



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL 42 OF 2016

(From original conviction and sentence in Obtaining Money by False Pretence 1120 of 2013 of the Resident Magistrate's Court at Baricho)

DENNIS GATHITHI GITHENDU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **DENNIS GATHITHI GITHENDU** was convicted by M. Kuvuti Resident Magistrate Baricho for the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code and sentenced to pay a fine of Ksh. 20,000/= or in default 12 months imprisonment and to refund a sum of Ksh115,855/= with interest at court rates from the date of judgement within three months failure of which execution shall issue.

2. It was alleged that on diverse dates between 2nd August 2011 and 11 October 2011 at Sagana Township with intent to defraud he obtained Ksh.115,885.00/= from Winfred Esther Wangari Mutugi by falsely pretending that he will help her acquire a plot.

3. The appellant was dissatisfied with the conviction and sentence and lodged this appeal based on the following grounds:

1. The learned magistrate erred in law and fact in making judgement against the weight of evidence.

2. The learned magistrate erred in law and fact in failing to find that the prosecution did not prove the particulars of the charge beyond reasonable doubts.

3. The learned magistrate erred in law and fact in disregarding the contradictions and inconsistencies in the evidence adduced by the prosecution.

4. The learned magistrate erred in law and fact in unfairly dismissing the defence put forth by the appellant.

5. The learned magistrate erred in law and fact in shifting the burden of proof to the appellant.

6. The learned magistrate erred in law and fact in making orders of a civil nature without affording the appellant an opportunity to be heard on the same.

7. The learned magistrate erred in law and fact in meeting out an unlawful and irregular sentence.

4. The appellant prays that the appeal be allowed, conviction be quashed, the sentence be set aside and the fine imposed refunded.

5. The appeal was disposed off by way of written submissions.

6. I have considered the appeal and the submissions.

This being the 1st appellate court I have a duty to evaluate the evidence tendered before the trial magistrate, analyse it and come up with my own independent finding but leave room for the fact that I had no chance to see the witnesses when they testified and leave room for that. This was the holding in the case of **Okeno - V - Republic (1972) E.A 32.**

The brief facts of the case are that the complainant Winfred Esther Wangari Mutugi (PW1) met the appellant on 2 August 2011 and he informed her that he was selling a plot at

Kshs.35,000/=. PW1 knew the appellant before as a pastor, a priest and a lawyer. The PW1 paid the appellant Ksh.40,000/= for the plot.

The appellant demanded payment of extra money for processing of title deed, 15,855/= for fixing beacon all totaling Ksh.115,885/=.

7. PW1 agreed to meet the appellant at Sagana so that he could show her the plot. PW1 did not find the appellant as he said he was at Nairobi. However, on reaching Kagio PW1 saw the appellant and he boarded the same matatu.

On reaching Kerugoya PW1 confronted him and asked him why he cheated her that he was in Nairobi. The appellant became rude. PW1 decided to report the matter to the police. The appellant was arrested and charged.

8. I have considered the evidence tendered before the trial magistrate. My evaluation of the evidence is that the evidence adduced by the complainant was not sufficient to support the charge.

9. The complainant during cross-examination contradicted her evidence in chief as to what she paid for the purchase of the two plots. She admitted that some money she paid was for airtime.

She admitted that the amount she stated in court and in the statement to the Police had a difference which she tried to say was for airtime.

10. The complainant further stated that she had asked the appellant to secure for her the death certificate of her late father. She asked appellant to get a surveyor to do subdivision of land at Baricho. She could not remember how much money she paid the appellant for those transactions.

11. The PW1 also admitted she had told appellant to accompany her sister who had a criminal case at Baricho. She further stated that she paid the appellant when he went to Nyeri to follow the appeal in the land case. She said she paid him through Mpesa and she could not differentiate the money she paid for the transactions and that for the purchase of land.

12. The complainant did not adduce any tangible evidence to prove that she was buying a plot.

No sale agreement was produced nor could she tell the plot number of the plot she was buying.

13. It is trite that the charge and particulars must be proved beyond any reasonable doubts. The complainant by her own admission could not tell how much money she paid for the plot. There was no prove that she paid Ksh.115,885/= to the appellant so that he could help her to acquire a plot. There was no prove that the appellant received the said amount with intent to defraud.

14. I have considered the defence of the appellant. I find that the defence of the appellant is plausible since the complainant admitted that she had other transactions with the appellant and had sent him money.

15. The prosecution had the burden to prove that the appellant obtained Ksh.115,885/= with intent to defraud. **Section 312 of the Penal Code** defines false pretence 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.

Section 313 of Penal Code 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 misdemeanour and is liable to imprisonment for three years.

The ingredients of the charge are: -

- Obtaining something capable of being stolen.
- Obtaining by false pretence.
- Obtaining something with intent to defraud.

16. The appellant did not deny that he received Ksh.115,885/=. The appellant testified that the money was paid to him to obtain a death certificate of the complainant's late father, accompany her sister to court and process title deed.

Then PW1 admitted during cross-examination that she had given the appellant the work and she could not differentiate the money she paid for the transactions and those for the plots.

17. As submitted the payments were for a future act as opposed to the past or present. Such presentation for a future action or intention does not amount to a false pretence. False pretence does not relate to future events.

The Court of Appeal in *Oware -V- Republic (1989) eKLR 287*,

The Court of Appeal Nairobi, it was held:

“A statement of intention about future conduct whether it be a statement of existing fact, is not such a statement as null amount to a false pretence in Criminal Law”.

The court was saying that the fact of obtaining by false pretences does not relate to future events.

18. The transactions which the complainant and the appellant had like securing a death certificate, getting a surveyor for sub-division, processing title deed and accompany her sister to court and going to Nyeri are matters which were expected to be satisfied in future. They therefore do not fall under the definition under *Section 312 of the Penal Code (Supra)* which states that the matter must be future or present. The transactions which the appellant and the complainant had were of a civil nature.

19. The complainant abused the criminal process because she did not disclose to PW-2- the police officer who investigated the case that she had other transactions with the appellant. She reported the matter after three years, on 17.12.13. The criminal process is not available for use to settle civil claims or as short cuts to recover civil debts. Such claims must be pursued through the legal regime available for enforcing such claims.

The circumstances do not fall under what is envisaged in a charge of obtaining by false pretences.

20. This was a criminal case and the burden was on the prosecution to prove the charge against the accused beyond any reasonable doubts. These burden never shifts. The trial magistrate erred by shifting the burden on the appellant in stating that the appellant could call a witness to prove his case.

Page 29 line 13-16 the trial magistrate stated:

“If the complainant and the accused only agreed over the three assignments in the presence of Kangara who personally called the witness and introduced the two, one would have expected the accused to call him as a witness to confirm that indeed that was the transaction and not the sale of a plot”.

Article 50 (2) (a) of the Constitution provides:

**“Every accused person has the right to a fair trial which includes the right-
To be presumed innocent until the contrary is proved”.**

The right to fair trial is one of the rights which shall not be limited as provided under *Article 25 (c) of the Constitution*.

It was therefore wrong for the trial magistrate to shift the burden on the appellant. The decision cannot therefore be upheld.

The trial magistrate did not comply with *Section 200 (1) (3) (4) of the Criminal Procedure Code* which provides:

1. Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

The provision is couched in mandatory terms. The trial magistrate ought to have complied.

Where the trial magistrate has not complied with this provision, the High Court may order that the conviction be set aside and a new trial be held.

There can be no doubt that the appellant was prejudiced as the trial magistrate never heard the prosecution witnesses and assess their

demeanor. Be thus as it may since there are grounds to warrant the setting aside of the conviction. I will not order a retrial.

21. I find that the evidence adduced by the prosecution was insufficient and fell short of proving the charge against the appellant beyond any reasonable doubts. The conviction of the appellant was against the weight of the evidence. The conviction cannot stand.

22. In conclusion I find that:

- The appeal has merits.
- The conviction is quashed.
- The sentence is set aside.
- The order for appellant to refund Ksh. 115,885/= is set aside.
- The fine paid by the appellant shall be reimbursed.

Dated this 31st day of October, 2019.

L.W. GITARI

JUDGE