



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 652 of 2003

BEN NDEMO MAINA..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Resident Magistrate Mrs. F. Nyakundi dated 16th May, 2003 in Criminal Case No. 8881 of 2002 at the Makadara Law Courts)

JUDGEMENT

The appellant herein, *Ben Ndemo Maina*, was charged with the offence of obtaining money by false pretences contrary to s.313 of the Penal Code. The particulars of the charge were that he, on divers dates between 3rd November, 2000 and 21st February, 2001 at Kasarani Mwiki, in Nairobi, with intent to defraud, falsely obtained Kshs.104,000/= from *Joseph Nyang'au Bogonko*, by pretending that he had a piece of land to sell to the said *Joseph Nyang'au Bogonko*.

After hearing the four prosecution witnesses and the unsworn statement of the appellant herein, the learned Magistrate analysed the evidence, and made her finding as follows:

“Having considered all the evidence that has been adduced before me, this Court finds that the accused person obtained a total of Kshs.104,000/= from the complainant, on the pretext that he was selling him a plot No.1149 of Umagara Wiyonera Co. Ltd., but instead showed him a different plot on the ground, belonging to Mwanamukia Company. This was a deliberate and conscious act on the part of the accused person who knew very well what he was doing. There can be no excuse on the part of the accused person. A witness from Umagara Wiyonera Company Ltd. testified in Court and confirmed that the accused person only had one plot, No. 1149. The Court confirmed this is where the accused resides and the plot is quite distinct and is some distance away from the one he pointed out to PW1 as Plot No. 1149. I dismiss the defence by the accused person in the circumstances and find that the third count facing the accused person has been proved beyond any reasonable doubt. I find the accused person guilty as charged and convict him under section 211 of the Criminal Procedure Code.”

After taking into account the mitigation plea of the appellant herein, the learned Magistrate sentenced him to a two-year term of imprisonment.

The appellant's grounds of appeal are as follows:

- (i) that the learned Magistrate erred in law and in fact in convicting him on the uncorroborated evidence

of PW1;

- (ii) that the trial Court should have found the complainant not to be an honest witness;
- (iii) that the learned Magistrate's visit to the *locus in quo* was inconsequential as she conducted the said visit without a map and without a surveyor to give the requisite testimony;
- (iv) that the learned Magistrate should have noted that the appellant did have valid title for the suit land;
- (v) that the trial Magistrate should have noted that there had been a double allocation of the suit land;
- (vi) that the prosecution had failed to call all the material witnesses.

It was the appellant's choice that learned State Counsel **Ms. Gakobo** should begin, and he would then respond.

Ms. Gakobo noted that there had been certain irregularities in the trial process. On page 3 of the proceedings in respect of 28th June, 2002 the *Coram* is set out, and the prosecutor is shown as **Inspector of Police Sarah**; at the next appearance, on 30th June, 2002 the record shows "Coram as before"; "Coram as before" is again shown at the following hearing session, 24th July, 2002; **Inspector Sarah** is recorded as the prosecutor on 29th July, 2002; **Inspector Sarah** is again shown as the prosecutor on 27th September, 2002; then the record shows "Coram as before" for 11th October, 2002, 11th November, 2002 and 20th November, 2002; during the session of 5th December, 2002 the prosecutor is shown as **Police Constable Radak** (5th December, 2002); the next hearing after that was on 13th December, 2002 when the entry appears as "Coram as before." It is on 13th December, 2002 that the evidence of PW5, Police Force No. 230025, **Inspector Richard Imo** was taken.

Learned counsel urged that the role of **P.C. Radak** in the conduct of the prosecution, on 13th December, 2002 was not in compliance with the terms of s.85(2) as read with s.88(1) of the Criminal Procedure Code (Cap.75). S.85(2) of the Criminal Procedure Code thus provides:

"The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case."

And s.88(1) of that Code provides:

"A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the Attorney-General in this behalf shall be entitled to do so without permission."

Police Constable Radak's conduct of prosecution as aforesaid, counsel noted ? and I think, quite properly ? was not in accordance with the law, and vitiated the trial conducted.

Learned counsel asked for a quashing of the trial as conducted, but also urged the Court to order a *retrial*. It was her belief that the evidence on record was strong, and likely to return a conviction if retrial was ordered. **Ms. Gakobo** submitted that the offence charged in this case was a serious one, as a substantial loss had been occasioned to the complainant on account of the acts which are the subject of the charge. It was also, besides ? learned counsel urged ? a matter of public interest and the interests of justice, that the charge is retried, and disposed of according to law. Counsel also indicated that witnesses in the case were likely to be available if a retrial were ordered. **Ms. Gakobo** noted that the appellant, who had been out on bond, would not be prejudiced if a retrial were ordered.

The appellant, for his part, devoted more attention to shortfalls as he perceived, in the trial process,

than to the case for a retrial. He contended that the Magistrate had convicted him without taking into account all the evidence; he urged that the complainant had not been an honest witness; he submitted that the conviction was based on uncorroborated evidence; he urged that essential witnesses had not been called to prove the prosecution case; he contended that the trial Court's visit to the scene had been hamstrung by the absence of a surveyor.

This is a case of obtaining money by false pretences, pretences which relate to a land transaction. If a person attempts to sell land which doesn't exist, and that person receives money for the same, then ? I believe ? the prosecution would have good grounds for laying charges against that person, as part of their duties in criminal prosecution. Only the *merits* of the evidence tendered, and Court's finding thereon, will determine if such false pretences have been used to defraud the complainant. *Prima facie*, therefore, prosecution in this case was fully justified. Such prosecution is not necessarily *unfair* to the accused; for there is a chance of acquitting him at a *preliminary stage* if the Court finds that there is no case to answer; and even at the end, an acquittal is possible depending on the Court's assessment of the whole range of the testimonies.

I consider it proper to order a retrial in this case, as I will quash the trial which had taken place but had a fundamental irregularity which I have already noted. I will make orders as follows:

1. The trial proceedings which resulted in the Judgement of 16th May, 2003, together with the said Judgment itself, are hereby quashed and vacated.
2. A new trial on the original charges shall be conducted before a different Magistrate from the one who conducted the original trial.
3. The case shall be mentioned for the purpose of assigning hearing dates, before the Chief Magistrate at the Makadara Law Courts on **15th August, 2007** at 9.00 a.m.

Orders accordingly.

DATED and DELIVERED at Nairobi this 30th day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: G. Ndung'u

For the Respondent: Ms. Gakobo

Appellant in person