknown place within Nairobi, made a certain document namely a

National Identify Card serial No. 1868889 purporting it to be a National Identify Card issued by the National Registration Bureau.

And in the fourth count, it was alleged that the appellant on 25th November, 2004 at Morara & Co. Advocates aforesaid, knowingly and fraudulently uttered a certain identify card serial No. 1868889 to Mr. Gibson Morara purporting it to be the genuine identity card of Stephen Mungai Kahiga.

After a full trial before the learned Senior Resident Magistrate (Ms. S.N. Karani), the appellant was convicted on the first, third and fourth counts. On count one he was sentenced to three years imprisonment . On each of counts three and four the appellant was sentenced to five years imprisonment. The sentences were ordered to run concurrently.

Being aggrieved by the foregoing the appellant filed an appeal in the High Court which appeal was dismissed by the High Court in its judgment dated and delivered on 9th February, 2009. Still aggrieved by the decision of the High Court the appellant now comes before this Court by way of second and final appeal. That being so only matters of law fall for consideration by dint of **section 361** of the Criminal Procedure Code.

The facts as accepted by the two courts below appear simple, straightforward and rather interesting. An advertisement appeared in the Daily Nation of 30th November, 2004 to the effect that there was a plot for sale at Umoja Innercore Estate . The cell phone No. 0720-848300 was given as the contact number. On seeing this advertisement and being desirous of clinching this opportunity to own a plot in Umoja, one Wilfred Mathenge, a businessman, called the contact number and as a result was directed to Umoja where he met the appellant who showed him (Mathenge) a plot under partial construction. The appellant and Mathenge (the complainant) went to Nairobi City Council offices located in Umoja Estate and found the name of Stephen Mungai Kahiga indicated as the owner of the plot. On that basis the complainant engaged in negotiations with the appellant who was acting as the agent and the price was brought down from Kshs.850,000/- to Kshs.570,000/-. The two (appellant and complainant) went to the office of an advocate, Mr. Gibson Morara (since deceased) where a sale agreement was drawn and as a sign of serious intention or commitment to buy the plot the complainant paid Kshs.300,000/- to the appellant. It was then agreed that the payment of the balance would be in four installments. On 10th December, 2004 the complainant met the appellant at the offices of Morara Advocates and paid to the appellant a further Kshs.100,000/- - an endorsement was duly entered on the sale agreement by the advocate.

The complainant having paid the bulk of the purchase price decided to send workers to the plot in question to demolish the partial structures. This task of demolishing the structures was assigned to Paul Maina (PW2) who was however stopped from carrying out the assignment on the ground that the plot belonged to someone else and not the complainant. Those who had been sent to demolish the structure, were actually arrested and taken to Buru Buru Police Station. The complainant on being informed of what had happened rushed to Buru Buru Police Station where he presented the sale agreement as well as the power of attorney which the appellant had signed allowing him to transfer the plot to the complainant once final payment had been effected. While at Buru Buru Police Station the complainant met a man who had documents for the same Umoja Innercore plot which the complainant was purchasing. This man informed the complainant that he too had been approached by the appellant to purchase the same plot.

The complainant who was now put on guard called the appellant offering to meet him and to pay the outstanding instalments of the purchase price at the Advocate's offices. The complainant was accompanied by a police officer and when the appellant turned up he was promptly arrested.

Evans Monga Oyari (PW3) of the National Registration Bureau carried out investigations into the matter. Oyari found that the appellant's real name was John Irungu Kariuki and not Stephen Mungai Kahiga.

In the course of her judgment the learned trial Magistrate said:-

“.. I am satisfied [from the exhibits] that the accused received money from the complainant in the presence of an advocate, [on] the understanding that he would sell to him plot C – 70 in Umoja Innercore Section 111 ... The accused made absolutely no attempt to lead the evidence to show he had a claim in the said property or that the complainant may have been wrongly chased away. This clearly shows [that] the accused falsely represented [to] the complainant that he had ownership of the said plot knowing fully well this was not the case.”

As regards the appellant’s complicity in the offences the learned trial Magistrate said:-

“... from the evidence tendered before me, it is apparent [that] at the time the accused was transacting with the complainant he presented himself as Stephen Mungai Kahiga. This he did by affixing his photograph to an identity card belonging to Stephen Mungai Kahiga, being identity Card No. 1868889. The accused has no explanation whatsoever as to what his photograph was doing on another person’s identity card. It is apparent, given [that] the accused proceeded to transact under the said name, he was the one who forged the said identity card and knowing fully well it was a false document [meant] to defraud the complainant ...”

In dismissing the appellant’s appeal in the superior court the learned Judge (J.B. Ojwang, J) stated:-

“There is no doubt that the complainant lost some 400,000/- to a fraudster who had advertised a plot in Umoja Innercore for sale; and the fraudster had given his telephone number, at which the complainant reached him; he courageously showed the land intended for sale to the complainant; he concluded a sale agreement with the complainant before an advocate; he collected the purchase price in two installments from the complainant, he showed the complainant, all through, an identity card in which he must have known, his photograph was lodged in an identity card belonging to someone else; he pretended to be that someone else; he fraudulently collected purchase price in respect of a plot that was not his property, and in respect of which the true owner had not given him a power of attorney.”

As already stated elsewhere in this judgment the appellant now comes to this Court by way of second and final appeal. When the appeal came up for hearing on 24th May, 2010 the appellant appeared in person while the state was represented by Mr. M. O’Mirera (Senior Principal State Counsel) . The appellant handed in his written submissions and asked us to consider the same together with the grounds of appeal.

On his part, Mr. O’Mirera submitted that the evidence against the appellant was watertight and that there are concurrent findings by the two courts below. On the question of the appellant’s defence, Mr. O’Mirera submitted that it was properly considered and rejected. He therefore urged us to dismiss this appeal.

From the concurrent findings of the two courts below this is a case in which the appellant hatched and executed a scheme in which he purported to sell a plot which he had no authority to sell and in the process managed to obtain a total of Kshs.400,000/- from the complainant. We have carefully considered the written submissions and the grounds of appeal which in the final analysis challenge the findings of fact by the two courts below.

In concluding his judgment the learned Judge of the superior court delivered himself thus:-

“It was proved beyond reasonable doubt, in my opinion, that the appellant herein had obtained money by false pretences contrary to section 313 of the Penal Code. It was also proved beyond reasonable doubt, in my opinion, that the appellant had constructed the identity card which he used to deceive the complainant, without authority contrary to section 357 (a) of the Penal Code. Similarly it was proved beyond reasonable doubt, that the appellant had altered the false document he had made, to secure unmerited monetary advantages from the complainant. I find, in the result, that the appellant was, on the evidence on record, rightly found guilty, convicted and sentenced.”

This Court has stated on numerous occasions that it will not interfere with concurrent findings of

fact by the two courts below unless such findings were made on no evidence at all or on misapprehension of it or no reasonable tribunal properly directing itself to the evidence would make such findings – See **M’RIUNGU V. R [1983] KLR 455**. In the present appeal there are concurrent findings by the two courts below that the appellant was guilty as charged.

We have considered the record of appeal and as we have already stated this was a case of a cunning man who, through fraudulent means, managed to obtain Kshs.400,000/- from the complainant on the pretence that he (appellant) had authority to sell a plot in Umoja Innercore. We therefore have no reasons to interfere with those concurrent findings of the two courts below. The findings were fully supported by the evidence on record. Accordingly this appeal is dismissed in its entirety.

Dated and delivered at Nairobi this 9th day of July, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.