



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 42 OF 2020

MONICA OKENYURI KEBATI.....APPELLANT

VERSUS

STATE.....RESPONDENT

(Being an appeal from the proceedings, Ruling, Judgment and Sentence of the Learned Chief Magistrate Hon. Nathan Shiundu dated and delivered in Kisii CMCCR NO 143 OF 2017)

JUDGMENT

1. The appellant, Monica Okenyuri Kebati, was charged with 2 counts of obtaining money by false pretence contrary to **section 313 of the Penal Code**, as well as an alternative charge of cheating contrary **to section 315 of the Penal Code**. In addition she was charged with a third count of personation **contrary to section 382 of the Penal Code**. After being taken through a full trial, the appellant was found guilty and convicted in respect of count 1 and 2, particulars of which were as follows;

COUNT I: OBTAINING MONEY BY FALSE PRETENCES CONTRAY TO SECTION 313 OF THE PENAL CODE

On the 13th day of February 2016 at Kisii Township within Kisii County, with others not before the court and with intent to defraud obtained sums of Kshs 150,000/- from one EDWARD MAKORI ONGANGA by falsely pretending that you had a parcel title No. CENTRAL KITUTU/DARAJA MBILI/2561 and that you would sell the land to EDWARD MAKORI ONGANGA a fact you knew to be false.

COUNT I: OBTAINING MONEY BY FALSE PRETENCES CONTRAY TO SECTION 313 OF THE PENAL CODE

On the 1st day of March 2016 at Kisii Township within Kisii County, with others not before the court and with intent to defraud obtained sums of Kshs 700,000/- from one EDWARD MAKORI ONGANGA by falsely pretending that you had a parcel title No. CENTRAL KITUTU/DARAJA MBILI/2561 and that you would sell the land to EDWARD MAKORI ONGANGA a fact you knew to be false.

2. The applicant dissatisfied with the findings of the trial court has appealed on the conviction and sentence by filing a petition of appeal on 4th November 2020 which was later amended on 15th December 2020 and raises the following grounds;

1.The Learned Trial Magistrate misdirected himself in law in finding and holding against the weight of evidence that the charges of obtaining money by false pretense contrary to section 313 of the Penal Code under counts I&II of the charge sheet had been proved as against the appellant to the required standard.

2.The Learned Trial Magistrate erred in law in convicting the appellant without evaluating the evidence adduced by the prosecution which evidence otherwise does not support the charges upon which the conviction was founded.

3.The learned Trial Magistrate erred in law and fact by relying on hearsay evidence which evidence was not corroborated by direct and independent evidence linking the appellant to the alleged criminal acts mentioned in the charge sheet.

4. The Learned Trial Magistrate erred in law and fact by failing to consider the mitigating facts given by the Appellant's Counsel which would have persuaded the Learned Magistrate to give a non-custodial sentence under the prevailing circumstances.

3. This being the first appellate court, it is my duty to evaluate and reconsider afresh the evidence on record so as to arrive at my own conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses (see: **Okeno v Republic [1972] EA 32**).

4. A summary of the prosecution case was that the accused personated Esther Nyang'aru Ratemo and obtained Kshs 1,000,000/- from Edward Makori Oganga (Pw1).

5. Pw1 testified that he met the accused person on 10th and 13th February and they discussed the sale of her land. The parties signed an agreement for sale with the appellant posing as ESTHER NYANG'ARU RATEMO who received Kshs 150,000/-. A further agreement was entered into on 23rd February 2016 and a further Kshs 150,000/-. Subsequently on 1st March 2016, Pw1 paid Kshs 700,000/- to a KCB Account held by ESTHER NYANG'ARU RATEMO. He later learnt that the applicant was not the owner of the land and through the green card obtained by the CID. According to the green card the land was owned by Casper Ratemo.

6. Jared Gisoire testified that he witnessed Pw1 give the appellant a total of Kshs 300,000/- on two occasions. He also recalled that he saw a cheque of Kshs 700,000/- in the appellant's name and witnessed an agreement of sale at the office of Ochoki & Co. Advocates.

7. Pw3 testified that on 14th January 2017 he took Pw1 to the accused's home after Pw1 gave him a description of the appellant. Corporal Wilson Kiptum No 63651 (Pw4) testified that on the same day he received a report from Pw1. The accused had received money from Pw1 for sale of land and subsequently opened a bank account No. 1172764xxx.

8. When put on her defence the appellant submitted that she did not sell the land to the complainant but the same was sold by ESTHER RATEMO. She testified that the signature on the agreement was not hers and that no specimen of her signature was taken for examination. She further denied having an account with Kenya Commercial Bank.

ANALYSIS AND DETERMINATION

9. In this instant appeal, the main issue for determination is whether the prosecution proved to the required standard that the appellant committed the offence with which she was charged. The offence of obtaining by false pretences at **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.”

10. In **Francis Mwangi & another v. Republic [2015] eKLR**, the ingredients of the offence of obtaining by false pretences were disclosed as follows:

“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 pretences.*
- 3) *Obtaining the thing with intent to defraud.*

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.”

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.”*

11. In this case the appellant submitted that there was no evidence called to prove that Esther Nyang'aru Ratemo is also known as Monicah Okenyuri Kebati. The evidence by the prosecution indicates that the complainant specifically dealt with Esther Nyang'aru Ratemo but not the appellant.

12. Pw1 testified that he met with the appellant several times. He gave the description of the appellant to Pw3. The appellant was also identified by Pw2 who had seen the appellant on two occasions. The appellant thus obtained a total of Kshs 300,000 during two instances from Pw1 in the presence of Pw2 knowing too well that she was not the owner of parcel No. CENTRAL KITUTU/DARAJA MBILI/2561. There was evidence that a further Kshs 700,000 was deposited into an account that she had given to Pw1. As a result of false representation the appellant caused Pw1 to lose a total of Kshs 1,000,000/-.

13. Pw2's evidence is evidence of an eye witness who was present and saw the appellant receive Kshs 150,000/- from the complainant twice. There is no serious challenge to the credibility of Pw2's evidence neither is there any evidence to demonstrate ill will against the appellant by Pw2. Upon re-evaluation of the evidence, I find it credible and reliable evidence which corroborates the complainant's evidence thus rendering the conviction of the appellant safe.

14. Looked at in totality, the prosecution's evidence against the appellant proved the charges to the required degree. The trial court's finding cannot in the circumstances be faulted.

15. Under **section 313 of the Penal Code** the offence is considered a misdemeanor and anyone found guilty is liable to imprisonment for three years. In this case the appellant was sentenced to 1 year imprisonment in respect of count 1 and 2, with the sentences running concurrently. I find that the said sentence is not excessive and order that the appellant proceed to serve the remaining balance of her jail term.

16. The appeal lacks merit and is hereby dismissed.

DATED and DELIVERED at KISII this 23rd day of February, 2021

A. K. NDUNG'U

JUDGE