REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 141 OF 2010.

GLADYS NEKESA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from conviction and sentence delivered on 26th November, 2010 by T.A. Odera – SRM

in Criminal Case No. 958/2009 delivered on26/11/2010 at Kitale.)

J U D G M E N T.

1. The appellant **Gladys Nekesa** was charged with the offence of obtaining money by false pretences contrary to section 313 of the penal code. The particulars of the charge states that on 10th day of February, 2009 at Kitale town within Trans Nzoia West District of the Rift Valley Province, with intent to defraud obtained Ksh. 300,000 (Three Hundred thousand) from **NANCY CYNTHIA NAFULA** by falsely pretending that she was in a position to lease 50 acres of land to the said NANCY CYNTHIA NAFULA, a fact she knew to be false or believed to be untrue. The appellant was tried before the Senior Resident Magistrate, was convicted and sentenced to 2 ½ years imprisonment.

2. Being aggrieved by the conviction and sentence, the appellant has appealed and raised the following grounds in the petition of appeal.

1. THAT, the learned trial magistrate erred in law and in fact in holding that the prosecution have proved its case beyond any reasonable doubt in absence of any credible evidence.

2. THAT, the learned trial magistrate erred in law and in fact in convicting the appellant without the evidence of material witness.

3. THAT, the learned trial magistrate erred in law and in fact and introduced her own theory that the land in question belonged to Agricultural Development Corporation when no evidence was led to that effect by he prosecution.

4. THAT, the learned trial magistrate erred in law and fact in convicting the appellant on a charge sheet that was defective.

5. THAT, the charge sheet was fatally defective.

6. THE, sentence and conviction was against the weight of evidence tendered by the prosecution.

*7. **THAT**, the sentence was harsh and excessive in the circumstances.*

*8. **THAT**, the appellant ought to have been accorded the benefit of doubt in light of the insufficiency of evidence tendered.*

3. In further arguments to support the above grounds of appeal, **Mr**. **Wafula** submitted that the charge against the appellant was not proved. There was no evidence that the land in question belonged to ADC farm. There was no evidence to show the land did not exist. Even the charge was defective because the agreement which was produced as evidence showed that the complainant paid a sum of Ksh. 250,000/= despite the fact that the charge sheet read a sum of Ksh. 300,000/=. It was further argued that the identity of the appellant was not proved, the appellant in her defence denied that she was the person described in the sale agreement.

4. This appeal was opposed; M/**s. Bartoo**, the learned State counsel supported the conviction and sentence which she submitted was based on credible evidence by the complainants who paid money to the appellant. The evidence of the complainants was corroborated by the Land Agent; he had introduced the appellant to the complainants and witnessed the appellant point out the piece of land and also the exchange of money for lease of the land.

This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to allow the appeal. In so doing the court must always caution itself that it never saw or heard the witnesses and give due allowance for that.

5. The appellant was convicted based on the evidence of five prosecution witnesses. **Nancy Cynthia Nafula**, PW1, who is also the complainant in this case, testified that on 10th February, 2009, she and her husband **Simon Musinde Majisu**, PW2, were looking for land to lease in Kitale. They visited the offices of Elite Ventures in Kitale and met **Calistus Chales Cheruiyot** who told them that he had a client by the name Grace (Appellant) who had a piece of land to lease. PW3 testified that he called the appellant. They met with the complainants and the appellant took PW1, PW2 and PW3 to view a piece of land within Endebess Area. According to PW1, PW2 and PW3 the appellant said the land belonged to her husband one **Joseph Visanda**, She produced a letter of allotment. After viewing the land, they all proceeded to the offices of **Ann Kibe &** Co. Advocates where they drew a lease agreement which was produced in evidence.

6. According to the lease agreement, **Minayo Visada Grace**, was identified by PW1, PW2 and PW3 as the one who took them to see the land, the one who signed the lease agreement and took money from PW1 while purporting she was the owner of the land. This was the same person who was the accused person and she is the appellant in this case. After the lease agreement was signed, the appellant requested PW1 to give her a further sum of Ksh. 50,000/= so that she could plough the land for her. PW1 testified that she paid the appellant the further sum, but after those payments were made, the appellant failed to plough the land as agreed. The appellant stopped answering her telephone calls until PW1 sent a short message that she intended to pay her some more money as ploughing charges. That is when the appellant showed up and was arrested by PW5.

Further evidence was adduced by **Ann Wanjiku Mwaura** PW5 whose law firm drew the lease agreement.

7. After evaluating the above evidence, the learned trial magistrate was satisfied that the prosecution proved its case to the required standard. I have similarly evaluated the evidence, especially the issue of identification of the appellant. When the lease agreement was drawn, the appellant presented herself as **Minayo Visadia Grace**. According to the charge sheet, the appellant's name is **Gladys Nekesa Wasike** alias **Minayo Visadia Grace**. Thus I see no defect with the charge sheet because the appellant was impersonating and presenting herself to the complainants as **Minayo Visadia Grace.** I have considered the defence offered by the appellant in which she denied having entered into a lease agreement or receiving any money from the complainant. The appellant contended that she was arrested because of mistaken identity. I find this issue was properly interrogated by the learned trial magistrate especially page 30 of the judgment where she made the following findings;.

"On whether accused obtained the Ksh. 300,000/= with intent to defraud. PW1 and PW2 and PW3 said how accused presented herself to them as a landowner and obtained Ksh. 300,000/= from them. PW5 produced the agreement between them to show that the money was obtained. PW1, PW2 and PW3, were firm that accused is the one who leased the land and PW1 and PW2 said she is the one who received the money from them, though accused says this is a case of mistaken identity. They met her severally and so they had an opportunity of knowing her. I do not see how they would have even fabricated the case against her for no reason. I proceed to dismiss her defence as a mere denial. This cannot be a case of mistaken identity. I find that accused indeed obtained the Ksh. 300,000/= from PW1 and PW2."

8. I am in concurrence with the learned trial magistrate that based on the evidence on record; there was no possibility of mistaken identity. PW1 and PW2 who were the complainants were able to identify the appellant. Moreover, PW3, who was the land agent, confirmed that the appellant was known to him as his client. I see no reason why PW3 would implicate the appellant with the offence. I am in agreement with the learned trial magistrate that the defence was a mere denial which did not dent the prosecution's case. The last issue to consider is whether the charge was defective because in the charge sheet the appellant was charged with obtaining money by false pretence a sum of Ksh. 300,000/=.

9. It is clear from the evidence that on signing the lease agreement, the appellant received and acknowledged a sum of Ksh. 250,000/=. She was later paid a sum of Ksh. 50,000/= as ploughing charges. I do not see any defect in the charge. On the issue of sentence, it is within the discretion of the learned trial magistrate to pass a sentence and this court can only interfere if the sentence passed is excessive in the circumstances of the offence. In this case the appellant was sentenced to 2 ½ years. The prescribed sentence is 3 years. The appellant offered mitigation which was taken into account but the trial magistrate observed that the offence was prevalent in this region and sentenced the appellant to 2 1/2 years. There is no justification for interfering with the learned trial magistrate's discretion in sentencing.

10. For the aforesaid reasons this appeal lacks merit and it is hereby dismissed. The conviction and sentence of the appellant is confirmed.

Judgment read and signed on 20th day of May, 2011.

M. KOOME.

JUDGE.