



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 50 OF 2018

ROBERT KIMUTAI KOSGEIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable N. Moseti in Eldoret Chief Magistrate's court Criminal Case No. 4643 of 2012 dated 18th July, 2018)

JUDGMENT

The appellant was charged with the offence of obtaining money by false pretence contrary to *Section 313* of the *Penal Code*. The particulars of the offence are that on 17.6.2012 at Eldoret Township Uasin Gishu District with the intent to defraud, obtained Ksh 480,000/= pretending that he was in a position to sell a plot Block No. 6/232 a fact he knew was false. The matter proceeded to hearing and the appellant was convicted for the offence of obtaining money by false pretence contrary to *Section 313* of the *Penal Code*. The second count was dismissed for lack of evidence. He was sentenced to serve two years imprisonment.

The appellant dissatisfied with the judgment and sentence of the lower court preferred an appeal citing the following grounds:

- i. That the learned magistrate erred in law and fact by failing to observe that the prosecution did not prove the elements of the offence of obtaining by false pretence.*
- ii. That the learned trial magistrate erred in law and in fact by completely disregarding the evidence of the appellant whereas there was no evidence in law to warrant and/ or sustain a conviction at all.*
- iii. That the learned trial magistrate erred in law and in fact by failing to give sufficient regard to the appellant's submissions.*
- iv. That the learned magistrate erred in law and in fact in failing to observe that elements of the offence of obtaining by false pretence were not proved and specifically that the fact of misrepresentation was not demonstrated.*
- v. That the learned magistrate erred in law and in fact in failing to observe that the appellant was convicted against a backdrop of insufficient and contradictory evidence.*
- vi. That the trial magistrate did not appreciate that the matter before it was civil and not criminal in nature based on the contractual dealings between the appellant and the complainant.*
- vii. That the learned magistrate erred in law and in fact by failing to address to himself on the exceptions to the offence of obtaining by false pretences.*
- viii. That the trial court erred in law and in fact in failing and/or ignoring the appellant's defence that the agreement between the appellant and the complainant related to future events and therefore the offence of obtaining money by false pretence could not arise.*
- ix. That the trial magistrate erred in law and in fact in failing to take into considerations the defence put forward by the appellant.*
- x. That the trial court did not comply with the provisions of the criminal procedure code cap 75 Laws of Kenya.*
- xi. That the sentence imposed was manifestly excessive on count 1 without an option of fine.*

xii. That the learned magistrate erred in law and in fact in failing to consider the issues raised in mitigation among other factors while sentencing the appellant.

Reasons wherefore the appellant prays for the orders:-

- i. That this appeal be allowed in its entirety
- ii. That the conviction be quashed
- iii. That the sentence be set aside and the appellant be set at liberty.

EVIDENCE

The prosecution opened its case by availing the complainant(PW1) Grace Kwamboka who testified that in May 2011 she met Philemon Chemoiwo and asked him to find land for her to buy. Philemon came with the accused and they went to Kigen Advocate and entered into a Land sale agreement. She paid Ksh 480,000/= to Robert Kimutai. The purchase price was Ksh 1,450,000/=. On 11.4.2011 she paid him Ksh 150,000/=. However when she went to the land she was purchasing she found someone else fencing it. She went with Philemon to the advocate and made an agreement that if Robert failed to give her the land Philemon would do so. The land was never given to her and one day when she saw them, she made a report to the Eldoret OCS who effected arrest. She had paid a total of Ksh 800,000/=. She referred to the acknowledgement vouchers as proof of payment. On cross-examination she stated that she never saw the land title deed and they had never agreed on when she would occupy the land. The amount she had paid had never been refunded to her, Robert Kimutai was the seller whereas Philemon was the broker.

Wilson Kigen (PW2) testified and averred that he was an advocate of the High Court of Kenya and he drafted an agreement between Robert Kimutai Kosgei who was the vendor, Grace Kwamboka Oura the purchaser and Philemon Kibet Chemoiwo as the witness. The land parcel no. Eldoret Municipality Block 6/231 was to be sold to the complainant, the purchase price was Ksh 1,450,000/= and upon signing the agreement the purchaser paid Ksh 480,000/=. The purchaser paid ksh 150,000/= on 5.7.2011, on 10.7.2011 she paid ksh 70,000/=. On 20.7.2011 she paid ksh 100,000/= to Robert Kimutai.

On cross-examination he stated that he did not look at the certificate of search. He signed the sale agreement, there was an error on the date showing 11.4.2011 instead of 17.6.2011, he was not aware if the land had been transferred to the purchaser.

Moses Kirui (PW3) testified that he was a land registrar. He had a certificate of lease showing the land in question which was being sold was L.R No. Eldoret/Block 6/231 measuring 0.2750 ha which was owned by Kisekem Ltd. The land was a lease hold for 99 years starting the 4.11.1985. It had been encumbered to National Bank of Kenya for a loan of Ksh 1.500.000/=.

The prosecutions case was closed and after submissions the court found the prosecution had established a prima facie case against the accused, he was therefore put on his defence.

3. Defence case

The accused (DW1) testified that he sold plot no. L.R No. Eldoret Municipality/ Block 6/231 which was half an acre to the complainant for a consideration of Ksh 1.450.000/=. The complainant paid a deposit of Ksh 480,000/=. The next installment was to be Ksh 250,000/=. The land was his having bought it on 10.6.2010, he produced the sale agreement of the purchase of the land on 10.6.2010. The complainant was in arrears, he had never sold to anyone else the suit land, and he did not know if anyone was on the suit land. The complainant had sued him in another case Eldoret CMCC No.438/13 for recovery of money and he had been paying the complainant's loan at Faulu Bank.

On cross-examination he testified that the complainant bought land from a different person. It was not true he was selling land that did not belong to him and that he had refunded Ksh 480,000/= to the complainant. He had bought the plot from Joseph Kibet Ndiema.

Christopher Alwanga Shitubu (DW2) testified that PW1 had taken a business and school loan from their group and when she was in default the accused started paying for her and he had paid a total Ksh 200,000/= owed to Jawabu group.

Appellant's submissions

It was counsel's submission that the appeal was against the conviction and sentence, which was harsh. The offence the appellant had been charged with had an option of a fine. The offence required a demonstration that what was obtained was capable of being stolen and there was intention to defraud. There was a sale agreement and payment was to be by way of installment. The land in question belonged to the appellant, lack of the actual title deed was not enough ground to hold that the land never belonged to the appellant. Further failure to transfer the title in itself was not enough evidence that the appellant never intended to transfer the land, counsel referred to **Joseph Wanyonyi Wafukho v. Republic [2014] eKLR**, where the court held,

“Criminal process is never a substitute to civil remedy or to be used to settle civil claim or to avail in a commercial transaction undue or collateral advantage over the other. That kind of practice is fraudulent demented abuse of the court process, should always be avoided by the parties, resisted and forcefully suppressed by the courts of law, whenever it manifests itself before the court.”

Further there was an ongoing case in Eldoret Civil case no. 438/2014 in which the complainant (PW1) had sued the appellant for recovery of her money.

The court was urged to be guided by *Okeno v. Republic (1972) E.A. 32* and *Pandya v. Republic (1975) EA 336* that it did not have the advantage of seeing and hearing the witnesses and their demeanor.

DPP'S Submission

It was counsel's submission that the appellants had been charged with two counts of obtaining money by false pretence. He was convicted on the first count. There is a sale agreement, which shows the appellant was given the money but did not avail the land to the complainant. PW3 who testified stated the land in question was not registered in the appellant's name but was under a Company's name called Kaskem Limited. The appellant had produced a sale agreement indicating that he had bought the land from one Joseph Kibet Ndiema who was not the registered owner, therefore he had no capacity to sell the land, and thus the conviction was lawful and sentence lenient. Further the offence was on the rise and the custodial sentence was to deter the same. Finally the court was urged to dismiss the appeal.

ANALYSIS AND DETERMINATION

The issues that arise for determination are:

1. Whether the appellant obtained the amount by false pretence or with intention to defraud the complainant.
2. Whether the sentence passed was harsh and excessive.

This being the first appeal the court has a duty to re-evaluate the entire evidence as was held in *Okeno v. The Republic* [1972] EA32, 36 that:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v. R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post [1958] EA 424."

The appellant was charged with an offence of obtaining by false pretence. In *Francis Mwangi & another v. Republic [2015] eKLR*, the ingredients of the offence 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."*

The prosecution witness(PW2) produced a sale agreement which indicated the appellant had entered into an agreement with the complainant for sale of land. The agreement shows the appellant was paid Ksh 450,000/=. The appellant did not dispute this fact in his defence, (see line 7 pg 69 of the record of appeal). The appellant even after failing to give the land, failed to refund the money back to the complainant. The proceedings show there was a time both parties were negotiating but the same failed.

The prosecution's counsel submitted that they had proved the offence committed beyond reasonable doubt whereas the appellant's counsel submitted that the prosecution had failed to prove the charge. The issue of the complainant suing the appellant for refund of the sum is irrelevant in this case as that is a different suit from the criminal case to which this appeal case is about.

In addition PW3 (pg 34 of the record of appeal) testified that the land parcel number in question was registered under a company by the name

Kisekem Ltd, and the appellant did not have the title to it. In his defence he claimed to have bought the same from one Joseph Kibet Ndiema. The trial court's analysis was on the evidence adduced in court and since PW3 had testified the land belonged to someone else, there is no way the appellant would have passed the title to the complainant. The appellant however still went ahead and received the money knowing that he did not have title to the land, thus had intention to defraud and the offence he was charged with is well within the provision of *Section 312* of the *Penal Code*.

The sentence passed was two years imprisonment; *Section 313* of the *Penal Code* provides that:

“any person who by false pretence and with the intent to defraud, obtain 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”

The sentence was within the law and was not therefore excessive.

The appeal lacks merit and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of May, 2019.

In the presence of:-

- (1) Mr. Kagunza for the appellant
- (2) Ms Kagali for State
- (3) Ms Sarah - Court assistant