



**Musa v Republic (Criminal Appeal E111 of 2022)
[2023] KEHC 2641 (KLR) (Crim) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E111 OF 2022
JM BWONWONG'A, J
MARCH 9, 2023**

BETWEEN

HASSAN NYAMAI MUSA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. H. Okwani P.M on 29th June 2022 in Makadara Chief Magistrate's Court in Criminal Case No. 1413 of 2020 Republic vs Hassan Nyamai Musa)

JUDGMENT

1. The appellant is challenging his conviction and sentence of 2 years imprisonment for the offence of obtaining money by false pretence contrary to section 313 of the *Penal Code*. He filed the present appeal raising sixteen grounds.
2. The main grounds are as follows. In a coalesced form in grounds 1 to 7 and 9 to 13 the appellant challenged the totality of the prosecution's evidence relied on by the trial court to convict him.
3. In grounds 8 and 15 the appellant complained that the trial court failed to consider his defence.
4. In grounds 14 and 16 the appellant challenged the sentence imposed as harsh and manifestly excessive.
5. The respondent filed grounds of opposition. The grounds raised are that the appeal is misconceived and unsubstantiated. The appeal is an abuse of the court process and the appeal lacks merit and should be dismissed.
6. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose*



vs. R [2013] e-KLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

7. Christine Mugambi (PW 1) the complainant testified that on June 5, 2012 and May 27, 2012 he met the appellant who informed her that he had two plots for sale in Kamulu. The purchase price for each was Kshs. 65,000. On various dates between 2012 and 2013, she deposits money totalling Kshs. 130,800/= to Diamond Acre Homes Limited, where the appellant was a director. The appellant issued receipts and acknowledged receipt of the funds.
8. The complainant told the court that she called the appellant requesting for a site visit. The appellant became rude and unresponsive. She reported him to Kamulu police station and recorded a statement at Ruai police station. The appellant was arrested in court. She maintained that she was never given a plot by the appellant despite several promises made. Further the appellant did not refund the money paid. She identified the appellant in court.
9. No 62061 PC Benjamin Mumo (PW 2) the investigating officer told the court that on February 26, 2019, a report was made by the complainant at the station. she complained that the appellant had obtained Kshs 130,800 by falsely claiming to be in a position to sell her land. She told the court that in the course of her investigations, she discovered that indeed the appellant through Diamond Houses where he was a director. Further, that the appellant neither transferred the purported plot or refund the money to the complainant. The appellant was summoned and when he could not take them to the plot, or refund the money obtained, he was arrested and charged. He produced the statement of accounts indicating when the money was deposited, the receipts issued and the certificate of registration with particulars thereof of Diamond Acre Homes Limited.
10. After the close of the prosecution's case, he was found to have a case to answer and was put on his defence. In his defence he gave sworn testimony. He did not call any witnesses.
11. In his defence, he testified that he is one of the directors of Diamond Limited. He met the complainant in 2012 and she wanted to purchase property from the company. At the time, the value of the property was Kshs 250,000. She paid Kshs 30,000 and continued making payments for 8 months. However, in 2013 she stopped making payments. In 2017, she was given a go ahead to start making payments again. She only paid for and came back in 2020 demanding her money.
12. He told the court, that as per the terms of the commitment form, the complainant was to make her payments for 36 months paying Kshs. 10,000 monthly. The figure was later reduced to Kshs 6,300/-. When she demanded her money back, as per the terms, she was to lose Kshs. 30,000/- which is equivalent to one share and was to be refunded Kshs 100,800/-. She demanded to be paid via Mpesa. The appellant told her to go to the office but to collect the amount but she refused. He was later arrested and charged. That it is a company policy that anyone who doesn't get a plot is refunded. He produced a title deed to the plot.
13. The trial court found the appellant guilty and charged and convicted him. He was sentenced to serve two (2) years imprisonment.

Analysis and determination.

14. In grounds 1 to 7 and 9 to 13 the appellant challenged the totality of the prosecution evidence relied on by the trial court to convict him. He submitted that the money paid by the complainant was paid to bank accounts owned by the company. Secondly, the property is registered in the name of the company



in which the appellant is one of the three directors. In addition, the appellant did not personally benefit from monies paid to the company's bank account. He argued that the burden of proof was not discharged beyond reasonable doubt.

15. Conversely, the respondent submitted the prosecution established the offence of obtaining by false pretence. That the PW 1 paid the monies pursuant to an agreement for the sale of plots. However, the appellant failed to honour the terms of the agreement. In addition, the money is something capable of being stolen. The respondent argued that the appellant obtained the money with a view of money was obtained with a view of defrauding the complainant. This is inferred from the failure to transfer the land to her. Section 313 of Penal Code (Cap 63) Laws of Kenya provides:

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

16. The ingredients of the charge are: Obtaining something capable of being stolen, obtaining by false pretence, obtaining something with intent to defraud.
17. The appellant did not deny that the company in which he is a director received Ksh 130,800/=. The complainant told the court that the money was paid as the purchase price for the acquisition of the property. However, she could not identify the property being acquired. On his part, the appellant told the court that the money was paid for the acquisition, sub-division and transfer of the property to the complainant. he produced a commitment form executed by the complainant and officials of Diamond Acres Home Limited. It was a commitment by the company to buy a parcel of land and subdivide into among its members.
18. Section 312 of the Penal Code confirms this position by decreeing that the representation must be of either a past or present fact. The Court of Appeal pronounced itself on this position in *Mathlida Akinyi Oware vs Republic*, [1989] eKLR where it cited with approval the holding of Devlin, J in the case of *R V Dent*, [1975] 2 All E R 806 and held that to constitute a false pretence, the false statement must be of an existing fact. I find that the payment was for a future act. The Court of Appeal held that:

“A statement of intention about future conduct whether it be a statement of existing fact, is not such a statement as null amount to a false pretence in Criminal Law”

19. The court was saying that the fact of obtaining by false pretences does not relate to future events.
20. The acquisition of land for sub-division and distribution to members is a process that is future oriented and that must be why there were timelines for the payment of the sums of money. The property was not supposed to be acquired and sub-divided and distributed to the complainant on the same day.
21. In the premises, the facts in this case undoubtedly reveal that the appellant's representation related to a future event which, as demonstrated earlier, cannot support a charge of obtaining by false pretences. The facts may ably support a civil claim but are insufficient to prove the offences charged in this case to the required legal standard.
22. For the reasons stated above, I am satisfied that the appellant was wrongly convicted on the charge preferred against him. It is thus my finding that this appeal is merited and it is hereby allowed in its entirety. The appellant's conviction is hereby quashed and the resultant sentences set aside.
23. The appellant shall be set free forthwith unless otherwise lawfully held on other lawful warrants.



**JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH
DAY OF MARCH 2023.**

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Wainaina holding brief for Mr. Wandugi for the appellant

Ms. Oduor for the respondent

The appellant present.

