



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.114 OF 2016
KHADIJA OMAR..... APPELLANT
VERSUS
REPUBLIC..... RESPONDENT

(From the original conviction and sentence in criminal case No. 33 of 2014 of the Chief Magistrate's Court at Isiolo by Hon. J.M Irura – Senior Resident Magistrate)

JUDGMENT

KHADIJA OMAR, the appellant, was convicted for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code.

The particulars of the offence were that on 2nd April 2012 at Isiolo Township of Isiolo County, with intent to defraud, obtained from **HOTHU ABDULLAHI** Kshs. 400,000/= by falsely pretending that she was in a position to sell a plot situate at Tulluroba / Chechelesi to the said **HOTHU ABDULLAHI** a fact they knew to be false.

The appellant was fined Kshs. 50,000/=in default to serve one year imprisonment. She now appeals against both conviction and sentence.

The appellant was represented by Mr. M Kariuki, the learned counsel. He raised eight grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by convicting the appellant on a charge that was not proved.
2. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

The state opposed the appeal through Mr. Namiti, the learned prosecuting counsel.

The facts of the prosecution case were briefly as follows:

After the appellant and the complainant had entered into a sale agreement and the complainant made the payment towards the purchase price, she learnt of another claimant over the same parcel of land. The matter was reported hence this case.

The appellant contended that she had land to sell.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

The ingredients of the offence of obtaining by false pretences contrary to section 313 of the Penal Code were enumerated in the case of **AMUGO vs. REPUBLIC HIGH COURT CRIMINAL APPEAL NO. 320 OF 1980** as follows:

The offence of obtaining by false pretences has seven possible ingredients which have to be proved beyond doubt before an accused person is convicted. They are (a) a false representation (b) which is made (c) by words or writing or conduct (d) of a matter of fact (e) either past or present (f) with knowledge of the falsehood or without belief that the presentation is true, and (g) the representation causing the giver to part with the thing obtained.

In the instant case I will endeavour to find out if these ingredients were proved by the prosecution.

The issue of sale of a land parcel between the complaint and the appellant is not disputed. What is in dispute is whether the appellant had land or she obtained the complainant's money by false pretences. At the time of purchase, the complainant was given some documents by the appellant. These documents were not produced in court. She proceeded to pay rates for plot No.3B until when **Susan Kinya Munyua** (PW4) laid a claim to the plot. In her evidence (PW4) said that she was allocated un-surveyed plot No.1 after balloting. She testified that the complainant was sold plot No.3B, which she said she never owned. She said she found the appellant in her plot in the year 2004.

There was a letter from the County Government of Isiolo dated 22nd December 2014 that was produced as an exhibit. This letter indicates that plot 3A, Tulluroba was in the name of Hadija while 3B was in the name of Hotho Abdullahi. There is yet another letter (Defence Exhibit 4) emanating from Isiolo County Government dated 25th November, 2013. The gist of the letter addressed to Susan K. Munyua is that the area of Tulluroba had been re-planned and Khadija Omar (the appellant) was allocated plot No.3.

It would appear that there are several issues of plot ownership of land in Isiolo that have been aggravated by the County Government officials constant changes on ownership. This has affected the parties in this case. The appellant gave a history of how she came to own the parcel of land at Tulluroba. She further testified that she embarked on refunding the complainant when the issue of ownership came up.

The ingredient of false pretences was not proved in this case. The conviction was not safe. Consequently, the conviction is quashed and the sentence set aside. The fine that was paid by the appellant to be refunded.

DATED at MERU this 28th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE