



**Nizamdin v Republic (Criminal Appeal E051 of 2021)
[2023] KEHC 20073 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E051 OF 2021
AK NDUNG’U, J
JULY 12, 2023**

BETWEEN

NAZAKTALI NIZAMDIN APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki
CM Criminal Case No 1808 of 2018 – L. Mutai CM)*

JUDGMENT

1. The appellant, Nazaktali Nizamdin, was convicted after trial of obtaining money by false pretence contrary to section 313 of the *Penal Code*. The particulars were that on July 6, 2011 at Nanyuki Town in Laikipia East sub-county within Laikipia county, with intent to defraud obtained Kshs 400,000/- from Ramadhan Maulidi Juma by falsely pretending that he was in a position to sell a plot title number 2787/58XIII also known as B4/63 to the said Ramadhan Maulidi Juma, a fact he knew to be false. On August 6, 2021 he was fined Kshs 200,000/- and in default to serve 1 ½ years imprisonment. He paid the fine.
2. The appellant has now appealed against both the conviction and the sentence. Through his advocate, he filed a petition of appeal dated August 17, 2021 raising the following grounds;
 - i. The learned magistrate failed to hold that the matter was purely a civil matter and not criminal.
 - ii. The learned magistrate erred by believing PW4 who had no document and legal capacity.
 - iii. The learned magistrate erred convicting the appellant on evidence that was contradictory.
 - iv. That the learned magistrate erred convicting the appellant whereas the case was not proved to the required standard.



- v. The learned magistrate erred by only believing the prosecution's evidence and disregarding the appellant's evidence and submissions.
 - vi. That the ingredients of obtaining money by false pretence were not proved.
 - vii. That the evidence adduced by the prosecution was inconsistent, false, unbelievable and hence inadmissible to warrant a conviction.
 - viii. That the charges were a framed up and an afterthought.
 - ix. The learned magistrate erred by basing her judgment on assumption and guesswork.
 - x. That the judgement was not based on evidence on record hence the conviction and the sentence were unwarranted and illegal.
3. The appeal was canvassed by way of written submissions. The appellant's counsel argued that the evidence on record revealed that the matter was purely civil in nature and not criminal. That the trial court erred in believing PW4 who had no documentation to show that he was a brother to Mohamed Ali(deceased) who was said to have bought the said property from the appellant; that there was no evidence that the appellant had sold the subject property to PW4's brother and there was no evidence that the land did not exist; that the confirmation of grant issued by Kitale High Court was proof that the land existed. It was urged that the trial court erroneously found that the appellant was not the rightful owner of the subject property yet the confirmation of grant confirmed that he was the administrator of his grandparents estate, hence he had the capacity to transfer the same; that the court erred finding that the appellant resold the subject property to a third party yet there was no evidence to prove those allegations; that the trial court held that the appellant had no capacity to sell the subject land oblivious of the fact that the appellant was to transfer the same upon completion of the succession case. He submitted that the ingredients of false pretence were not proved since the evidence on record was that the property was registered in the appellant's grandparent's name and he was pursuing a succession case before transferring the same to the complainant; that the appellant did not pretend that he was the owner of the said property and therefore, he had no intention to defraud the complainant.
4. The respondent through the state counsel opposed the appeal. Learned counsel submitted that the matter was not civil in nature but criminal since the appellant had sold the same plot to two different people and received money from them; that since he had sold the land to PW4's brother, he knew from the onset that he had no title to pass to PW1 and he did not communicate that fact to PW1 and, therefore, the concealment of those facts qualifies as a criminal intent to defraud. It is submitted that the appellant was arrested in 2018 as he was attempting to sell the same property to a third party hence, his conduct was fraudulent. That after selling the property to PW1, he was supposed to hand over the completion documents but he disappeared hence all circumstances suggested that the appellant had an ulterior motive to defraud the complainant. Further, that the law does not bar concurrent civil and criminal proceedings. That the appellant obtained money from the complainant by making a false representation hence, this exhibited fraudulent intentions and therefore the charge of obtaining by false pretence was proved.
5. Counsel submitted that PW4 was a competent witness since he testified that he had witnessed the agreement between his late brother and the appellant therefore, he understood the matter in question and he did not need a confirmed grant to show that he was the administrator of his deceased's brother estate. On the issue of contradictions, counsel urged that the prosecution case was consistent and sufficiently exhibited the ingredients of the offence the appellant was facing. On the appellant's defence, it is submitted that the same was fanciful as the appellant did not deny that he received money from the complainant, that he was indebted to PW4, and that the transfer never went through. That



the appellant claim that it was the complainant who refused to effect the transfer was discredited by PW3 who testified that the appellant attempted to obtain the balance from the complainant but he was informed to submit the completion document but he failed to do so. Therefore, the defence failed to rebut the ingredients of the offence and was therefore properly dismissed. On the sentence, counsel submitted that it was proper and urged this court to uphold the same.

6. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
7. I have therefore read through, considered and re-evaluated the evidence as recorded before the trial court to enable me reach my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact. I have considered the submissions and the authorities relied on by the parties.
8. Arising from the grounds of appeal, submissions thereon and evidence adduced before the trial court, the paramount issue for determination is whether the prosecution proved the offence of obtaining money by false pretence to the degree required in law. The evidence on record was as follows.
9. PW1 was the complainant, he testified that in 2011, he was informed of a plot that was on sale. He met the appellant, whom he knew and learnt that the land was in the name of the appellant's deceased grandfather. He was shown the succession matter that was ongoing in Kitale High Court and his lawyer was to push for determination of the matter. They entered into a sale agreement on July 6, 2011 and they agreed on purchase price which was Kshs 1,100,000/-. He paid a down payment of Kshs 400,000/- with the balance to be paid in installment. He identified the grant issued to the appellant and the gazette notice for the said land.
10. He testified that he was called and he was informed that the appellant had sold the land to a third party who had since fenced the land. He also learnt that the owners of the said land were abroad. He contacted the appellant but he was rude to him. the appellant had agreed to refund the money but he disappeared. He learnt in 2018 that the appellant was arrested courtesy of a third party and he pursued his claim with the police. He testified on reexamination that he did not clear the balance of the purchase price since the appellant was unable to transfer the land to him.
11. On cross examination he testified that he was shown the land in the presence of the appellant who informed him that the land was registered under his grandparent who had passed on. That the land was not transferred to the 3rd party whose brother was pushing for the refund.
12. PW2 was the Investigating Officer. He testified that on December 17, 2018, he received a complaint from the complainant that the appellant had obtained Kshs.400,000/- from him on pretence that he was in a position to sell land to him. He learnt that the appellant had been summoned in the station by the OCS due to another complaint that had been lodged earlier by Amin Mohamed Ali, PW4. He interrogated the appellant and he was unable to explain why he had sold the same property to two different people. He also learnt that the land was registered in the name of Kudan who had relocated to England. He produced the sale agreement as Pexhibit1, a copy of cheque Pexhibit2, Kenya gazette notice Pexhibit3, certificate of grant pexhibit4 and transfer form which were duly signed by the appellant as Pexhibit5.
13. He testified on cross examination that he was unable to trace the owner of the land one Kudan and that the appellant claimed that the said Kudan was a relative to Kudulan. That the succession case in Kitale was in respect to the late Kundulan. That PW4 took the possession of the said land and that he did not know whether Yanzin Mohamed was PW4's brother.



14. PW3 was the counsel who drew the agreement between the appellant and the complainant. He testified that on July 6, 2011, he received them and he was shown the title of the suit land. PW1 paid a down payment of Kshs 400,000/- with the balance to be paid within 90 days after the appellant had handed over the completion documents which included the appellant's passport photo, Pin No, clearance of rates and rents and ID card. The appellant signed the transfer form and attached his passport photo. Thereafter, the appellant demanded for the balance of the purchase price but he was not given since he had not complied. He testified that the transaction failed.
15. On cross examination, he testified that the land was registered in the name of Nazandmin Kadir who was deceased and that he was involved in the succession case of his estate in Kitale High Court and he obtained a grant in favour of the appellant. That the land in issue was included in the said succession case and that the transaction failed since the appellant failed to avail the necessary documents to facilitate the transfer.
16. PW4 testified that the appellant approached him in 2007 as he wanted to sell a plot to his brother, Mohammed Ali that was next to PW4's plot. The plot belonged to the appellant's late father. The appellant was paid Kshs 200,000/- with a balance of Kshs 500,000/- to be paid later. His brother however passed on 2008 and he decided to pursue the matter but the appellant was nowhere to be seen and his phone was switched off. He reported to the police and the appellant was arrested. He agreed to refund the money and he paid Kshs 30,000/- but disappeared after that. In 2018, he was alerted by Juma that the appellant was selling the same plot and he went to the police station where he found the appellant. He produced the acknowledgement letter for Kshs 30,000/- that the appellant refunded as Pexhibit6.
17. On cross examination he testified that the agreement between the appellant and his late brother was verbal but he was present. He testified that he was the administrator of his deceased's brother estate. That he decided to report to the police since the appellant had disappeared. He testified that he later learnt that the land did not belong to the appellant. He testified that he was able to buy the land from the rightful owner and the land is under his name.
18. That was the totality of evidence by the prosecution. The appellant gave sworn testimony. He testified that indeed he sold the said land to PW1. He testified that the sale agreement indicated that the owners were Kundanilal and Durgadass but his father had bought the said property from those two. He testified that he obtained the grant and signed the transfer documents but when he wanted to transfer the land to the complainant, the complainant demanded for his money back. He testified that the case against him was civil in nature and not criminal.
19. On cross examination, he told the court that he did not sell the property to a third party and never stopped communicating with the complainant. He testified that he was indebted to PW4 and the land has not yet been transferred.
20. That was the totality of the evidence before the trial court. Section 313 of the *Penal Code* creates the offence of obtaining money by false pretence. It provides;

“ Any person who by 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 misdemeanor and is liable to imprisonment for three years.”



21. It follows therefore that the essential elements of the offence of obtaining through false pretences can be summed up as follows: -
- i. Obtaining something capable of being stolen.
 - ii. Obtained it through a false pretence.
 - iii. Obtained it with intention to defraud.
22. False pretence is defined under section 312 of the *Penal Code* as follows;
- “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, is a false pretence.”
23. The elements that constitute false pretence from the above definition are:
- i. A representation of fact by word, writing or conduct;
 - ii. The representation that is either past or present;
 - iii. The representation must be false; and
 - iv. The person made the representation knowing it to be false or did not believe it to be true.
24. The first element of the subject offence that needed to be proved is whether the appellant obtained something capable of being stolen. From the record, there is witness evidence that the appellant obtained money. It was PW1’s evidence that the appellant received Kshs 400,000/- from the complainant as down payment for the purchase of the suit land. The appellant did not deny receiving the said money from the complainant. It is therefore clear from the evidence that the appellant obtained money from the complainant, and money is definitely something capable of being stolen.
25. However, taking the money did not solely constitute the offence and it was for the prosecution to prove that the same was obtained through false pretences and with intention to defraud.
26. This leads us to the second limb whether the appellant took the complainant’s money through a false representation and with intent to defraud. While there is evidence that the land existed, it is on record and not disputed that the appellant did not have title to the land. He therefore had no title to pass to any buyer of the land. PW2 testified that he discovered that the suit land belonged to one Kudan who had relocated to England and he was unable to get hold of him. PW4 testified that the land belonged to someone else and not appellant as he had claimed and that he was eventually able to buy the land from the rightful owners. PW4 testified that he is now the registered owner after buying the suit land from the rightful owners.
27. The appellant himself during his defence testified that the agreement between him and the complainant indicated that the owners of the suit land were Kundanilal and Durgadass but his father had bought the said property from those two. However, in his submissions before this court, he told this court that the suit land belonged to his grandfather. The complainant also testified that the appellant informed him that the suit land belonged to his grandparent who were now deceased. This admission alone hives away any legal standing that would have enabled the appellant to sell the said land to anyone before succession proceedings in respect of the relevant estate were concluded.



28. The prosecution produced a certificate of grant, Pexhibit 4, dated June 14, 2012 in succession cause No. 163 of 2004, High Court Kitale where the appellant was appointed as the Administrator of Nazamdin Gulam Kadir. The suit land was listed as one of the deceased's property. A closer look at the agreement between the appellant and the complainant, Pexhibit1, indicates that the suit land belonged to Kundan Lal and Durgadass Ganpatrai Luthra.
29. Therefore, it is not clear as to who owned the suit land even from the appellant's evidence. At first, he was selling the property as an heir of his father's estate and that the suit land belonged to his grandparent. In his defence however, he claimed that his father had bought the land from Kundan Lal and Durgadass. His case before this court is that the land belonged to his grandparent. All this leads to the fact that the land did not belong to the appellant as PW2 and PW4 testified.
30. Further, there is evidence that the appellant had previously sold the property to PW4's brother, Amin Mohamed (deceased) and consequently sold the same land to the complainant. The appellant in his defence denied selling the land to a third party but admitted to be indebted to PW4. PW4 produced an acknowledgement of money as Pexhibit6 dated and signed on October 25, 2011 between the appellant and PW4. The acknowledgement was for the refund of the purchase price of the suit land. The appellant paid Kshs 30,000/- and the balance of Kshs 142,000/- was to be paid by June 30, 2012. PW4 testified that the appellant disappeared and the balance was not refunded.
31. It is therefore clear from the above that indeed the appellant had sold the suit land to PW4's brother. PW4 testified that his brother bought the land in 2007 through a verbal agreement. The acknowledgement of the money speaks volumes to this as it clearly shows that the appellant was refunding money he had been paid. He thereafter on July 6, 2011, sold the same land to the complainant who was oblivious of the fact that the land had been sold to someone else.
32. The prosecution contention and which is buttressed by the evidence adduced is that was that the appellant had sold the property to two different people and, therefore, he made a false representation to the complainant that the property was free for sale knowing that it was encumbered by PW4's interest hence, element of fraud was established.
33. The question that this court has to answer is whether selling the property knowing he had no legal title to pass to a buyer and, secondly, selling the same land to two different persons brought out the elements of obtaining money by false pretence.
34. I have no difficulty finding that it does. This for the simple reason that the appellant sold the land to the complainant knowing well that he had sold the said suit land to another person though he had not transferred the same. Therefore, he made a false representation that he was in a position to sell the same suit land to the complainant knowing that he had been paid for the same plot by PW4's brother. If he had revealed that he had sold the property to PW4's brother, the complainant would not have lost the money in that scheme. This demonstrates the elements of false representation. Further, by purporting to sell land that he had no title to and receiving money thereto, the element of obtaining by false pretences is laid bare.
35. With the result that the entire appeal lacks merit and is dismissed.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF JULY 2023

A.K. NDUNG'U

JUDGE

