



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 52 OF 2017

JOB CHERUIYOT A CHEPKWONY.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Sotik PM's Court CR Case No. 2238 of 2015 – Hon Oruo RM)

JUDGMENT

The appellant herein was convicted and sentenced to three years imprisonment for the offence of obtaining money by false pretences C/S 313 of the Penal Code.

The particulars are that on the 12th day of March 2015 at Advocate Rono's office at Sotik town within Bomet county with intent to defraud obtained Kshs.270,000/= from David Kimutai Marusoi by falsely pretending that he was in a position to sell him a portion of land from the family and parcel number Kericho/Kaitet/327 measuring 0.5 acres registered under the name of Chepkwony Arap Langat Kiprop a proposition he knew to be false.

This is the first appellate court. It has a duty to re-evaluate and consider a fresh the evidence on record so as to arrive at its own conclusion. Okeno –V- R 1972 EALC

The prosecution in this case called six witnesses in support of their case with the defence calling one.

Brief facts

The accused/appellant offered to sell a piece of land measuring 0.5 acres to David Marusoi, the complainant for a sum of Kshs.270,000/= which money was paid to him and an agreement prepared at an Advocate's office. However, this land was not registered in the mane of the seller but that of another person. He was not able to transfer the land to the buyer when a demand for the refund of the money was made. He was not able to refund and the matter was reported to police.

Kipngeno Rop (PW3) testified in court that he knew the accused as his immediate neighbour. He further testified that they are not related at all. It was his evidence that L.R Kericho/Keitet/327 measuring 7.93 hectares was registered on 14/11/1988 in the name of his father. He produced in court a copy of the title deed. He told the court that none of his family members gave authority to the accused to sell the land and none participated in the alleged sale agreement.

PW 4 Josiah Rono is the Advocate who prepared the sale agreement between the parties for the sale of 0.5 acres for the purchase price of Kshs.305,000/=. There was a down payment of Kshs.265,000/=.

Balance of the purchase price was payable on or before 30/6/2015.

The complainant testified to have been intending to purchase a piece of land. He met the accused. He was shown the piece of land. The land was registered in the name of Chepkwony Arap Langat a neighbour to the accused. The agreed purchase price was Kshs.305,000/= for the ½ acre piece of land. He paid via Mpesa in 9 installments Kshs.270,000/=. Balance was payable on or before 30/6/2015.

He was not able to get the land transferred to him nor his money refunded. He reported the matter to police and the accused was later arrested and charged.

Martin Wekesa (PW6) is a liaison officer with safaricom. He furnished Mpesa statements for account No. 0728-608402 and 0729-951599. He testified that there were ten transactions between the accused and the complainant. He produced the two statements in court.

In his defence the accused testified that the complainant wanted to con him. He told the court that one Christopher Langat called him to Sotik and informed him that the complainant wanted land next to his. He told him that he had no land to sell but his father had land. He agreed. An agreement was entered into over the said land at an Advocate's office but maintains that the complainant did not visit and ascertain the land in question.

Issues for determination

1. Whether the learned trial magistrate considered and applied the law on obtaining money by false pretences.
2. Whether the magistrate considered the defence case.
3. Whether the refusal to hear the matter **Denovo** was prejudicial to the case for the defence.

1st issue –Elements of the charge

The essential elements in a charge for obtaining by false pretences are to be found in S. 313 of the penal code which provides:-

“Any person who by false pretences, and with the 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”.

A perusal of the judgment by the learned trial magistrate at page 7 did observe and singled them out as

- (a) Obtaining something capable of being stolen.
- (b) Obtaining it through a false pretence.
- (c) Obtaining with the intention to defraud.

Upon evaluating the evidence before him he proceeded to convict the accused.

It is not in dispute that the appellant did obtain Kshs.270,000/= from the complainant towards the purchase of some land. There is evidence from Liaison officer from Safaricom that indeed Kshs.270,000/= from ten transactions were sent from the account of the complainant to that of the appellant. He produced statements to that effect. The intention of the receipt of the money was crystallized in an agreement dated 12th March 2015 between the seller who is shown as Job Cheruiyot chepkwony and the purchaser who is shown as David Kimutai Marusoi.

The conditions of sale were to the effect that the seller had agreed to sell his portion of land from the family land of the acreage of 0.5 acres at the purchase price of Kshs.305,000/=. Possession was to take effect immediately.

The subject matter was land parcel No. Kericho/Kaitet/327 registered in the name of Keles Arap Soo.

The prosecution had the title deed registration No. Kericho/Kaitet/327 produced in court. It bore the name of Chepkwony Arap Langat Kiprop. A death certificate was produced showing that Chepkwony Arap Langat passed away on 7/5/2009.

PW3 did testify to the effect that the land in question belonged to his late father and none of the beneficiaries were selling it.

In the present case, the accused falsely pretended that the land he was offering for sale was a portion to be excised from his father's land as per the agreement.

The land in question LR Kericho/Kaitet/327 was registered in the name of Chepkwony Langat Kiprop who is a totally different person and not a relative of his. There is no evidence to the effect that he had a power of attorney and or in what capacity he was selling same.

False pretence is defined under S.312 of the penal code thus:-

“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”.

From the above the representation has to be

- (a) In words, writing or conduct.
- (b) To be either past or present
- (c) Representation has to be false.
- (d) To be made while knowing it to be false or believed it not to be true.

In the present case the representation was through both words and

in writing parties agreed and the agreement was reduced in writing.

The representation by the appellant was that the land at the time was his fathers and he was selling part of his portion. That representation was present not in the future.

Possession of the land was to take effect immediately upon signing the agreement. It was not in the future.

The appellant knew that he had no land to sell and that LR No. Kericho/Kaitet/327 did not belong to his father.

The appellant did obtain money by false pretences. His defence that PW2 persuaded him to sell the land, was considered by the learned trial magistrate and was found to be a mere denial.

On the issue whether the case should have commenced *De novo*. It is shown that the prosecutor objected to the same stating that only one witness was remaining to testify and that it was an old case of 2015. The learned trial magistrate proceeded with the case from where it had reached.

Though it did not come out clearly, what the prosecution was telling the court was that the case had advanced considerably for it to be heard a fresh. It was not clear whether the witnesses would be readily available, it is clear that this was an old case and it ought to have been heard and determined without undue delay. I find no good reason to fault the learned trial magistrate. It has not been demonstrated that his refusal to hear the case *De novo* occasioned injustice.

I am satisfied that the conviction was safe. As regards the sentence, the appellant was sentenced to three years imprisonment which is the maximum.

A perusal of sentencing notes does not show that he had previous convictions. The sentence was harsh in the circumstances of the case. The sentence of three years is hereby reduced to two years imprisonment from the date of conviction. The appeal succeeds to that extent only.

Judgment delivered dated and signed this 19th day of December 2018 in the presence of learned counsel for the prosecution Miss Kariuki learned counsel for the defence Mr. Kipngetich (absent)

Court assistant Mr. Rotich

M. MUYA

JUDGE

19/12/2018