REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 147 OF 2011

IRENE ROSE WANJIRA MARARO.....….....…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 732 of 2008, Nyeri, R vs Irene Rose Wanjira Mararo delivered by K. Cheruiot R. M. on 29.6.2011).

JUDGEMENT

Irene Rose Wanjira Mararo (hereinafter referred to as the appellant) was convicted on four counts of obtaining registration of land titles by false pretences contrary to Section **320** of the Penal Code[1]and was sentenced to a fine of **Ksh. 5,000/=** on each count in default to serve **six months imprisonment.** The learned magistrate acquitted her on four counts of forging land title deeds for lack of evidence.

Aggrieved by the said verdict, the appellant appealed to this court against both conviction and sentence. Her appeal filed on 11th July 2011 cites **4** grounds which in my view can be addressed by answering the following issues, namely:-

a. Whether the prosecution proved its case to the required standard.

b. Whether the charge sheet as drawn was defective.

This being a first appeal the court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The duty of the Judge is to consider the evidence objectively and dispassionately.[2]

On whether or not the prosecution proved its case to the required standard, I have carefully considered the prosecution and defence evidence, the relevant law and authorities. Section **320** of the Penal Code[3] provides that:-

Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.

I have deliberately underlined the words *"for himself or any other person"* because as the evidence in this case revealed, some of the titles in question were obtained in the names of other persons while others bore the name of the appellant. It is clear from the wording of Section **320** cited above, the accused person must:-

a. wilfully procure for himself or any other person any registration, licence or certificate under any law;

b. by false pretence.

False pretence is defined in Section **312** of the Penal Code[4] as follows:-

> *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 true, is a false pretence.*

The operative word under Section **312** is "***representation"*** which is applicable in the following circumstances:-

> *i. A representation by words, writing or conduct.*
>
> *ii. A representation in either past or present.*
>
> *iii. A representation that is false.*
>
> *iv. A representation made knowing it to be false or believed not to be true.*

The High Court of Botswana in *Lesholo & Another vs The State*[5] dealing with an offence of this nature held that:-

> *i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intend to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.*
>
> *ii. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not a false pretence if it is made in relation to the future event if it is made fraudulently. Where however, the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false.**[6]***

The offence of obtaining by false pretence means knowingly obtaining another person's property by means of a misrepresentation of fact with intent to defraud. For the offence of obtaining by false pretences to be committed, the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen.

Perhaps the most explicit exposition of the ingredients of the offence of obtaining by false pretences is to be found in the decision rendered by the Nigerian Supreme Court in the case of *Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria*[7] where the court stated in order to succeed in a charge of obtaining by false pretences, the prosecution must prove:-

> *a) that there is a pretence;*
>
> *b) that the pretence emanated from the accused person;*
>
> *c) that it was false;*
>
> *d) that the accused person knew of its falsity or did not believe in its truth;*
>
> *e) that there was an intention to defraud;*
>
> *f) that the thing is capable of being stolen;*
>
> *g) that the accused person induced the owner to transfer his whole interest in the property."*

The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest believe in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence. The above adequately presents the law as in the Penal Code."

I now briefly examine the evidence adduced in the lower court. **PW1** testified that after his father's death in 2007, his late fathers' title documents were placed in his custody pending filing succession proceedings. In May 2008 he received call from the CID that someone was complaining that her signature at the lands office had been forged. Official search on the titles revealed that one title was in his name, another one was in his name jointly with his father and the appellant (the property the subject of count three). He denied that he was ever involved in the transfer of the property. A search in respect of the property the subject of count two showed that it was registered in the name of the appellant. Previous searches on this title showed that it was in the name of the deceased. A search in respect of the property the subject of count V111 showed that it was registered in the name of the appellant. Also the property the subject of count V was found to be registered in the name of the appellant, though previously it was registered in the name of the deceased.

PW2 Peter Wangai Mararo testified that properties in his late father's name had been transferred as per the search certificates marked MF1 I to 13. He stated that a search for title number 1865 was registered in his name, his father and brother. He denied that he was involved in the transfer.

PW3 David Githaiga formerly an employee of Municipal Council of Karatina narrated the procedure involving transfer of properties in the Municipality and was certain that according to the council records, there were no transfer at all for title numbers, Block 1/276, Block 1/ 144 and Block 1/43.

PW5 who previously worked at the Nyeri Lands office as an assistant Land Registrar disputed a signature purported to be his that appeared in the documents alleged to have been used in the transfer of the properties in question and denied that the alleged transfers were done at the lands office.

PW4 formerly an employee of the Ministry of Lands and Settlement seconded to Mathitra Land Control Board as the secretary was categorical that from their minutes, title number Iriani/ Kairia/1865 was never discussed in the Land Control Board for purposes of granting a consent. Also, **PW7** who was the Nyeri District Land Registrar at the material time denied ever signing the documents relating to title number **1865** and **144** while **PW8** who also worked at Nyeri lands office denied signing documents for title numbers **433** and stated that no such transaction was entered on the presentation book on the date it is was alleged to have been transferred.

PW 9 also previously worked at the Nyeri Lands office confirmed that no documents were presented relating to Iriani/Kiaguthu/**1039** and Iriani/Karia/**1865** and concluded that the alleged transactions were not proper.

PW10 testified that she was interested in buying a parcel of land from the appellant, that they entered into a sale agreement, she paid part of the agreed consideration but before she could clear the balance the appellant approached her asking for the balance and to her surprise the appellant was holding a title already transferred into her name for the same land being **Iriaini/Kagutho/1039**. She never attended the mandatory land control board nor did she sign any transfer documents or participate in the processing of the said title in any manner. The appellant refunded her money. Her testimony was collaborated by the advocate who acted in the said sale and also **PW12**. The meaning of corroboration as defined or stated in the Nigerian case of *Igbine v. The State**[8]* is thus:-

"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses".

The investigating officers evidence was that he visited the offices of the land control board and Municipal Council of Karatina and confirmed that there were no records for the alleged transfers and that

the plots were in the names of the original owners. At the lands office, block 2/433 the records showed it had been transferred to the appellant. Also, Iriaini/Karia/1865 records showed it was transferred to the appellant on 20.4.2007, but was not officially booked. As for Block 2/433, the presentation did not reflect the purported transfer to the appellant and upon inquiry, the three land registrars confirmed that they did not sign the transfers in question. He was of the view that the transfers in the appellants favour were effected fraudulently since proper procedures were not followed.

PW12 investigated the case before he was transferred. He confirmed that it was the appellant who gave him copies of the title deeds but she declined to release the originals to him. He filed a miscellaneous application in court seeking courts assistance to recover the originals but he was transferred before he could get the court orders.

In her unsworn defence, the appellant did not shed light on how she acquired the titles. She insisted that the titles were given to her by her late husband and that her step children brought the case because they did not like her. In her testimony, she never presented any documents showing the instruments that transferred the parcels land to her or the alleged transferees. She never denied selling **Iriaini/Kagutho/1039** to **PW10** nor did she dispute entering into a sale agreement with her. She never explained how she obtained the title in her name without involving her. Normal procedures like seeking and obtaining the requisite consents from the Land Control Board or the Municipal Council were never compiled with. The lands office also disputed the alleged transfers. Her testimony was so shallow that it never shed light on the allegations nor did it rebut the allegations against her. I find that the defence by the appellant did not cast doubts on the prosecution case nor did it prove how she acquired the title.

The key questions are, did the prosecution prove the four counts to the required standard? Does the defence offered by the appellant in the lower court raise doubts on the prosecution case? Does it rebut the above ingredients? I have reviewed and analysed the defence offered by the appellant. A close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case. In my view, the defence did not rebut the serious allegations made in the evidence nor did it create doubts in the prosecution case.

After evaluating the evidence adduced, the law and authorities, I am satisfied that the prosecution proved the offence and that the necessary ingredients of the offence as enumerated above where proved beyond doubt. It is trite law that an accused person should only be convicted on the prosecution case and not on the weakness of his defence as it was held in the case of ***Sekitoleko vs. Uganda.[9]***

I find it necessary to address ground one of the appeal where the appellant states *inter alia* that the prosecution evidence was **contradictory.** On this point useful guidance can be obtained from the decision by the Uganda Court of Appeal in *Twehangane Alfred vs Uganda**[10]** where it was held that* it is not every contradiction that warrants rejection of evidence. As the court put it:-

> *"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."*

Thus, it is settled law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.[11] The question to be addressed is whether the contradictions cited by the appellants are grave and point to deliberate untruthfulness or whether they affect the substance of the charge.

At this juncture, it is important to examine the nature and meaning of the word contradiction. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of *David Ojeabuo vs Federal Republic of Nigeria*[12] where the court stated as follows:-

> *"Now, contradiction means lack of agreement between two related facts. Evidence contradicts*

another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

In the above cited case it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.[13]It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.[14] I find that the contradictions cited in this case (if any) are not substantial or fundamental to the main issues to the extent of creating doubts in the mind of the court.

Counsel submitted that there was no nexus between the evidence adduced and the charge sheet. The word nexus means *"a connection or series of connections linking two or more things."* There is evidence that the appellant caused title deeds to be transferred into her name and or names of other persons. The alleged transferees never signed any transfer instruments or participate in the transfer process. How did she obtain the titles. This question was not answered, yet all fingers and possibilities point at her. The appellant sold one of the parcels and took a title deed to the buyer bearing her name, yet the buyer never attended the land control board or sign any transfer documents. There was a duly signed sale agreement to attest to this. The lawyer who acted in the transaction confirmed this. This crucial evidence was never rebutted. In my view, the evidence was not only overwhelming, but it irresistibly pointed to the guilt of the appellant.

Counsel for the appellant insisted that the charge sheet was defective because it stated that the offences were committed at Karatina yet the land registry is at Nyeri. The particulars of a charge form an integral part of the charge sheet. This position was reiterated by the court of appeal in *Isaac Omambia vs Republic*.[15]"In this regard, it is pertinent to recall the provisions of Section **134** of the Criminal Procedure Code[16]which provides that:-

"Every charge or information shall contain, and it is sufficient if it contains a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence"

It is trite law that an accused person must be charged with an offence known to the law, including the correct particulars in the charge sheet, so that the accused person is informed of the offence with which he is charged, and the likely sentence that he would receive if convicted. In this regard, I adopt, with approval, the sentiments expressed by the court in *Sigilani vs Republic*[17] where it was held that:-

"The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence to the charge."

The charge sheet stated the offence was committed at Karatina. The witnesses at the lands office stated that the transfer documents were not presented at the lands office and the land registrars disputed the signature appearing in the documents produced in court. One thing is evident, the titles in question were not genuinely obtained, and evidence adduced implicates the appellant. In my view it could have been sufficed for the charge sheet to state that the offence was committed at an unknown place. The nature of the offence is such that evidence does not have to place the appellant at the scene. In some offences like robbery, the evidence must as of necessity place an accused person at the scene. But for an offence like the one in this case what is important is for the prosecution to prove the ingredients of the offence as outlined earlier in this judgement.

The mention of Karatina to me is a mere discrepancy that is not fatal. I am reinforced in my view by the sentiments expressed by the court of appeal in *Joseph Maina Mwangi vs Republic*[18]where it was held as follows:-

> *"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code**[19]** that is whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"*

I hold the view that the discrepancy as to where the offence was committed is in my view inconsequential and cannot be said to have caused prejudice to the appellant. As stated above, it could have been sufficient for the charge sheet to read that the offence was committed at an unknown place because titles can be fraudulently processed at the lands office or elsewhere. What is important is for the prosecution to bring forward cogent evidence connecting the appellant with the titles in question and in this regard I find that the evidence tendered was strong, overwhelming and compelling and that the ingredients of the offence were proved to the required standard. It is also important to mention that it was the appellant who gave copies of the titles to the police but refused to give them the originals raising questions as to where she obtained the copies from if at all no originals existed.

The upshot is that the learned magistrate correctly analysed the evidence and properly convicted the appellant on the strength of the evidence and that the charge sheet as drawn is not defective. Hence, I hereby up hold the conviction.

Regarding the sentence, it is an established fact that sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

The general principles the Court adopts in an appeal relating to sentence was authoritatively stated by **Nicholas J** in the South Africa case of *R v Rabie**[20]*as follows:-

> *1. "In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-*
>
> *(a) should be guided by the principle that punishment is "pre- eminently a matter for the discretion of the trial Court"; and*
>
> *(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised*
>
> *2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.".*

Further sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must consider the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances.[21]

The appellant was sentenced to a fine of Ksh. 5,000/= for each count or in default to serve six months imprisonment. Section **320** of the Penal Code[22] provides that a person convicted under the said section shall be liable to imprisonment for one year. I find that the said sentence is not excessive considering the nature of the offence.

There is nothing to show that the trial court the court took into account irrelevant factors or that a wrong

principle was applied nor is the sentence so harsh and excessive that an error in principle must be inferred. Accordingly, I find no reason to interfere with the said sentence.

The upshot is that this appeal against both conviction and sentence fails and the same is hereby dismissed.

Right of appeal 14 days.

Signed, delivered and **dated** at **Nyeri** this **28th** day of **June** 2016

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] See the Supreme Court of India in the case of K. Anbazhagan v. State of Karnataka and Others, Criminal Appeal No. 637 of 2015

[3] Supra

[4] Ibid

[5] {1999} (2) BLR 278

[6] R. vs Dent {1952} 2 Q.B. 590

[7] SC. 41/2003

[8] {1997} 9 NWLR (Pt.519) 101 (a), 108

[9] {**1967} EA 531**

[10] *Crim. App. No 139 of 2001, [2003] UGCA, 6*

[11] See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217 & uGANDA VS

[12]{2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

[13] See Osetola vs State {2012} 17 NWLR (Pt1329) 251

[14] See Theophilus vs State {1996} 1 nwlr (Pt.423) 139

[15] {1995} eKLR

[16] Cap 75, Laws of Kenya

[17] {2004} 2KLR 480

[18] {2000} eKLR

[19] Cap 75, Laws of Kenya

[20] {1975} (4) SA 855 (A) at 857D-F

[21] Alister Anthony Pareira vs State of Maharashtra {2012}2 S.C.C 648 Para 69

[22] Supra