REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 154 OF 2017

(From Original Conviction and Sentence in Butere PMCCRC No. 375 of 2013,

by Hon. F. Makoyo, Senior Resident Magistrate, on 19th August 2017

and 18th December 2017, respectively)

GRACE NEKESA ANYANGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon. F. Makoyo, Senior Resident Magistrate, on one count of obtaining money by false pretences, contrary to section 313 of the Penal Code, Cap 63, Laws of Kenya, and was accordingly sentenced to serve eighteen (18) months in prison. The particulars of the offence charged were that the appellant, on 19th February 2011, at Lunza, Butere District, within Kakamega County, she, with intent to defraud, obtained a sum of Kshs. 320, 000.00, from Jared Okutoyi Ayoyi, by falsely pretending that she was in a position of selling to him a piece of land, a fact she knew to be false.

2. There was the alternative charge of intermeddling with the property of a deceased person, contrary to section 45(1)(2)(a) of the Law of Succession Act, Cap 160, Laws of Kenya. The particulars were that the appellant had, without authorization by law or a grant of representation, disposed of the land in issue, being free property of a dead person, to Jared Okutoyi Ayoyi, in return of which she received consideration.

3. She pleaded not guilty to the charges before the trial court on 22nd October 2013, a plea of not guilty was entered, and a trial was conducted where the prosecution called 6 witnesses. PW1 was the complainant, who described how the appellant and her son approached him with an offer to sell land to him. He agreed. He paid them the agreed consideration, reduced their agreement into writing, and he took possession of the land. The land was subsequently sold to someone else, and he was forced to vacate it. PW2 and PW3 were present when the appellant received the purchase moneys from PW1. PW4, like PW1, had bought the same land from the appellant, only for it to turn out that it had been sold to another person, and had even been transferred to the name of that other person. Arrangements were made for him to be refunded the money. PW5 was the local Assistant Chief, who was involved in the transaction between PW1 and the appellant, he reduced the agreement into writing and witnessed the exchange of money. The matter was taken through succession proceedings, which did not involve PW1, and the property was subsequently sold to another person. The accused was put on her defence, she gave a sworn statement, where she stated that she had not sold, but leased, the land to PW1. She denied the transaction, denied receiving the purchase money, and asserted that she never dealt with PW1.

4. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds of appeal. She avers that she was convicted on a non-existent charge, as the original charge had been amended; the prosecution had failed to prove the two counts against her; the evidence adduced did not support a charge of obtaining money by false pretences; the fact that PW1 took possession of the land was not taken into account, and it demonstrated existence of the land; the case was more civil than criminal; and the sentence imposed was excessive.

5. As the first appellate court, I am alive to my duty to re-evaluate the record of the trial court, and to draw my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the appellant and the witnesses during the trial. I am guided in that regard by the decision of the Court of Appeal in ***Okeno vs. Republic*** **(1972) EA 32 (Sir William Duffus P, Law and Lutta JJA).**

6. The appeal was canvassed by way of written submissions, placed on record by the appellant, and highlighted by her advocate. I have read

through the written submissions, and the record of the highlights, and I have noted the arguments advanced by both sides.

7. The first ground revolves around the charge upon which the appellant was convicted. It is submitted to be non-existent. The trial court captured the charge that the appellant faced, under section 313 of the Penal Code, as the original one that was read to her when she was first produced in court., yet the same was subsequently amended on 9th December 2015, to revamp it, and to introduce a second count, of intermeddling with estate assets. The appellant is arguing that her conviction was founded on the original charge, and the evidence adduced must have been founded on the original charge. It is also argued that the trial was founded on the particulars of the old charge.

8. The language of the amended charge did not change the character of the overall charge. It was still the same offence; the particulars were merely revamped. Crucially, the trial started in earnest on 9th December 2015 after the appellant pleaded to the amended charge. The appellant has not demonstrated that that the evidence adduced did not support either the old or the new charges. The net effect was the allegation that she had purported to dispose of property by sale which she could not possibly sell, since she had no authority to sell it. Obtaining money from anyone, by purporting to sell to him property that one had no authority to sell, and in respect of which she could not pass a good title was at the heart of the matter, in both the original and the amended charge. The trial court in the recital of the charge referred to the original count as opposed to the amended one, but that did not prejudice the appellant. She had the benefit of legal representation throughout the trial. The conviction was not founded on a non-existent charge. There were no two charges, the original charge was merely amended, it did not die, but existed in an amended fashion. This was not a case of substitution of the original charge with a totally new one, but a mere revamping of the charge, to make it more accurate. The mistake in the judgement was not fatal, since the charge was amended, the trial was founded on the amended charge, and the trial court was evaluating the evidence based on that amended charge, and slip in describing the charge should not affect the final outcome.

9. The second ground is that the prosecution failed to prove its case beyond reasonable doubt. I am not persuaded that there was no intent to defraud on the part of the appellant. Firstly, the appellant was selling property that did not vest in her. It was not her property, for the registered proprietor was a dead person. She had no authority over the land. It is what is called intermeddling in succession law. A person who purports to sell estate property when they do not hold a grant of representation engages in making false representations that they are selling land, and can pass good title to the buyer. It amounts to obtaining the purchase money under a false pretence. It amounts to defrauding the other person of the money, so long as the seller has no authority to sell the land, and the capacity, at the material time to transfer the land to the buyer. See *Ribanex Caxton Awita vs. Republic* [2016] eKLR (JA Makau J)

10. From the evidence on record, there was a representation in words, made by the appellant to PW1, when she offered to sell the land to him. The representation was at the present, that is she had land to sell at the time she was making the representation, where she purported to have the capacity, at the time, to legally dispose of the said land by way of sale. It was not about her selling the land in future. She represented that she was capable of selling the land at the time of the representation, and it was in that behalf, that she purported to put PW1 in possession. The representation was false, to the extent that the land in question did not vest in the appellant. She was not the registered proprietor of the land, and she did not hold a grant of representation over the land. She had no capacity to sell it, and she could at the time give a good title to anyone. So the representation, that she could sell that land to PW1, was false. The representation was made with the knowledge that it was false or believed not to be true. She was not the proprietor of the land, nor the administratrix of the estate of the dead proprietor, and, therefore, she knew she could not have the property transferred to the name of PW1, and that was why she was promising that she would take care of the interests of PW1 during succession, because she knew that the representation, that she could legally and validly sell the land to PW1 was not true. The representation was not about a future sale, for the offer was not about the possibility of selling the property after succession. The representation was that she was selling the property, at that particular moment, money changed hands at that time, and possession was delivered that that time. See *Joseph Amunga Ochieng vs. Republic* [2016] eKLR (JA Makau J)

11. It is argued that the appellant did not obtain the money, since the same was never given to her, but to PW4. The material on record points to the fact that PW1 and PW4 were not in any sale transaction. It was the appellant who had approached PW1 and PW4, with representations that she had land to sell. The land had been sold to PW4 first, by the appellant. He paid the consideration, but as the sale did not materialize, he wanted his money back. The appellant then offered the land to PW1, and the moneys realized from that sale was what was used to refund the money PW4 was demanding. PW4 said that that refund was done on 19th February 2011, the same day that PW1 said that he paid the appellant. According to PW4, PW1 produced the money, it was taken by the appellant's son, who gave it to the appellant and the appellant gave it to the chief, who then gave the money to the appellant. PW4 was empathic that two agreements were signed on 19th February 2011, between the appellant and himself, and between the appellant and PW1, and that she signed both. She was the central figure in the matter, and she was the one who acted as the seller.

12. The two agreements, made on 19th February 2011, were produced. One was between the appellant and PW1, where she sold the land for a consideration. The second agreement is not really a sale agreement, but a surrender by PW4 of the land to PW1, after the sale of the land by the appellant to PW1. In the second agreement it is indicated that PW4 had withdrawn from the earlier sale, hence the sale to PW1. The agreement indicates that the sale money was paid to the appellant, the wife of the registered proprietor, and then it moved to PW4. There is, therefore, no doubt, at all, that it was the appellant who received the money. The earlier agreement between PW4 and the appellant was also produced. It was made on 18th August 2003, and was executed by both the appellant and PW4. According to that agreement, she was purported to be the registered owner of the proprietor of the property at the time of execution, and that she was selling the land to PW4, with an undertaking to oversee the process until he got his title deed. Curiously, at the time of the purported sell of the land to PW4, the registered proprietor was alive, and signed on the agreement as a witness.

13. Overall, the evidence that the prosecution adduced was sufficient to establish that the appellant had obtained money from PW1, by falsely representing to him that she had land to sell to him, which representations she knew were false. The case was proved beyond reasonable doubt, and the appellant was properly convicted.

14. The third ground was that the matter was more civil than criminal, and, therefore, the trial court ought to have dismissed the charges and sent the parties to the civil court. Selling property belonging to another person, without that other person's authority, amounts to indulging in criminality. Firstly, it amounts to obtaining money by falsely pretending that you have capacity to deliver something, which you cannot. The land in question here belonged to a dead person, it was not in the name of the appellant, she could not possibly sell it to anyone, not when she

did not have letters of administration. Doing so is outlawed by section 45 of the Law of Succession Act, which defines the offence of intermeddling with the estate of a dead person. Section 45 makes intermeddling a criminal offence. Clearly, what the appellant engaged in was pure criminal activity. It was compounded by the fact that when the appellant and her family eventually took the property through the succession process, they did not honour the arrangement they had with PW1, illegal or unlawful as it was, they decided to sell the land to someone else, without refunding the sale money to PW1, which then prompted his resort to the criminal process, which he was entitled to do. There was, of course a civil side, to it, in the sense that PW1 had the option of suing to recover his money, but the mere existence of a civil remedy does not absolve one of criminal liability. A person should not be excused from criminal liability by the fact that the complainant has an option of seeking redress from a civil court. The two processes can go ahead simultaneously, without one prejudicing the other.

15. The final ground is that the sentence imposed was excessive in the circumstances. I am not persuaded that it was. Firstly, the appellant had purported to sell property she had no authority to sell. Secondly, she took money from PW1 when she knew, at the time, that she could not transfer the land to him. Thirdly, even after successfully taking the property through succession, she did not seek to honour the unlawful agreement with PW1, she instead got into another agreement with someone else, and asked PW1 to vacate the land, without offering to refund his money, which she had received under the pretext of selling the land to him. Fourthly, this was not the first time that the appellant was getting involved in getting money from people, by purporting to sell land to them, only for the sales to fall through, if the experience of PW4 is anything to go by. It be bespeaks a person who is cunning, deceitful, fraudulent and dishonest. Such conduct ought to be punished, to deter the appellant and like-minded persons. Her conduct called for a custodial sentence, which the trial court quite properly imposed.

16. Overall, I find no merit in the appeal herein, and I hereby dismiss the same.

17. I note from the record that the appellant is elderly and sickly, see the proceedings of 29th December 2017, before Majanja J. That moves me to set aside the custodial sentence imposed, though deserved, and to substitute it with a probation order, to be served within Kakamega County, for two years. Should the appellant breach the terms of the probation order, or commit an offence during the probation period, the probation order shall be set aside, and the original custodial sentence reinstated. It is of ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE, 2021

W MUSYOKA

JUDGE