



REPUBLIC OF KENYA



**Moronya v Republic (Criminal Appeal E025 of 2023)
[2023] KEHC 27020 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E025 OF 2023
RPV WENDOH, J
NOVEMBER 30, 2023**

BETWEEN

MORONYA SIRIMA MORONYA APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence by Hon. A. N. Karimi – Principal Magistrate in Rongo Senior Resident Magistrate’s Criminal Case No. E057 OF 2022 delivered on 8/05/2023)

JUDGMENT

1. Moronya Sirima Moronya was convicted in Criminal Case E057 of 2022, for the following offences;
Count (1) stealing contrary to Section 268 (1) as read with Section 275 of the [Penal Code](#). The
I: particulars of the offences are that on 26th August, 2021 at Nyametaburo area in Kuria West Sub County, stole a land sale agreement document and mobile phone Tecno Spark 6 all worth Kshs. 12,000/= the property of Linet Kerubo Machuka.
Count Obtaining money by false pretences contrary to Section 313 of the penal Code in that on
II: 26/8/2021 at Nyametaburo Area of Kuria West Sub County with intent to defraud, obtained from Linet Kerubo Kshs. 550,000/= by falsely pretending that he was in a position to sell to her a piece of land BUK/BOH at Makerero village, a fact he knew to be false.
2. The prosecution called a total of four witnesses in support of their case. When called upon to defend himself, the appellant opted to remain silent.
3. The Court convicted the appellant and sentenced him to three years imprisonment on each count and the sentences were ordered to run concurrently.



4. The appellant is aggrieved by the said judgment and preferred this appeal. The grounds of appeal are as follows: -
 1. That the court failed to comply with Article 50 (2) (g) and (h) of *the Constitution*;
 2. That the offences were not proved to the required standard;
 3. That the trial court failed to consider his mitigation.
5. The appellant prays that the conviction be quashed and sentence set aside.
6. The appellant filed written submissions in which he argued that the complainant (PW1), a lady who was well learned could not have failed to do due diligence to establish the existence of the land before parting with Kshs. 550,000/=; that the burden of proof was shifted to him yet it was for the complainant to prove her case.
7. As regards PW2, the appellant questioned his credibility because of the inconsistencies in his evidence.
8. As for PW4, the appellant submitted that he did not carry out any investigations but just relied on the evidence of the witnesses as he did not establish the existence and ownership of the said land. He submitted that the prosecution had the burden to prove their case beyond reasonable doubt but they failed to do so.
9. Though the Respondent were allowed seven (7) days to file their submissions as from 30/10/2023, upto this day the court is writing the judgment, about twenty (20) days later, the Respondent had not filed submissions.
10. This is a first appeal and it behoves this court to re-examine all the evidence tendered in the trial court afresh, analyse and evaluate it and arrive at its own independent findings but bear in mind that this court neither saw nor heard the witnesses testify. I am guided by the decision of Okeno vs. Republic (1972) EA 32.
11. PW1 Linet Kerubo testified that in January, 2021 she sent one Peter (PW2) to get her land to buy and land was found in Kosebe. PW1 met Peter (PW2) who introduced her to the appellant, Moronya at Kosebe near Nyametaburo, and the appellant showed them the land he wanted to sell. The land was part of a large portion of land and she was given a copy of a title. She did a search and the land bore the name Moronya meaning it was family land. She agreed to purchase an acre for Kshs. 550,000/=. A Sale Agreement was drafted by the Chief. The appellant was with his brother-in-law and Surveyor while her witness was Peter. (PW2). PW1 paid the appellant Kshs. 220,000/= in cash leaving a balance of Kshs. 330,000/= to be paid in May 2021. Before May, the appellant requested for Kshs. 6,000/= which PW1 sent through the appellant's number; that there was a Covid lockdown to Migori and the Appellant asked her to deposit the money in an account registered in the names of Moronya Sirima Moranya where she deposited Kshs. 300,000/= on 28/5/2021 as per deposit slip exhibited. She sent the appellant another Kshs. 10,000/= through mobile banking on 6/8/2021. She met the appellant in late August 2021 so that they could finalise the transaction. They went to the Chief and she gave the appellant a further Kshs. 10,000/=being the final payment in the presence of the Chief; that the appellant took her to the shopping centre on his motorcycle to go and get copies of the documents but along the way, the appellant grabbed her bag with the phone inside , and sale documents and sped off; that thereafter he switched off his phone. PW1, reported to Isebania police station and was later informed that the appellant had been arrested. The appellant offered PW1 to farm the land for ten (10) seasons and he was released promising to refund the money but he failed to do so, was arrested and charged. PW1 denied that she had any other business deal with the appellant.



12. Machuga Moses (PW2), Assistant Chief of Nyametaburo testified that the complainant bought land in his area; that the appellant called him on 25/2/2021 and told him of his intention to sell part of his land; He requested PW2 to go to his home to draft an agreement. Present were the complainant, Appellant, and the appellant's younger brother, that a surveyor was called to measure the land and he (PW2) drafted the agreement; the purchase price was 550,000/=; that the appellant was paid Kshs. 220,000/= leaving a balance of Kshs. 330,000/= to be paid on 20/5/2021; that in May 2021, the complainant called to confirm to have deposited Kshs. 300,000/= in the appellants account. On 27/5/2021, the appellant called to ask PW2 to draft the final agreement that Linet said she had paid Kshs. 10,000/= through Mpesa and he drafted the agreement indicating that the price was fully paid and all parties signed the agreement; that the appellant and Linet left on a motor cycle to go to make copies of the documents at the cyber; that about 6:00p.m Linet called to inform him that the appellant had stolen the agreement, Phone and had disappeared and he advised her to report to the police. PW2 was given a warrant of arrest but the appellant fled his home for long. On 5/9/2021 PW2 got information that the appellant was back home and he called police to go arrest him; that they tried to settle the matter, the appellant was released but was rearrested when he failed to pay. PW2 identified the sale agreement he drafted and which was signed in his presence.
13. PW3 Peter Nyamasengere recalled that in January 2021, he met Moronya Sirima who requested him to get him a buyer for his land as he needed money for school fees. He got PW1 and he organised for the two to meet; that they met and the appellant showed the land measuring 272ft x 222ft and another 245ft x 218ft for Kshs. 550,000/=. PW3 confirmed that the complainant paid Kshs. 220,000/= as deposit. He witnessed the sale agreement in the presence of William Machugu, Jones Ruma Moronya brother to Appellant, now deceased. He confirmed that PW2 drafted the agreement; that later, PW1 informed him that after making the final payment, the appellant had followed her and he snatched the document and her phone; they could not trace the appellant at his home oR his phone.
14. PW4 PC Phanice Achungo was assigned this case to investigate. After getting the report of the theft from PW1, PW2 confirmed to have written the draft agreement which was signed in his presence. PW4 also received from the complainant the exhibits through which she paid the appellant.
15. The appellant opted to remain silent on his defence. It is one of the three ways that one is required to defend himself. The fact that he remained silent did not lessen the burden placed on the prosecution to prove its case beyond reasonable doubt. Although the appellant alleged that the trial court violated his right to fair trial under Section Article 50 (2) (g) and (h) of *the Constitution*, he did not substantiate the said allegation. He did not allude to it in his submissions. He who alleges must prove. There was no attempt to prove the said allegations. Besides, I see from the record of 17/1/2022 when the appellant was presented to court for plea, that the trial court informed the appellant of his right to counsel at his own expense. The said ground must fail for not having been substantiated.

Whether offence of theft was proved:

16. PW2 and PW3 corroborated PW1's testimony that indeed the appellant agreed to sell land to PW1 and PW2 drew the agreement which was signed in his presence by PW1 and the appellant while PW3 was PW1's witness. In fact, PW3 told the court that he is the one who sought out a buyer i.e the complainant after the appellant informed him in January 2021 that he had land to sell. It is PW3 who introduced PW1 to the appellant. The appellant has not challenged this evidence that he agreed to sell land to the complainant in January 2021 and that it was reduced into nothing when PW1 paid the last instalment and both parties appeared before PW2 to confirm the final agreement.



17. PW2 and PW3 also corroborated PW1's testimony that on 25/1/2021 when the sale agreement was agreed upon, the complainant (PW1) paid the appellant Kshs. 220,000/= cash. That fact has not been disputed. PW1 also produced a deposit slip from Equity Bank dated 28/5/2021 for Kshs. 300,000/= in account number 1870150915045 in the name of Moronya Sirima Moronya. Again, this fact has not been disputed. The complainant talked of having paid other smaller amounts of monies to the appellant, in Mpesa statements. After receipt of the money, the appellant called PW2 to draft the final agreement. I find that there was overwhelming evidence adduced by the prosecution confirming the appellant's intention to sell land to PW1 and that he was fully paid for the land.
18. The complainant was alone with the appellant when the theft allegedly took place. PW1 immediately reported to PW2 about it and also informed PW3 about it. The matter was immediately reported to the police who started a search for the appellant.
19. As regards theft of the phone, PW1 did not provide any evidence as proof that she ever owned such phone by producing a receipt or the IMEI number. It is was not enough to allege. There are ways to prove ownership of a phone which the prosecution never attempted to do. The complainant's evidence that the appellant snatched the agreement and disappeared is however not disputed.
20. As to whether the offence of obtaining by false pretences was proved; the offence of obtaining by false pretences contrary to Section 313 of the *Penal Code* is defined as follows:-

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.”
21. The said offence was considered in the case of *Francis Mwangi & Another vs. Republic* (2015) eKLR, the ingredients of the offence are as follows:-
22. From the definition, the basic ingredients of the offence can be summarized as follows:-
 - 1) The act of obtaining something capable of being stolen.
 - 2) Obtaining the thing by false pretence.
 - 3) Obtaining the thing with intent to defraud.
23. The definition of false pretence on the other hand is given under Section 312 of the *Penal Code* as follows:-

“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.”
24. The operative word under Section 312 is representation which is applicable in the following circumstances:-
 - 1) A representation by words, writing or conduct.
 - 2) A representation in either past or present.
 - 3) A representation that is false.
 - 4) A representation made knowing it to be false or believed not to be true.”



25. In *Oware vs. Republic* (1984) KLR 2001 the Court of Appeal said:-
A representation as to a future event cannot support a charge of obtaining money by false pretences”
26. In *R vs. Dent* (1955) 2 QB pp 594/5 Devlin J said:-
"a long course of authorities in criminal cases has laid down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law”.
27. Guided by the above authorities , a representation as to a future event does not constitute a charge of obtaining.
28. In the instant case, the appellant actually showed the complainant the land he wanted to sell to her in the presence of PW2 and PW3.
29. The complainant paid the whole purchase price as agreed but the appellant claimed to have changed his mind and denied intending to sell the land. PW1 told the court that the appellant wanted to change the agreement so that the complainant could only lease the land for sometime. I find that the promise did apply to the present and the appellant did obtain the money from PW1 using false pretences. I am satisfied the offence was proved to the required standard of beyond reasonable doubt.
30. In my view, the theft of the sale agreement was to further the offence of obtaining by false pretences. The appellant was trying to destroy the evidence supporting the sale of land. I find that the trial court arrived at the proper verdict convicting the appellant on both counts. I have no reason to interfere and I affirm the conviction.
31. As for the sentence, the appellant was handed the maximum sentence on both counts. In my view the circumstances were such that the appellant deserved a deterrent sentence. The sentences were ordered to run concurrently. I find no good reason to interfere with the sentence. I find no merit in the appeal and it is hereby dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 30TH DAY OF NOVEMBER, 2022.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Kaino for the State.

Appellant present in person.

Emma / Phelix – Court Assistant

