



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO. E018 OF 2021**

**ELIZABETH ACHIENG ABONGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from the judgment, conviction and sentence passed on the 22<sup>nd</sup> July 2021 by Hon. James O. Ong'ondo, Senior Principal Magistrate in Siaya SPM's Court Criminal Case No. 151 of 2020)***

**JUDGMENT**

1. The appellant herein is Elizabeth Achieng Abongo. She was charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the offence are that on the 28th December 2018 at Nyaminia sub-location, Yala Township Location in Gem sub-county within Siaya County, with intent to defraud, she obtained Kshs. 490,000 from one Judith Anna Agola pretending that she was in a position to sell a parcel of land No. East Gem/Nyaminia/1706 to the said Judith Anna Agola. The appellant pleaded not guilty to the charge, and after a full trial, she was found guilty of the charge. She was convicted and sentenced to serve probation for two years and to pay to the complainant the sum of Kshs 490,000 within six months of the date of sentence in default to serve prison term of the remainder term.
2. Aggrieved by the conviction and sentence, the appellant lodged her Petition of Appeal dated the 30<sup>th</sup> July 2021 and filed in court on the 19<sup>th</sup> October, 2021 with leave of court raising the following grounds of appeal:
  - a) *The learned trial magistrate erred in law by his failure to appreciate that the title subject of the dispute between the complainant and the accused was created by the County Survey office in or about 1998.*
  - b) *The learned trial magistrate erred in law and fact in his failure to appreciate that the land subject of this case actually exists on the ground save that the surveyor created it largely from a road reserve which action the appellant had no contribution to hence she cannot be blamed for the same.*
  - c) *The learned trial magistrate erred in law and in fact by his failure to appreciate that the title deed that the appellant was passing to the complainant was issued by the Land Registrar Siaya who made the 2 parties believe that it was genuine and capable of passing a good valid title.*
  - d) *The learned trial magistrate erred in law and in fact by his complete failure to appreciate the defence tendered by the accused person.*
  - e) *The learned trial magistrate erred in law and in fact by his failure to act and find that the matter before him was purely civil.*
3. The prosecution called 5 witnesses to establish a prima facie case against the appellant who was placed on her defence. She gave unsworn statement of defence.
4. The appeal was canvassed by way of written submissions and only the appellant filed her submissions.

**Appellant's Submissions**

5. It was submitted that the evidence of mens rea was not proved as there was no evidence adduced to show that the appellant knew that the land that she resided on was a road reserve which was corroborated by the surveyor who admitted that they created land in favour of the appellant's deceased husband 22 years ago, which land, 90% of it lay on a road reserve.

6. The appellant further submitted that there was no evidence that the title deed to L.R. No. East Gem/Nyamminia/1706 was created by the appellant nor with her connivance and that for that reason, it was inconceivable as to how the court concluded that there was overwhelming evidence of intent to defraud. It was her submission that the fraudsters in this case should have been the Surveyor that created the title number in 1998 and the Land Registrar who issued the title deed without whom the appellant would have had nothing upon which to base her intention to sell the land.

7. The appellant therefore submitted that for the intention to defraud, and an element of the offence of obtaining by false pretences to be proved, there must be mens rea and that the said intention must be proved beyond reasonable doubt. Reliance was placed on the cases of **Makueni HCCRA No. 21B of 2018 Stephen Ndungwa alias Kithuku v Republic** as well as that of **KAKAMEGA HCC Cr. Appeal No. 98 of 2016 [2017] eKLR, Danstone Kwaba Okwako v Republic** where the Court held *inter alia* that *the learned trial magistrate erred in law and fact in convicting the appellant on charges which were not supported by evidence and that had the trial court addressed its mind to the nature of the charge, the court would not have come to the conclusion it did as the charge of obtaining money through false pretences was not proved at all.*

### **Analysis & Determination**

8. I have considered the grounds of appeal and the submissions made by the appellant, the evidence on record before the trial court as well as the applicable law in this appeal. This court being a first appellate court is under a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion taking into account that it neither saw nor heard the witnesses testify. This was held in the case of **Okeno v Republic [1973] EA 32** and reiterated by the Court of Appeal in the case of **David Njuguna Wairimu v Republic (2010) eKLR**.

9. The offence of obtaining by false pretence is defined under Section 313 of the Penal Code which provides:

*“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.”*

10. Section 313 Penal Code sets out three essential elements of this offence which must be proved by the prosecution beyond reasonable doubt. The three elements are:

(a) *Obtaining something capable of being stolen.*

(b) *Obtaining it through a false pretence.*

(c) *Obtaining it with intention to defraud.*

11. The evidence adduced by the prosecution witnesses was as follows: PW1, **Judith Anna Agola** the complainant testified that the appellant informed her that she wanted to shift her home to Busia to which the complainant offered to buy the appellant's land. It was her testimony that the appellant asked for Kshs. 500,000 but they negotiated and agreed at Kshs. 490,000 purchase price which she paid to the appellant in her house on the 23/12/2018.

12. PW1 further testified that the appellant showed her the land and they made an agreement witnessed by her daughter. She stated that the appellant moved away at night telling her not to worry after which she later demanded for Kshs. 20,000 for transfer of title and later Kshs. 35,000.

13. The complainant testified that she later went to the Lands Office at Siaya where she found the appellant with one Mary who informed her to go for the title after one week which was curious to her as there was no surveyor but Mary told her that the surveyor called Fred had gone there and surveyed the land.

14. PW1 testified that when she started to construct on the land, her daughter, PW2 went to check the map and found that the land did not exist and when she inquired of the same from the Land's office she was informed by Mr. Oyugi that there was no parcel on the ground which prompted her to report the matter to the police.

15. In cross-examination, PW1 stated that the appellant was her neighbour and that she had stayed in Yala from 2007. She further stated that the appellant informed her that she wanted to move to Busia and asked the complainant if she could buy the appellant's land. She further stated that the appellant informed her that she was going to do succession over the suit land to change it into her name which she did and presented the complainant with a document in her name. In re-examination, PW1 stated that the land she was sold was  $\frac{3}{4}$  a road reserve and therefore it did not exist on the ground.

16. PW2, Eunice Akoth Manyasa, the complainant's daughter testified and corroborated the complainant's testimony and further stated that after paying the Kshs. 35,000 asked by the appellant to facilitate the transfer, the appellant refused to give them receipts but signed acknowledging receiving the money.

17. It was her testimony that after receiving the title deed in the complainant's name, PW2 went for the map but noticed that the land was not on the map forcing her to call the appellant who came and confirmed the same then disappeared and switched off her phone.

18. In cross-examination, PW2 stated that they visited the land and purchased it and even saw the title deed but that the surveyor told them that the parcel was a road reserve. She further stated that she was not aware whose mistake it was to issue a title deed to land on a road reserve.

19. PW3 Harrison Odongo, a surveyor based at Siaya testified that the DCI vide a letter dated 29.11.2019 requested his office to investigate the suit land and visit it to confirm whether the parcel existed on the ground which he did and confirmed that 90% of the land lay on a road reserve passing by the gate of St. Mary's School Yala while the rest lay in parcel No. 254.

20. He further testified that when he went through the records, he found a suspicious mutation done in 1998 which generated number 1706, the suit land, which mutation could not be genuine. He produced the mutation as PEx 8 and his report as PEx 3.

21. In cross-examination, he reiterated that the suit land title was created in 1998 and that it was not genuinely created. He stated that he got the mutation at their office which he stated was not a custodian of fake documents.

22. He further stated that parcel Nos 1105 and 254 existed on the ground and that the suit land, parcel 1106 was not a combination of the two as it would have the acreage of both and further that the suit land was not put on the map index as it was a road reserve. He further stated that he visited the ground and could not see the land but only farming done on the road reserve.

23. PW4 Mary Akoth Achieng testified that she was a Senior Support Staff at the Ministry of Lands Siaya and that on the 20.6.2019, PW1 and PW2 went to her office requiring transfer of land so she took the forms which they had and took them to the Land Registrar Mr. Macharia who informed her to tell them to return after a week and he directed her to type a title deed.

24. In cross-examination, she stated that she took all documents given to her by the seller to the Land Registrar and did not verify the said documents as that was the work of the Land Registrar. She further stated that she did what she was told by her boss who had given her the documents to type.

25. PW5 No. 232549 Inspector Elijah Warui Njuguna testified that the complainant reported the case at Yala Police Station claiming that someone had conned her. He testified that the Land Registrar gave them the following documents to aid in their investigations:

- a) *Mutation Form creating the land No. East Gem/Nyamninia/1106*
- b) *Transfer of land document*
- c) *Green card/original*

26. He further testified that the complainant showed them the sale of land agreement between her and the appellant as well as the title deed but on going to the location, he found there was no such land but a road reserve near St. Mary's Yala School. PW5 produced the Sale Agreement as PEx 1, Title Deed as PEx 2, Surveyor's Report as PEx 3, Title Deed for Morris as PEx 4, Green Card as PEx 5, Map Index as PEx 7, Mutation Form as PEx 8, Certificate of official search dated 29/8/2019 as PEx 9, Receipt for Kshs. 500 as PEx 10 and Transfer as PEx 11.

27. In cross-examination, he testified that according to the record, the suit land was registered on 10/6/1998 in the name of Maurice Abongo, the appellant's late husband but by 9/1/2019 the suit land was registered in the appellant's name. He further stated that according to the green card, the appellant transferred the land to the complainant and that the title was genuine as it came from the Land Registry but that the title deed was erroneous as there was no land on the ground.

28. PW5 further stated that the appellant showed the complainant a road reserve which the complainant assumed belonged to the appellant. In re-examination, he stated that the complainant entered into the sale of land agreement to buy land from the appellant at the instigation of the appellant.

29. Placed on her defence, the appellant gave unsworn testimony to the effect that the suit land belonged to her grandfather who died in 1995 and sub divided the same to her husband who died in June 2000. She stated that she was tilling and living on the land and that the complainant was her neighbour who requested her to sell the land to her.

30. It was her testimony that she took her title to the lands office to confirm if it was in the name of Morris where she met Mary who told her that she could change it to her name which was done.

31. She further stated that she entered into an agreement with the complainant for sale of the suit land which was done and the title changed to the complainant's name. She denied obtaining money by false pretense and stated that the complainant was using the land to date.

### **Determination**

32. I have considered the evidence before the trial court, grounds of appeal and filed submissions on behalf of the appellant. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant her conviction and whether the sentence imposed should be interfered with.

33. From the evidence adduced by both the prosecution and the defence, there is no dispute that LR No. East Gem/Nyamninia/1106 existed as far back as 1995. The appellant herself was not the original owner of the land and only gained title after the demise of her husband Morris Abongo.

34. The evidence adduced showed that even the lands office acknowledged the existence of the land and thus the suit title passed from the appellant's grandfather, to her husband and eventually to herself without raising any alarm. Further, the appellant herself believed the land to

be genuine and she had lived there and tilled it for many years.

35. There is no doubt that the Appellant received a sum of Kshs. 490,000 from the complainant, which is something capable of being stolen under the law. However, it is not the taking of money that constitutes the offence, rather, that the money was taken with the intention to defraud. The fraud is found in the false pretence as was held in the case of **Joseph Wanyonyi Wafukho v Republic [2014] eKLR**.

36. A false pretence is defined in 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.”***

37. In the instant case, the question is whether the prosecution proved beyond reasonable doubt that the appellant made her representation to the complainant knowing the same to be false or did not believe the same to be true.

38. The evidence adduced by the prosecution clearly point to an appellant who at all times knew the land was legitimate. The same position was held by the Lands Office at Siaya as was evidenced by the Green Card produced as PEx 5 by PW5 showing the history of the land as being owned by the appellant’s deceased’s husband Maurice Abong’o Ngolo as early as 10.6.98.

39. It therefore follows that albeit the said land was later found to be on a road reserve, it was the mistake of the Lands office who created land on the road reserve and issued title of the said land. The title was issued to the appellant’s husband and the appellant was only but a beneficial owner thereof. From the evidence adduced, it is clear that the land is a road reserve and there is no evidence that the appellant fraudulently obtained such title to the said land. The complainant was under a duty to do due diligence to establish whether the land she was buying was a road reserve of not before purchasing the same from the appellant since the two were neighbours. In my view, the trial court erred in law and fact in convicting the Appellant on a charge which was not supported by evidence. There is no proof that the appellant falsely and or fraudulently pretended to be the owner of the land she sold to the complainant. There was evidence that the land was in existence save that it was on a road reserve and the people responsible for creating land on a road reserve and issuing title were the survey and lands officers long ago in 1998. This does not, however, absolve the appellant from civil liability for recovery of the sums of money received from the complainant being consideration for sale of land that is a road reserve and which land belongs to the Government of Kenya and therefore the Lands Office had no authority to issue title for the said road reserve land. I find the appeal merited, the appellant’s conviction is hereby set aside and sentence imposed is hereby quashed. The appellant, if in prison, unless otherwise lawfully held, is hereby set at liberty forthwith.

40. File closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF JANUARY, 2022**

**R.E. ABURILI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR ASHIOYA ADVOCATE FOR THE APPELLANT-VIRTUALLY**

**N/A FOR RESPONDENT**

**CA: MODESTAR AND MBOYA- VIRTUALLY FROM SIAYA HIGH COURT**