



**Republic v Mohammed (Criminal Appeal E036 of 2021)
[2023] KEHC 741 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E036 OF 2021
KW KIARIE, J
FEBRUARY 9, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

SWALEH OMONDI MOHAMMED RESPONDENT

(From the original judgment in Criminal case No. 733 of 2018 of the Chief Magistrate's Court at Homa Bay by Hon Thomas A. Obutu – Senior Principal Magistrate)

JUDGMENT

1. Enoch Clinton Onyando alias Swaleh Omondi Mohammed, the respondent herein, was acquitted of the offence of obtaining money by false pretences contrary to section 313 of the *Penal Code*.
2. The particulars of the offence are that on diverse dates between July 11, 2018 and August 2018 in Kisii Town within Kisii County, jointly with others not before court, with intent to defraud obtained KShs.520, 000/= from Tejas Arphid by false pretending that he was in a position to sell to him land parcel number Kanyada/ Kotieno /Katuma “B”/244 S/No 129191 a fact he knew was false.
3. The appellant was dissatisfied and filed this appeal through the firm of Nyamurongi & Company Advocates. The following grounds of appeal were raised:
 - a. The learned trial magistrate erred by failing to appreciate the uncontroverted evidence of identification of the accused person tendered before court.
 - b. The learned trial magistrate placed a burden of proof on the prosecution higher than the legal threshold of ‘proof beyond reasonable doubt’ in holding that the advocate who drew the agreement “should have confirmed that persons who appeared before him were genuine and real parties”.



- c. The learned trial magistrate erred in failing to find that the prosecution had tendered uncontroverted evidence establishing the offence charged beyond reasonable doubt.
 - d. The judgment of the learned trial magistrate was against the weight of evidence tendered by the prosecution.
 4. The respondent was represented by the firm of H Obach & Partners. He opposed the appeal on grounds that:
 - a. The identity of the person who entered into a contract with the complainant was not proved.
 - b. The offence of obtaining by false pretences was not proved.
 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
 6. Whereas the appellant contended that the respondent was identified as the person who entered into a sale agreement with the complainant, the appellant said the identity of the culprit was not proved. In his evidence the complainant testified that in the course of the transaction, he met the respondent on three occasions. He was introduced to him as Enock Clinton Onyando. Their meeting was on July 4, 2018. On this occasion the respondent went with some documents in respect of Succession Cause No 187 of 2018 which was pending at Homa Bay court. On July 11, 2018 they met at office of Nyamweya Osoro, for the sale agreement. On August 1, 2018 he again met the respondent when he went with another title deed and they made another agreement before Ezekiel Mudavadi, advocate.
 7. I therefore find that the complainant had ample interactions with the person he entered into a sale agreement with and he was later in a position to identify him as the respondent.
 8. Enock Nyanchoka Mainogu (PW2) testified that he identified the respondent due to the interactions he had with him. At all the material times he was with PW1. I therefore find that his evidence of identification cannot be faulted.
 9. The advocate who drew the sale agreement is Mbarak Ogaro Nyanchonga (PW4) He identified the respondent as the person who was selling the land.
 10. I therefore find that the identity of the seller was proved to the required standards,
 11. The ingredients of the offence of obtaining by false pretences contrary to section 313 of the Penal Code were enumerated in the case of *Amugo vs Republic* High Court (Kisumu) Criminal Appeal No 320 of 1980 (unreported) as follows:

The offence of obtaining by false pretences has seven possible ingredients which have to be proved beyond doubt before an accused person is convicted. They are as follows:

- a. a false representation;
- b. which is made;
- c. by words or writing or conduct;
- d. of a matter of fact;
- e. either past or present;



- f. with knowledge of the falsehood or without belief that the presentation is true;
and
- g. the representation causing the giver to part with the thing obtained.

The court went on to state for there to be a conviction, all the eight ingredients must be established beyond any reasonable doubt.

12. It is trite law that for an action to amount to a false pretence, it must be of past or present facts and not of future facts. Lord Devlin in the case of *J R vs Dent* [1955] 2 Q B 594 stated:

...a long course of authorities in criminal cases has laid down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.

13. In the instant case, when the respondent offered the land in question for sale, he disclosed that there was a pending succession cause. The sale therefore could be effected then but in future after the conclusion of the succession matter.
14. Though it was alleged that the title deed that formed the basis of the contract was forged, the respondent was not charged with the offence. Had he been charged with the offence and successfully prosecuted, then he would equally be found guilty for the offence of obtaining by false pretences. This could have given him the chance to explain himself on how he came to possess a forged document.
15. I therefore find that the acquittal by the trial court cannot be faulted except for the reasons for his acquittal. The complainant can seek redress in a civil court.
16. The appeal is therefore dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF FEBRUARY, 2023.

KIARIE WAWERU KIARIE

JUDGE

