REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 487 OF 2004

(From original conviction(s) and Sentence(s) in Criminal case No. 5878 of 2000 of the Chief Magistrate's Court at Thika (Betty Rashid – S.P.M.)**ISAAC KAIRU KURIA………….. ………………………………………..APPELLANT**

VERSUS

REPUBLIC…………………… …………………………………………....RESPONDENT

J U D G M E N T

The Appellant **ISAAC KAIRU KURIA**, an 81 year old man, was charged with six counts of **OBTAINING MONEY BY FALSE PRETENCES** contrary to Section 313 of the Penal Code. He was convicted in three counts which the learned trial magistrate did not specify in the judgment. However he had been put to his defence for counts 3, 5 and 6. The Appellant was then sentenced to a fine of 50,000/- each on each count and in default to serve 1 year imprisonment on each count. The learned trial magistrate also made an order of compensation requiring that the Appellant pay compensation to each and every Complainant in the six counts of offences as received by him as per the charge sheet.

In brief the Prosecution case was that the Appellant put some of his plots he owned on sale. That he promised to the offer to sell the Complaints in the case, PW1, JOSPHAT, PW3, MUNGARU, PW6, AGNES, Complainants in counts 3, 5 and 6, paid moneys to PW4, the Appellants called at his offence on various occasions. The Plots were never offered to them.

The Appellant has not denied receiving monies from the three Complainants. His defence was that after receiving the monies, he was in the process of showing them the plots, other people interfered with the process and got titles to the land irregularly. Then he put a caveat on the land. Then he was arrested for a case in Nakuru, and eventually for the case (instant) in Nakuru. That due to court process the Complainants got impatient. That was in 1997. He claims that in 2001, after he was acquitted in the Nakuru case, he went and showed the Complainants some plots in Juja. However, they never got back to him instead they continued with the criminal case against him in this case. The Appellant also called the Assistant Chief of the area to confirm that the Appellant had reported the matter to him. That the Appellant passed by his office with six people, saying he was going to show them plots.

The Appellant being aggrieved by the conviction and sentence lodged this Appeal. On the day of hearing the Appeal, the Appellant's Advocate MR. MOGIRE argued only against the sentence. The main ground argued was that the sentence should have been ordered to run concurrently and not consecutively since the 3 offences arose out of the same transaction. He relied on **NG'ANG'A vs. REPUBLIC C.A. No. 885 of 1975 or 1981 KLR 531.** That authority does not apply to the instant case simply because where a fine is imposed as punishment to an offence, and therefore is in respect of two or more counts, the default sentence cannot be ordered to run concurrently. That would make nonsense the very notion of imposing a fine.

Learned counsel for the Appellant, **MR. MOGIRE** also submitted that the court failed to consider the advanced age of the Appellant. Consequently, the sentence imposed was harsh and excessive in the circumstances.

MISS MWENJE, learned counsel for the State did not agree with **MOGIRE'**s submission that the offences were committed out of the same transaction saying the Complainants involved were many. She did not oppose the court to take into account the Appellant's age, health and bereavement when considering sentence.

Even though the Appellant opted only to argue his Appeal as regards sentence, I still find it very important, due to the peculiar circumstances of this case and the legal points involved to consider his Appeal as regards the conviction. In the filed Petition of Appeal, the Appellant raised four grounds of Appeal against sentence. These were as follows: -

1) That his defence was totally ignored by the learned trial magistrate.

2) That the Prosecution failed to prove a case against him.

3) That the Prosecution witness contradicted themselves.

4) That the evidence adduced was insufficient to warrant his conviction.

Taking all grounds into consideration simultaneously in order to be brief, I find that it is a grave issue whether the ingredients of the charge of **OBTAINING BY FALSE PRETENCES** contrary to Section 313 of the Penal Code were proved.

"***Section 313, Any person who by any false pretences, and with intent to defraud, obtains from any other person anything capable of being stolen … is guilty of a misdemeanor and is liab le to imprisonment for three years.***"

False pretences has been defined under Section 312 of the Penal Code as

"312 Any representation made by words, writing or conducts of a matter of fact, either part 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, is a false pretence."

In the three counts i.e. 3, 5 and 6 the Appellant is alleged to have obtained with intention to defraud the sums of money

"by falsely pretending tha t he had plots for sale to the said (Complainants).'

The learned trial magistrate did not consider this issue. It was incumbent upo n the Prosecution to prove that the Appellant in obtaining the money from the Complainants, which he does not deny, did so through false pretences that he had plots to sell. The learned trial magistrate, in her judgment at page 3 observed as follows: -

"Accused person in his defence as admitted receiving the moneys mentioned in the various counts and added that he showed the Complainants plots in Juja farm to subdivide among themselves they declared. It is noteworthy that all the Complainants have testified that to date accused person has not given them any plots."

It was the Appellant's defence that at the time the Complainants made payments to him, no plots had been shown tot hem. That is also admitted by the Complainants in their various testimonies in the Appellant's defence, he said he was unable to give the Complainants the plots he intended because of irregular allocation of that land to others through fraud as a result of which a caveat was entered by himself. He then said that he showed the Complainants alternative land and brought a witness DW2, the

Assistant Chief of the area to confirm that the Appellant did pass through his office with six people Complainants whom he was going to show plots.

The issue of the land not existing and therefore established the particulars of the charge relied upon by the Prosecution that the Appellant falsely pretended he had land to sell, was not proved. It is clear from the evidence that land existed. PW1 said he was shown some land but vowed not to accept it because it was smaller than one agreed. So did PW3, she said she declined to be shown any plots because they were smaller. Evidence of PW6 was even more strange because he said he did not know the Appellant until he came to court.

From evidence adduced it is clear land existed but due to disagreement over the sizes the Complainants PW1 and PW3 declined to accept. PW6 seems not to have been in touch with the Complainant and so unaware of how to get his plot. For that ingredient of the offence charged, the Prosecution did not prove it as required.

The other ingredient for the offence was considered by the learned trial magistrate in her judgment. That of whether the promise to sell was in the present, past or future. For the offence to be proved, the promise made must be either in the past or present. The simple reason for this is that a promise as to future conduct is uncertain since the future is uncertain. Such promise cannot form the basis of a criminal charge. The learned trial magistrate found this: -

> "***In the present case accused person promised the six Complainants plots which existed at the time they made the payments in installments and to them they were cutting shares in an existing parcel of land and the only job that remained was to be shown their particular plots on the promise to get plots for which they paid their money was in the present."***

The learned trial magistrate, with due respect to her, misapprehended the issue. The thing that the Appellant promised the Complainants was to sell plots to them. As at the time they made the payments and even on completion they had not seen any plot. The conduct promised by the Appellant was to sell plots in a certain piece in Juja. The 'conduct' to sell was in the future even though the land was itself there. After completing payment the Appellant's explanation, and which the Prosecution seems to admit, was that the land was still there but that through irregular dealings the exercise to transfer it to the Complainants had to be halted. The irregular dealings were not caused by himself. The Prosecution did not seem to bother to check out that point with the Lands office. The point is however clear that the promise in issue here was in the future that certain land would be sold to the Complainants in completion of their payments. That the only reason that promise to sell in this case, which would have been completed through the transfer of land to the Complainants, could not be met. The reason it was not met could not be visited on the Appellant. That is why a promise to do something in the future cannot form the basis of a criminal charge since the future changes. In this case the future changed.

The other ingredient is that the Appellant obtained money with an intention to defraud. The Prosecution was not able to establish any fraud on the part of the Appellant. Having found that the land was in existence at the time the Complainants made payment and having found that the exercise has halted or been interfered with due to irregular dealings and or fraud by others not the Complainant, the intention to defraud cannot be said to have been established.

Even without considering all the other issues involved in this matter, having found that the promise to sell was in the future. It cannot be said that the charge was proved by the

Prosecution as required. In my sound view, the transactions in issue in this case were civil in nature and should have best been dealt with in a civil court.

The last point I wish to tackle is the order of compensation. An order of compensation can be made by court hearing a Criminal case under Section 31 of the Penal Code. However, that order cannot be made in two instances which affect this case.

See SULLIVAN vs. REPUBLIC 1966 E..A 423.

1**) Court should not be invoked to award compensation in the nature of substantial damages normally recoverable in a civil suit and the present case is not one in which compensation should have been made particularly in view of the fact that the remedy available to the Complainants could best be addressed in a civil suit.**

2) It should not be ordered except in the clearest of case. This case 'was' not 'clear'. It needed to be tested in a civil suit before such order to be made.

Having considered this Appeal, I am satisfied that the convictions entered and the orders made in this case cannot be sustained. The conviction was unsafe and should not be allowed to stand. Consequently I quash the conviction and set aside the sentence. The order of compensation made herein was improper as the issues involved herein were civil in nature and should have been addressed in a civil court. Accordingly I set aside the compensation order made. The upshot of this Appeal is that the same is allowed in its entirety. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 7th day of October 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

Appellant – present

Mogire for Appellant

Mwenje for Respondent

Muia CC

LESIIT

JUDGE