



No. 197/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 65 OF 2011

JULIUS MUTHAMA MAKAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate Court Criminal Case No. 751 of 2010 by Hon. N.N. Njagi on 11/3/2011)

JUDGMENT

1. The Appellant was charged with the offence of Obtaining by False Pretences, contrary to **Section 313 of the Penal Code**. The particulars of the offence being that on diverse dates between **17/7/2004** and **1/8/2005** at **Masimba Market** in **Makueni District** within **Eastern Province**, with intent to defraud, obtained from **Nancy Njeri Kibari** the sum of **Kshs. 170,000/=** by falsely pretending to sell her a plot worth the said sum of **Kshs. 170,000/=**.
2. He was tried, convicted and sentenced. A fine of **Kshs. 200,000 /=-** was imposed. In default of payment of the same he was required to serve a term of imprisonment for one (1) year. Being dissatisfied with the conviction and sentence he appealed on grounds that :-
 - i. The learned magistrate erred in law and in fact in convicting the appellant against the weight of evidence.
 - ii. The learned magistrate erred in law and in fact in making a finding that the appellant was guilty of obtaining money by false pretence when there was no evidence of any false pretence.
 - iii. The learned magistrate erred in law and in fact in convicting the appellant based on a fatally defective charge which was bad for duplicity and which charge embarrassed the appellant and vitiated the trial.
 - iv. The learned magistrate erred in law and in fact in meting out a harsh and excessive sentence on the appellant who was a first offender and failing to take into account his mitigation.
3. Briefly, the facts of the case are that on **16th July, 2004**, PW1, **Nancy Njeri Kibari** (*the complainant*) met the appellant at her **Mwangaza Bar**. He offered to sell her a plot. She visited the site at **Sultan Hamud**. They agreed on a price of **Kshs. 130,000/=**. They reduced the agreement into writing. Mode of payment was by instalments. However she was not put in possession of the plot. A search carried out at the Land Registry revealed that the plot was not in the appellant's name. He was arrested and charged.
4. In his defence the Appellant said he was aware the complainant was purchasing a plot. He admitted having sold the plot to the complainant. She paid by instalments. The plot was however not surveyed. The complainant however wanted a plot that had already been registered. He took

- her to Kajiado where his wife had a plot measuring the same size- 50X 100ft in size. They had the plot transferred into the name of the complainant. He denied having committed the offence.
5. It was the submission of **Mr. Kasyoka Counsel** for the appellant that the unregistered plot for which the sale agreement was entered into did exist. The plot belonged to the appellant; therefore there was no false pretence. Thereafter the complainant opted to have it exchanged with a **Plot No. 446, Kajiado** that was surveyed hence there was no basis for false pretence. Further, it was his submission that the charge is fatally defective. Money was paid in instalment and the charge as framed is duplex as it combines different instances of obtaining. There were alleged three instances of obtaining and some expenses met could not be lodged together as it was prejudicial to the appellant. Disregarding the defence given was therefore erroneous.
 6. **Mrs Abuga**, learned State Counsel for the State opposed the appeal. She stated that the complainant paid for the plot but the appellant did not give vacant possession of the plot. She stated that the appellant admitted having not given vacant possession of the un-surveyed plot and having given an alternative land an allegation that was not proved. Further, she argued that the charge as drawn was proper as it disclosed the offence committed and the sentence meted out was within the law.
 7. This being the first appeal, my duty is to analyse and reconsider evidence adduced by witnesses in the Lower Court to reach my own conclusions. In drawing such a conclusion, I must bear in mind that I neither saw nor heard witnesses who testified. (see **Okeno versus Republic [1972] E.A. Pg 32**).
 8. The charge as drawn reads

“Obtaining by false pretences contrary to Section 313 of the Penal Code”.

The statement of the offence did not disclose what was alleged to have been obtained as required by the law. It is not enough to state what is indicated in the marginal note. The thing capable of being stolen must be stipulated.

9. The particulars of the offence per the charge are provided as follows:-

“on diverse dates between 17/7/2004 and 1/7/2004 and 1/8/2005 at Masimba market in Makueni District within eastern Province, with intent to defraud, obtained from Nancy Njeri Kibari the sum of Kshs. 170,000/= by falsely pretending to sell her a plot worth the said sum of money.

10. Evidence adduced was that the appellant having agreed to sell a plot to the complainant (PW1) took her to the site. The plot was situated between the slaughter house and **Arroi River**. She paid an instalment of Kshs. 40,000/= out of the **Kshs. 130,000/=** (purchase price) on the **16/7/2004**. On **26/7/ 2004** she paid a further **40,000/=**. The appellant was to avail documents of the plot after payment of the purchase price. PW1 however instructed an advocate who intervened. She paid a further 20,000/ to enable the appellant avail any documents for the plot. The appellant does not dispute having received the purchase price in instalments but argues that the plot shown to the complainant was un-surveyed and she wanted a registered one that is when they now agreed to have a plot that was registered in his wife’s name transferred to the complainant. On cross-examination the complainant admitted that she was to get an alternative plot in the name of the Appellant’s wife.
11. The issue to be addressed is therefore whether the appellant acted with intent to defraud with false pretences. Section 312 of the Penal Code defines false pretences as :-

“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....”

12. The representation of sale of plot was made by the appellant by word and in writing. The sale agreement (exhibit 1) describes the plot as situated at **Sultan Hamud, Makueni District** next to **Arroi River** and Mombasa Road, near Sultan Water Station. Documents were to be availed later.

- Exhibit 2 is an agreement indicating payments made by instalments. This is evidence that at the time of purchasing the plot the kind of representation made to the complainant was futuristic. The representation was neither present nor past.
13. The complainant admitted having seen the plot. When it turned out to be un-surveyed. She accepted an alternative plot. There is nothing to suggest that the plot in issue did not belong to the appellant. It can therefore not be said with certainty that he made the representation to sell the plot knowing it to be false.
 14. It was stated that he had an intent to defraud. The duty was upon the prosecution to prove that the appellant had a specific intent to defraud the complainant. Exhibit 3 was a transfer document from **Olkejuado County Council**. The document is for transfer of a plot from **Hanna Mueni Muthama** to the complainant the **Plot is No. 446/Business- Sultan Hamud Centre**.
 15. Following the transaction per the evidence of the complainant she paid more money to the County Council for processing of documents hence her claim of Kshs. 170,000/=. The fact that the appellant acted by giving her an alternative plot after she declined to accept the initial plot exonerates him from any intent to defraud.
 16. From the foregoing it is apparent that the charge was defective. Secondly, there was no evidence of false pretence on the part of the appellant or some intent to defraud. It was erroneous on the part of the trial magistrate to reach a decision to convict the appellant.
 17. In the premises I do allow the appeal. The conviction is quashed. The sentence meted out is set aside. The fine imposed if paid shall be refunded to the appellant.
 18. It is so ordered.

DATED, DELIVERED and SIGNED this 25TH day of **MARCH**, 2014.

L.N. MUTENDE

JUDGE