



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 293 OF 2004**

**(From original conviction (s) and Sentence(s) in Criminal case No. 1361 of 2001 of the Chief Magistrate's Court at Nairobi (C. Githua (Mrs.) -PM)**

**BERNARD NYAGA KIMOTHO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant **BERNARD NYAGA KIMOTHO** was charged and convicted of the offence of Conspiracy contrary to Section 317 of Penal Code and sentenced to serve 12 months imprisonment by the Chief Magistrate's Court at Nairobi. Being aggrieved by the conviction and sentence he lodged this Appeal.

The appellant raised several grounds of appeal; however on considering them I find that the appellant raises the following issues:

- 1) That the learned trial magistrate erred in law and fact in convicting on insufficient evidence.
- 2) That the learned trial magistrate erred in law and fact by failing to give due regard to the defense.
- 3) That the Conspiracy charge was defective and the conviction could not be sustained since the appellant was charged alone.

The facts of the prosecution case were that the complainant in the case P.W.1, bought property, LR NO. 209 /370, in 1998. The said property was a Commercial building with ten tenants including the appellant in this case. The complainant contracted the services of PW 2 to be collecting rent from the tenants. There was no problem until 21st September 1999 when PW2 was served with a notice by one of the tenants which indicated that the property had changed hands. PW2 informed PW1 who visited the premises and was given two letters, exhibit 5(a) and 6(b) by one of the tenants. The two letters informed the tenants that the property had been taken over by one, **MONICA WAMBUI THANDE** and that the rent would be collected by **TOSECO CO. LTD.** According to the complainant's evidence, later in 2000, the Appellant sued the Complainant and one **MONICA WAMBUI THANDE** asking the court to determine who among them was his landlord. The Appellant also informed the Complainant that he would no longer pay him rent. Following investigations, the police led by PW4, on the 3rd April 2001 recovered from the appellant's shop, a heap of documents exhibits 22, 23, 25, 27, 28, 30, 31 and 33, all of which involved a High Court case in which the Complainant's property was

taken over by MONICA WAMBUI THANDE. He was then charged with this case.

When the Appeal came up for hearing on 9/12/04; the Appellant told the court that the case was a fabrication since he had not committed the alleged offence. He told the court that the Complainant was his Landlord where he was living and that he owed him rent of Kshs.180, 000. He submitted that the trial magistrate did not consider the grudge between the Complainant and him. The Appellant submitted that the Complainant had told the trial court that he (the appellant) had filed a matter against him (the Complainant) in the Tribunal No. 5 of 2000.

**MISS NYAMOSI** the learned counsel for state submitted that she was supporting the conviction by the trial court. She however conceded that the Appellant owed the Complainant over 100,000/-. However, she submitted that the case in point was not brought over the unpaid debt.

Having re-evaluated the evidence adduced before the court, it is quite clear that the learned trial magistrate appreciated the issue of the rent owed to the Complainant by the Appellant. She did not find that there existed any grudge between the Appellant and the Complainant. The learned trial magistrate finding on this point was correct and cannot be faulted.

The appellant submitted that of all the witnesses the evidence of PW4 and PW8 formed the basis of the conviction, yet the evidence was contradictory as PW4 said that he had searched his shop on 4/4/01 while PW8 said that she had typed one of the documents which were found in May 2001. The appellant submitted that the parties in the file No. 820/95, which was an exhibit in the case before the trial Court, were one **GEORGE WAINAINA GITAO** and the Complainant. That in case No. 716 of 2000, the appellant submitted that he was sued by the complainant for failing to pay rent and that there was no nexus between him and the Criminal charge. He also submitted that in the judgment, the learned trial magistrate stated that one **GEORGE W. GITAO** and one **MONICA WAMBUI THENDE** were the culprits.

**MISS NYAMOSI** submitted that the Complainant's evidence was that he owned LR. No. 209/3 706 situated at South B. That on 22/9/99 he said he got a court order showing that the property was owned by one MONICA WAMBUI THANDE and he investigated the case after which he found that the Appellant was among the people who had tried to defraud him. That in HCCC No. 820/95, it was shown that there was a consent judgment recorded by one MONICA and one WAINAINA which dispossessed the complainant of his property.

**MISS NYAMOSI** conceded that in convicting the Appellant, the trial court had relied mainly on evidence of PW4 and PW8. **MISS NYAMOSI** told the court that from the evidence, PW4 had said that he had gone to visit the Appellant at his shop and found papers related to **HCCC No. 820/95** and **HCCC No. 716/2000** and that it was through these cases that the Complainant lost his property. She also submitted that PW8 had said that she was the secretary who typed some document related to these two cases and that it was her evidence that it was the Appellant who had given her the instructions to type an Affidavit bearing the name MONICA. **MISS NYAMOSI** submitted that PW8 knew the Appellant before and she identified him positively. **MISS NYAMOSI** conceded that there were contradictions in the evidence of PW4 and PW8. However, she submitted they had been considered by the trial magistrate and on page J7 of her judgment, the Court found that they were not material and did not affect the prosecution case.

On that issue of the parties in High Court Case No. 820 of 1995, the significance of the evidence of PW4 and PW8 was that the appellant was party to the preparation of documents in that Case. When it is borne in mind that that was the same case in which the complainant in this case had

purportedly been dispossessed of his property, his possession of the documents is quite significant. Taking into account the appellant's conduct of suing the complainant and asking the Court to determine his landlord between the complainant and MONICA to whom he should pay the rent, that conduct was not just mischievous but was proof of the appellant's deep involvement in the conspiracy to dispossess the complainant of his property. From the record it's clear that the learned trial magistrate convicted the Appellant from the evidence of PW4 who testified on the finding of the document in the Appellant's shop, and the evidence of PW8 who testified that the appellant gave her the affidavit produced in Court as exhibit 33, to type. The learned trial magistrate found that there was some contradictions between the evidence of these two witnesses but rightly characterized them as being immaterial. I agree with her finding and see no reason to fault her. I find that in addition to other evidence adduced in this case the evidence of these two witnesses was very essential in linking the Appellant with the conspiracy. The learned magistrate found them credible and trustworthy and I see no grounds upon which I could find otherwise.

Finally, the appellant told the court that he was wrongfully charged with Conspiracy alone not considering the fact that that charge cannot stand against one person. On the issue of conspiracy Miss NYAMOSI submitted that the Appellant was a co-accused with others who were not before the court since they could not be traced. I agree with counsels submissions. Under Section 317 of Penal Code the Prosecution has to prove that the Appellant conspired with another by deceit or any fraudulent means to defraud the Complainant of any property. The Prosecution in this case has fully proved that the Appellant was party to the filing and Prosecution of the case 820/95 in which the Complainant stood and or lost his property. The Prosecution was able to establish that the Appellant acted together with other or others who were not traced. On that ground I find that the Appellant's submission lacked in merit. Having re-evaluated the evidence adduced before the trial Court, and having considered the submission made by the Appellant and MISS NYAMOSI for the Respondent, I find no merit in this Appeal. I find that the evidence adduced against the Appellant was overwhelming and that it established the charge of conspiracy as charged beyond any reasonable doubt. The learned trial magistrate gave due regard to the Appellant's defense and came to the right conclusion, after considering the evidence in the entire case that it was unworthy of belief. I find the conviction safe and uphold it accordingly.

On the sentence, **MISS NYAMOSI** told the court that the Appellant was convicted this year June to serve 12 months imprisonment. He has served six months and that the court had gotten the opportunity to see that he was not well. That being the case she left the matter of the sentence to the Court to decide. The Appellant in the reply told the court to allow the Appeal as he has been very sick.

The maximum sentence for the offence of conspiracy contrary to Section 317 of Penal Code is 3 years imprisonment. The Appellant was sentenced to one year's imprisonment. I have considered the Appellant's apparent frail frame; it is evident that he is unwell. Having served half the sentence imposed, on the basis of the Appellant's own circumstances, I find that he has served sufficient punishment. I set aside the sentence and order that he be set free unless he is otherwise held.

Orders accordingly.

Dated at Nairobi this 17th day of December 2004.

**LESIIT**

**JUDGE**

Read, signed and delivered in the presence of;

**LESIIT**

**JUDGE**



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