



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 33 OF 2019

KALUME NGUMBAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the state

J U D G M E N T

The appellant was charged before the Principal Magistrate's Court at Lamu with 2 counts of Obtaining by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence in the first count were that on the 11/6/2016 at about 9:00am at Hindi Town in Lamu West Sub-County, the appellant with to defraud, obtained from **Aliduh Abai Issa** cash to tune of Kshs.100,000/= by falsely pretending that he will sell him a quarter of an acre piece of land.

In the second count, The particulars of the offence were that on the 10/6/2016 at about 1300hrs at Hindi Town in Lamu West Sub-County, the appellant with to defraud, obtained from **Aliduh Abai Issa** cash to tune of Kshs.300,000/= by falsely pretending that he will sell him a half an acre piece of land.

The appellant denied the charges levelled against him, and the matter proceeded to full trial. He subsequently found guilty on both counts and sentenced to a fine of Kshs.100,000/= in default one year imprisonment in count one. In count two he was fined Kshs.200, 000/= in default 2 years imprisonment. He was dissatisfied by the learned trial magistrate findings and he preferred the instant appeal on the grounds that:

- (a) That he is remorseful for having been involved in the commission of the offence and he regrets his actions.*
- (b) That he is the sole breadwinner for his family, and without him they are sunk into poverty.*
- (c) That his conviction and sentence were harsh and excessive.*

Facts

(PW1); Aliduh Abdi Issa testified that on the 11/6/2016 he met with the appellant who was in company of Assistant Chief Lausi. The said Assistant Chief told the witness that the appellant was selling land. The appellant confirmed the same and told the complainant, PW1 that he was selling land measuring a ¼ of an acre for Kshs.150,000/= and that the land was situated in Saba Saba Area. In considering to buy the land, **(PW1)** negotiated with the accused and agreed to lower the price to Kshs.100,000/=.

On the 9/7/2016 the accused then met with **(PW1)** and agreed to sell him an additional ½ an acre at Kshs.300 000/= in the presence of Assistant Chief and **Mahat**. Thereafter, the chief and the appellant showed **(PW1)** the plots of land that he had purchased. **(PW1)** then heard that the land he purchased had an ongoing case. He then went to Assistant Chief Lausi who informed him that the case had been concluded. PW1 went to the said plots and found someone who was staying there who then told him that his name is **Stephen Ngige** and that he is the registered owner of that parcel of land. **Mr. Ngige** told **(PW1)** that many people had come to the plot claiming that the appellant sold them the land.

On the 29/12/2016, (PW1) went and reported that accused to **Chief Jamal** and the appellant was summoned by the chief. Upon reaching the Chief's place, the appellant denied selling the land to (PW1) and disowned the sale agreement. They later went to the inspector of administrative police where the appellant denied selling land to (PW1). The appellant alleged that (PW1) had lent him money.

(PW1) went and carried out search after which he discovered that **Mr. Stephen Ngige** was the registered owner of the said parcel of land. The search was dated 23/3/2017 and the same proceed in court as Pexh 4. The accused had sold to him Plot No. 269 which was owned by the said **Mr. Ngige**.

(PW2), **Ahmed Mohamed Lausi** testified that on 11/6/2016, the appellant approached and requested to introduce him to (PW1). He further testified that he required money to attend to a family case in Garsen. He told (PW2) that if he finished the case he would allocate ¼ of an acre to (PW1). He started that (PW1) gave the appellant money to the tune of Kshs.100,000/= after which they reduced the agreement unto writing. The appellant later approached (PW1) and offered to sell him land for Kshs.300, 000/=. (PW2) witnessed (PW1) paying the appellant the said asking price. The agreement was also reduced into writing. (PW2) further told the court that the appellant failed to transfer the land to (PW1). He hid behind a purported family dispute which prevented him from transferring the said land to (PW2).

(PW3); **Stephen Ngige Njuguna** testified that he entered into an agreement to purchase Plot No. Lamu/Hindi Magogoni/269 on 16/1/2002 with the appellant's family. He was then issued with a title deed of the said plot in 2007 and produced a copy of in court which was marked as Pexh 5. He further subdivided the plot. He also told the court that the appellant took him to court with his elder brother, on charges of forgery vide Lamu P.M.CR. 571 of 2014. However, the case was dismissed, he produced the judgement of court, marked as Pexh 12.

He was later informed that the accused had sold ¾ acre of his land to (PW1). He was called to give a statement at Mokowe Police Post.

(PW4); **CPL, Pascal Malala** the investigating officer in the matter produced several exhibits in support of the prosecution case.

To his defense, the appellant testified that in the year 2013 he visited the Chief to get a succession letter. He was issued with the latter dated 22/7/2013 marked herein as Dexh1. He then went to the lands office to carry out a search on the said piece of land. He said the land belonged to his father. He however found out that the land was registered to Stephen Ngige. The appellant then went and reported **Stephen Ngige** and his brother **Justus Charo Ngumbao** to the authorities. The Appellant produced a copy of the charge sheet which was marked as Dexh 4. He later followed up on the succession cause and filed a suit at the lands court at Malindi. He then met with **Chief Lausi** and (PW1) in Lamu town. (PW2) asked him how far the succession had gone and he told him that he had been issued with letters but her required money to conclude the matter.

The appellant further testified that (PW1) then agreed to lend him Kshs.400, 000/= to finalise the succession cause on the promise that upon it's completion, he would allocate (PW1) a portion of the family land. Their agreement was that the appellant would give (PW1) some 3 parcels of land measuring ¼ an acre each. The agreement was reduced into writing. The appellant also filed a land case against (PW3).

Lastly, the appellant testified that he has not been able to conclude his case. He has asked (PW1) to be patient since the agreement was that he could get land after the succession cause is concluded. He is still in the process of transferring title but since he has been remanded in custody in this case.

(DW2); **Harison Katana Ngumbao** told the court that the appellant is his brother. (DW2). testified that they had gone to do a search in respect of their family land. However, they found that their father's title had been cancelled. He said **Stephen Ngige** and their elder brother **Justus Charo** were the culprits. He informed the court that the purpose of his testimony was to confirm that there is an ELC Case in respect of the subject land herein..

Submissions.

The appellant tendered submissions in support of the grounds of appeal. He seems to be more focused on providing the court on the mitigating circumstances which he asks the court to consider for purposes of reducing his sentence. He averred that when he resisted arrest he was under the influence of alcohol. Further he seems to suggest that the police officer who arrested him attempted to siphon some money from him to the tune of Kshs.10,000/= which motivated the charges on resisting arrest. He also stated that he is the sole bread winner for his family and that he has already been rehabilitated as he has also undergone training and acquired some skills which may help him outside the bars if a chance is given to him to reunite with the rest of the Kenyan society.

Mr. Franklin Sirima, the learned Counsel for the State filed submissions in opposition to the appeal. The Learned Counsel testified that the prosecution case against the appellant was proved beyond reasonable doubt. He submitted that the ingredients of the offence of obtaining as set out in the case of **Francis Meangi and Another v Republic (2015) eKLR** were all proved beyond a reasonable doubt. In summation, Counsel argued that since the appellant knew that the land belonged to someone else and therefore could not pass title to the complainant and proceeded to receive money from the complainant, and that is indicative of the intention to defraud. He, therefore, argued that the appellant's appeal must be dismissed for it is without merit.

Findings and Determination

The salient elements of the offence of obtaining by false pretences are well set out in the case of **Francis Mwangi & Another v Republic (2015) eKLR** as correctly cited by the learned counsel for the Respondent. They are disclosed as follows:

“From the definition, the basic ingredients of the offence can be summarised as follows:

- 1. The fact 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 pretences is given in terms of Section 312 of the Penal Code as under:

“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 a representation that is applicable in the following circumstances:-

- 1) A representation by words, writing or conduct.*
- 2) A representation in either past or present.*
- 3) A false representation.*
- 4) A representation made with full knowledge that it is false or believed to be untrue.*

Applying the foregoing principles of law in the instant matter, it is common knowledge that a piece of land is capable of being stolen. Was the land obtained by false pretences or did the appellant attempt to sell the said land while pretending to be the owner? It was the evidence of **(PW1)** that the appellant approached him wanting to sell some pieces of land. They reached an agreement on the sale of the said land. **(PW1)** testified that he gave the appellant a purchase price of Kshs.100,000/= for a quarter an acre and Kshs.300,000/= for half an acre. The sale agreements in respect of the said sale were produced before the trial court. The land in question was not registered in the appellant's name. Further, the appellant had full knowledge that he did not have the legal capacity to sell the land to sell to PW1 as one can not sell what they do not own. He had no colour of right to sell or transfer the said land to the complainant.

The appellant testified before the trial court that the land had been fraudulently transferred to **Stephen Ngige Njuguna**. He produced proceedings for a criminal case wherein **Stephen Ngige** and **Justus Ngumbao** we're charged with fraud and intermeddling. **(PW3)**, **Stephen** brought evidence in form of a judgement vide Lamu Criminal Case No.571 of 2014 delivered on 2/11/2015.

The appellant was well aware that the land belonged to someone else and that he could not pass title in the circumstances. He does not deny having signed both of the agreements of sale produced before court. He went ahead to receive monies purporting to sell land knowingly that he did not have title to, and that is indicative of an intention to defraud. In the process, there was no mention by the appellant that the land was subject to a succession cause. That therefore rebuts the appellant's defence that he was being lent money to conclude the succession and the Land case.

Therefore, one can only deduce that the appellant made a false representation to the complainant that he was in a position to sell him a ¼ of an acre as well as an additional ½ an acre which he knew very well that he was not in a position to sell. The appellant did that with an intention to defraud the complainant as **(PW1)** was not aware that the appellant was not the registered owner of land title Number **Lamu/Hindi Magogoni/269**. The complainant would not have paid the appellant the said monies if he had informed of that fact.

I therefore find the prosecution to have proved their case against the appellant beyond reasonable doubt that the appellant obtained Kshs.100,000 and Kshs.300,000/= from the complainant by false pretences with intention defraud him through selling to him land he does not own, a thing capable of being stolen. On sentence, I find that the appellant was properly sentenced within the bounce of the law and I have nothing before me which motivates the court to interfere with the sentence imposed on the appellant by the learned trial magistrate.

Disposition.

The upshot is that I find the appellant to have been properly convicted and sentenced under Section 313 of the Penal Code on both counts.

The appeal is hereby dismissed on both conviction and sentence for it is without merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE