



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: A.K. NDUNG'U J.)

CRIMINAL APPEAL NO. 41 OF 2020

VINCENT MATARA ONCHOKE.....APPELLANT

VERSUS

STATE RESPONDENT

(Being an appeal from the judgment of the Hon. N.S. Lutta (C.M.)

delivered on 9th December 2019 in CMCR No. 2525 of 2015)

JUDGEMENT

1. The appellant, **VINCENT MATARA ONCHOKE**, was charged, convicted and sentenced to serve 2 years' imprisonment for each of 3 counts of obtaining money by false pretences contrary to **section 313** of the **Penal Code**.
2. The particulars of the first count were that on 18th September 2013 at Kisii Township within Kisii county with intent to defraud, obtained from Haron Obonyo Okero Kshs. 1.7 million by falsely pretending that he was in a position to sell him a parcel of land known as Central Kitutu/Daraja mbili/675 a fact he knew to be false. The particulars of the second count were that on the same day and at the same place, he obtained from Haron Obonyo Okero Kshs. 100,000/= by pretending he was in a position to sell him Central Kitutu/Daraja mbili/675 a fact he knew to be false. On the third count, the appellant was charged with obtaining Kshs. 800,000/= from Haron Obonyo Okero on 15th January 2014 at Kisii Township within Kisii county by pretending he was in a position to sell him the same piece of land.
3. This being a first appeal, I will proceed to analyse the evidence in its entirety and reach my own conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify. (See ***Kilu & Another vs. Republic [2005]1KLR 174***)
4. The prosecution's case was that on 18th September 2013 Haron Obonyo (PW1) and the appellant entered into an agreement for purchase of land parcel number Central Kitutu/Daraja mbili/675 (herein "land parcel no. 675"). PW1 testified that the appellant gave him a title which appeared original and that on conducting a search he was satisfied with it. They agreed on a purchase price of Kshs. 2.6 million.
5. On 18th September 2013, PW1 deposited Kshs. 1.7 million in the appellant's account and gave him Kshs. 100,000/= in cash. PW1 deposited the balance of Kshs. 800,000/= in the appellant's Co-operative Bank account in Kisii on 15th January 2014.
6. Henry Maraga Nyaberi (PW3), Benard Onyangori (PW4) and Joel Ogota Kinara (PW5) witnessed the transaction and identified the agreement between the appellant and PW1 during the trial. They confirmed that the appellant had transferred Kshs. 1.7 million to the appellant's account and that the appellant had received Kshs. 100,000/= in cash for the land. PW5 also testified that the balance of Kshs. 800,000/= was paid in January 2014.
7. Job Isaac Obure (PW6) drew the agreement between the appellant and PW1. He recalled that the appellant had gone to his chambers and requested him to draft the sale of land agreement for land parcel no. 675. He confirmed that the parties agreed to a consideration of Kshs. 2.6 million. He also confirmed that the initial payment of Kshs. 1.8 million was paid on the same day and the balance was paid on 15th January 2014.
8. PW6 testified that the appellant later came and instructed him to act for him in an environment and land matter No. 347 of 2013 which involved the land he had written an agreement on. He told the court that the transfer was done but the documents disappeared at the lands office. He therefore made an application seeking that the appellant be supplied with copies of the document but later realized that the parcel of land had been charged to the Kenya industrial estates.

9. PW1 realized that the land did not belong to the appellant when he visited the land and found people living there who claimed that the land belonged to them. He conducted another search and found out that the land belonged to someone else and had an ICDC loan. He reported the matter to the police and after 5 months, the appellant was arrested.

10. The County Land Registrar, Stephen Mokaya (PW2), informed the court that the land parcel no. 675 was a subdivision of land parcel no. 361. He testified that the records for land parcel no. 675 were missing from their office. Parcel No. 361 was in the name of Bonyonyo Omurwa and a document that was inserted for parcel 675 was a fraud and could not be relied on. He produced a copy of the green card for land parcel 675 which he said was a forgery. When cross examined, PW2 confirmed that a subdivision for parcel no. 361 was done but the documents for 675 were missing.

11. Inspector Joseph Ngoche (PW7) produced the appellant's bank statement to show that he had received Kshs. 1.7 million. He also produced a copy of the agreement and the search as exhibits.

12. In his sworn defence, the appellant testified that he acquired the title of the land in question in 2006. He admitted that PW1's agents had approached him and he had sold the land to him at Kshs. 2.6 million. He stated that the complainant had done due diligence by conducting a search. He had also brought a civil suit against him which had been dismissed with costs. During cross examination, the appellant stated that he was not aware whether there was a pending appeal in the civil case. He also testified that he was in possession of the land when he sold it.

13. The appellant contested his conviction and sentence by the trial court on the grounds that the trial magistrate had failed to appreciate that the offence of obtaining by false pretences had not been proved. He contended that he had passed good title and the trial court erred in finding that he had unlawfully obtained the money. The appellant also claimed that the elements of the offence under Section 313 were not proved beyond reasonable doubt. He argued that the trial magistrate had misdirected himself in failing to appreciate that civil case No. 508 of 2015 which had been filed against him had been dismissed. He also challenged the sentence imposed by the trial magistrate on the basis that it was excessive.

14. In his submissions, the appellant insisted that he had passed good title which had originated from the registry. He also pointed out that the title produced had not been subjected to scrutiny by a document examiner to determine its illegality and that PW2 had not shown how the document was forged.

15. The offence of obtaining by false pretence is proscribed 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 misdemeanor and is liable to imprisonment for three years.”

16. From the above provision, the three essential elements to be proved for the offence under Section 313 Penal Code to be established are:

- (a) Obtaining or causing delivery to another of something capable of being stolen;
- (b) Obtaining it through a false pretence; and
- (c) Obtaining it with intention to defraud.

17. It is trite Law that the burden of proof in criminal prosecution shall always and invariably fall on the prosecution unless section 111 of the Evidence Act applies.

The section reads;

“111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

The Court of Appeal in **Criminal Appeal No. 11 of 2012 [2018]eKLR** stated;

“...Accordingly, all judicial officers conducting criminal prosecutions should ensure that at no time does the burden of proof shift to the accused person and more importantly, such a judicial officer should not appear in his/her decision to shift that burden.”

18. Throughout a criminal trial, an accused person bears no duty to prove his innocence. The burden is on the prosecution to prove their case beyond reasonable doubt.

In **Stephen Nguli Mulili v Republic [2014] eKLR** this is what the court had to say;

*“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of **DPP v Woolmington, (1935) UKHL 1** where the court eloquently stated that the golden thread in the “Web of English Common Law” is that it is the duty of the prosecution to prove the case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukathi Murwa v R*[2013]eKLR”*

19. In the famous case of **Miller v Ministry of Pensions [1947] 2 ALL E R 372**, Lord Denning stated with regard to the number of proof beyond reasonable doubt.

“That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect the community if it admitted fanciful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing, short of that shall suffice.”

20. In the Nigerian case **of Bakare –vs- State (1987) 1NNLR (PT 52) 579**, the Supreme Court stated;

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in over adversary system of criminal justice. The displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.

21. There was indisputable evidence that the appellant obtained money from PW1 which is a thing capable of being stolen. According to the testimonies of PW1, PW3, PW4, PW5, PW6 and the appellant’s bank account statement produced by PW7 the appellant received a sum of Kshs. 2.6 million from PW1 for sale of land parcel no. 675. He received Kshs. 100,000/= in cash and had a sum Kshs. 1.8 million deposited in his account by PW1 on 18th September 2013. The balance of Kshs. 800,000/= was deposited in his account on 15th January 2014. The appellant also admitted that he had received Kshs. 2.6 from PW1 for purchase of the land.

22. Having established the first element of the offence under Section 313 the prosecution was then required to prove that the appellant obtained the money through false pretences.

23. “False pretence” is defined under **Section 312** of the **Penal Code** as:

“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.”

24. The elements that constitute false pretence from the above definition are:

- a) A representation of fact by word, writing or conduct;
- b) The representation that is either past or present;
- c) The representation must be false; and
- d) The person made the representation knowing it to be false or did not believe it to be true.

25. By entering into an agreement with PW1 for sale of land parcel no. 675, the appellant made a representation in the present by conduct and in writing that he was the owner of that parcel of land.

26. To prove that the representation made by the appellant was false, the prosecution relied on the evidence of PW1. He testified that before he purchased the land, the appellant gave him a title which appeared original. He also conducted a search at the lands office and was satisfied with it.

27. PW1 produced a copy of a green card (P. Exh. 2) for land parcel no. 675 which showed that the land was a sub division of Plot 361. It indicated that the land was registered in the names of Bonyunyu Omurwa and Jeremiah Masese on 21st January 1974. The land was then transferred to Samwel Nyanyuki in April 2002 and later transferred to the appellant on 18th November 2006.

28. The prosecution also produced a certificate of official search dated December 2013 which showed that the appellant was the owner of the land at the time and also produced a title issued in the name of PW1 on 8th January 2014.

29. PW1 told the court that after paying the purchase price, he visited the land and found some people in occupation claiming ownership of the land. He conducted a second search after purchase and discovered that the land belonged to someone else and had an ICDC loan.

30. The certificate of official search dated 12th May 2015 and produced as P. Exh 5 revealed that the land in question belonged to Jeremiah

Masese and a caution had been registered in favour of ICDC in July 2014.

31. The land registrar (PW2) testified that parcel number 361 was in the name of Bonyonyo Omurwa and the document that had been inserted for parcel no. 675 was fraudulent and could not be relied on. He went on to dismiss the green card relating to land parcel no. 675 as a forgery.

32. At this point it may appear that the appellant made a false representation to PW1 that he was the owner of land parcel no. 675 but a closer analysis of the facts and the evidence calls for caution. In **Joseph Wanyonyi Wafukho v Republic CRIMINAL APPEAL NO 200 OF 2012 [2014] eKLR** where a purchaser was similarly denied vacant possession, Gikonyo J. held;

“[16] A cursory treatment of the above facts may create a feeling that there could be some criminal liability on the part of the Appellant for failing to deliver the land; after he had sold it and received the sum of Kshs. 252,000-which is not a small sum in the circumstances of this case. But such is just but a false feeling which, if not careful, might blur the mind of the court. However, courts of law are experienced at unravelling such assumed dilemmas by carefully considering the facts of the case and the law applicable. The facts of this case reveal that the suit land existed; had been surveyed and a boundary delineated. Also, although there was no formal document to show that the Appellant was the registered proprietor of the suit land, there was no doubt, [and that was not contested], that he owned or had proprietary interest in the suit land. The only problem is that family members did not support or approve of the sale. He was selling was real land, and not what I would call ‘air’. There was nothing false or untrue about the agreement for sale of the land or the land itself. Therefore, it cannot be said, in the circumstances of this case, that the Appellant made a false representation of fact about the land.”

33. In this case, it is noteworthy that although PW2 testified that the green card relating to land parcel no. 675 was a forgery he did not inform the trial court how he had formed that opinion. He did not indicate whether an analysis had been conducted to ascertain the authenticity of the documents relating to land parcel no. 675. The basis for his assertion that the green card was a forgery was anybody’s guess. It was especially necessary for the prosecution to give credible evidence to show that the document was a forgery given PW2’s admission that the records relating to land parcel no. 675 were missing from the lands registry.

34. The evidence adduced by the prosecution was not conclusive that the appellant’s representation to PW1 that he was the owner of land parcel no. 675 was false. This finding is informed by the fact that PW2 confirmed that land parcel no. 675 was a subdivision of land parcel no. 361. A search conducted prior to the sale showed that the appellant was the owner of the land. After the sale, a title deed was issued in the name of PW1.

35. Under **Section 26** of the **Land Registration Act, 2012**, a certificate of title is deemed to be conclusive evidence of proprietorship unless it is shown that it was acquired through fraud or misrepresentation to which the person is proved to be a party or it is proved that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

36. PW2’s claim that the documents pertaining to land parcel no. 675 were fraudulent was not supported by any credible evidence. He did not produce any documentation to prove who the actual owner of land parcel no. 675 was at the time of the sale. The indication in clause 1 of the agreement that PW1 had inspected the land prior to the sale and was satisfied with it further compounds the prosecution’s case.

37. There was no evidence to demonstrate that if at all the documents pertaining to land parcel no. 675 were forged, the appellant forged them or was part of the scheme to forge or remove records from the land’s registry.

38. Records of details of land ownership are in custody of the land registrars in the land registries spread out all over the country.

For the prosecution to prove that the representation made to PW 1 by the appellant was false, a diligent investigator needed to call evidence to show that the search certificate obtained by PW 1 from the Lands Office was not genuine and/or did not emanate from the lands registry. Evidence was also necessary to show that the land was never registered in the names of the appellant (i.e and that the title issued to PW 1 on 8th January 2014 was not issued by the land registry and was a forgery).

39. PW 2, the Land registrar fell far short of answering the above questions. He bore the duty to show the documents did not emanate from their office and prove they were a forgery. A diligent investigating officer would have incorporated officials from the land registry who were then at the offices at the material time to establish if the official search and green card emanated from the office. Such conclusions would be impossible without a forensic examination of the questioned documents by a qualified document examiner.

40. PW 2’s admission that records relating to land parcel No. 675 were missing from the lands registry is unhelpful to the prosecution’s case as in those circumstances the claim by the appellant that he was owner of the land at the time he sold it is not effectively challenged.

41. In contrast, the appellant’s claim that he was the owner of the land at the time of the purchase was supported by a certificate of official search, a copy of the green card for land parcel no. 675 and corroborated by the fact that after sale, a title was issued in the name of PW1.

42. PW1’s statement that the appellant disappeared for 5 months after the sale may cast doubt on the appellant’s innocence but suspicion however strong will not be the basis of a conviction. Concrete evidence is what conviction should be based on. In this case, I find that the prosecution’s case was not proved beyond reasonable doubt.

43. In the end, I find that the prosecution did not prove its case to the required standard. The appeal is hereby allowed. I quash the conviction of **VINCENT MATARA ONCHOKI** on all three counts and set aside the sentence imposed on him. He is hereby set free unless otherwise lawfully held.

Dated, signed and delivered at Kisii this 7th day of July 2021.

A.K NDUNG’U

JUDGE