Odhiambo v Republic (Criminal Appeal E067 of 2022)
[2023] KEHC 22553 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22553 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E067 OF 2022

JRA WANANDA, J

SEPTEMBER 22, 2023

BETWEEN

PAMELA ATIENO ODHIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Mumias Senior Principal Magistrate's Court Criminal Case No. 376 of 2020 with the offence of obtaining by false pretence contrary to Section 313 of the Penal Code. The particulars of the offence were that on diverse dates between 7/06/2015 and 17/01/2017 at Township sub-location, Mumias West sub-County within Kakamega County, with intent to defraud obtained from Yusuf Ali Akina Kshs 3,500,000/- pretending that he could sell him a piece of land (plot L.R. No. 8056/42) in Mumias Township Trading Centre, a fact he knew to be false.

2. The Appellant was charged with the alternative offence of wrongful confinement, contrary to section 263 of the Penal Code. The particulars of the offence were that on 11/09/2020 at Alphond Medical Centre Nabongo Location in Mumias West sub-County within Kakamega County, she wrongfully confined the said Yusuf Ali Akina.

3. The Appellant pleaded not guilty and the matter proceeded to full trial. She was represented by Mr. K'Owino Advocate.The prosecution called 5 witnesses while for the defence, the Appellant was the only witness. She gave sworn testimony.

Prosecution evidence

4. PW1 was the complainant Yusuf Ali Akina. He stated that in 2015 he was approached by his agent, one Hassan Juma t/a Matawa Property Agency who told him that he had a client selling her property, PW1 passed by the client's house on 7/06/2015, the client was the Appellant, they started the negotiations, PW1 was with his wife, Appellant wanted to sell her property IR. No. 4348 located within Mumias

Township and that was where the Appellant was residing, they agreed on Kshs 5.3 Million as purchase price and Kshs 300,000/- for the agent, PW1 paid Kshs 100,000/- to the Appellant on the same day, at that time they did not have a written agreement, Appellant gave her bank Account number at Kenya Commercial Bank (KCB) where PW1 was to deposit the balance, PW1 later transferred Kshs 400,000/- to the Appellant's said bank account on 8/06/2015, Kshs 150,000/- on 30/06/2015 and Kshs 600,000/- on 28/07/2015, they agreed that when PW1 gets time he would prepare an agreement. PW1 added that he deposited and/or transferred further amounts to the Appellant's bank account, namely, Kshs 100,000/- on 10/08/2015, Kshs 100,000/- on 15/08/2015, Kshs 50,000/- on 23/05/2016, Kshs 500,000/- on 1/11/2016 and Kshs 1,540,000/- on 17/01/2017

5. He added that he had also been making payments to the Appellant via Mpesa, he obtained statements from Safaricom Ltd, on 16/09/2015 he paid to the Appellant's phone number Kshs 20,200/-, Kshs 50,000/- on 14/04/2016, Kshs 50,300/- on 15/06/2016, Kshs 25,000/- on 29/12/2016 and Kshs 10,000/- on 5/01/2017.

6. PW1 further testified that the aggregate amount that he paid was Kshs 3,500,000/-, he was to pay the balance and insisted on a formal agreement, this was in January 2017 but the Appellant started becoming elusive claiming that she was busy and that the land documents were with her sister abroad, at one time the Appellant went to PW1's office in Nairobi and asked for PW1's bank account to enable her refund the money, PW1 insisted on refund with an interest at the rate of 13%, PW1 decided to lodge a caution against the property and that is when he realized that the same had been transferred on 23/12/2016 to Messrs Cyrene Projects Ltd, before carrying out a search his Advocates Messrs Akwala Advocates had earlier sent a letter to the Appellant demanding a formal agreement for sale, they never received a response, the Advocates had also sent a letter to the sub-county Administrator Mumias sub-county requesting for a restriction to be placed on the property, they received a response from the Ministry of Lands stating that the property had already been transferred and that they therefore could not place the restriction, they referred them to the Courts, by that time PW1 had also confirmed the position from the search, he tried to contact the Appellant but she was elusive, he then reported the matter to the Mumias Police Station, he was given officers who accompanied him to the Appellant's premises but found that she had already left, in November 2020 he came across some demolitions going on in the property, he found the foreman who confirmed that they had purchased the property, PW1 then went to look for the Appellant, he found her but she did not recognize him because they had not seen each other for about 2 years, afterwards the Appellant never picked his calls and never called back, he went back to the police and reported the matter, by that time the Appellant had relocated to a different residence, he learnt of the location of the Appellant's new residence and shared the information with the police, on 2/11/2020 he found the Appellant at her clinic Alphon Medical Centre, he tried to get the Appellant to discuss the issue but she declined, she tried to run through the back door but was unsuccessful, she then communicated in vernacular to her employees which he could not understand, an employee blocked PW1 then the Appellant locked PW1 inside the premises, he remained locked in until about 10.00 o'clock, he called his wife who reported to the police who then came and freed him, thereafter the police arrested the Appellant and charged her in Court.

7. In conclusion, PW1 stated that the payments that he made were for purchase of the piece of land, the Appellant gave a proposal to pay back in monthly instalments, that was in 2017, she made some refunds which PW1 could not confirm how much it was but it was not more than Kshs 200,000/-.

8. In cross-examination, PW1 confirmed that there was no written sale agreement, purchase price was Kshs 5.3 Million, he did not pay the full amount, the payments that he made were for a period of about 2 years, he did not have all the bank statements, other than purchase of the said piece of land he did not have any other financial transaction with the Appellant, the money he was refunded by the

Appellant was to his understanding the interest and not the principal sum, on the day he was locked in the Appellant's clinic he had gone there at around 7.30 pm, the Appellant told the police that he PW1 was armed with a gun and that he wanted to shoot her, when she locked him inside the clinic, by that date PW1 had already reported the issue of the piece of land purchase to the police.

9. The next witness, PW2, was one Hassan Juma who introduced himself as a registered agent of buying and selling land and he is based at Mumias. He stated that he knew the Appellant from the year 2002 when the Appellant was treating PW2's late mother, she has been treating him and his family, the Appellant has a clinic, he heard that the Appellant had a property and was disposing the same, that was in 2015, the land was LR No. 8056/42 grant number 4348, she went and talked with the Appellant about the sale and he started looking for clients, one client, PW1, showed willingness to purchase the land, he met with PW1 on 7/06/2015, the Appellant and PW1 knew each other and they all agreed on the price, on the same day they went to the property and met the Appellant, the meeting took about 2 hours, apart from the 3 of them, one Umi Ramadhan was also present, selling price was agreed at Kshs 5.3 Million, it was a commercial plot with a foundation that was not complete, his commission was Kshs 300,000/-, it was agreed that PW1 would pay half of the purchase price before they got a sale agreement, on the same day PW1 paid Kshs 100,000/- cash to the Appellant, he promised to pay Kshs 400,000/- through his bank account at KCB Mumias branch, regarding PW2's commission the Appellant paid him Kshs 40,000/- via Mpesa on 8/06/2015, the amount was 10% of the amount paid, PW1 was to take over the property after an agreement was signed which was to be signed after PW1 had paid half of the purchase price, they were to prepare and sign a sale agreement.

10. PW2 added that subsequently the Appellant claimed that it is her husband who had purchased the property and that they had not transferred the property to her name and that she needed time to have the title transferred to her name, the Appellant resided on the property so they believed and trusted her, PW2 had a copy of the title and he had gone to the Municipal offices and found that the title was in the name of one Lydia Owalo, he believed that the Appellant had bought the property from that person and that the Appellant was still in the process of transferring the same into her name, he advised PW1 to obtain an official search, he knew about the subsequent payments made by PW1 to the Appellant because he continued keeping in touch with both, the Appellant had been paid a total amount of Kshs 3.5 Million, they were unable to get the Appellant, he obtained a search from Ardhi House in Nairobi, the search showed that the property had been transferred to Messrs Cyrene Projects Ltd, the registration was done on 23/12/2016.

11. PW2 added that the Appellant became evasive, they got Messrs Akwala Advocates to send a demand letter to the Appellant, she responded indicating that PW1 had not complied with the agreement, he advised PW1 to lodge a caution/restriction, on the land, they sent letters to Kakamega and Ardhi House in Nairobi, the land had been transferred so they were not able to place the restriction, he accompanied PW1 to Mumias police station, sometime in August 2020 he received a call from PW1 asking him to meet PW1 at the property, when PW2 went to there he found people carrying out renovations, when he talked to the workers they told him that they were instructed by Messrs Cyrene Ltd which had purchased the property, he then accompanied PW1 to the Appellant's clinic which was a walking distance from the property, they found the Appellant but did not manage to talk to her since she slipped out and ran away, he later learnt of the location of the Appellant's new residence since the Appellant had to relocate from the property in question when the renovations commenced, on 11/09/2020 at around 8 pm in the evening PW1 called him and sounded to be under pressure, he asked PW2 to go to the Appellant's clinic, when he reached the clinic he found the door closed but PW1 was inside, he was informed that there had been a scuffle between the Appellant and PW1 and the Appellant had pushed PW1 inside the clinic then locked him inside, he then went and informed the police, he was with PW1's wife and brother, after some time PW1 was rescued.

12. In conclusion, PW2 stated that he attempted to have the matter solved but the Appellant was not accessible, he did not know whether the Appellant had made any payments, he was only paid his commission when the 1st instalment was paid, nothing else has been paid, he is not bitter, he was surprised that the person he knew so well could actually abuse the friendship they had.

13. PW3 was Umi Kuntun Ramadhan. She described herself as PW1's wife and testified that on 11/09/2020 PW1 was to arrive from Nairobi, he did not reach home so she called him but he did not pick, PW1 later called and informed her that he was walking home when he found the Appellant's clinic open, the Appellant owed him Kshs 3.5 Million, that he entered the clinic and found the Appellant who after some talks locked PW1 inside then left. PW2 testified further that she went to the clinic and found the door had been locked with a padlock, she unsuccessfully tried to call the Appellant, PWI was later rescued and released, before this she had reported the matter to the police whom she gave the Appellant's phone number.

14. PW4 was one Dominic Odhiambo, a Laboratory Technician at the Appellant's clinic. He testified that on 11/09/2020 the Appellant had sent him to the supermarket, when he came back, he found the Appellant in some scuffle with PW1, when PW4 intervened, the Appellant got an opportunity and fled and locked him and PW1 inside the clinic, PW1 told him that the Appellant owed him money, later the Appellant came with the police and the door was opened.

15. The prosecution's last witness was PW5, one Inspector Raymond Otieno stationed at Mumias Police Station and who was the investigating officer. He stated that on 11/09/2020 he was on patrol with other officers when he was instructed to link up with foot patrol team to go to the Appellant's home since she had confined PW1 and fled, he went to Bookers Police Post took the in-charge and went to the Appellant's house, she was not there, she was then summoned and she came over and they all went to the Appellant's clinic where they found PW1 and PW4 inside a room, the door was broken and they escorted the two to the station where they recorded statements, he found out that in 2017 the Appellant had obtained money from PW1 in the belief that she would sell land LR No. 8056/42, the Appellant had obtained Kshs 3,524,000/- from PW1 yet she had transferred the piece of land to Cyrene Ltd on 23/12/2020, payments had been made through cash and bank, PW1 alleged that the Appellant was avoiding him and on the said date he had spotted the Appellant at her clinic and he had gone to talk to her, instead the Appellant locked him inside and fled, the issue of obtaining the money was reported on 19/03/2017. He then produced various exhibits including bank and Mpesa statements and letters.

16. In cross-examination, he stated that the parties entered into the agreement in 2015 and the property was transferred to Cyrene Ltd in 2020, the purchase price was 5.3 Million out of which PW1 had paid Kshs 3.5 Million, there was no sale agreement, PW1 did not tell him that the Appellant had refunded some of the money nor that they had agreed on a refund nor that PW1 had given the Appellant details of his bank account for purposes of the refund, he could not have charged the Appellant if he were aware that the Appellant had refunded part of the money.

Defence evidence

17. In her sworn evidence, the Appellant testified that she is the proprietor of Alphond Medical Clinic located in Mumias, one Sunday in mid-2015 PW1 came with a broker by the name Hassan and stated that he was interested in purchasing the Appellant's plot, they got into a verbal agreement, he was to purchase the plot which had a storey building and a 3-bedroomed house at an agreed purchase price of Kshs 6.5 Million, PW1 agreed to pay the amount in 3 months, he made several payments but not in the manner that they had agreed, PW1 then called and asked her to go to his workplace in Nairobi, when he went PW1 told her that he was struggling to pay and asked her to refund him by instalments,

he gave her his bank account details in writing, she started repaying by depositing Kshs 200,000/- on 3/04/2017, Kshs 200,000/- on 22/04/2017 and Kshs 100,000/- on 22/06/2017. She produced the deposit slips and also Mpesa Statements. She added that in 2018 she had some constraints financially since her mother was sick and eventually died in 2019, the Corona pandemic also affected her and she did not have money, when PW1 came to the clinic he found her with a patient and asked for his money, she tried to escape from the door but PW1 blocked her, one of her employees intervened, the Appellant ran out and locked the two in the clinic, she then went to the police station and when she arrived she heard the Officer Commanding the Station (OCS) stating that the lady they were looking for is here, she went back to the clinic with the police who later put her in the cells.

18. She stated she did not obtain the money fraudulently, she wanted to sell the plot and PW1 had agreed to pay in 3 months but he took 2 years, PW1 opted out of the agreement, he called the Appellant to his office and told her that he was not able to complete the whole amount.

Judgment of the trial Court

19. At the end of the trial, by the Judgment delivered on 8/09/2022 the trial Magistrate convicted the Appellant on the charge of obtaining money by false pretense but acquitted her on the charge of wrongful confinement. Thereafter, upon the Appellant's request, the Court suspended the sentencing and allowed the parties time to negotiate a settlement.

20. However, no settlement having been reached, on 28/09/2022 the Court delivered its sentence by which it ordered the Appellant to pay a fine of Kshs 3 Million out of which Kshs 2,800,000/- was payable to PW1 and the balance of Kshs 200,000/- was to be utilized as the fine. In default, the Appellant was to serve imprisonment for a period of 2 years.

Grounds of Appeal

21. Being dissatisfied with the decision, the Appellant filed a Petition of Appeal on 11/10/2022. The Grounds of Appeal raised were as follows:

    i. The learned trial magistrate erred in law and fact in convicting the Appellant while the ingredients constituting the offence as charged had not been proved.

    ii. The learned trial magistrate erred in law and fact in convicting the Appellant while the prosecution had not proved its case beyond reasonable doubt.

    iii. The learned trial magistrate's findings and conviction are against the weight of evidence on record.

    iv. The learned trial magistrate erred in law and fact in convicting the Appellant while the evidence clearly showed the complainant having agreed on refund and having received part payment thereof, the offence as charged did not lie.

    v. The sentence meted out to the Appellant is harsh and excessive.

22. Pursuant to directions given, the parties filed written Submissions. The Appellant, through Messrs K'Owino & Co. Advocates filed Submissions on 17/01/2023. On her part, Learned Prosecution Counsel N.K. Chala had filed her Submissions earlier on 16/01/2023.

Appellant's submissions

23. The Appellant's Counsel submitted that the parties entered into an oral agreement for sale of land described as L.R. No. 8056/42, the purchase parties according to the complainant was Kshs 5.3 Million

while according to the Appellant it was Kshs 6.5 Million, the agreement was entered into around 7/06/2015, by the date that the Appellant was arrested on 11/09/2020, the complainant had not paid the full purchase price and had paid Kshs 3.5 Million, in March 2017 the Appellant met with the complainant at the complainant's workplace where the two agreed to mutually terminate the agreement to pave the way for a refund of the part purchase price that had already been received by the Appellant, at that meeting the complainant gave the Appellant his bank account for purposes of making the refunds, pursuant thereto the Appellant deposited monies in the complainant's bank account, the Appellant was subsequently arrested on 11/09/2020.

24. According to Counsel, the prosecution failed to prove the charges beyond reasonable doubt, the prosecution needed to prove that the accused by false pretence, with intent to defraud obtained something of value capable of being stolen from another person, "false pretence" together with "intent to defraud" must therefore be proved. He cited the case of Peter Nyamu Mutithi vs Republic [2021] eKLR where an earlier case of Gerald Ndoho Munjuga vs R [2016] eKLR was cited with approval and submitted that the first element, that the Appellant obtained something capable of being stolen was proved.

25. Regarding the second element that the Appellant "obtained through false pretence", Counsel submitted that it is admitted by the complainant that out of the agreed purchase price, the Appellant had only paid a sum of Kshs 3.5 Million in a period spanning 2 years, in view thereof, the purchase was not proved. He added that in her testimony which she was never cross-examined on, she testified that the complainant informed her of her inability to continue with the agreement invited her to his Nairobi office and they agreed that she refunds the purchase price in instalments, she duly complied and repaid part of the purchase price through bank account supplied by the complainant and also via Mpesa, she only stopped payments owing to the ill-health of her mother and COVID-19 adverse effects to her business, this uncontroverted evidence offered a reasonable explanation and did rebut the ingredients of the charge, the complainant having failed to pay the entire purchase price, having agreed on a refund and having received partial refund, there was clearly no intent to defraud.

26. He added that there is no dispute that the Appellant was the owner of the plot, there was thus no false pretence on the Appellant since the facts at the time of entering into the agreement were that the land belonged to the Appellant, she admitted receiving part of payments and voluntarily agreed to refund the same, she indeed refunded the same, the ingredient of obtaining by false pretence was therefore not proved, the case herein was a purely a contractual civil dispute in which the police should never have been involved, the investigating officer (PW5) testified that the complainant never informed him that the Appellant had refunded part of the money thus the complainant wilfully withheld crucial information, PW5 was categorical that if this information had been given he would not have charged the accused with the offence, in view thereof there was no basis for the conviction, the trial Magistrate misdirected herself, her finding that the property was transferred to a third party in 2016 is not supported by any evidence on record, there was a certificate of official search produced as exhibit showing when exactly the property was transferred to the third party, this was confirmed by PW5, the finding that the Appellant continued receiving monies towards the purchase price of the suit long after transfer to a third party was therefore erroneous, the letter dated 30/03/2017 produced by the prosecution does not specify when the property was transferred to the third party. He then again referred to the case of Gerald Ndoho Munjuga (supra) in which the Botswana case of Lesholo & Another vs The State and submitted that in this instant case there was no misrepresentation either past or present which was false at the time of entering into the agreement for sale, no proof of any intention to defraud and no proof of intention to defraud. He added that the accused in her defence, which was not challenged by cross-examination, raised doubt as to her guilt and rebutted the ingredients of the charge.

27. On sentencing, Counsel submitted that although the sentence of 2 years imprisonment is not illegal, in imposing a fine of Kshs 3 Million with a directive that Kshs 2,800,000/- be paid to the complainant the Court was harsh and excessive, it failed to consider the mitigating circumstances and also the principles of proportionality, deterrence and rehabilitation, prior to being charged the Appellant had paid a substantial part-payment of the purchase price, during pre-sentencing she made an offer to repay by instalments subject to her financial ability but the offer was rejected by the complainant, the Court also harshly turned itself into a civil Court in ordering payment of part fine to the complainant, the Court should have meted out a reasonable fine and an alternative of a prison term which was lesser in severity.

Respondent's submissions

28. On the part of the Respondent, Prosecution Counsel submitted that the trial Court gave the definition of the offence of "obtaining by false pretence" as provided for under Section 313 of the Criminal Procedure Code, the Court further explained the elements of the offence by quoting the case of Gerald Ndoho Munjuga v R (supra) in which the High Court of Botswana case of Lesholo & Another v The State (supra) was cited. Counsel submitted that the evidence shows that the complainant transferred sums of money to the Appellant in various denominations over a period of time amounting to Kshs 3,696,000/-, the total captured in the Judgment is Kshs 3,496,000/- and in charge sheet it is Kshs 3,500,000/-, this creates an inconsistency on the amount that that was actually paid to the Appellant, be that as it may, money is something that is capable of being stolen as was stated in the case of Peter Nyamu Mutithi v R (supra). She also cited the case of Stephen Ndungwa v Republic [2020] eKLR.

29. Counsel further quoted the definition of "false pretence" as stated in Section 312 of the Penal Code and submitted that the elements to be proved are that there is a representation made by words, writing or conduct, that the representation is either past or present, that the representation is false and that the person makes the representation knowing it to be false or does not believe it to be true. Counsel added that it is evident from the evidence of the prosecution witnesses that the person who made the representation to the accused was not the Appellant but the agent PW2, PW1 confirmed as much, the agent stated that he just heard that the Appellant was selling her property, he did not give the specifics of who gave him that information and who gave representations or who chaired the meeting that was held on 7/06/2015, this part did not fit well within the prosecution's case and it did not comply with the elements required to prove the offence.

30. Counsel further submitted that it was the complainant's admission that that the agreement was that he was to pay the entire purchase price before the transfer could be done, he unilaterally changed the terms of the agreement, the transfer after payment of the full purchase price was an agreement to be fulfilled in the future and not present, PW2 stated that the transfer was to commence after the complainant had paid 50% of the purchase price, this statement was not corroborated by the complainant.

31. Counsel submitted further that the prosecution case was marred with inconsistencies, the amount stated to have been obtained was Kshs 3.5 Million, from PW1's evidence, the total of amounts he listed was Kshs 3,696,000/-, it was also in evidence that part of the amount was refunded to the complainant, PW1 stated that what was refunded was not more than Kshs 200,000/- but upon cross-examination he confirmed that much more was paid in refund, the amount repaid amounted to Kshs 1,028,290/-, it was not explained why the refunded sums were not factored by the investigating officer.

32. In conclusion, Counsel submitted that the Court is a Court of justice and the prosecution should at all times relay the true facts of each particular case and should not be persuaded by the whims of the complainant, the above matters render the charge defective for being inconsistent with the facts, the totality of the foregoing is that the prosecution concedes to the Appeal for failing to prove the charge

to the required standard. Counsel therefore conceded that the conviction and sentence be set aside, the complainant had already entered into another agreement with the Appellant for refund of the cash which should have informed his cause of action as against the Appellant and not the agreement for sale of property.

Analysis and Determination

33. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (see Okeno vs. Republic [1972] E.A 32).

34. Although the State conceded to the appeal herein, it does not follow that this Court must therefore automatically allow the appeal. Despite the concession by the State, the Court still has the duty to scrutinize the evidence afresh and arrive at its own determination. In Odhiambo vs. Republic (2008) KLR 565, it was stated as follows:

> " the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

35. In my view therefore, the issues that arise for determination in this appeal are the following;

    i. Whether the prosecution proved the offence of obtaining by false pretence to the required standard.

    ii. Whether sentence imposed was justified.

36. I now proceed to analyze and answer the issues:

i. Whether the prosecution proved the offence of obtaining by false pretence to the required standard

37. The offence of obtaining by false pretence is defined under Section 313 of the Penal Code as follows:

> " 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."

38. In the case Gerald Ndoho Munjuga v R HC Criminal Appeal No. 213 of 2011 (Nyeri), Justice Mativo quoted the High Court of Botswana in Lesholo & Another v. The State as follows:

    i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intent to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.

    ii. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not false pretence if it is made in relation to the future even if it is made fraudulently. Where however the representation speaks both of a future promise

and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false [8]

iii. ..... The representation must be made with the specific purpose of getting money from the complainant which he/she would not have given had the true facts been revealed to him."

39. As stated above and as correctly submitted by both parties, there are three essential elements of the offence of obtaining by false pretences as follows:

i. Obtaining something capable of being stolen;

ii. Obtaining through false pretences; and

iii. Obtaining with intent to defraud.

ii. Whether the Appellant obtained something capable of being stolen

40. The first element that the prosecution needed to prove is that the Appellant obtained something capable of being stolen. The parties are in agreement that the Appellant obtained money from the complainant as part-payment of the purchase price for the piece of land in issue. Indeed, there is uncontroverted evidence confirming this fact. There is therefore no doubt that the Appellant obtained money from the purchaser, and money is definitely something capable of being stolen.

iii. Whether the Appellant obtained the money by false pretences or with intention to defraud the complainant

41. The finding that the Appellant obtained something capable of being stolen is not by itself sufficient to sustain a conviction since the mere taking of the money did not per se constitute the offence charged. The prosecution had to therefore also prove that the money was obtained through false pretences and with the intention to defraud.

42. Section 312 of the Penal Code defines "false pretence" 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."

43. From the above definition, a "representation" therefore encompasses the following:

(1) A representation by words, writing or conduct.

(2) A representation of a matter of fact either past or present.

(3) A representation that is false.

(4) A representation made knowing it to be false or believed not to be true.

44. As rightly submitted by both Counsel for the Appellant and Counsel for the State, the above definition also connotes that the offence of obtaining by false pretences does not relate to future events. In this case, the transfer of the subject land to the complainant was dependent on payment of full purchase price hence a future event. It was therefore upon the prosecution to prove that the Appellant received full payment of the purchase price but refused to transfer the land. Since the full purchase price had not been received, I find that the offence of obtaining by false pretence had not crystallized. On this

point, I cite the Court of Appeal decision in Carolyne Nabwire Wawire v Republic [2018] eKLR in which the Court stated as follows:

> " To constitute a false representation under section 313 of the Penal Code, the representation in question must be of a matter of fact, either past or present. It has been held consistently that a representation about future events cannot form the basis of a charge of obtaining money by false pretences. (See for example Abdallah v. Republic [1970] EA 657) and Oware v. Republic [1984] KLR 2001). The dicta of Devlin J. (as he then was), in R. v. Dent [1955] 2. Q.B. 594, where he stated that:
>
> > "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",
>
> has been cited with approval in this jurisdiction and we agree with the same.

For the above reasons, we find that this appeal has considerable merit and hereby allow the same. This was really a purely civil dispute in which the criminal process should never have been invoked. Accordingly, we quash the appellant's conviction and set aside the sentence. It is so ordered."

45. In this case, the particulars of the charge were that the Appellant obtained money by "pretending" that she could sell the said piece of land to the complaint, "a fact she knew to be false". Clearly, this purported ingredient of the charge was not correct since the prosecution did not demonstrate that the piece of land did not belong to the Appellant. On the contrary, the evidence indicates that indeed the Appellant was the owner. The complainant's grievance was not that the Appellant did not own the land but rather, that although the Appellant owned the land, she transferred the same to a third party instead of the complainant. In the circumstances, the particular that the Appellant "pretended" that she could sell the land to the complaint cannot be correct. "Pretending" connotes that the Appellant did not have the capacity to sell the land at the time of entering into the agreement which was not the case here. I therefore find that there was no misrepresentation either past or present which was false at the time of entering into the agreement for sale.

46. I must however caution that my view may have been different had the prosecution demonstrated that the Appellant had already transferred the land to the third party even as she was still receiving the instalment payments from the complainant. This is because such conduct would have indicated a clear lack of intention to transfer the land and therefore fraud. From the record, the last payment made by the complainant to the Appellant was on 17/01/2017. There is then the letter dated 30/03/2017 (about two months after the last payment) from the Ministry of Lands advising that the land had already been transferred to a third party. The letter does not however indicate when the transfer to the third party was effected or registered.

47. I note that PW2 (land agent) stated that he obtained a search from Ardhi House in Nairobi and which search showed that the property had been transferred to Messrs Cyrene Projects Ltd on 23/12/2016. However, although there is reference to a Search having been produced in evidence, there is no such exhibit either in the Record of Appeal or in the lower Court file before this Court. All I have encountered is reference in the complainant's evidence-in-chief to the marking for identification (MFI) of a copy of a search document as "MFI PEx 5". Apart from being merely marked for identification, I have not come across any indication that the same was eventually formally produced as an exhibit.

48. More importantly, the investigating officer (PW5) is recorded to have stated the following in his evidence-in-chief:

> " We were to produce some documents MFI PEx 1, 2, 3, 4, 5 and 9 .... disappeared from police file when the investigating officer was absent"

49. From the above, I can confidently conclude that the Search document marked as "MFI Ex 5" intended to be produced as an exhibit was never eventually so produced. Had the same been produced, then the exact date of transfer to the third party would have been easily established and in turn, the Appellant's alleged intent to defraud or lack of it. Absence of the Search meant that a crucial piece of information was not availed to the Court and as a result, a material gap in the prosecution's case was left unaddressed. Since the letter dated 30/03/2017 from the Ministry of Lands does not indicate when the transfer to the third party was registered, I find that there was no material before the trial Court to justify the trial Magistrate's findings that the complainant continued to receive payments even after transferring the land to a third party.

50. There are also discrepancies between the testimony of the prosecution witnesses and the testimony of the Appellant. First, regarding the amount of purchase price agreed upon, while the complainant and PW2 (land agent) stated that it was Kshs 5.3 Million, according to the Appellant it was Kshs 6.5 Million. Secondly, while according to PW2 the piece of land being sold was a commercial plot with only an incomplete foundation, according to the Appellant, the plot had a storey building and a 3-bedroomed house. Further, while the Appellant stated that the agreement was that full payment was to be made within 3 months, the complainant and PW2 did not give any timelines for payment. Fourthly, while the complainant claims that it is the Appellant who approached him with the proposal to rescind the transaction and refund the amounts paid, the Appellant claims that it is in fact the complainant who approached her with the proposal.

51. While it may be true that one of the two sides is being untruthful, it is also possible that there was an innocent miscommunication or misunderstanding between the two sides regarding the facts in contention. However, I note that the prosecution opted not to cross-examine the Appellant. Although opting not to cross-examine does not by itself weaken the prosecution case, it leaves the Appellant's evidence unchallenged and therefore liable to be treated as more believable. Moreover, since the burden of proof in criminal cases rests entirely on the prosecution, failure to prove any fact works against the prosecution case.

52. I also note PW2's testimony that the Appellant became evasive and that they therefore instructed Messrs Akwala Advocates to send a demand letter to the Appellant and that the Appellant responded indicating that PW1 had not complied with the agreement. Indeed, the Appellant's letter dated 18/03/2017 was produced as an exhibit and I note that in the letter, the Appellant stated that the complainant frustrated the transaction when he failed to honour the term that he was to pay a deposit of 50% before a sale agreement could be formalized and that the Appellant was willing and ready to refund the amount paid. This statement was consistent with the Appellant's testimony. I therefore find that the complainant contributed to the collapse of the transaction thus creating doubt on the allegation that there was intent to defraud on the part of the Appellant.

53. On a related point, the complainant testified that the agreement was that the Appellant was to avail to him a sale agreement upon payment of 50% of the purchase price. He stated that upon payment of such payment of 50%, he insisted on the formal agreement but that the Appellant started becoming elusive claiming that she was busy and that the land documents were with her sister abroad. While this may be true and if so, may indeed point at some level of dishonesty on the part of the Appellant, I must point

out that the offence stated in the charge sheet is the Appellant's alleged failure to transfer the property and not failure to avail a sale agreement. The allegation is therefore of no consequence to the charge.

54. Regarding the issue of refund, the complainant stated that at one time the Appellant went to the complainant's office in Nairobi and asked for the complainant's bank account to enable her refund the money. The complainant stated further that he agreed but insisted on refund with an interest at the rate of 13%. He also conceded that indeed, some refunds were paid to him. I am of the view that mere agreeing to a refund and even actual receipt of a refund of a portion of the amount paid should not by itself exonerate a fraudulent vendor from the offence of obtaining by false pretence. Were this to be the case, then fraudsters, upon being cornered, would simply avoid criminal liability by coercing victims to accept a refund and upon acceptance by the victim, pay a few instalments in purported refund then stop further payments. Clearly, this could not have been the intention of the law.

55. However, in this case, the investigating officer (PW5) testified that the complainant never disclosed to him that he had received some payments in refund from the Appellant. He was emphatic that he would not have charged the Appellant had such disclosure been made to him. There is also the discrepancy over how much the complainant actually received as refund. While the complainant testified that he received refunds that were not more than Kshs 200,000/-, the evidence on record revealed that he actually received much more than what he admitted. These instances of non-disclosure and/or selective disclosure on the part of the complainant raises significant doubts about the truthfulness of his testimony.

56. In my view therefore, the defence offered by the Appellant was reasonable in the circumstances and it did rebut the ingredients of obtaining by false pretences and obtaining with intent to defraud. I therefore agree with the Appellant's Counsel that the circumstances of this case rendered it a purely contractual civil dispute in which the police should never have been involved.

Finding

57. I therefore find that out of the three ingredients of the offence of obtaining by false pretence, the only ingredient proved by the prosecution was that the Appellant obtained "something capable of being stolen". The other two ingredients, namely, "obtaining with false pretence" and "obtaining with intent to defraud" were never proved. Accordingly, I find that the offence of obtaining by false pretence contrary to Section 313 of the Penal Code was not proved beyond reasonable doubt.

ii. Whether sentence imposed was justified

58. In view of the finding above, I do not find it necessary to deal with this second issue. I may however mention that generally sentencing is an exercise of discretion by the trial court as was held in the case of Shadrack Kipkoech Kogo - vs - R, Eldoret Criminal Appeal No. 253 of 2003, where the Court of Appeal stated as follows:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."

59. With the above in mind, I do not agree with the Appellant's Counsel's submission that the trial Court turned itself into a civil Court in ordering payment of part of the fine to the complainant. This is because in ordering for the compensation, the trial Court relied on Section 24 of the Penal Code which lists the punishments that the Court may inflict as death, imprisonment, community service, detention

under the Detention Camps Act, fine, forfeiture, payment of compensation, finding security to keep the peace and be of good behaviour and any other punishment provided by the Penal Code or by any other Act.

60. In my view it has not been demonstrated that in passing the sentence, the trial Court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered. No justification for this Court to interfere with the sentence has therefore been shown.

61. However, since I have found that the charge against the Appellant was not proved beyond reasonable doubt, this finding on the sentence is rendered inconsequential.

Final Order

62. In the end, I make the following final Orders:

    i. The conviction of the Appellant is hereby quashed and sentence set aside.

    ii. Consequently, the Appellant is hereby set at liberty forthwith unless she is otherwise lawfully held.

DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023

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WANANDA J. R. ANURO

JUDGE