



**Mukunga v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 5506 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E007 OF 2023**

PJO OTIENO, J

MAY 17, 2024

BETWEEN

SAMSON MAINA MUKUNGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentencing of Hon. Dolphina Alego
(SPM) in Kakamega Criminal Case No. 294 of 2016 dated 30th January, 2023)*

JUDGMENT

1. The Appellant was arraigned before the Senior Principal Magistrate at Kakamega in Criminal Case No. 294 of 2016, charged with the offence of obtaining money by false pretence contrary to section 313 of the Penal Code.
2. The particulars of the offence were given that on the 5th day of August, 2015 at Kakamega Township within Kakamega County, the Appellant with the intent to defraud obtained cash of Kshs 870,000/ from Fridah Chimoli Mushila by falsely pretending that he was in a position to sell her a piece of land known as Butso/Ingotse/1631 a fact he knew was false.
3. The appellant pleaded not guilty to the charge and the case proceeded to full trial with the prosecution calling a total of six (6) witnesses.
4. PW1, Fridah Chimishi Mushila, the complainant, gave a sworn testimony and stated that on 5/8/2015 in the company of the Appellant, one Wycliffe, Bernard, Leonard and Cess she went to view the Appellant's piece of land which he had indicated measured three (3) acres and which he agreed to sell to her at the price of Kshs 1,350,000/. She then transferred as sum of Kshs 800,000/ and gave him cash of Kshs 70,000/ on the agreement and understanding that the remaining balance of Kshs 480,000/ would be settled within 3 months of her occupation of the land. An agreement to this effect was drawn and executed at an advocate's office and the parties parted ways thereafter. Thereafter, she tried reaching



- the Appellant but her calls went unanswered. She was prompted to report the matter to the police. She further stated that the Appellant is in possession of the land and he has refused to return the money she paid.
5. On cross examination she stated that before paying for the land she did a search which showed that the Appellant had used the land as security for a loan with AFC and that part of the money that she paid the Appellant was to be used to offset the loan which was in the sum of Kshs 364,000/ . She further stated that when the Appellant got to call her he asked her to address him by way of a letter which she did on 6/11/2015 to which the Appellant responded on 1/16/2016 after she had reported the incident with the police. She further stated that the Appellant sued her for uprooting sugarcane vide Civil Suit No. 38 of 2017 claiming damages in the sum of Kshs 1,500,000/, an allegation she disputes.
 6. PW2, Mushila Wycliffe Matasi gave sworn evidence and stated that on 5/8/2015 he accompanied PW1 to view a parcel of land known as Butsotso 1631 belonging to the accused who was present in the company of his brother. On the land had been planted sugarcane. He stated that the complainant transferred a sum of Kshs 800,000/ to the Appellant's Equity Bank Account and then gave him cash in the sum of Kshs 70,000/, in his presence.
 7. On cross examination he stated that the land was never handed over to the complainant and that the complainant owed the Appellant a small portion of the purchase price.
 8. PW3, John Daniel Maina also gave sworn testimony and stated that he was a retired Senior Chief of Kabras. That on 5/8/2015 the Appellant informed him that he wanted to dispose his land known as Butsotso 1631 and that the complainant had expressed interest in buying the land at the sum of Kshs 450,000/ per acre which for 3 acres came to a purchase price of Kshs 1,350,000. He said that the complainant deposited a sum of Kshs 800,000/ into the appellant's account and she again gave him Kshs 70,000/ cash with the agreement that PW1 would occupy the vacant area and upon the Appellant harvesting sugarcane PW1 could occupy the entire land. He added that he was surprised to be called by the CID in 2016 to confirm if there was any such sale agreement. He confirmed to the DCI his knowledge of same. On cross-examination he confirmed to court the existence of the land on the ground and that the two parties transacted.
 9. PW4, Leonard Burudi, testified that on the fateful day he accompanied the complainant to view a piece of land and they met with the Appellant who sold to PW1 two acres at a sum of Kshs 900,000/ and that they went to Equity Bank and she paid the Appellant through a lawyer with a remaining balance of Kshs 30,000/. He confirmed having signed the agreement as a witness then left for his work place. On being cross-examined, the witness told the court that he was present at negotiation and witness payment and execution of the agreement.
 10. PW5, Nafuye Juliet gave evidence that she was an Advocate and adduced a Sale Agreement she drew over the parcel of land known as Butsotso Ingotse 1631 measuring 1.2 ha executed by the Appellant as the seller and the complainant as the purchaser. She identified agreement as having been witnessed by her late colleague by the name of Gemase. She stated that the terms of the agreement were that the purchase price was Kshs 1, 350,000/ to which a sum of Kshs 800,000/ was paid through a bank account and Kshs 70,000/ in cash which payments the Appellant acknowledged receipt. The remaining balance of Kshs 350,000/ was to be paid within three (3) months after execution of the agreement.
 11. PW6 was No. 239855 Inspector George Emai, who testified that he was the Investigating Officer having received a complainant from PW1 to the effect that she had purchased land from the Appellant and paid a total sum of Kshs 870,000/ which amount the Appellant used to clear his loan with AFC Bank. He did his investigations and decided to charge the Appellant because the complainant neither got



- a refund of her money nor the land. He said that the telephone number the Appellant gave was not going through when called. He produced the sale agreement as P.Exh.2.
12. On cross examination he stated that he was not aware that the agreement had been cancelled but confirmed that the land indeed exists.
 13. The evidence of PW6 marked the close of the prosecution case after which the court ruled that a prima facie case had been established against the Appellant and he was thus placed on his defence.
 14. Only the Appellant testified at the defence hearing in which he stated that he was the owner of parcel of land known as Butso/Ingotse/1631 and which he sold to PW1 at a consideration of Kshs 1,350,000/ and to which he received Kshs 870,000/ from the complainant with a balance of Kshs 480,000/. He claimed that on 9/12/2015 the complainant wrote him a letter which he received on 21/12/2018 in which the complainant was cancelling the sale agreement prompting him to file a suit vide CMCC 38/2017 seeking damages because the complainant had used the land for 3 months. He stressed the fact that he owned the land and still own it and that it does exist on the ground.
 15. On cross examination he stated that he had charged the land, did not have copy of the title deed and that he did not return the money because that the complainant had never come for the money. On being cross-examined, he asserted having had the authority to charge the land and that he could not transfer after the complainant cancelled the agreement.
 16. Judgment was subsequently delivered and the Appellant was convicted and sentenced to pay a fine of Kshs 100,000/ or serve two years in prison.
 17. Dissatisfied with the Judgment of the trial court, the Appellant has lodged this appeal premised on the grounds that his conviction was not supported by the weight of evidence; that the trial court failed to recognize gaps in the Respondent's case and that the trial court erred in presiding over a matter that was purely Civil.
 18. The appeal has been canvassed by way of written submissions filed by both sides which submissions the court has read and benefited greatly.
 19. In his submissions the Appellant faults the decision of the trial court on the allegations that it failed to give any findings on the ingredients of the charge of the offence of obtaining money by false pretense as set out in the case of *Ndarave v R*. In the decision the court outlined the ingredients to be; a) the thing obtained must be capable of being stolen and; b) false pretense with intent to defraud.
 20. On the element that the thing obtained must be capable of being stolen, it is submitted that all witnesses confirmed that a search was conducted prior to the sale and that they further confirmed that the suit property belonged to the Appellant and since the land belonged and still belongs to the Appellant, it was not capable of being stolen.
 21. On the element of false pretense with intent to defraud it is argued that the Appellant offered to sell the complainant the suit property to which they did a search and the complainant even visited the land and they negotiated the terms which were reduced into an agreement making the matter purely civil. They argue that a criminal process is not a means to settle a civil claim and cite the case of *Bungoma HCA 200/2012 Joseph Wafukho Wanyonyi v R* in that regard.
 22. It is the submission of the Respondent that the prosecution proved the requisite elements of the offence of obtaining money by false pretense namely; that the Appellant obtained something capable of being stolen, that the same had been obtained by false pretense and that the same had been obtained with intent to defraud.



23. On the first element that the Appellant obtained something capable of being stolen they contend that the item capable of being stolen was the money which there is no contention that the Appellant received a sum of Kshs 870,000/ from the complainant.
24. On the second element that the money had been obtained by false pretence they argue that the Appellant lured the complainant to part with money knowing he never intended to part with the possession of the land since the complainant was to occupy the land for a period of 3 months and thereafter settle the remaining amount yet the Appellant took the monies, cleared his loan, switched off his phone and disappeared. They assert that this matter is not purely civil and submit that section 193A of the Criminal Procedure Code provides that the fact that a matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not act as a bar to the commencement of criminal proceedings. The decision in *R v Inspector General of the National Police & another Ex Parte Beatrice Hilda Omunia; Peter Nganga Chege & 2 Others (Interested Parties)* (2019) eKLR was cited in that regard.

Issues for Determination

25. The court has considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the Respondent, appreciates that the appeal is solely on conviction and discerns the following issues for determination: -
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt?
 - b. Whether the issues before the trial court were civil or criminal in nature?
26. In seeking to determine the two issues, the court appreciates its mandate and obligation on a first appeal to demand a complete and in-depth re-appraisal and re-examination of the entire record at trial, with a view to coming to own independent conclusion, of course, while giving a room for the fact that the trial court did enjoy the benefit of seeing and hearing the witnesses testify.
27. For the prosecution to achieve a conviction on a charge of obtaining by false pretence under section 313 of the *Penal Code* it has prove, beyond reasonable doubt, that the accused committed an act or acts leading to obtaining something capable of being stolen, by advancing to the victim a false pretence with the ultimate goal to defraud, the victim.
28. From the evidence recorded at trial, it is neither disputed nor contested that the Appellant offered to sell the complainant property known as Butsotso/Ingotse/1631 measuring 1.2 ha at the sum of Kshs 1, 350,000/. Of that sum, the Appellant acknowledged receipt of a sum of Kshs 800,000/ that was paid through his Equity bank account and another sum of Kshs 70,000/ that was paid to him in cash. The court appreciates that money is a valuable property, capable of being stolen, and therefore, the first ingredient of the offence was admitted and demanded no further proof. That leave the question whether in receiving the money the Appellant did so by false pretences and with intention to defraud.
29. False pretences is defined under section 312 of the *Penal Code* to be constituted by 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.
30. Put on the facts of this appeal, it was the testimony of the complainant that before paying for the subject land, she was accompanied by PW1, PW2 and PW4 to conduct a search which confirmed that the suit land was indeed registered in the name of the Appellant. That fact was confirmed by PW2 and PW4 in their testimonies. The appellant equally confirmed that he was the registered owner of the suit land. The complainant and the appellant in the company of PW2 and PW4 proceeded to an advocate's



office where they drafted a sale agreement which is not disputed, setting out the terms of the agreement and the complainant proceeded to make part payment of the purchase price to the appellant in the sum of Kshs 870,000/.

31. Having been confirmed that the appellant was the registered proprietor of the suit land, the court finds that evidence on record was against the advancement by the prosecution of the narrative that the monies were obtained by false pretence. There was no demonstration of any false presentation. It was the duty of the prosecution to prove that there was a falsehood on the presentations made by the Appellant. To this court, if the land was registered in his name, he had the capacity to sell same. If however, he never intended to part with the title, it was still the onus of the prosecution to prove that intention. In this matter, no additional attempt was made to prove intention beyond the agreement to sell and receipt of money. I find that false pretences was never proved. In coming to that conclusion, the court takes persuasion from decision of F. Gikonyo J in *Joseph Wanyonyi Wafukho v Republic* Criminal Appeal No 200 of 2012 [2014] eKLR where the court held:

“A cursory treatment of the above facts may create a feeling that there could be some criminal liability on the part of the Appellant for failing to deliver the land; after he had sold it and received the sum of Kshs 252,000-which is not a small sum in the circumstances of this case. But such is just but a false feeling which, if not careful, might blur the mind of the court. However, courts of law are experienced at unravelling such assumed dilemmas by carefully considering the facts of the case and the law applicable. The facts of this case reveal that the suit land existed; had been surveyed and a boundary delineated. Also, although there was no formal document to show that the Appellant was the registered proprietor of the suit land, there was no doubt, [and that was not contested], that he owned or had proprietary interest in the suit land. The only problem is that family members did not support or approve of the sale. He was selling was real land, and not what I would call ‘air’. There was nothing false or untrue about the agreement for sale of the land or the land itself. Therefore, it cannot be said, in the circumstances of this case, that the Appellant made a false representation of fact about the land.”

32. The three ingredients of the offence are cumulative and failure to prove just one negate the charge. For that reason and having found that the second element of obtaining by false pretence was not proved, it serves no meaningful purpose to delve on the third issue of whether there was the intention to defraud. It is enough that one element was never proved to the requisite standards.
33. Having found that the criminal offence charged was not proved, the court appreciates the case at hand appears to reveal a breach of a term or the terms of the sale agreement. The complainant felt disgruntled then moved a criminal court to enforce the contract. In the court’s view, the dispute is purely civil in nature. The complainant remains at liberty to seek remedy in a Civil Court which is vested with the jurisdiction to determine questions on breach of contract. This in no way disregards the provisions of section 193 of the *Penal Code*. It simply means that not every dispute must give the prospects of invoking both civil and criminal sanctions. Others must only fall one on side of the divide.
34. At the end, the court finds and holds that the conviction was against the weight of evidence hence quashes the conviction and sets aside the sentence.
35. Let the Appellant, if in custody, be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF MAY, 2024.

PATRICK J O OTIENO



JUDGE

In the presence of:

No appearance for Matete for the Appellant

Ms. Chala for the Respondent

Court Assistant: Polycap

