REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 210 OF 2011.

REPUBLIC :: PROSECUTOR.

VERSUS

ALPHONSE MUSONYE :: ACCUSED.

(Being an appeal from the conviction and sentence of P.O. Ooko – RM in Criminal Case No. 348 of 2008 delivered on 13th September, 2011 at Kakamega)

JUDGMENT

1. The appellant herein ALPHONSE MUSONYE was charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal code. It was alleged that on the 9th day of July, 2004 at Bwichina village Shiswa sub/location in south Kakamega District within Western Province, with intent to defraud obtained from ATANAS MADEGWA the sum of Ksh. 45,000/= in pretence that he would sell him a piece of land a fact which he knew to be false.

2. He denied the charge and the case proceeded to full trial. After the full hearing and upon consideration of all the evidence that was placed before it, the trial court was satisfied that the prosecution had proved the case against the appellant. The appellant was found guilty and convicted. He was fined Ksh. 40,000/= in default he was to serve two (2) years imprisonment. He paid the fine.

The appeal

3. The appellant was aggrieved by the said decision and filed this appeal on the following grounds:-

(i) That the learned trial magistrate erred in fact and law in convicting the appellant when the prosecution had not proved their case on the required standard;

(ii) That the learned trial magistrate erred in fact and law in shifting the burden of prove as against appellant;

(iii) That the learned trial magistrate erred in fact and law in rejecting the evidence of the appellant;

(iv) That the learned trial magistrate erred in fact and law in convicting the appellant while basing solely on circumstantial evidence;

(v) That the trial magistrate erred in fact and law in basing his decision on matters that had not been brought up in evidence.

4. Mr. Mukavale, learned counsel for the appellant combined all the grounds of appeal in his argument. He argued that there was no proof of the offence by the evidence on record. He submitted that the appellant and the complainant entered into land sale agreement where the appellant was paid Ksh. 45,000/=. It was clear that the land was not in the appellant's names but was in the names of a person who had sold to the appellant but had not transferred the same. Since he (the appellant) had taken possession, the appellant gave the complainant possession and the complainant started using it. The complainant was thereafter stopped from using the said parcel by one RobaAndeke Silisi.

5. There was an agreement between the appellant and the complainant with Robai Andeka over the land. Robai Andeka was the registered owner of the land.

6. Counsel submits that the complainant did not address court to the fact that the land was registered in the names of Robai Andeka which was critical. He adds that the court also did not address itself to that fact but focused on the element that there was no agreement with Robai. He opines that the matter was purely a civil dispute and there was no intent to defraud.

7. Mr. Oroni from O.D.P.P conceded to the appeal on the ground that the charge did not disclose offence vis a vis the evidence on record. There were agreements and possession and there was no false pretence that was disclosed. He added that Robai Andeka who is the registered owner of the land in question herein sold the same to the appellant but never transferred it. The appellant then sold it to the complainant who took possession. Robai then tried to claim back possession. He maintained that the dispute was purely of a civil matter.

Analysis and Determination

8. This being the first appeal, then this court's duty is to analyse the evidence afresh and come up with its own conclusion bearing in mind that it never had chance of seeing the demeanor of the witnesses while they gave their evidence **See Okeno vs. Republic 1972 EA 32 and Mwangi vs.Republic 2006 2 KLR 28.**

9. In the case of **Okeno vs. Republic 1972 EA 32** the court of appeal for East Africa stated the duty of an appellate court on first appeal as follows:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination".***
>
> ***The above position was enunciated in the case of Pandya vs. Republic where the court held that "an appellate court ought to treat the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expect ….affirm a conviction on evidence that has been reviewed."***

10. In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, if should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

11. Thus this being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & another Vs Republic** the court citing **Okeno v. R** held:-

> ***"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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 courts 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. "

12. Having considered all the vital arguments by the parties herein the following issues need this court's determination.

(a) What are the elements of the offence of obtaining money through false pretences?

(b) Did the facts of the case support a charge of obtaining money through false presences?

(c) Whether the charge of obtaining money through false pretences was proved beyond any reasonable doubt?

13. The offence of obtaining through false pretences is established in section 313 of the Penal code. From the said section, the following essential elements of the offence of obtaining through false pretences are discernable; that the person

(a) Obtained something capable of being stolen;

(b) Obtained it through a false pretence; and

(c) With intention to defraud.

14. From the evidence, there is no doubt the appellant received Ksh. 45,000/= from the complainant which is something capable of being stolen under the law. But it is not the taking of money that constitutes the offence but rather that it was taken with the intention to defraud. The fraud is found in the false pretence. False pretence is defined in section 312 of the penal code as follows:-

"***Any representation, made by words, writing or conduct, of a matter of fact, and which the person making it knows to be false or does not believe to be true, is a false pretence. For it to be a false pretence there must be:-***

(a) A representation of fact by word, writing or conduct;

(c) The representation is either past or present;

(c) The representation must be false;

(d) The person made the representation knowing it to be false or did not believe it to be true.

15. Briefly the appellant had bought land from one Robai Andeka Silisia who was the registered owner in 1992 for Ksh. 16,000/=. He took occupation of the said land but was not issued with a title by Robai Andeka. In the year 2004 he sold the land to the complainant (PW1) for Ksh. 45,000/= and there were agreements to that effect. He introduced the complainant to Robai Andeka before selling the said piece of land to him. There were also agreements to this effect.

16. In essence for every transaction by the appellant and complainant there was an agreement of soughts. PW1 has produced "P.Exhibit 1" agreement dated the 9th July, 2004 while the appellant produced "DExh. 1" and "DExh. 2 (a) and (b)" agreements dated 18th July, 2005.

17. From the above facts the legal frame work which governed the transaction in controversy makes the transaction a purely civil action thus removing it from the realm of criminal law. The upshot is that the

trial court erred in law and fact in convicting the appellant on a charge which was not supported by evidence.

18. I find that the charge of obtaining money through false pretences was not proved as required by law. For those reasons the appeal is allowed conviction quashed and sentence set aside. The fines paid by the appellant upon conviction by the trial court shall be refunded to him in accordance with the Rules and Regulations of the court.

SIGNED, DATED AND DELIVERED at **KAKAMEGA** this **27TH** day of **SEPTEMBER** 2016.

C KARIUKI

JUDGE.

In the Presence of:-

..... for the accused person.

.....for the Prosecutor.

..... Court Assistant