



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 140 OF 2017

ALBERT KIPKURUI CHEMITEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no 470 of 2014 delivered on the 16th day of March, 2017 by Hon. R. Yator, SRM]

JUDGMENT

1. The appellant was on 16/3/17 convicted and sentenced to imprisonment for 2 years for the offence of obtaining money by false pretence contrary to section 313 of the Penal Code. The appellant appealed on grounds principally relating to the sufficiency of evidence to convict and harshness of the sentence for not giving an option of a fine considering the advanced age of the appellant. Pending his appeal the appellant was released on bail by this Court on 28/3/17.

2. At the hearing of the appeal, Counsel for the appellant urged that the prosecution's evidence was not consistent and cogent, and could not therefore be relied on to convict the appellant. Counsel pointed to the testimony of the complainant where she said that there were no witnesses when she gave the money but on cross-examination stated that there was a witness who saw him give the money. On account of this self-contradiction by the complainant, the appellant urged that the appeal should succeed. Counsel further urged that the trial Court did not consider the mitigation and age of the appellant at 67, to whom a custodial sentence without this option of a fine was inappropriate.

3. Counsel for the DPP did not oppose the appeal. She agreed with the submissions of the appellants' Counsel and stated that during cross-examination of PW1 the witness had stated that there was a witness to the giving of the money and later contradicted herself stating that it was only the appellant and herself. It was contended that the evidence of Pw1 as to how the money changed hands is not corroborated.

Counsel further urged that Pw3, the purported witness to the giving of the money denied knowing anything about the transaction, even after being declared hostile by the trial Court.

4. In exercise of the duty of the 1st appellate Court, and upon considering the evidence before the trial Court, this Court must find that the charge of obtaining by false pretence has not been proved because of the inconsistencies in the evidence of the complainant as to the payment of the money allegedly obtained by false pretence. If the payment is not proved, there could be a basis for convicting the accused. The witness who could have supported the complainant's evidence of payment, Pw3, denied witnessing the payment or being present at the place where the transaction is alleged to have taken place.

5. The two statements of the complainant in examination-in-chief and on cross-examination are distinctly contradictory and the Court cannot choose to accept one over the other. In examination-in-chief, the witness PW1 said:

"I gave him the money as he said he had a land and I believed him as a councillor and church elder and due to his age. We were only the two of us when I gave him money and there was no witness. He never gave me any land and I waited and this is my sixth year and he has never given me the shamba nor the money and in fact I reside at strangers."

On cross examination, the witness was referred to her statement and said:

"PW1 referred to the statement page 3 paragraph 2 , "I feared to give him money without any witness and we were near office of advocate and I saw Joseph Lorgar who is my neighbour and I called him to one witness what I was about to do."

That is the correct position. I called Joseph as a witness so to confirm the same as the amount of money which was large. I did not recall to go back to advocate and enter agreement. I did not see the land before I gave out money and I did not see any agreement/title. He was to sell me 2 acres and I do not know if the police recorded the 2 acres as I was explaining as [they] record.

I took time the report to the police as the accused kept telling me to wait so as to give me land.”

6. I find it also incredible that the complainant PW 1, who had just been out transaction a sale of land as a vendor to another PW2 Penina Leboo who paid her Ksh 260,000/= in cash before an advocate, would have in her turn to purchase land give the whole money to the accused without the transaction being witnessed by an advocate or other person, and entered into an agreement for sale.

I entertain doubt whether the money was paid to the accused at all despite the accused’s good standing as, in the words of the witness PW1, “*a councillor working in the government and a church elder*”, and if it was paid whether it was for the purpose of purchase of land as alleged by the complainant. The complainant could not explain why it has taken her 6 years to follow up on the matter despite her having had to live with strangers for lack of the land which the appellant was alleged to sell to her.

7. There must be something of untruthful testimony in the evidence of PW1 and the case of ***Ndungu Kimanyi v. R*** (1979) KLR 282 cited by the counsel for the appellant is on point, that “*the witness upon whose evidence it is proposed; to rely should not create an impression in the mind of the court that he is not a straight forward person, trustworthiness or do (or/say) something of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence*”.

The evidence of the complainant PW1, herein, gives the impression of an untruthful witness.

8. Of course, sentencing is in the discretion of the court, and I have not heard anything in the mitigation of the appellant that he is 67 years of age that would on the test of ***Wanjema v. R*** (1971) EA 493 impeach the sentence of imprisonment for 2 years without fine. Section 313 of the Penal Code provides for the offence of obtaining by false pretence a penalty of imprisonment for three years. Of Course, under section 26 (3) of the Penal Code “*a person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment*”, but this is the discretion of the court on a case to case basis.

Orders

9. Accordingly, for the reasons given above, I find the conviction of the appellant to be unsafe in view of the contradictions, in the prosecution evidence, and I am consequently unable to uphold the decision of the trial Court.

10. The appellant is, therefore, acquitted of the charge of obtaining money by false pretence contrary to section 313 of the Penal Code, and the conviction therefor by the trial Court is quashed and the sentence of imprisonment for 2 years imposed on him is set aside.

11. The sureties for the release on bail of the appellant herein are discharged, and securities may be returned to the depositors.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF JANUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.