



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 271 OF 2013

AGNES MUMBUA MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 310 of 2011 by M.K. Mwangi, the Ag. Senior Principal Magistrate)

JUDGEMENT

1. The Appellant **AGNES MUMBUA MUTUA** was charged with two counts of offence of obtaining money through false pretence contrary to **Section 313** of the **Penal Code** the particulars of which were that on 19th and 22nd day of April, 2010 at Athi River within Machakos County with intent to defraud obtained a total of Kenya shillings one million (**Kshs.1,000,000/=**) from **EVA NKATHA** and **BEATRICE KATHURE MUTHURI** respectively purporting to be in a position to sell to them Plots number 169 and 170 in Sabaki Estate a fact which she knew to be false.

2. She pleaded not guilty, was tried convicted and sentenced to a fine of **Kshs.150,000/=** or in default to serve one year in prison. Being dissatisfied with the conviction and sentence she filed this appeal and raised the following grounds:-

1) That the conviction was against the weight of the evidence.

2) The Learned Acting Senior Principal Magistrate erred in both law and fact in convicting the accused on the complaint of Eva Nkatha and Beatrice Kathure Muthuri on the charge of obtaining by false pretences when all parties were aware that the property was part of land whose parent title belonged to Naretoi Agencies.

3) The Learned Acting Senior Principal Magistrate erred in both law and fact in convicting the Appellant when the charge and in the evidence in support did not disclose a commission of a crime.

4) The Learned Acting Senior Principal Magistrate erred in both law and fact in convicting the Appellant when the prosecution did not prove the case beyond the standard required.

5) The sentence imposed on the Appellant is harsh and excessive in the circumstances of the case.

3. At the hearing of this appeal both the Appellant and the state filed written submissions and it is worth noting that the state supported the appeal, however the court is not in law bound to allow the appeal merely because the same is conceded to and is required in law being the first appeal to evaluate the evidence on record and to come to its own finding and conclusion on the same giving allowance to the fact that it did not have the advantage of the trial court in seeing and hearing witnesses and therefore may not comment on their credibility or otherwise. See **OKENO v REPUBLIC [1973] EA 32**, **GERALD NDOHO MUNJUGA v REPLUBC [2016] eKLR** which I shall do herein under.

SUBMISSIONS

4. On behalf of the appellant it was submitted that the transaction forming the basis of the offence was a land transaction between the Appellant and the complainants and that there needed to be proof that the subject matter was not in existence and that it does not relate to future events. It was submitted that the land existed and it was only possession and title that were to be in the future. It was submitted that the dispute was purely a civil dispute in which the complainants remedy was a refund of the money paid. That the conviction was based on the fact that the Appellant did not deliver the plots or title to the complainants without the court taking into account that there were further process that were to be undertaken by **NARETORI AGENCY** which frustrated the transaction.

5. It was submitted that very vital witnesses including the officials of Naretori Agency and the Advocates who drafted and executed the Agreements between the parties were never called. In support of the submissions the case of **JOSEPH WANYONYI AFUKHO v**

REPUBLIC [2014] eKLR was submitted.

6. On behalf of the state in support of the appeal it was submitted that the facts of the case revealed that the suit land existed, had been surveyed and a boundary delineated, the complainants confirmed that they actually visited the land. It was submitted that there was nothing false or untrue about the Agreement for Sale therefore the evidence on record did not disclose a criminal offence that could lead to a conviction.

RE-EVALUATION OF EVIDENCE

7. The facts of this case are not in dispute. The Appellant agreed to sell and the complainants agreed to buy some two plots at Sabaki area of Athi River. **PW1** in her evidence before the trial court stated that she was introduced to the Appellant by **PW2 JOSHUA KITHOME MUINDE** who she trusted and who told her that the appellant could assist her in buying land. It was the complainant's evidence under cross-examination that the Appellant disclosed to them that the land belonged to Naretori Agencies and that it would take some time to process the plots. She further confirmed that she talked with the officials of the said agency who confirmed that the plots were available for sale.

8. **PW2** confirmed having introduced the complainants to the Appellant and that after they started complaining that they had not been issued with title deeds, he spoke with the Appellant who confirmed to him that the complainants had not paid some money which was required for the processing of the title deeds. This evidence was corroborated by that of **PW3** who confirmed that the Sales Agreement was prepared by **WARI & CO. ADVOCATES** and that the Appellant gave them certificates to hold while awaiting the issuance of title deeds by the officials of Naretori. She stated further that they thereafter signed another agreement with the Appellant for the refund of the purchase price after they found the plots fenced off and that they only reported the matter to the police after the Appellant refused to pay. She confirmed that there was leadership wrangles among the officials of Naretori Agencies the registered owner of the property they had bought from the Appellant.

9. **PW4 PC MICHAEL MBOYA** the investigating officer confirmed having arrested the Appellant and that the complainants rejected a request for reconciliation. When put on her defence the Appellant stated that she had bought the two plots from Naretori Agencies and produced a Sales Agreement to support the said sale which plots she later sold to the complainants and therefore had no intention to defraud them. The Appellant defence was never rebutted at the close of the trial. In law she was only required to give a probable account which I find she did.

ANALYSIS AND DETERMINATION

10. What constitutes the ingredients of the offence under which the Appellant was charged with has received adequate judicial pronouncements including in **JOSEPH WANYONYI WAFUKHO supra** submitted by the Appellant wherein Justice F. Gikonyo had this to say-

“[10] The offence of obtaining through false pretences is established in Section 313 of the Penal code as reproduced below:

313 Obtaining through false pretences

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.

From the said Section; the following essential elements of the offence of obtaining through false pretences are discernible: that the person;

a) Obtained something capable of being stolen;

b) Obtained it through a false pretence; and

b) With the intention to defraud.

[12] What is false pretence? It is defined in Section 312 of the Penal code as below:

312 Definition of false pretence

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.

[13] Let us un-pack the above definition of false pretence further. There must be:

a) A representation of fact by word, writing or conduct;

b) The representation is either past or present;

c) The representation must be false; and

d) The person made the representation knowing it to be false or did not believe it to be true.”

11. I have had the advantage of looking at the **BOTSWANA CASE of THEREGO v THE STATE 1991 BLR 292 (CA)** wherein Puckrin JA had this to say of the ingredients:-

“The phrase “false pretences” is inherently tautologous as the word “pretence” connotes some falsity. Be that as it may, the relevant sections of the Penal Code are easily understood; the crime consists in the making of a representation by an accused which is false in a material respect with the intention of inducing another person to part voluntarily with some or other property belonging to that person which is capable of being stolen. Of course, a necessary ingredient of the crime is that the accused should have the requisite mens rea; that is the knowledge both that the representation is false and the intention to induce the other person to part with his or her property as a consequence of the misrepresentation . . .”

12. From the evidence on record, it is clear that the plots were in existence, the Appellant disclosed to the complainants well in advance that she was selling to them what she had bought from the original owner and therefore the transfer and issuance of the title to the complainants was a future event. There was therefore no evidence tendered before the trial court to show that the Appellant made a false statement of a past event or of an existing fact or event as regards the plots or titles thereof. As regards the transaction, no *mens rea* was proved by the prosecution.

13. It is well established rule of criminal law that the false pretences or representation to be indictable must be an untrue statement of a past or an existing fact. False representation amounting to a mere promise or statement of an intention having reference to future events are not criminal within false pretence statutes. At the time of the transaction both the Appellant and the complainants confirmed the existence of the plots and further the complainants confirmed that there arose thereafter a dispute between the officials of the registered owner of the land.

14. It is worth noting that the officials of the said registered owner of the land who were well known to the Appellant and the complainants and the investigation officer were never called to confirm or deny the entitlement of the Appellant to the two plots giving her right and power to sell the same to the complainants and neither was there any evidence adduced by the prosecution to show that the two certificates issued to the complainants were not genuine. It is therefore the finding of this court upon taking into account the evidence on record that the prosecution did not prove its case against the Appellant to the required degree as the offence does not relate to future events.

15. It is also clear that the transactions herein was of civil nature and the complainants were well aware of this as confirmed by the fact that they have filed the following civil case being RMCC No. 634 and 635/2013 at Mavoko in respect of the recovery of the money paid to the Appellant as purchase price and would therefore agree with Justice F. Gikonyo in **JOSEPH WANYONYI WAFUKHO supra** thus:-

“[20] After taking all legal considerations into account, it is clear the direction the law is taking the court. But before I close, hear this, all those to whom these presents may come greeting; that criminal process is never a substitute for criminal remedy or to be used as a means to settle a civil claim or to avail a party in a commercial transaction undue or collateral advantage over the other. That kind of practice is fraudulent, demented and abuse of the court process; should always be avoided by parties, resisted and forcefully suppressed by courts of law whenever it manifests itself before court.”

16. I further find support in the holding by Justice JA Makau in **RIBANEX CAXTON AWITA V REPUBILC [2016] eKLR** where the good judge had this to say:-

“25. The complainant's claim was never a claim based on criminal law but civil law. The delay in refund of the rental deposited or delivery of premises offered to the complainant did not make appellant's breach of the contract criminal in nature. The proceeding to police could not otherwise make appellant's breach of contract criminal in nature. The complainant knew what he wanted was either the refund of his money or the shop offered but he could not get the shop as it had not been completed then and to settle old scores or teach the appellant a lesson he unjustly decided to use criminal justice system to pursue not his claim but to have appellant punished. The complainant's claim is firmly hinged on civil process and he should not have invoked criminal process. It is my finding that the complainant's application of criminal justice system to have the appellant apprehended, interrogated, arraigned in court was wrong as it was made to punish and humiliate the appellant rather than settling the complaint's claim in the right forum thus in a civil court.”

17. I have nothing more useful to add to the observation by the two good Judges.

18. From the Judgment of the trial court it is clear that in convicting the Appellant the court erroneously found that the accused knew that she was not registered as the owner of the two parcels and sold them as a registered owner, which was against the evidence tendered before him which was clear that the plots were registered in the names of Naretori Agencies as confirmed by the complainants and the certificate issued to them by the same and therefore fell into error which makes his Judgement liable to be set aside.

19. As I have stated herein it is also clear that vital witnesses who would have helped the court reach a just determination as regards the transactions herein and the ownership thereof were never called leaving the court with no option than to draw an adverse inference that had they been called their evidence would have been adverse to the prosecution case the benefit of which should have been accorded to the Appellant.

20. It therefore follows that the prosecution case against the Appellant was not proved to the required degree and the Appellant was convicted in error. I would therefore allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless otherwise lawfully held as the complainants follow her in the right forum in the civil court at Mavoko.

Dated and Signed at Nairobi this 12th day of September, 2018.

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J. WAKIAGA

JUDGE

Delivered in open court this 20th day of September, 2018 at Machakos by Justice D. Kemei on behalf of Justice J. Wakiaga in the presence of:-

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D. KEMEI

JUDGE