



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 227 OF 2011

SELLY MWENDE MUKAI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. V.A Otieno (RM) delivered on 18/11/2011 in Mwingi Senior Resident Magistrate's Court Criminal Case No. 324 of 2008)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Selly Mwendu Mukai**, was charged with the offence of obtaining by false pretence contrary to **section 313** of the **Penal Code**.
2. The particulars of the offence were that “on diverse dates between 1st January 2008 and February 2008 at **Mwingi Town** in **Mwingi District** within **Eastern Province** with intent to defraud obtained from **Jotham Migunga Ochieng** goods and cash Kshs.8,200 all totaling at Kshs.20,000/= falsely pretending that you were in position to sell him plot No. **LR 301** situated in **Mwingi Township**.
3. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to serve one year probation period.
4. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the grounds that can be summarized as follows:-
 1. **That the prosecution evidence disclosed no criminal offence.**
 2. **That the evidence disclosed a civil dispute.**
 3. **That there was no sufficient evidence adduced in support of the charge sheet.**
 4. **That the judgment was against the weight of the evidence.**
5. During the hearing of the appeal, the parties relied on written submissions. I have duly considered the same.
6. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
7. PW1 **Jotham Migunga Ochieng** testified that the Appellant who was working for his family as a house help had a child who had passed her **KCPE exams** and had been admitted to secondary school. That the Appellant requested him for financial help to do shopping for the school. The complainant made a shopping of Kshs.19,500/= and also gave some cash money. The total came to Kshs.20,000/=. The Appellant was to give the complainant a plot if she failed to repay the

money. Later the Appellant and the complainant entered into an agreement for the sale of one acre plot at Kshs.100,000/= with the Kshs.20,000/= being the down payment. The balance of the payment was to be made after the transfer of the plot which was still in somebody else's name. The Appellant later failed to avail her original identify card to the complainant and refused to complete the sale transaction and also failed to refund the money. The complainant reported the matter to the police. The accused was arrested and was subsequently charged with the offence herein.

8. PW4 **Joy Kawira** the complainant's wife also established that the Appellant had spent Kshs.20,000/= in total for the school shopping for the Appellant's daughter. That they later entered into a land sale agreement. The Appellant was to sell a one acre plot to them at Kshs.100,000/= with the Kshs.20,000/= being the deposit.
9. The evidence of PW2 **William Mwanzia Samuel** was that he went to see the plot in question with the complainant and the complainant's wife in the presence of the accused.
10. PW3 **Christine Kathini Musili** who was employed at the complainant's electronic shop gave evidence that the Appellant collected a total of Kshs.19,290/= from the shop on the strength of a note given to the Appellant by the complainant.
11. PW5 **Sgt. Donatos Cheboi** received the complainant's report and carried out investigations before charging the Appellant. His evidence was that the plot was still in the name of one **Kathuka** who had sold the same to the Appellant.
12. When placed on her defence, the Appellant gave sworn evidence. It was her evidence that she was employed by the complainant as a house help but they later became lovers. The Appellant denied anything to do with the plot or having received any money from the complainant's shop. According to the Appellant, the complainant gave her gifts like a phone set, a radio and other items. The Appellant's evidence was that after her relationship with the complainant turned sour, the complainant framed her with the case.
13. The complainant's evidence is corroborated in all material respects by that of his wife (PW4) and that of the complainant's shop employee (PW3) that the Appellant was given money by the Appellant. According to the complainant and his wife, the total amount given to the Appellant was Kshs.20,000/=. The evidence of the surveyor (PW2) adds credence to that of the complainant (PW1) and the wife (PW4) that the Appellant took them to see the plot in question.
14. Although the complainant and the wife referred the court to a sale agreement produced in court and purportedly signed by the Appellant, there was no proof that the signature on the said document is that of the Appellant. It is also clear from the prosecution evidence that the plot in question was not in the name of the Appellant. The plot was still in the name of a third party who was not called to testify. It was therefore not established whether the said third party was ready and willing to transfer the said plot.
15. The prosecution evidence reveals that there was a failed sale agreement. There is no evidence to show whether efforts were made to have the deposit refunded or for specific performance. The prosecution evidence fell short of proving the offence of obtaining by false pretences beyond any reasonable doubts. The Appellant ought to have been given the benefit of doubt.
16. The appeal has merits and I allow the same. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of July, 2015

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B. THURANIRA JADEN

JUDGE