

KENYA / JUDGMENT

Fred Nzuro Mwaniki v Republic [2017] KEHC 50 (KLR)

[2017] KEHC 50 (KLR)

COURT

High Court

CASE / FILE NUMBER

Criminal Appeal 85 of 2015

Source: new.kenyalaw.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 85 OF 2015

FRED NZURO MWANIKI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence of a fine

of Ksh. 60,000/= ID 1 year in jail in CR. CASE No. 1483 of 2010

by Hon. R. ODENYO at Mombasa Law Courts on 05/05/2015)

JUDGMENT

1. The Appellant was charged with another who was discharged under section 87 (a) of the C.P.C with two offences; Count one being conspiracy to defraud contrary to section 317 of the penal code.
2. The particulars of the first Count were that on or about 29th day of March, 2010 at an unknown place within the Republic of Kenya, the Appellant jointly with others not before court, conspired to defraud Felister Watetu Muriithi of cash Ksh. 515,000/= by pretending that title deed for plot No. 3427/111/MN CR 34109 was a genuine and valid title deed from the Registrar of lands for MEHBOUB MUHAMED ABDULGAFOR, a fact they knew to be untrue or false.

3. The Appellant was charged with a second count of obtaining by false pretences contrary to section 313 of the penal code in that on diverse dates between 29th March, 2010 and 15th April, 2010 at Equity Bank Moi Avenue Branch in Mombasa District within Coast Province the Appellant with intent to defraud obtained from M/S FELLISTER WATETU MURIITHI cash Ksh. 515,000/= by falsely pretending that the title deed for plot No. 3427/111/MN CR 34109 in the names of MEHBOUB MUHAMED ABDULGAFOR was a genuine and valid title deed capable of being used as security, a fact he knew to be untrue or false.
4. The prosecution evidence in summary is that the Appellant approached the complainant (PW1) on 25/03/2010 in the company of JAMES WAITITU (PW2) and one MEHBOUB who wanted a loan of Ksh. 500,000/=.
5. The Appellant told the complainant that the said MEHBOUB had a title deed he wanted to use as security for the loan. An Advocate did a search on the piece of land and afterwards the complainant gave the MEHBOUB Ksh. 500,000/= and she saw MEHBOUB giving Ksh. 50,000/= to Waititu and Ksh. 100,000/= to the Appellant.
6. After some time, the complainant learnt that the land in respect of the title deed had several titles. The complainant learnt from a lady that the land belonged to her deceased brother called MEHBOUB. The complainant reported the matter to the police and the Appellant was arrested and charged with this offence.
7. The Appellant stated in his defence that the complainant who is his neighbor and friend joined him at a county bar one evening in the company of Waititu (PW2) and one Mackenzie. He said they were having a conversation and he was not part of it.
8. The Appellant said that they left him in the same place and later, the complainant returned with Mackenzie and Waititu and the complainant asked him to be her witness.
9. The Appellant said he agreed to be her witness and they signed an agreement before a lawyer. They proceeded to a bank where the complainant gave Mackenzie Ksh. 500,000/=. The Appellant said PW2 called him after some time and told him that they had been trying to sell land to Mackenzie and they had disagreed. Subsequently, the Appellant was arrested and charged. He denied being part of a conspiracy to obtain money from the complainant.
10. The trial court found the Appellant guilty as charged on the two counts and sentenced him to pay a fine of Ksh. 60,000/= on each Count ID to serve 1 year in jail. The Appellant has appealed against the conviction and sentence on the following grounds:-
 - (i) The learned Magistrate erred in law and in fact in finding that the prosecution had proved its case to the required standard and thereby failed to give benefit of doubt to the Appellant.
 - (ii) The learned Magistrate erred in law and in fact in convicting the Appellant against purely circumstantial evidence.

- (iii) The learned Magistrate erred in law and in fact in totally disregarding the Appellant's statement, and all the relevant factors and misapprehending, the law, thereby arrived at a wrong conclusion.
 - (iv) The learned Magistrate erred in law and in fact in convicting the Appellant against the weight of the overwhelming evidence in his favour.
 - (v) The learned Magistrate erred in law and in fact in dismissing the Appellant's plausible defence and thereby shifting the burden of proof to the Appellant.
 - (vi) The learned Magistrate erred in law and in fact in convicting the Appellant when there existed no sufficient or any evidence at all to support the charge preferred.
 - (vii) The learned Magistrate erred in law and in fact in holding that the Appellant had a common intention with others to defraud the complainant.
 - (viii) The learned Magistrate erred in law and in fact in arriving at the plausible conclusion that the Appellant was going to gain from the money.
 - (ix) The learned Magistrate erred in law and in fact in allowing the state to withdraw the charges facing one JACKSON KIMARU alias MEHBOUB MAKENZE the main perpetrator who perpetuated the fraudulent acts.
 - (x) The learned Magistrate erred in law and in fact in giving an excessive sentence in the circumstances.
11. The Appellant submitted through his Advocate APPOLLO MUINDE as follows:-
- (i) That the complainant testified that she gave the money to one MEHBOUB and that the Appellant was given Ksh. 50,000/= by MEHBOUB and PW2 was also given Ksh. 100,000/= by the said MEHBOUB and yet PW2 said in his testimony that he did not receive any money from MEHBOUB.
 - (ii) That there is evidence that there was an agreement between MEHBOUB and the complainant and that the Appellant was a mere witness.
 - (iii) That the transaction in question is tainted by illegality as the complainant who admitted she is a shylock was engaged in an illegal business.
 - (iv) That no efforts have been made to bring to book one MEHBOUB and therefore the Appellant's Appeal should be allowed and the conviction and sentence be overturned.
12. The Respondent opposed the Appeal and submitted as follows:-

- (i) That the three issues for determination before the trial court which were arrived at on an affirmative were firstly that it was the Appellant who introduced the said MEHBOUB to the complainant and secondly that the Appellant conspired with the said MEHBOUB to present a fake title deed to the complainant and thirdly that they obtained Ksh. 515,000/= from the complainant.
- (ii) On the issue that money lending is an illegal transaction, the Respondent submitted that the charges the Appellant was facing had nothing to do with money lending and that the said issue was not raised by the Appellant during the trial.
- (iii) Finally, the Respondent submitted that the prosecution proved its case against the Appellant and the withdrawal of charges against the said MEHBOUB was for the benefit of the Appellant since the said MEHBOUB is still at large and the case would still be pending in the trial court.
13. I have re-evaluated the evidence in this case bearing in mind that I did not have the advantage of seeing the witnesses. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in *Kiilu & Another Vs Republic* the court citing *Okeno v. R* held:-
- "An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. "
14. My findings are as follows:-
- (i) That the Appellant and others presented a fake title deed to the complainant and they obtained a total of Ksh. 515,000/= from the complainant.

(ii) Although the said MEHBOUB is still at large, the role played by the Appellant is explicit. At page 21 of the proceedings (line 1, the Complainant said it is the Appellant who introduced MEHBOUB to her as a good friend whom the appellant knew well. The Appellant told the Complainant that the said MEHBOUB was in financial difficulties and he wanted to borrow Ksh. 500,000 to offset a mortgage.

(iii) The issue of the illegality of the transaction was not raised in the trial court except in cross examination and the Appellant cannot raise it at the Appeal stage as this court has no way of establishing that the transaction was tainted with illegality. The Appellant did not say in his defence before the trial court that the transaction was illegal.

(iv) The Appellant did not challenge the evidence by the complainant that he received Ksh. 100,000 from the borrower and the trial court found that this was an indication that he indeed conspired with MEHBOUB to defraud the Complainant. There is also evidence that the Appellant went back to the Complainant with the said MEHBOUB and obtained a further Ksh. 15,000.

(v) I find that the evidence on record is watertight and the conviction herein safe. The Appellant received part of the proceeds of the conspiracy from MEHBOUB and there is evidence that the Appellant was the link between the Complainant and the said MEHBOUB who is still at large.

(vi) The Appeal lacks in merit and the same is accordingly dismissed and both the conviction and sentence are upheld.

Dated, Delivered and Signed at Mombasa this 2nd October, 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://new.kenyalaw.org/akn/ke/judgment/kehc/2017/50/eng@2017-10-02>

CASE PAGE <https://chat.esheria.ai/case-law/kenya/fred-nzuro-mwaniki-v-republic-2017-kehc-50-klr-criminal-law-high-court-2017>

Prepared on 24 October 2026 · Esheria