



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 98 OF 2016

DANSTONE KWABA OKWAKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in Kakamega CMC Cr. Case No. 3633 of 2015 delivered on 10.10.2016 by Hon J. Ong'ondo SRM)

J U D G M E N T

Introduction

1. The appellant herein Dastone Kwaba Okwako was charged with obtaining money by false pretense contrary to Section 313 of the Penal Code. The particulars of the offence were that on the 13th day of September, 2015 at South Butso, Lurambi Division Kakamega Central District, within Kakamega County with intent to defraud obtained from Haggai Kasasi a sum of Kshs.,285,000/- by falsely pretending that he would sell him a piece of land measuring 0.75 acres a fact he knew was false. After a full trial, the appellant was convicted of the offence of stealing contrary to Section 268(2)(a) of the Penal Code and was sentenced to serve two(2) years imprisonment.

The Appeal

2. Being dissatisfied and aggrieved by the judgment of the trial court which was delivered on the 10.10.2016 the appellant filed this appeal challenging both the conviction and sentence. The appeal is based on the following home –made grounds:-

1. That the learned trial Magistrate erred both in law and fact in entertaining the case before him, convicting and sentencing him when the matter before him was purely civil and not criminal in nature.
2. That the trial Magistrate erred both in law and fact in convicting the appellant under Section 189 of the C.P.C Cap 75 Laws of Kenya when the offence of stealing was not disclosed in evidence.
3. That the evidence adduced by the prosecution was not sufficient to warrant the conviction of the appellant.
4. That the trial court erred both in law and fact in admitting prosecution exhibit P – 1 (land sale agreement) when the same was inadmissible unenforceable and was not subjected to any forensic

examination.

5. That the trial Magistrate erred both in law in failing to consider the appellant's evidence and shifting the burden of proof.

6. That the decision of the trial Magistrate was against the weight of evidence and has resulted in miscarriage of justice.

7. That the sentence handed to the appellant was too harsh.

3. The appellant prays that the appeal be allowed conviction quashed and the sentence set aside.

Submissions

4. In his submissions through M/S Nandwa Advocate the appellant maintains that the matter before the trial court was Civil in nature and that the criminal proceedings were only used to cause the appellant to admit the complainant's demands. The learned advocate adds that though the appellant was charged with the offence of obtaining money by false pretense he was convicted of stealing.

5. He submits further that the evidence before court did not bring out the ingredients of the offence of stealing and that the trial court ought not to have convicted the appellant. He raised issue with PEX1 which is the sale agreement allegedly made on 13.09.2011 yet date of acknowledging receipt of payment was 11.08.2012 and adds that the appellant did not obtain any money on 13.09.2011 but same could only have been obtained on 11.08.2012.

6. Counsel further explains and submits that payment alleged to have been made to appellant was made by M-Pesa in 2012 and not 2014 and that the said amounts were payment of salary and not as a consideration of anything else. He adds that the agreement of sale was not signed by the appellant, thus making the same null and void in law.

7. Lastly appellant's counsel maintains that the judgment by the learned trial Magistrate did not comply with Section 169 of the Criminal Procedure Code.

8. In opposing the appeal Mr. Ngetich, prosecution counsel maintains that the charges preferred against the appellant were of a criminal nature were so preferred in accordance with the Penal Code. He submits that the said charges were proved beyond reasonable doubt.

9. He adds that in applying Section 189 of the CPC the trial court it explained its reasons for doing so but adds that there was no need for the court to change the offence of obtaining to one of stealing.

10. He further adds that the main issue the trial court was looking at was whether the vendor had a valid title to pass and not whether there was land. counsel submits that vendor had no title to pass.

11. On the agreement of sale prosecution counsel concedes that the same does not satisfy the ingredients of a contract but submits it was introduced for purposes of showing exchange of money between appellant and the purchaser. He adds that it was properly submitted and that it served its purpose.

12. He further maintains that even though the charge sheet had a defect the defect was not so fatal as to cause miscarriage of justice and that in any event, the defect was curable under section 382 of the CPC.

13. Regarding the judgment of the learned trial court, counsel submits that though the judgment was brief it met the requirements of Section 169 of the CPC. On the authorities cited by appellant's counsel, Mr. Ngetich submits that the same do not bring out the argument of the appellant and that instead, the authorities support the respondent's case.

14. This is a first appeal and as a first appeal court, this court is obligated to re-evaluate the evidence on

record, analyze it and make its own findings bearing in mind that it was not present at the trial to see and assess the demeanour of the witnesses. This court will not interfere with the facts as presented and recorded by the trial court but will rely on them as they are recorded. See **Okeno vs- Republic [1972]EA 32 and David Njuguna Wairimu – vs – Republic [2010] eKRL** where the learned Judges explained the duty of the first appellate court.

The Prosecution Case

15. The prosecution called only two witnesses. PW1 Haggai Kasasi (Haggai) testified that he bought a parcel of land from the appellant in the year 2011 and paid him Kshs.310,000/= which was the agreed purchase price.

16. He stated that he paid Kshs.285,000/= on 13.9.2011 and Kshs.25,000/= by way of M-Pesa. There was an agreement to that effect dated 15.9.2011 which he produced as “PEX1” and the MPesa statement “PEX2” In 2015 he decided to develop the said parcel of land but found out someone else had already planted bamboo seedlings on the said parcel. He did not find the appellant the whole of the year 2015 and so he reported the matter to the police. Both the appellant and the wife were arrested.

17. On cross examination by the appellant, Haggai explained to the trial court that the agreement was not done in a government office or by an advocate. He added that the parcel of land had not been registered in the appellant’s name but in the name of someone else. He added that the payments through Mpesa made to the appellant was not salary.

18. PW2 No. 99307 PC Samson Bor from Kakamega Police station reiterated Haggai’s testimony as to how Haggai purchased land from the appellant for Kshs.310,000/= but after Haggai made full payment, the appellant disappeared.

19. PW2 identified the agreement “PEX1” and added that he went to the scene where he discovered that the appellant had sold the parcel of land to another person. He also said he interrogated the appellant who admitted having resold the said parcel and who asked for time to repay the money. After his investigations, he charged the appellant with the offence of obtaining money by false pretense.

20. At the close of the prosecution case, the trial court after carefully considering the evidence by the prosecution found that a prima facie case had been established and thus put the appellant on his defence. Section 211 of the CPC was complied with.

Defence

21. The appellant gave an unsworn statement. In his evidence he told the court that he leased the parcel of land to the complainant for kshs.3,000/= sometime in 2011. He explained that after six(6) months the complainant went to him with documents for him to sign and he signed and also gave out copies of his identity card. He claimed in his evidence that the complainant gave him a Job as shamba boy at the Murami Church where he worked for some time. He also claimed to have borrowed Kshs.10,000/= from the complainant but maintained that he did not sell the land parcel.

22. The appellant called his wife as his witness. The wife told the trial court that the complainant leased the parcel of land in 2011 and was paid kshs.3,000/=. According to her testimony they did not agree on the lease period but they later signed in a book. Later her husband was arrested and charged.

23. On cross examination she stated that her husband was paid kshs.6,000/= as monthly salary by the complainant through Mpesa.

Determination

24. Having carefully considered the evidence afresh together with the submissions by the appellant and after hearing the rival argument by the respondent the following issues are important for determination.

- (a) Whether the issues before the trial court were civil or criminal in nature
- (b) Whether the trial court erred in convicting the appellant under Section 189 of the CPC
- (c) Whether the evidence adduced by the prosecution was sufficient to warrant a conviction of the appellant.

25. Before making a finding on this first issue, I will deal with issue No. 3 on whether the evidence adduced by the prosecution was sufficient to warrant a conviction. The appellant faced the charge of obtaining money by false pretence contrary to section 313 of the Penal Code. Section 313 of the Penal Code provides as follows;- “Any person who by 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 misdemeanor and is liable to imprisonment for three years.”

26. From the above section the essential elements of the offence of obtaining through false pretences can be summed up as follows;-

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

27. The Penal Code defines “false Pretence” under section 312 to be “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.”

28. In the instant case, Haggai testified that when he wanted to buy a parcel of land he found one and then met the appellant and they agreed on a portion of 0.75 acres for Kshs.310,000/=. From PW1’s testimony, it is not the appellant who gave a representation to him but he himself stated that he found the land. This was in 2011. Haggai goes ahead and states that he paid the appellant kshs.285,000/= at Sheiywe Guest House but executed an agreement three(3) years later in April 2014 when he liquidated the balance. Admittedly, the purported sale agreement was null and void for failure to meet the parameters of a valid contract. In 2015, Haggai went to see the land but found someone else in occupation.

29. Haggai who is a man of the cloth and a senior Officer at Vihiga County that is chief Agricultural Officer – Vihiga County did not take the necessary steps to verify the ownership of the said parcel of land. The charge sheet as presented also is totally defective as it does not adequately particularize the parcel of land which the appellant purported to sell to Haggai. The evidence left the court guessing as to the parcel of land which the appellant purported to sell. This court cannot assume that the appellant had land and sold it to the complainant. Particulars have to be clearly set out by the prosecution in the charge sheet first and the evidence led to confirm those facts. This did not happen in the instant case.

30. This court cannot make any assumptions especially in criminal cases where the proof should be beyond reasonable doubt. It is my considered view that Haggai cannot be believed and his conduct after the alleged purchase leaves many gaps in the prosecution case.

31. Haggai did not call any witnesses to corroborate his evidence not even his wife or a member of his church. He only called PW2 a police officer who also investigated the matter.

32. The Police officer stated he went to the unknown parcel of land to carry out investigations. He did not gather any information as to the ownership of the unknown parcel of land from the lands office. Infact PW2 did not carry out any investigations at all because at least he would have given this court the parcel number of the land allegedly sold to Haggai. It appears to me that the police officer had a sinister

motive by bringing these trumped up charges against the appellant.

33. I therefore find that the prosecution failed to prove the charge against the appellant to the required standard. I also find and hold that the evidence adduced by the prosecution was insufficient to warrant a conviction of the appellant.

Conclusion

34. Having come to the above conclusion and having also found that the charge sheet was fatally defective as it did not specify the parcel of land to be sold I need not go through the other two issues of determination.

35. The upshot of the above is that the learned trial magistrate erred in law and fact in convicting the appellant on charges which were not supported by evidence. In my considered view, had the trial court addressed its mind to the nature of the charge, the court would not have come to the conclusion it did. The charge of obtaining money through false pretenses was not proved at all. For those reasons the appeal succeeds. The appeal is allowed, conviction quashed and sentence set aside.

36. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment delivered, signed and dated in open court at Kakamega this 20th day of June 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Miss Khatashi for Nandwa.....For Appellant

Mr. Juma(present).....For state

Polycap.....Court Assistant