



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 72 OF 2013

JOHN ODHIAMBO AYOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Chief Magistrate's Court at Kisumu Criminal Case No. 249 of 2012]

J U D G M E N T

The appellant was charged with the offence of Forgery contrary to section 349 of the penal code.

The particulars were that on the 10th day of February 2002 at unknown place within the Republic of Kenya jointly with others no before court forged a land title deed Kisumu/Kanyakwar 'A'/278 purporting it to be a genuine document issued and signed by D.M. Muhanyi the Registrar of Titles Ardhi House Kisumu.

He was equally charged with the 2nd count of Obtaining money by false pretence contrary to section 313 of the penal code.

The particulars were that on the 7th day of April 2012 at Kisumu City in Kisumu East District within Nyanza Province jointly with others not before court with intent to deponed obtained a total of Kshs. 800,000/= from one Kennedy Chacha Juma by falsely pretending that the land parcel deed Kisumu/Kanyakwar 'A'/278 was genuine and valid a fact you knew to be false.

The appellant denied the offences. The prosecution called a total of 8 witnesses to establish their case.

PW1 Chacha Juma Kennedy, told the court that he was looking for land within Kisumu area. He went to an agent called Abdalaman who took him to Ms D.O.E Anyul Advocate and entered into a sale agreement with the appellant. He paid the agreed purchase amount of Kshs. 800,000/= while he was looking for the money to effect transfer, he went ahead to build a toilet on the property and to fence it. Later he was told that a lady came claiming the property. He later realised that he had been conned and he lodged a complaint with the police who later arrested the appellant.

PW2 Beatrice Anyango Okumu, told the court that she stays in Mombasa. On 5-5-2012 when she

came to Kisumu, she decided to visit the land and she found it fenced. She did a search and she realised that strange entries of transfer had been effected. She denied selling the land. The same was still registered in the name of her late husband.

PW3 Abdaraman F. Opiyo, is a land agent at Kondele. He knew PW1 as a friend and was looking for land. His friend Jomo introduced him to the appellant. He did a search with PW1 and found that the documentations were in order. The appellant then came with the original documents and they went to the advocate and entered into the same agreement where the purchaser PW1 paid Kshs. 800,000/= and he was given his commission of Kshs. 40,000/=. Later he was told that the title was fake.

PW4 George Gichimo Gachie, the District Land Registrar explained to the court how when PW2 came he realised that strange unsupported entries had been done at the register. He cancelled the same and had the entries in the register revert to the true owner Meshack Okumu.

PW5 George Wahomba, the finger print expert and Alex Mwongera the document examiner produced evidence showing the forgeries on the documents including the fact that the title deed in the name of the appellant was a forgery. They confirmed that the signatures in the documents belonged to the appellant.

When put on his defence the appellant gave unsworn evidence. He denied that he was called John Odhiambo Ayoo and that his true name was Francis Otieno Tobias. He even called for the production of the OB to buttress his defence.

This court has perused the proceedings carefully as well as the submissions by the parties herein. The state supported the conviction arguing that the case against the appellant was watertight and had been proved beyond doubt. The appellant on his part still argued that this was a case of mistaken identity and that had the police conducted their investigation well he would have been exonerated.

In his petition of appeal dated 4-6-2013 the appellant basically raised two key elements, namely, that the provision of Article 25 (a) and 50 (2) of the Constitution were violated and that the case was poorly investigated and therefore he ought to have been acquitted.

In **Okeno -VS- Republic [1972] EA 32**, the court's decision that in the first appeal such as this, this court ought to reevaluate the evidence afresh with a view of arriving at an independent decision.

From the evidence on record and from the submissions by the learned state counsel, I do not think that there is any argument to counter the fact that an agreement was done on 7-1-2012. The same was executed in broad daylight and in the presence of Mr. Anyul Advocate. There were sufficient witnesses to back up the same. Neither do I buy the appellant's argument that he was theparty. The photographs accompanying the documents portrayed his image, a fact which he cannot deny. Equally, the signature as found by PW5 belonged to him. Surely he cannot claim to belong to one Francis Otieno Tobias. All the parties including the complainant were adults and of sound mind. I think this was a very lame excuse.

In any event even the OB which he called for showed his name and not of one Tobias. **PW6 Alfred Juma Odongo**, confirmed meeting the applicant and in fact witnesses the agreement and the payment of Kshs. 800,000/=. Was the appellant's fundamental rights as enshrined in Article 25 (a) of the Constitution breached" Article 25 (a) speaks of the rights of:

"Freedom from torture and cruel, inhuman or degrading treatment or punishment".

I do not think so. There is no proof of such breach. Neither do I find any breach of the rights under Article 50 (2) of the Constitution breached. As a matter of fact the court granted the opportunity during his defence to the appellant to call for the production of the OB. The case adjourned and the same brought. Unfortunately, it showed the name appearing therein to belong to the appellant.

Even if peradventure he was called Francis Otieno Tobias he ought to have raised that objection way ahead while the proceedings were on. He cannot therefore lay blame on his advocate Mr. Ogone.

I think I have said much to show that this appeal ought to fail. I must mention though that proper investigation ought to have been carried out at lands office to establish how the entries in the register were changed without any supporting documentations. The appeal is hereby dismissed.

Dated, signed and delivered at Kisumu this 16th day of December, 2014.

H.K. CHEMITEI

JUDGE



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