



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL APPEAL NO. 13 OF 2020

PETER NYAMU MUTITHI..... APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

Introduction

1. The Appellant herein, Peter Nyamu Mutithi, was charged in Marimanti SPM Criminal Case No. 80 of 2017 with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code. The particulars of the offence were that on 01/08/2017 at Kiamiramba village, Kathangacini location in Tharaka North sub-county within Tharaka Nithi county, with intent to defraud obtained from Francis Kiambi Kiriuro Kshs. 144,000/= through Boniface Murithi and Macerino Nthiga by falsely pretending to sell 16 acres of land located at Kiamiramba village. After full trial, the Appellant was found guilty as charged and was consequently sentenced to serve three (3) years imprisonment.

The Appeal

2. The Appellant filed this appeal challenging the said conviction and sentence that were passed by Hon S. M. Nyaga (S.R.M.) on 29/11/19. The appeal is based on the following grounds:

i. The Learned Trial Magistrate erred in law and in fact in failing to sufficiently analyse the evidence of the prosecution's case, because had he done so, he would have found that the evidence was inconclusive and obviously unreliable and therefore could not sustain a conviction.

ii. The Learned Trial Magistrate erred in law and in fact in failing to find that the evidence against the Appellant did not disclose obtaining money or intention to defraud hence the charge against the Appellant had not been proved, and it was therefore unsafe to convict based on the same.

iii. The Learned Trial Magistrate erred in law and in fact in failing to find that the failure to call the complainant to testify casted doubts in the weight and value of the prosecution evidence and was fatal to the prosecution's case.

iv. The Learned Trial Magistrate erred in law and in fact in that he indulged in speculative conjectures, drew inferences and arrived at conclusions not warranted by the evidence on record and his decision was pre-determined, arbitrary, indefensible, biased and has occasioned a serious miscarriage of justice to the Appellant.

v. The Learned Trial Magistrate erred in law and in fact in failing to adequately consider the defence because had he done so, he would have entertained doubts on the weight and value of the prosecution's case.

vi. The Learned Trial Magistrate erred in law and in fact in failing to find that the complainant's claim was purely civil in nature and it was improper for the prosecution to invoke criminal process in pursuance of a civil claim.

vii. The Learned Trial Magistrate erred in not finding that the prosecution had not proved its case beyond reasonable doubt.

viii. The sentence passed by the Learned Trial Magistrate was manifestly excessive in the circumstances of the case.

Submissions

3. The appeal was heard by way of written submissions. In his submission through M/S Murango Mwenda & Company Advocates, the

Appellant contended that the evidence adduced by the prosecution was insufficient to prove the ingredients of the offence he was charged with. He further submitted that the failure to call the complainant as a witness cast doubt on the weight of the prosecution evidence. It was further submitted for the Appellant that the trial court's conclusion was not supported by evidence and that the trial court failed to adequately consider the Appellant's defence. The Appellant also averred that the claim in question was civil in nature and that the sentence passed by the trial court was manifestly excessive.

4. In opposing the appeal, the prosecution counsel submitted that the Appellant hatched a plan to sell land to people and this was a pure defrauding mission. The counsel claimed that it had proved its case beyond reasonable doubt and that the offence was criminal in nature. The prosecution counsel further submitted that the sentence that was passed against the Appellant was within the required parameters and therefore urged this court to uphold the conviction and sentence passed by the trial court.

Issues for Determination

5. In my view, the following are the main issues for determination:

- i. Whether the failure to call the 'complainant' as a witness was fatal to prosecution's case (Ground of Appeal No. 3)
- ii. Whether the prosecution proved the elements of obtaining by false pretence to the required standard (Grounds of Appeal Nos. 1, 2, 4, 5, 6 and 7)

Analysis

6. This is a first appeal. The duty of the first appellate court as explained in **Okeno v. Republic [1972] EA 32** and in **David Njuguna Wairimu v. Republic [2010] eKLR** is to re-evaluate the evidence on record, analyze it and make its own findings while bearing in mind that it was not present at trial to see and assess the demeanour of the witnesses. This court should therefore not interfere with the facts as presented and recorded by the trial court, but instead, should rely on them as they are recorded.

7. The subject dispute arose from land transactions made between the Appellant and Francis Kiambi Kiriiri (hereinafter referred to as "the purchaser"). As noted from the evidence, there were three (3) separate transactions each involving sixteen (16) acres of land. The trial magistrate referred to the three transactions as the first, second and third phases with the first phase being in 2011, the second phase in 2012 and the third phase in 2017. I see no harm in continuing to refer them as such. There were written agreements for the first two phases (that is, for 2011 and 2012) but the same was not produced in evidence as the prosecution failed to produce the original copies of the agreements. The third phase has never been formalized and it is the said third phase that forms the subject of the present dispute according to the prosecution's evidence.

8. The prosecution case was premised on the evidence of six (6) witnesses. PW1, PW2, PW3, PW4, and PW5 played different roles during the three phases of the land transactions. PW1, Boniface Nkanga Mutithi, is a nephew to the Appellant and an agent of the purchaser. He witnessed the payments made during the three phases. PW2, Daniel Kauro Munge, is the Appellant's neighbour while PW3, Peter Kinyanjui Kingoni, was called by the Appellant to be a witness in the land sale agreement. PW1, PW2 and PW3 witnessed the Appellant being paid Kshs. 110,000/=. PW3 was paid to survey the land for the third phase. PW4, Mercilino Nthiga, was also an agent of the purchaser and witnessed the agreement in the first phase but did not sign the agreement. PW4 also delivered part of the payments for the transactions to the Appellant on behalf of the purchaser on different dates. PW5, Geoffrey Mucee Mutea, was involved in the survey of the land, although he is not a trained surveyor. According to the area chief of Kathangacini location, Runyino Kibuti Viola, who was also summoned by the trial court to give his evidence, he witnessed the first two phases of the transactions but was not involved in the third phase.

Whether the failure to call the 'complainant' as a witness was fatal to the prosecution's case

9. Ground of Appeal no. 3 is dealt with under this heading.

10. According to PW6, the investigating officer, there was no formal complaint made by the purchaser and neither was he called as a witness for the prosecution's case. In the Appellant's submission, failure to call the 'complainant' was fatal to the case for the prosecution.

11. From the onset, the meaning and application of the word complainant as used by our courts in criminal proceedings seems to sometimes cause confusion. The definition of the word complainant is not provided for in the Criminal Procedure Code (Cap 75 of the Laws of Kenya). On the one hand, the word complainant has been used to refer to a person who lodges a complaint with the police or any other lawful authority that some offence or criminal act has been committed. The nearest our Criminal Procedure Code has made an appreciation of the meaning of the word complainant is under **Section 208(1) of the Code** which reads as follows:

"(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any)."

Section 202 of the Criminal Procedure Code also makes reference to a complainant and specifically states that if the complainant fails to turn up in court on the date fixed for hearing the accused is entitled to an acquittal. **Section 204 of the Criminal Procedure Code** also makes reference to a complainant who for good reasons may be allowed to withdraw a complaint.

12. The second meaning of the word complainant has been restated in several cases to include the public prosecutor. In **Ruhi Vs. Republic 1985 KLR 373** the High Court held as follows:

“We must state at the onset that we are satisfied that the term complainant in Section 208(1) of the Criminal Procedure Code includes; The prosecution as well as the person so described in the particulars of the charge.”

13. In my view, the accurate interpretation of the word complainant is as the Court of Appeal expressed by in the case of **Roy Richard Elimma & Another Vs. Republic [2003] eKLR**. In that case, the court stated as follows while considering the use of the word complainant in Section 202 of Criminal Procedure Code:

“The parties named in Section 202, for example, are the complainant and the accused person. If the “complainant” is aware of the hearing date and is absent without explanation, the Court may acquit an accused person, unless the court sees some other good reason for adjourning the hearing. The “complainant” in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of the crime who is merely the chief witness on behalf of the Republic.”

14. The law is clear that there is no particular number of witnesses required for proof of any fact. Section 143 of the Evidence Act (Cap 80 Laws of Kenya) provides as follows:-

“No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”

15. In **Julius Kalewa Mutunga Vs. Republic [2006] eKLR**, the Court of Appeal held as follows:-

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

16. The case of **Bukenya & Others vs Uganda [1972] E.A.549** is a leading case in this issue as the East African Court of Appeal held that:-

- i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
- ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
- iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”

17. In the case of **Bukenya & Others vs Uganda (supra)**, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

18. In the present case, it is not disputed that PW1 and PW4 were agents of the purchaser. The Appellant even confirmed that the arrangement was that he would be paid through PW1 and PW4 (See page 74 of the Record of Appeal, lines 6-7). The investigating officer, PW6 testified that it is PW1 who reported the matter to the police. As submitted by counsel for the appellant the money alleged to have been paid by Francis Kiambi was the bone of contention. His testimony was necessary to establish the allegation that he paid the money to the appellant. PW1 2, 3, and 3 claimed Francis Kiambi paid Kshs.160,000/- to the appellant. This the appellant denied and his defence was unconverted. The burden was on the prosecution to prove beyond any reasonable doubts that he had obtained Kshs.144,000/- on 1/8/2017 from Francis Kiamba as stated in the particulars of the charge. It is trite that the burden was on the prosecution to prove the charge and the particulars beyond any reasonable doubt. No explanation was given as to why Francis Kiambi was not called as a witness and yet he was a compellable and competent witness. Francis Kiambi was a crucial witness. As stated in the case of **Bukenya -v- Uganda (supra)** failure to call a crucial witness by the prosecution witness the court to make an adverse conclusion against the prosecution case. The court stated: **“In our view, the failure by the prosecution to call crucial witnesses weakened their case to an extent that they failed to prove the case against the appellant beyond reasonable doubt as required in criminal cases. The gap created by the failure of the prosecution to call important witnesses is a doubt whose benefit we must give to the appellant which we hereby do.”**

In this case, failure to call the ‘purchaser’ Francis Kiambi was fatal for the following reasons:-

- The court will make adverse conclusion against the prosecution case that if he was called he would have adduced adverse evidence to the prosecution case
- It cast doubts in the prosecution case in view of the contradictions in the evidence adduced and the particulars of the charge on the amount obtained by the appellant.
- The defence of the appellant was un-controverted and therefore weighty.
- Gaps were created in the prosecution case which inevitably case doubts in the prosecution case.

It is trite that doubts cast in the prosecution case must be given to the accused. In his case failure to call Francis Kiamba who was a crucial witness in his case was fatal and casts doubts in the prosecution case. The benefit of doubts must be given to the appellant and I give him benefit of doubts.

Whether the prosecution proved the elements of the offence of obtaining by false pretence

19. Grounds of Appeal nos. 1, 2, 4, 5, 6 and 7 are dealt with under this head.

20. The offence of obtaining by false pretence is defined under Section 313 of the Penal Code which provides 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.”

21. In the case **Gerald Ndoho Munjuga V R HC Criminal Appeal No. 213 of 2011 (Nyeri)**. Justice Mativo, quoting with approval from the **High Court of Botswana in Lesholo & Another V. The State**, which case dealt with an offence of this nature was noted, the court held:

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.”

22. As rightly submitted by the Respondent, there are three essential elements of the offence of obtaining by false pretences, which are:

i. Obtaining something capable of being stolen;

ii. Obtaining through false pretences; and

iii. Obtaining with intent to defraud.

i) Did the Appellant obtain something capable of being stolen?

23. 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. 110,000/= from Francis Kiambi as down payment for the purchase of 16 acres of land in the third phase. The same was given to the Appellant at his home and witnesses of that payment included PW1, PW2, PW3 and PW5. On cross examination, PW2 stated that he was the one who counted the cash and gave it to the Appellant.

24. The Appellant also received Kshs. 50,000/= which was paid at Nairobi in a meeting between the Appellant and the purchaser. The receipt of Kshs. 50,000/= was not denied by the Appellant. PW1 confirmed the payment of the same from the purchaser while PW2 heard about the payment from the Appellant. It is therefore clear from the evidence that the Appellant obtained money from the purchaser, and money is definitely something capable of being stolen. However, the taking of 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.

ii) Did the Appellant obtain the money by false pretences or with intention to defraud the purchaser?

25. 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.”

26. As rightly submitted by the Appellant, the above definition connotes that the offence of obtaining by false pretences does not relate to future events. The transfer of the subject land to the purchaser 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.

27. It was not disputed that the Appellant had agreed to sell land to purchaser. As I have earlier noted, there were three separate transactions involved between the Appellant and the purchaser. He even conceded that he had sold 32 acres to the Appellant in two different instances. It is however not clear when the agreement for the third phase was made and what the terms of the agreement were. According to PW1, the purchase price was agreed at Kshs. 160,000/= for 16 acres. However, the trial court while recording PW3's statement noted, “Purchase price Kshs. 114,000. Balance 94,000 for 16 acres.” In my view, there is a notable discrepancy in the prosecution evidence as to the purchase price of the subject land and the amount of money that was paid to the Appellant.

28. The Appellant's defence was that he had not been paid the full purchase price. The issue in dispute is whether the Appellant was paid in full to enable him to give the land to the purchaser. Since this was not a single transaction and the parties were dealing in casual manner without any formalities, it is also not clear how much money was received by the Appellant and for what purpose the money he received was for. From the Mpesa statement produced as PExh5, PW4 received Kshs. 54,000/= from the purchaser on 15/05/2017. Apart from PW4's testimony, there is no other proof that the money was given to the Appellant. In addition, it is possible that the money could have been towards clearing the balance of the previous transaction or it could have been payment towards the full purchase price of the third phase. In my view, the defence offered by the Appellant in the lower court was reasonable in the circumstances and it did rebut the ingredients of obtaining by false pretences and obtaining with intention to defraud.

Did the prosecution prove its case against the Appellant to the required standard?

29. The trial court found the Appellant to be "guilty as charged". According to the particulars of the charge sheet, the total value allegedly obtained by the Appellant was Kshs. 144,000/=. The Appellant questions the specificity of the amount he is alleged to have obtained and the date on which he is alleged to have obtained the stated sums. In my view, for the prosecution to succeed in securing a conviction, they had to prove that the Appellant obtained the sum of Kshs. 144,000/= from the purchaser through PW1 and PW4 on 01/08/2017 under false pretence or with the intention to defraud.

30. It was the testimonies of PW1 and PW2 that on different dates, the Appellant received Kshs.110,000/= and Kshs.50,000/= from the purchaser. On the other hand, PW4 testified that on different dates, he received from the purchaser Kshs.45,000/= and Kshs.46,000/= which he forwarded to the Appellant. In addition, it was the prosecution's evidence according to PW3, the Appellant asked him to witness a sale agreement on 28/09/2017. On the other hand, PW4 testified that the purchaser sent him to the Appellant 14/08/2017 to find out why the Appellant was refusing to give the purchaser the land under the third phase. I am therefore of the view that the prosecution did prove that the Appellant obtained a certain sum of money for the third phase of the transactions. However, as submitted by the Appellant, it is equally my view that the prosecution did not prove that the exact amount stated in the charge sheet had been obtained by the Appellant on the date stated in the charge sheet.

31. The question that now begs determination is whether the evidence adduced in trial court could sustain a conviction. The law is clear that the legal burden of proof in criminal cases never leaves the prosecution's backyard. The learned trial magistrate observed that there was lack of consistency in the Appellant's evidence with regards to the measure of land that he owed the purchaser. To the mind of the trial magistrate, ***"This is type of contradiction that befall a fraudulent mind"***. In my view, the magistrate wrongly shifted the burden of proof to the Appellant. It was not proper for the learned trial magistrate to impugn the Appellant's defence and ignore the myriads of contradicts and inconsistencies in the prosecution case. In my opinion, the trial court failed to appreciate that in a criminal case an accused person has no obligation to prove his innocence or that his defence is true but all that is needed is to create some doubt in the mind of the court.

32. I am inclined to agree with the Appellant that the prosecution's case was marred with a lot of inconsistencies which raised doubt as to the guilt of the Appellant. In the circumstance, I opine that the Appellant's guilt was not proved beyond reasonable doubt. I therefore find no justification for the trial magistrate to find the **"accused guilty as charged"**. A close examination of the defence offered by the Appellant clearly shows that it raises doubts on the prosecution case.

Conclusion

33. I have no doubt in my mind that the Learned trial Magistrate erred in law and fact in finding that the offence of obtaining money through false pretences was proved beyond reasonable doubt. For the reasons stated above, having analysed and evaluated the evidence I come to the conclusion that the charge was not proved beyond any reasonable doubts. The proceedings show an obvious attempt to coerce the appellant to give land to the complainant even before the charge was proved. See page 19 of the record where the prosecution's counsel stated while opposing Bail, ***"we object the prayer the accused lied to court that if on personal bond he would deliver the land he owes the complainant. I pray he only be considered if he meets my client's demands."*** This matter involved a sale of land transaction. The dispute was of a civil nature and the criminal justice system that is police and DPP had nothing to do with it. The conviction of the appellant was against the weight of the evidence and the sentence imposed was manifestly harsh and disproportionate. The conviction and the sentence cannot be supported. I find that the appeal has merits. I allow it and order that the conviction and sentence be set aside. The appellant shall be set at liberty unless he is otherwise lawfully held.

Dated, signed and delivered at Chuka this 4th day of March 2021.

L.W GITARI

JUDGE

4/3/2021

Judgment read out in open court.

L.W. GITARI

JUDGE

4/3/2021