



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Appeal 116 of 2004

(from original conviction and in Criminal Case No. 719 of 2004)

KOI ANTHONY KAHINDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was tried in the lower Court for the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. He was convicted and sentenced to a fine of Kshs.30,000/= and in default to serve 18 months imprisonment. Being dissatisfied with both the conviction and sentence he filed this appeal, listing 4 grounds.

The grounds are to the effect that the learned trial magistrate failed to consider that the land in question was ancestral land which had been allocated to him; that the charge was not proved against him; that his defence was not considered by the trial Court and that the sentence was excessive and harsh.

The Principal State Counsel supported both the conviction and sentence.

Before considering the appeal, I must, as I am bound to, being first appellate Court analyse the evidence in order to draw my own conclusion. The complainant, Peter Kishombe wanted to buy land. He was introduced to the appellant who showed him a parcel of land which he indicated he intended to sell. They agreed and the complainant paid Kshs. 38,000/=, the purchase price. This was recorded in an Agreement witnessed by four witnesses on 22nd November, 2003.

The appellant was required to place the beacons on the parcel of land before the complainant could take possession. He failed to do this and instead told the complainant that he had sold the land. This prompted the complainant to demand for a refund of the purchase price. The appellant refunded only Kshs.1000/= but failed to refund the balance hence these charges.

False pretence is defined in Section 312 of the Penal Code 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.....”

The complainant and his wife, Sanali Mulusa (PW2) as well as his 3rd witness Biryra Raphael Kalu, maintained that the appellant, after failing to erect beacons told them that the land had been sold earlier on by his cousin. The appellant, on the other hand, maintained that the land had been given to him by his father and he sold it to the complainant, who according to him changed his mind.

The appellant's witnesses, his mother, Keya Mwii (DW2) his father, Daniel Koi (DW3) and a neighbour, Mamuli, (DW4) confirmed that the land in question belonged to the appellant.

The prosecution was required to show that the appellant made a representation that the land in question was his and that he had the authority to sell it, yet that representation was false and the appellant knew that it was false. No evidence was adduced as to who the land had been sold; the identity of the appellant's cousin alleged to have sold it or even proof that when the complainant tried to develop the land he was obstructed by another purchaser. The appellant maintained at the trial that he did not understand why the complainant has not taken possession of the land. I find that false pretence has not been proved. I agree with the ground attacking the trial Court for failing to consider the appellant's defence.

The judgment of the trial Court is ½ a page, sketchy and appears to have been written in a hurry.

A judgment must comply with Section 169 of the Criminal Procedure Code. It must, *inter alia*, contain the point(s) for determination, the decision arrived at and reasons for that decision. The trial Court's judgment fell short of this.

The appellant's defence was misunderstood to mean that he conceded that he obtained money when he had no land to sell.

The finding of the learned trial magistrate cannot stand. The result is that the appeal is allowed, sentence set aside and

conviction quashed. The appellant shall be set free forthwith unless otherwise lawfully detained.

Orders accordingly.

Dated and delivered at Malindi this 16th day of September, 2005.

W.OUKO

JUDGE

16.9.2005

W. OUKO, J

Applicant – present

Mr.Ogoti for state

CC: Gladys

Judgment delivered in Court.

W.OUKO

JUDGE