



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 12 OF 2014.

ESTHER AKIRU EKWAMAPPELLANT.

VERSUS

REPUBLIC..... RESPONDENT.

(Being an appeal from the original conviction and sentence of W. Wachira – AG. PM in Criminal Case No. 750 of 2013 delivered on 24/3/2014 at Lodwar.)

J U D G M E N T.

1. The appellant, **Esther Akiru Ekwam**, appeared before the Principal Magistrate at Lodwar charged with obtaining by false pretences, contrary to section 313 of the penal code, in that on diverse dates between 12th October, 2012 and 8th March, 2013, at Natolol village, Turkana Central district, with intent to defraud obtained Ksh. 299,000/=, from Lydia Eduki by pretending that she would sell to the said Lydia Eduki, a piece of land, a fact she knew to be false.
2. After a full trial, the appellant was convicted and sentenced to serve twenty eight (28) months imprisonment but being aggrieved with that outcome she preferred the present appeal on the basis of the grounds contained in the petition of appeal dated 9th May, 2014.

At the hearing of the appeal, the appellant appeared in person and fully relied on her grounds of appeal.

The Learned Prosecution Counsel, **Mr. Gikunda**, opposed the appeal on behalf of the state/respondent.

3. Learned Prosecution Counsel submitted that the offence was proved as required and that the sentence imposed by the trial court was lawful as the appellant received two (2) years and four (4) months imprisonment yet the charge carries a three year imprisonment sentence.

Learned Prosecution Counsel urged this court to dismiss the appeal.

4. Having considered the appeal on the basis of the supporting grounds and the submissions by the respondent, the duty of this court was to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.
5. In that regard, this court considered the evidence adduced by the prosecution through the complainant, **Lydia Eduki Kamar (PW1)**, the complainant's mother, **Esther Akuja (PW2)**, and the investigating officer, **P.C. Patrick Nyaoke (PW3)**. The appellant's evidence in defence was also considered.

6. 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.

And, under section 313 of the penal code, a 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.

7. From the evidence by the complainant (PW1), she entered into a sale agreement with the appellant for the purchase of a plot at a consideration of Ksh. 320,000/= which was to be paid by instalments and in that regard, the complainant paid a first instalment of Ksh. 160,000/=, a second instalment of Ksh. 80,000/=, a third instalment of Ksh. 45,000/= and a last instalment of Ksh. 14,000/=. In sum, the complainant paid a total of Ksh. 299,000/= to the appellant as demonstrated by material documents (P. Exh. 1-3).
8. However, along the way, the agreement collapsed prior to the payment of the full purchase price by the complainant due to the failure by the appellant to deliver to the complainant ownership documents. Consequently, the appellant undertook in writing to refund the Ksh. 299,000/= together with interest (see P. Exh. 5) but when she failed to do so, the complainant reported to the police leading to the arraignment of the appellant in court with a criminal offence.

P.C. Nyaoke (PW4), assumed investigations of the matter and charged the appellant.

9. Although in her defence, the appellant denied the offence and indicated that she never sold any land, there was ample evidence that she entered into a sale agreement for the sale of a plot to the complainant. The agreement was validly executed in writing and part of the purchase price was paid. The appellant however breached the contract by failing to deliver the land to the complainant. Consequently, the remedy available to the complainant was damages for breach of contract or specific performance of the contract or refund of the part purchase price by the appellant. These are civil remedies and therefore the reference of the dispute to the police was undesirable and an attempt to criminalize a purely civil transaction.
10. Indeed, the evidence against the appellant did not establish all the necessary ingredients of section 312 and 313 of the penal code other than showing that she obtained part of the purchase price from the complainant hitherto as part of a civil rather than a criminal transaction.

For all the foregoing reasons, this court would find that the appellant's conviction by the Learned trial Magistrate was neither sound nor safe.

This appeal is therefore allowed to the extent that the conviction of the appellant by the trial court is hereby quashed and the resultant sentence set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Ordered accordingly.

[Delivered and signed this 21st day of April, 2015.]

J.R. KARANJA.

JUDGE.