

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.150 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. Ole Tamar – SRM delivered on 26th April 2012 in Makadara CMC. CR. Case No.1398 of 2007)

JOHN OPONDO NEKO.....

.....**APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, John Opondo Neko was charged with the offence of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 17th July 2006 at Kayole Estate in Nairobi, the Appellant, with the intent to defraud, obtained from Bernard Onjula (the complainant) the sum of Kshs.120,000/- by falsely pretending that he was in a position to sell him a plot. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve two (2) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the charge of obtaining money by fraud yet the prosecution had not established a case against him to the required standard of proof beyond any reasonable doubt. He took issue with the verdict reached by the trial magistrate, who, in his opinion, had failed to consider the crucial evidence adduced by an official of Dandora Jua Kali Association which was to the effect that the location of the plot had been changed after the survey had been done. He was aggrieved that the trial magistrate had failed to consider his defence before reaching the determination to find him guilty of the charge. The Appellant faulted the trial magistrate for sentencing him to serve a custodial sentence of two (2) years without giving him an option of paying a fine. He was of the view that the sentence imposed was manifestly excessive in the circumstances. In the premises therefore, the Appellant prayed for the appeal to be allowed, the conviction quashed and the sentence imposed upon him set aside.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Kimani for the Appellant and by Ms. Ndombi for the State. Mr. Kimani conceded that indeed the Appellant had obtained the sum of Kshs.120,000/- as consideration for the purchase of a parcel of land referred to as Plot No.032 Dandora Jua Kali. He stated that the said plot was owned by the Appellant at the time he sold it to the complainant. He explained that the position of the land on the ground changed after survey was done. This resulted in the relocation on the ground of the plot that was owned by the Appellant. It was his submission therefore that the basis of the prosecution's case that the Appellant did not own a plot in the area was not true. That the Appellant owned a plot in the area was confirmed by the Secretary of Dandora Jua Kali Association. However, it was clear from his testimony that the plot in question had not been surveyed. Neither were there beacons on the ground specifically indicating the position of the plot. The plot did not have a title. It was not clear from the Secretary's testimony why there existed no titles for the said plots. Mr. Kimani submitted that as a sign of good faith, the Appellant had deposited the sum of

Kshs.120,000/- in court as security to secure his release on bond pending appeal. He urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on the Appellant.

Ms. Ndombi for the State opposed the appeal. She submitted that the prosecution established, to the required standard of proof beyond any reasonable doubt, that the Appellant sold to the complainant a non-existence parcel of land. She stated that when the trial court visited the *locus in quo*, it confirmed that the parcel of land sold to the complainant by the Appellant was not the specific one that the Appellant actually owned. She submitted that the prosecution had established that the Appellant had indeed obtained the sum of Kshs.120,000/- by pretending that he was in a position to sell the particular parcel of land. She urged the court to take into consideration the fact that immediately after obtaining the money, the Appellant relocated from the area and was only traced a year after the agreement had been entered into. She submitted that the defence of the Appellant was considered by the trial court before it reached the verdict that the Appellant be convicted as charged. She urged the court to dismiss the appeal as it lacked merit.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court before arriving at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore is required to give due allowance in that regard (See Njoroge –vs- Republic [1987] KLR 19). In the present appeal, the issue for determination by this court is whether the prosecution established its case on the charge of obtaining by false pretences to the required standard of proof beyond any reasonable doubt. **Section 312** of the **Penal Code** defines false pretences thus:

“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.”

In the present appeal, it was the prosecution’s case that the Appellant entered into an agreement with a view to sell a piece of land at Kayole estate to the complainant knowing well that he did not own that particular parcel of land. The evidence adduced by the prosecution witnesses confirm that indeed the Appellant showed the complainant a piece of land which he did not actually own. Evidence was adduced which established that the Appellant owned a parcel of land some distance from where he had physically shown the complainant. In his defence, the Appellant explained away this discrepancy. It was his testimony that the position of the land was changed when the land was surveyed and new numbers issued. In essence, the evidence adduced by the Appellant in his defence confirms the central theme of the prosecution’s case that the Appellant indeed sold to the complainant a plot for a consideration of Kshs.120,000/- which he clearly knew did not belong to him.

It is therefore this court’s finding that the prosecution did establish, to the required standard of proof beyond any reasonable doubt, that the Appellant obtained the said sum of Kshs.120,000/- from the complainant with the knowledge that he was selling to the complainant a parcel of land that he did not own. The Appellant’s conduct fits the definition of false pretences as defined by **Section 312** of the **Penal Code**. The Appellant’s appeal against conviction therefore lacks merit and is hereby dismissed.

As regard sentence, the Appellant is of firmer ground. It was apparent that after his conviction, the Appellant realized the folly of his conduct. He deposited the said sum of Kshs.120,000/- in court in order to secure his release on bail pending appeal. This court invokes **Section 177** of the **Criminal Procedure Code** and directs that the said sum of Kshs.120,000/- be restituted to the complainant, Bernard Onjula. The custodial sentence of two (2) years is in the circumstances set aside. It is apparent that the Appellant is remorseful. However, he will not altogether escape punishment. This court will call for a probation report to be prepared with a view to determining the appropriate sentence that the Appellant will serve. This appeal shall therefore be mentioned on **3rd June 2015** for a probation report to be presented to the court. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MAY 2015

L. KIMARU

JUDGE