



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL APPEAL NO. 143 OF 2015

(Being appeal from original Conviction and Sentence in the Chief Magistrate's

Court at Naivasha Criminal Case No. 165 of 2013 by S. Muchungi - RM)

JACINTA NYAWIRA NDERITU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, Jacinta Nyawira Nderitu was jointly charged with another with the offence of Obtaining money by false pretences Contrary to Section 313 of the Penal Code. In that on the 19th day of April, 2012 in Naivasha District within Nakuru County, jointly with others not before court with intent to defraud, he obtained from **Simon Nyegenye** the sum of Kshs 3,150,000/= by falsely pretending that they had sold land parcel Nos. **Naivasha/Mwichiringiri Block 4/867, Naivasha/Mwichiringiri Block 4/868 and Naivasha/Mwichiringiri Block 4/869** information they knew to be false or believed to be untrue. The accused denied the charges. After a full trial they were convicted and sentenced to 18 months imprisonment.

2. The Petition of appeal is against conviction and sentence. Grounds 1, 4 and 5 attack the propriety of the charge sheet, while grounds 2 and 3 challenge the findings of the trial magistrate. In ground 6, the Appellant challenges the sentence imposed. Parties filed written submissions on the appeal.

3. On grounds 2 and 3 the Appellant's advocate argued that the genuine owner of the land parcels allegedly sold to the Complainants and the Land Registrar were not called to testify. Moreover, there was no evidence that the Appellant had any role in the transaction. That the sale agreement did not bear the name of the alleged Complainant, Simon Ngegenye. Therefore, the evidence tendered was insufficient, but the court proceeded to shift the burden of proof upon the Appellant who was not shown to have received the sums in the charge sheet.

4. The charge sheet, according to the Appellant's advocate, was defective for duplicity. In combining three transactions relating to 3 separate land parcels, the prosecution rendered the charges duplex, he argued. On the sentence, it is argued that the same was harsh and excessive as there was no evidence that the Appellant sold any land parcel or received any payment in that regard from the complainants.

5. For his part the Director of Public Prosecutions conceded the appeal citing the prosecution failure to call critical witnesses such as the Land Registrar and the real owner of the property, in proof of the alleged fraudulent nature of the impugned transaction. The Director of Public Prosecutions also points out that no sufficient connection was established between the Appellant and the alleged fraudulent

transaction and that the court shifted the burden of proof to the Appellant.

6. As an appellate court, this court is not bound to agree with the concession made by the DPP (see **Safari Charo Koyo Vs. Republic [2017] eKLR**). The court must re-evaluate the evidence on record and draw its own inferences. In **Okeno –Vs- Republic [1972] EA 32** the court stated:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424.”

7. The prosecution evidence was as follows. A group of land dealers comprising of **Harry Njenga Kamau (PW1)**, **Simon Ndungu Nyegenye (PW2)** and complainant in charge sheet), **David Thamaine Kamau (PW4)** **Peter Macharia Waweru (PW3)** and **Peter Muigai Kariuki** were seeking for parcels of land to purchase. One of them, Peter (not clear which one in particular) was approached by a secretary in the Law firm of Gichuki Advocate, Jacinta Nyawira (the appellant) and informed of the availability of 3 land parcels being **NAIVASHA MWICHIRINGIRI BLOCK 4/867, 868 and 869** for sale.

8. The appellant gave the purchase price as Shs 1,200,000/- a piece, when she met the group on 13/4/2012. She later communicated to PW1 that the owners had agreed as requested by group through her to reduce the price of each parcel downwards to Shs 1,050,000/=. Subsequently she passed onto **PW1** and **PW2** the copies of titles to the plots, all in the name of **Teresiah Wamaitha Njuguna**. The parties confirmed the bonafides by conducting searches in the land office. They also viewed the properties.

9. The appellant herein organized for a meeting between the purchasers and purported owners of the land on 19/4/2012. The former group met 3 men and 1 woman the latter who was said to be the land owner. One of the men gave his name as Ng’ang’a and another Kamau the owner’s alleged neighbours. The Appellant’s co-accused in the trial introduced himself as a son of the owner, who allegedly resided in Githunguri. When the purchasers requested to make payment by cheque the vendor claimed that her account was in arrears, demanding cash payment.

10. **PW1** and his partners therefore withdrew cash from their respective bank accounts totaling Shs 3,150,000/=. Jacinta prepared an agreement for sale which was however signed before another advocate identified as Ngechi, as Jacinta said her employer was out. The money was paid over to the ‘vendor’, after one of the accomplices confirmed it to be alright.

11. A week later, the purchasers presented their documents at the Lands office. They were asked to present the vendor, but the Appellant and her co-accused were evasive when asked to produce her. Eventually the complainants traced a lady going by the names of the alleged vendor, in Githunguri. She allegedly denied having sold the plots. Apparently, her grandchild had stolen the title documents. It turned out that the alleged vendor had been an imposter. Police arrested Jacinta and her co-accused. When called upon to make her defence, the Appellant merely admitted to have introduced the purchaser to the vendors in her office, denying any further role in the dubious transaction.

12. As a first appellate court, the duty of this court is to review the evidence of the trial and draw its own conclusions. (See **Okeno -Vs- Republic [1972] EA 32**). Without going into the merits or otherwise of the charge sheet presented, the fraudulent intent and the false pretence stated in the particulars of the charge state inter alia that: **“with intent to defraud obtained from Simon Nyegenye the sums of Kshs 3,150,000/= by falsely pretending that they had sold land parcels numbers NAIVASHA/MWICHIRINGIRI BLOCK 4/867, NAIVASHA/MWICHIRINGIRI BLOCK4/868,**

NAIVASHA/MWICHIRINGIRI BLOCK 4/869 an information they knew to be false or believed to be untrue.”

13. The false nature of the information underscores the intent to defraud. Thus, it was incumbent upon the prosecution to prove the alleged lack of bonafides of the proffered title documents and the lack of capacity on the part of the alleged imposters to sell the land to the complainant. The trial magistrate correctly directed herself to the definition of ‘false pretence’ under section 312 of the Penal Code:-

“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.”

14. From the evidence tendered, there can be no dispute that the supposed vendor and her 3 companions received the sum of Shs 3,150,000/= from the complainants or one of them presenting payment on their behalf, purportedly as purchase price for the three land parcels. However the prosecution failed to adduce evidence in proof of the false pretence and attendant intention to defraud on the part of the ‘vendor’ and her partners.

15. The complainants told the court that after the lands office declined to process their transaction, they traced the real owner a lady in Githunguri bearing similar names as the imposter vendor, and who allegedly denied having sold the 3 parcels of land. This critical witness was inexplicably never called to testify. Neither was the land registrar. This is a most surprising omission on the part of the prosecution. In my considered view, the trial court was entitled at this juncture to invoke the provisions of Section 150 of the Criminal Procedure Code to summon these witnesses.

16. All that remained therefore was strong suspicion that indeed the Appellant perpetrated a fraud, with other actors. Based on her described and admitted role, and subsequent conduct, she was probably complicit of the false nature of the transaction in question. At the end of the trial however the main question remained unanswered to the required standard: whether the Appellant was complicit in the impugned transaction from the role she played, or whether she was part of a conspiracy, hatched by herself, her co- accused and other actors to defraud the complainants through pretended ownership by one of them, of the subject parcels of land.

17. While it is apparent that the appellant had abused her position as a secretary in a legal firm, not only to carry on a land brokerage business but also to prepare legal documents, evidently for some benefit, there is no firm evidence as to her complicity in the fraud against the complainants in this case. As stated in **Sawe –Vs- Republic [2003] eKLR**

“suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

18. In light of the foregoing, I agree with the submissions by the Appellant’s counsel in support of grounds 2 and 3 of the Petition of appeal. The Director of Public Prosecutions correctly conceded the appeal on grounds that evidence tendered against the Appellant was insufficient to support the conviction. In the circumstances I will allow this appeal, quash the conviction against the appellant and set aside the sentence meted out.

Delivered and signed at Naivasha, this **16th** day of **November, 2017**.

In the presence of:-

For the DPP : Mr Mutinda

For the Appellant : Mr Owuor

Appellant : Present

C/C : Barasa

C. MEOLI

JUDGE