REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 2 OF 2015

(CORAM: J. A. MAKAU – J.)

RIBANEX CAXTON AWITA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 24.3.2016 in Criminal Case No. 458 of 2012in UKWALA Law Court before Hon R. M. Oanda – AG.P.M.)

JUDGMENT

1. The Appellant **RIBANEX CAXTON AWITA** was charged with an offence of obtaining by false pretences contrary to **Section 313 of the Penal Code**. The particulars of the offence are that on the diverse dates of 13th and 24th April 2012 in Ugunja sub-location in Ugunja district within Siaya County with intent to defraud obtained from **LUCAS OMONDI RAKAMA** the sum of Kshs.35,000/= by falsely pretending to rent a shop for five months advance down payment to the said **LUCAS OMONDI RAKAMA** worth the said sum of Kshs. 35000/=.

2. After full trial the appellant was found guilty, convicted and placed on probation for a period of two (2) years.

3. The conviction and sentence provoked the appellant to prefer this appeal setting out eight (8) grounds of appeal as follows:-

> ***(a) The Learned Ag. Principal Magistrate erred in law and in fact in convicting the Appellant for the offence of Obtaining by False pretences contrary to Section 313 of the Penal Code, in the absence of any of any sufficient evidence in support thereof.***
>
> ***(b) The Learned trial Magistrate was wrong in not finding that the particulars of the charge had not been proved.***
>
> ***(c) The Learned Magistrate erred is not finding that the acts complained of as presented by the prosecution did not constitute/establish the offence charged.***
>
> ***(d) The Learned trial Magistrate erred in not finding that at the time the Lease agreement was executed between the Appellant and the Complainant, the Appellant was incapable of committing the act of false pretence which constituted the offence charged.***
>
> ***(e) The Learned Ag. Principal Magistrate was wrong in not finding that the contract between the***

Appellant and the Complainant related to a promise for the future (when the subject premises would be ready for occupation) which promise could not constitute the offence charged.

(f) The Learned trial Magistrate erred in law and in fact in allowing the use of criminal prosecution for recovery of a civil debt.

(g) The Learned Magistrate was wrong in not finding that the dispute between the Complainant and the Appellant was a purely contractual Civil matter that required civil remedies.

(h) The Judgment of the Learned Ag Principal Magistrate as a whole was against the weight of evidence on record.

4. The Appellant was represented by Mr. Manwari, learned Advocate, whereas Mr. Elphas Ombati, represented the State.

5. I have very carefully considered the rival written submissions by the appellant's and Respondent's Counsel as well as their oral submissions in support and in opposition of the appeal.

6. This is a first appellate court and as such I am required to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and cannot comment on their demeanour. I will draw my conclusion, after giving due allowance and in doing so I am guided by the Court of Appeal in the case of **Okeno V Republic [1972] E.A. 32** where the court set out the duties of first Appellate court thus:-

"***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. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A.. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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 V. Sunday Post, (1958) E.A. 434)***"

7. The evidence in support of the charge as the appellant's defence is part of the record of appeal and as such I would not reproduce the same as it is easily available from the Record of appeal, I shall however summarize the facts of the prosecution case and the defence in this appeal.

8. The facts of the prosecution case are that PW1 Lucas Omondi Rakama on 4th April 2012 was called by the appellant telling him he had a house to let. PW1 and his wife met the appellant, and agreed on the rent at Ksh.35,000/= which was to be paid after a week. That on 13.4.2013 PW1 paid Ksh.30,000/= and receipt MFI – P1 issued and further Ksh.5000/= was paid on 24.4.2012 as per receipt MFI – P2. PW1 was to enter the house on 15.5.2012. In May when PW1 wanted to prepare the house for a shop, the appellant told him NEMA had refused him further construction. PW1 waited upto August 2012 without getting any information from the appellant. PW1 later saw another businessman entering the shop. PW1 send his wife to the appellant who told her, he had let the premises to a customer who paid more money and he offered to refund the deposit to PW1 but did not do so. In October PW1 reported the matter to the area Chief who summoned the appellant but he did not honour the summons. PW1 then reported the matter to Police who summoned him but he offered to pay the amount in a week's time but failed to do so. He was arrested and arraigned before court and charged with this offence.

9. The defence case is that the appellant knows the complainant. That the appellant owns a business premises at Ugunja as per plan MFI-D2 plot 557 Ugunja which the appellant was developing a storeyed commercial building with provision of two shops at the ground floor. That in February 2012 the complainant approached the appellant seeking a shop and he told him to wait till April and at the same time he paid Ksh.35,000/= as a deposit notwithstanding the premises was not ready for occupation. That

as the appellant continued with the construction the complainant approached him wanting his money back as his wife was going to T.T.C. That as the appellant could not raise the money the complainant kept on demanding the same. That the complainant later reported the matter to police who wanted the appellant to pay the money upfront. The appellant instructed his lawyer's who wrote a letter to the O.C.S. dated 23.1.2012 – MFI – D3. That upon receipt of the lawyer's letter the police got infuriated and arrested the appellant and charged him with this offence. That by the time of the arrest the appellant had completed the construction and the shops were ready for occupation. That the delay was caused by NEMA when it stopped the construction as per MFI-D1. The appellant denied the offence of obtaining money falsely as it was rental deposit, urging he did not stop the complainant from taking possession of his premises and stated he told the complainant he could not raise the money at once. He stated the charge is misplaced, wrongful as the complainant would have filed a civil suit, other than lodging a complaint through the police. He produced the documents as exhibit D1, D2 and D3.

10. The appellant's counsel in support of the appeal submitted that the prosecution failed to prove the offence to the required standard, that the particulars of the offence disclosed no offence, that tenancy was to take effect in future hence no offence of false pretence was disclosed, that the trial court misapprehended the law and that the complainant's remedy lied in civil claim. The learned Advocate for the appellant in support of his submissions referred to two authorities: **Francis Mwangi & Another Vs. Republic [2015] eKLR** and J**oseph Wanyonyi Wafukho Vs. Republic [2014] eKLR.**

11. The state counsel opposed the appeal and submitted that the deposit by the complainant was for rent deposit for 5 months, that it was not clear from the documents when the tenancy was to commence, but submitted the premises should have been completed by the end of April 2012 hence the intention to defraud, the appellant did not demonstrates any effort to seek indulgence of the complainant regarding delay nor did he exhibit goodwill at all in dealing with the complainant and that the appellant did not offer an explanation to exonerate himself from the offence. The learned State Counsel in support of that proposition referred to the case of **Gerald Ndoho Munjuga V. R. HCCRA No. 213 of 2011 (Nyeri)**

12. The Appellant herein faced a charge of obtaining by false pretences contrary to **section 313 of the Penal Code.**

> **Section 313 of the Penal Code** Provides:-
>
> ***"Any person who by any false retence, 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."***

13. The essential elements of the offence of obtaining through false pretences can be summarized 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***.

14. It is important before proceeding to deal with each of the essential elements of obtaining through false pretences to state what the Penal Code defines "***False pretence***." to be under **Section 312 of the Penal Code**:-

> "***False pretences" is defined 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 be true, is a false pretence."***

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

(a) A representation by words, writing on conduct.

(b) A representation in either past or present.

(c) A representation that is false.

(d) A representation made knowing it to be false or believed not to be true.

16. In view of the above it is therefore very clear that the offence of obtaining by false pretence does not relate at all to any future events. The above Sections unfortunately proclaims that the representation **should be of either past or present fact but not future fact (*underlining mine to emphasis the relevant representation that result into false pretences*)**. The case law referred to me points towards that direction and position.

17. In the case of **Owere V. R. (1984) KLR 2001,** at The Court of Appeal sitting in Nairobi addressed itself thus:-

"A representation as to a future contract support a charge of obtaining money by false presentences. In the above mentioned, the case R V. Dent (1955) 2 Q.B. PP 594/95 was referred to and in which case Derlin, J. - State:-

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

18. In the case **Gerald Ndoho Munjuga V R HC Criminal Appeal No. 213 of 2011 (Nyeri). Justice Mativo,** quoting with approval from the **High Court of Botswana in Lesholo & Another V. The State,** which case dealt with an offence of this nature noted the court held:

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 false pretence if it is made in relation to the future even 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 [8]

iii. ……..... The representation must be made with the specific purpose of getting money from the complainant which he/she would not have given had the true facts been revealed to him"

19. In view of the provisions of **Section 313 of the Penal Code** and the several circumstances, relating to the issue of obtaining by false pretences, the representation of facts must be past or present and not of the future. In the case of **Joseph Wanyonyi Wafukho V. R. (2014) eKLR** my brother **Hon. Justice Gikonyo** and in the case of **Francis Mwangi & Another R. [2015] eKLR** my sister **Lady Justice G.W. Ngenye and in Case Gerald Ndoho Munjuga V. R (2016) eKLR,** the learned judges made a similar observation, that obtaining by false pretences does not relate to the future events.

20. In the instant case the complainant PW1 testified that he paid rent deposit for a house which was still under construction and for future occupation. The appellant informed PW1 that NEMA had refused him

further construction. This is confirmed by PW1's exhibits P1 and P2 which are silent on the commencement period of the tenancy though the purpose of the payment was to create tenancy between the Appellant and the complainant. Exhibit P3 dated 17.03.2012 partly stated:

> ***RE: ADVANCE RENT PAYMENT:***
>
> ***Today on 17.03.2012 I Ribanex Caton Awitta confirm having received Kshs.35,000/= say K.Shillings Thirty Five Thousand only, being rent advance for premise at Ugunja. This being 5 months rent advance. The premise should be complete by end at April 2012 for the tenant – David Kimaiyo.***
>
> ***1. Ribanex Caxton Awitta ID/No.22.11735 - signed.***
>
> ***2. David Kiprotich Kimaiyo ID/No. 12028050 – signed***
>
> ***3. Zachary Oyula Opondo ID/No. 14663444 – signed***

Exhibit P3 related to tenancy for one David Kimaiyo, PW2 and not the complainant. The position as regard commence of tenancy period for the complainant, PW1 cannot be ascertained from exhibit P1 and P2 but from the evidence of PW1 and PW2 it was intended to be in the future once the construction was completed. The appellant in his sworn evidence which was not controverted or challenged at all by the prosecution, he testified that he agreed to let a shop to the complainant in February 2012 and asked him to wait till April 2012 but the premises was not ready by then forcing the complainant to demand back his money but the appellant could not raise the full amount at once leading the complainant to file a complaint with police. The delay in completion of the building was caused by NEMA which had stopped the works as per exhibit D1 which delay was communicated to the complainant. The appellant stated that he eventually completed the building and he has not stopped the complainant from taking possession. That he did not refuse to refund his money but delayed due to the fact owing that he is not able to raise the whole amount at once which fact was communicated to the complainant.

21. The issue for my consideration is whether the prosecution proved the offence of obtaining through false pretenses as to the required standard? The prosecution in the instant case needed to demonstrate that the appellant received the money and had no intention of releasing the rental premises to the complainant. From the evidence of PW1, he only paid rental deposit to the appellant and no agreement in written was made but oral agreement in which the appellant offered to handover the premises in April 2012. The premises offered was under construction however NEMA stopped construction frustrating the appellants efforts to complete the building as he had anticipated and leading to the breach of the contract. The delay was not intentional and it can safely be said the prosecution proved receipt of the rental deposit but did not prove that the appellant had intention to defraud the complainant. It has in view of the above not been demonstrated that the appellant's representation to the complainant was to his knowledge not true. The alleged false pretence did not relate to a past or present but related to the future event and even if it was made fraudulently it is not a false pretence as it related to the future events. It would amount to false pretence if the representation is of past or present or both future promises if coupled with false statements of existing or past facts and if such alleged existing facts are false. In view of the above it is not possible to come to a conclusion that the appellant had intention to defraud the complainant, as his representation related to a future event, which unfortunately was frustrated by the failure to complete the construction in time due non-compliance with (NEMA Regulations) or requirements which had resulted in stopping the constructions works before the promised time of delivery of the offered premises.

22. The complainant claimed both PW1 and PW2 were offered one shop yet in his exhibits P1 and P2 the shop number of the offered shop to him has not been disclosed. He did not in his evidence disclose which of the two shops was offered to him, in terms of number or location. I have considered PW1's evidence and that of PW2, PW3 and that of the appellant, and the only reasonable conclusion that one can draw from the evidence is that the complainant was offered any of the two shops and not a particular shop, and had that been the case the site or location or number of the plot that was offered to the complainant should have been indicated in the receipt issued to him. That there is still a vacant shop

which the complainant could have taken, therefore the appellant cannot be said had intention to defraud the complainant.

23. I will now turn to the appellant's Counsel submission as to whether the complainant's claim is civil or criminal in nature and whether it was proper for the complainant to invoke criminal process in pursuance of his claim? The evidence on record and the production of rental receipts exhibits P1 and P2 is an indication that there was an oral tenancy agreement between the complainant and the appellant. The transactions between the two was a commercial transaction, this claim is therefore civil in nature. We have in this country legislation governing the relationship between the Landlords and Tenants and even a Tribunal to deal with disputes between Tenants and Landlords arising out of breach of tenancy agreements. We equally have civil courts to deal with commercial claims arising out of issues dealing with breach of contracts, such as the one in this instant case. PW1 complained to police. PW3 testified that he commenced investigation and in his evidence he stated and I quote:-

> ***"I produce exhibit P4. Accused obtained money from complainant"***

24. In his evidence PW3 never mentioned that he found that the appellant had obtained money by false pretence before he charged him with that offence. He admitted in cross-examination he has never known anything as:-

> ***"breaching of contract"***

The police were informed by appellant's counsel that this matter between the two was a civil matter and not criminal in nature through a letter exhibit D3, which letter irked the police officers and decided to prefer criminal charges against the appellant. The trial court in considering the appellant's evidence as regards to the nature of complainant's claim started as follows:-

> ***"In his defence, accused, despite the prevailing circumstances had guts to tell the court that the complainant ought to have filed a civil suit for recovery. This in my view, is a reflection and/or display of impunity of the worst order. It is a sign that accused herein intended to defraud ------ todate he has not made any effort to refund the money paid to him by complainant."***

25. The complainant's claim was never a claim based on criminal law but civil law. The delay in refund of the rental deposited or delivery of premises offered to the complainant did not make appellant's breach of the contract criminal in nature. The proceeding to police could not otherwise make appellant's breach of contract criminal in nature. The complainant knew what he wanted was either the refund of his money or the shop offered but he could not get the shop as it had not been completed then and to settle old scores or teach the appellant a lesson he unjustly decided to use criminal justice system to pursue not his claim but to have appellant punished. The complainant's claim is firmly hinged on civil process and he should not have invoked criminal process. It is my finding that the complainant's application of criminal justice system to have the appellant apprehended, interrogated, arraigned in court was wrong as it was made to punish and humiliate the appellant rather than settling the complaint's claim in the right forum thus in a civil court. (see **Joseph Amunga Ochieng V R HCRA 94 of 2015 Siaya**)

26. **Article 25 of the constitution** provides:

> ***"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited:-***
>
> ***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***
>
> ***(b) freedom from slavery or servitude;***
>
> ***(c) the right to a fair trial; and***
>
> ***(d) the right to an order of habeas corpus."***

The application of the criminal justice system should not be applied in a clear situation where the matter in issue is civil or rights in nature.The police should not allow themselves to be used by public to harass, torture, punish or treat innocent citizens in a degrading manner in assisting people whose civil claims or rights are disguised as a criminal offences such as in the instant case. I find the police in the instant case acted wrongfully, unlawfully and unconstitutionally in prosecuting the appellant for a non-existent offence as the complainant's claim was purely civil in nature.

27. **The upshot is that the trial magistrate erred in law and fact in convicting the appellant on charge which was not supported by evidence. That had the court addressed its mind on the nature of the claim, it would not have come to the conclusion it did. The charge of obtaining by false pretence was not proved at all and for that reason the appeal succeeds. I allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.**

DATED AT SIAYA THIS 16TH DAY OF JUNE, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 16TH DAY OF JUNE, 2016.

In the presence of:

Mr. J. O. Manwari for the Appellant

Mr. E. Ombati for State

Appellant - Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE