



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 23 OF 2017

BETWEEN

SALHA MUSA APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon.T.Obutu, PM (read by Hon. P. Shinyada, SRM),dated 3rd April 2017 at the Chief Magistrates Court at Kisumu in Criminal Case No.590 of 2014)

JUDGMENT

1. Before the Subordinate Court, the appellant, **SALHA MUSA**, faced a single count of obtaining money by false pretence contrary to **section 313** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. She was convicted and sentenced to 2 years' probation. She now appeals against conviction and sentence. The charge facing the appellant was as follows;

On the 21st day of October 2010 at Central Chambers Building in Kisumu Municipality within Kisumu County with intent to defraud, obtained from TOPISTER ADIKINYI OGONYO the sum of Kshs. 150,000/- by falsely pretending that she was in a position to sell hand parcel KISUMU/CHIGA/3032, a fact she knew to be false.

2. This being a first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form an opinion on their demeanour (see *Okeno v Republic [1972] EA 32*). In order to proceed with this task, it is necessary to outline the facts as they emerged before the trial court.

3. The complainant, Topister Adikinyi Ogunyo (PW 1) testified that she entered into a sale agreement dated 21st December 2010 with the appellant for the purchase of a land parcel known as KISUMU/CHIGA/3032 for which she paid Kshs. 150,000/- in cash. The signing of the agreement and receipt of the cash was witnessed by Francis Otieno Odero (PW 2) and Clare Akoth Ogonyo (PW 3). Aoko Oguthe (PW 4), a finger print expert, confirmed that the finger prints on the sale agreement belonged to the appellant. PW 1 told the court that she took possession of the property and the appellant promised to process the title in January 2011 but by the time she complained to the police this had not been done.

4. The investigating officer, Corporal Geoffrey Njeru (PW 5), recalled that after PW 1 made a complaint, he confirmed from the Kisumu Land Registry that the subject property belonged to the appellant. When

obtained and Green Card for the property, he found that the on 24th December 2010, 3 days after signing the agreement, the appellant had charged the property to Kisumu Loans Board for the sum of Kshs. 40,000/- but that the charge was discharged on 27th November 2014.

5. The appellant elected to make an unsworn statement in her defence. She accepted that she had received Kshs. 150,000/- from PW 1 who was purchasing the her property. She explained that she had guaranteed a friend a loan of Kshs. 40,000/- but when the friend did not repay it, she was forced to repay the loan whereupon she was able to discharge the property. She stated that she was surprised when she was arrested yet PW 1 was in possession of the property, had constructed a fence and was carrying out construction.

6. The grounds of appeal are set out in the memorandum of appeal dated 11th April 2017. The thrust of the appeal according to the appellant's counsel, Mr. Olel, is that the prosecution failed to prove its case beyond reasonable doubt. Counsel submitted that the court erred in holding that it was a false pretence for her to charge the property when she had already sold it to PW 1. Counsel contended that by the time the appellant was charged, the complainant was already in possession of the land and the only issue left was for the property to be transferred to her. Counsel referred to the cases of *Elisha Nyagaya Oduro v Republic Siaya HCCRA No. 43 of 2016 [2016]eKLR* and *Joseph Wanyonyi Wafukho v Republic BGM HCCRA No. 200 of 2012 [2014]eKLR* where it was held that for purposes of the offence of false representation must be relate to the past or present event and not a future event.

7. Ms Ogoro, counsel for the respondent, supported the conviction and submitted that the false representation was the fact that according to the sale agreement, possession and transfer were immediate and by the time the charge was preferred, the complainant did not have ownership and the appellant could not transfer the land.

8. The offence of obtaining through false pretences is defined by **section 313** of the *Penal Code* as follows:

313. 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.

9. The essential elements of the offence are that the person obtained something capable of being stolen, that he obtained it through false pretences and did so with the intention to defraud.

10. **Section 312** of the *Penal Code* defines what constitutes false pretence and it states as follows:

312. 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.

11. Case law as well posits that the representation should be of either a past or present fact and not future fact. In the words of Devlin J., in **R v Dent [1955] 2 QB 594** as quoted by the Court of Appeal in **Oware v Republic [1989] KLR 287**, that:

[A] long course of authorities in criminal cases has laid down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.

12. From the foregoing the question before the trial court ought to have been whether, at the time the agreement of sale was made, the appellant made a false representation that she was selling land for which she did not have a title and was thus unable to sell. It is clear from the evidence that at the time material to the charge, the appellant was able to fulfil the terms of the sale agreement which stated that, "possession/transfer" was immediate. Whether the appellant breached the agreement was not an issue as

suggested by counsel for the respondent.

13. Before I conclude, I wish to state this was clearly a case that was well suited for resolution in a civil court as the parties entered into a binding agreement and PW 1 has taken possession.

14. The appeal is allowed and the conviction and sentence are quashed and the appellant is hereby discharged.

DATED and DELIVERED at KISUMU this 19th day of October 2017.

D.S. MAJANJA

JUDGE

Mr Olel, Advocate for the appellant.

Ms Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.