



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO.84 OF 2011

DISMAS OKASIBAAPPELLANT

VRS

REPUBLIC.....RESPONDENT

(An appeal from the Conviction and Sentence of the Hon. F. Kyambia

in

Bungoma Cr. Case no.1326 of 2010)

JUDGMENT

1. Dismas Okasiba, the Appellant was on 5th July, 2010 charged with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code. It was alleged that on 5th May, 1995 and 8th October, 1995 at Amukura Shopping Centre, in Amukura Location, Teso North with intent to defraud, the Appellant unlawfully obtained Ksh.13,500/= from Faustino Emodo by falsely pretending to sell him half piece of plot.
2. After trial, he was found guilty, was convicted and sentenced to a fine of Kshs.5,000/= or 2 years imprisonment. He has now appealed to this court listing six (6) grounds of Appeal against the said conviction and sentence.
3. As a first Appellate Court, this court is obligated to re-examine and evaluate the evidence afresh in order to arrive at its own independent findings and conclusions. See **Ekeru -vs- Republic [19720 EA.**
4. The prosecution case was that on 5th May, 1995, the Appellant approached the complainant and offered to sell him a plot of 25 x 100 ft; that they agreed a price of Kshs.14,500/= whereby, the Complainant paid the Appellant Kshs.2,500/=. The Complainant paid the Appellant further sums all totaling to Kshs.13,500/=. Two agreements were entered into which were reduced into writing. That when the Complainant visited the property with a surveyor, he found the property had been sold by the Appellant to a 3rd party. That later, the Appellant called to refund him the purchase price but the Complainant declined to take the money as what he wanted was the plot. On cross-examination, the

Complainant confirmed that the Appellant had not obtained the money by false pretence. He asserted that as at the time he paid the money he had not been shown the plot.

5. PW2 told the court that he is the one who prepared the two agreements that were signed by the Complainant and the Appellant. He told the court that he and the Complainant had been shown the plot but it was later sold by the Appellant. PW3 was the Investigating Officer. He testified that on 15/12/09, he perused the OB and found that the case had been allocated to him. That he established that the Complainant and Appellant had entered into an agreement for sale and purchase of a plot measuring 25x100ft; that when the Complainant approached the Appellant to show him the piece of land, he learnt that the Appellant had sold it to someone else. He then decided to charge the Appellant.

6. On cross-examination, he confirmed that the complaint was being laid against the Appellant 14 years from the date when the alleged agreement was made; that he never established whether the Complainant had inspected the land before entering into the agreement for sale.

7. In his sworn defence, the Appellant told the court how the Complainant had approached him for a plot; that he showed him a plot he was selling measuring 25x100 ft; that the plot was still intact but the Complainant had refused to pay the balance of Kshs.1000/= or to accept the refund of the money he had paid. That the Appellant reported the matter to the Assistant Chief who summoned the Complainant twice but there was no settlement. The Appellant produced two (2) letters to confirm that fact. According to the Appellant, the Complainant did not want to pay either the balance or take a refund, he only insisted on the plot. The Appellant denied that he had sold the plot to any other person. He called DW2, the area chief, who basically corroborated the Appellant's evidence on the latter's efforts to have the matter settled.

8. Mr. Onyando argued all the grounds together. He submitted that the charge was not proved to the required standard. That the transaction was a sale which was a contract in Civil Law. That the Complainant had not completed the payment of the purchase monies as at the time the case against the Appellant was instituted. That the Complainant had confirmed that the Appellant had not received the money by false pretence. Counsel cited the Case of **SILUMU & ANOR -VS- REPUBLIC [1986] KLR 259** in support of the submission that there was no evidence of false pretence. Counsel faulted the trial court for not considering that the subject property was still in existence at the time of trial.

9. Mr. Kibellion, Learned State Counsel opposed the appeal. He submitted that the subject matter of the sale was land as per the agreements produced as Pexh. 1 and 2. That the Appellant had acknowledged having received Ksh.13,500/=. That, although the money was paid to the Appellant, the land was not in his possession. That the Appellant was not able to deliver the land and his offer to refund the money came after the offence had already been committed. Counsel urged that the appeal be dismissed.

10. Having reviewed and evaluated both the evidence and submissions of counsel, the issue for determination, in my view, is whether the evidence tendered disclosed or proved the charge of obtaining the alleged money by false pretences.

11. It is not in dispute that the Complainant and the Appellant entered into an agreement for the sale of land. The terms of the agreement were properly set out in the agreements produced as Pexh.1 and 2, respectively. The purchase price was Kshs.14,500/= payable in instalments. It is also not in dispute that the Appellant did receive from the Complainant a sum of Kshs.13,500/= in pursuance of the said agreement. The question is, in the circumstances of this case, did the Appellant receive that money by false pretences?

12. In order to answer that question, several issues have to be resolved. These are; was there land or plot to be sold? If there was, which plot was it? Was that land or plot sold to a third party and if so, when? It is only when these issues are resolved that one can actually conclude whether or not when the Appellant received the sum of Kshs.13,500/= from the Complainant, he did so with an intent to defraud.

13. The evidence on record is that, when PW1 entered into the agreement with the Appellant in 1995, he did not go to see the subject plot. That the Appellant took him to the land in the company of a surveyor

but they found that the land had been sold by the Appellant. PW2 who drafted the two agreements, PExh1 and Pexh2, told the court both in his evidence in chief and cross-examination that, by the time the Complainant paid the initial deposit of Kshs.2,500/=, the Appellant had shown them the land. PW3 told the court that the complainant did not tell him whether he had inspected the land before entering into the agreement. On his part, the Appellant maintained that when the Complainant approached him with PW2 in 1995, he showed them the plot, that it is then that they agreed on the purchase price of Kshs.14,500/= and that the plot was still available and intact at the time of trial.

14. I have seen the agreements entered into by the parties and produced as Pexh.1 and 2. Save for measurements of 25x100 ft or ½ plot, the plot the subject of the agreement was not identified either by registration number i.e title number or physical address or where it was situated. Neither the charge sheet nor the evidence show where the same was situated. It is not clear if the plot was in Amukura Shopping Centre, Bungoma Town, Mt. Elgon or even in Uganda. Further, the evidence of PW1, PW2 and PW3 did not identify which or what plot that was being sold and/or was sold to a 3rd party. If the same had been identified, then the allegation that it had been sold to a 3rd party would have been easier to prove. A search from the Lands Office would have shown that the subject property was at the time of the trial in the name of a 3rd party. This however did not happen.

15. PW1 did not tell the court that he had seen the plot which was vacant before he made any payment and that after making the payment, he visited the plot and found a 3rd party in occupation thereof. He only stated that; he was not shown the property at the time he was making payment; that when the Appellant took him to the property with the surveyor, they found that it had been sold to a 3rd party. Asked how he had established the plot had been sold, he said that the Appellant had told him so. The Complainant never disclosed to the court the identity of the alleged purchaser (3rd Party) nor did he say he found anyone in occupation thereof.

16. To my mind, the case was never at all investigated as all the foregoing issues needed to have been established to prove the element of fraudulent intent on the part of the Appellant.

17. It should be remembered that PW2 and the Appellant told the court that before the agreement was signed the Complainant was shown the plot. In his defence, the Appellant insisted that the plot was still available and that what he needed was only payment of the balance of the purchase price. That evidence was not challenged. To my mind, the charge was never proved at all.

18. Before concluding this judgment, there is one issue that has disturbed this court. The agreement was entered into and payment of Kshs.13,500/= made in 1995. It may not be clear when the completion date was. However, why did not Complainant wait until 14 years later to lodge a complaint with the police? When did he discover that the land had been sold and was not available to him? To my mind, to wait for such an unreasonably long period, to press for criminal charges, is not only unfair and irregular, but also a blatant abuse of the process of court. Given, criminal offences may subsist for a long time, but to wait for a lapse of such a long time to press for criminal charges, to my mind, will be in breach of the right to a fair hearing under Article 50 of the Constitution. It is so because, that right in my view encompasses a duty on the state to bring charges against an accused with dispatch such that evidence is not eroded by either memory lapse or death of witnesses. To my mind, even if the prosecution had proved the charges against the Appellant, which it failed to, I would have still allowed the appeal on this ground alone.

19. I think I have said enough to show that the appeal is meritorious and it is hereby allowed. Accordingly, I quash the conviction and set aside the sentence. The sum of Kshs.5000/= paid by the Appellant as fine is to be refunded forthwith.

It is so ordered.

DATED and DELIVERED at Bungoma this 19th day of May, 2014.

A. MABEYA

JUDGE