



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO.46 OF 2019

KALUME NGUMBAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 62 of 2017 of the Senior Resident Magistrate's Court at Lamu Law Court-V. K. Asiyu, PM dated 20th August, 2019)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

The Respondent in person

J U D G M E N T

The appellant was charged with obtaining by false pretense contrary to Section 313 of the Penal Code. The particulars of the offence were that on the 11th of June, 2016 at about 9:00 a.m at Hindi town in Lamu West Sub County within Lamu County with the intent to defraud, obtained from **Aliduh Abdi Issa** cash of Kshs.100,000/- by falsely pretending that he will sell him a quarter acre piece of land.

He was charged with Count II – Obtaining by false pretense contrary to Section 313 of the Penal Code. The particulars being that on the 10th day of July, 2016 at around 1300hrs at Hindi town in Lamu West Sub County in Lamu County with intent to defraud, obtained from **Aliduh Abdi Issa** a sum of Kshs. 300,000/- by falsely pretending to sell him half acre piece of land.

Background

PW1 Alidun Abdi Issa told the court that on the 11th day of June, at around 9:00 a.m, the assistant chief called him, he got up and went to meet him. He was with the appellant. It was the assistant Chief who informed him that the appellant was selling land at the area near Saba Saba, the land he was selling was a quarter an acre which he was selling at Kshs.150,000/-. That upon bargaining they settled at Kshs.100,000/- as the purchase price.

He also stated that he asked the chief if he knew the appellant to which he confirmed knowing him. That the chief advised him to pay the purchase price since the appellant was facing some financial problems then the sale agreement would be prepared later. That he paid Kshs.100,000/- for the purchase of the said parcel of land in the presence of his **Muhat** his friend, the appellant and the Assistant chief. They all signed an agreement which was dated 11th June, 2016.

That upon travelling to Nairobi he enquired from the chief if the appellant had other parcels of land since he wanted to buy another half an acre, he called the appellant who confirmed and agreed to sell him another half an acre at Kshs.300,000/-. He further told the court that he went back to Lamu on the 10th day of July, 2016, withdrew Kshs.300,000/- and gave the cash to the appellant in the presence of his friend **Muhat** and the chief. That the agreement was reduced to writing and the sale agreement was dated 10th July, 2016. He later asked the chief to show him the parcels of land and in the evening the assistant chief and the appellant showed him the plots and they agreed that the fees for the survey was to be borne by him.

He stated that he later heard that the appellant's land had a court case, he went to the Assistant Chief who told him that the case had been concluded. He said that the appellant wanted money to transfer the title to his name since his father had passed on. That went to the person who was staying at the plots and he told him that the plots were his. He advised him to go carry out a search to confirm who the owner of the land.

He said that he rushed to the chief who later summoned the appellant and the appellant asked the chief to give him more time to give him his plots. That another agreement was made and it was dated 28th October, 2016.

That on the 29th of December, 2016 the chief called the appellant who denied to knowing the sale agreements that they had entered into. That he said that he did not know how they got a copy of his Identification Card. That they went to the A.P's office and the appellant said that he had not sold land to him and that he was not aware of any agreement.

He also confirmed that when he carried out a search, he found out that the land belonged to one **Stephen Ngige Njuguna**. The search was dated the 23rd day of March, 2017.

At cross examination, he confirmed that he gave the money to the appellant but he was not shown any title. He also said that he was not aware there was a succession dispute. That he was neither given a copy of the letter dated 13th April, 2012. He also stated that he did not conduct a search because the chief assured him that the plot existed and he was not aware of any land dispute. He confirmed that he did not lend him any money and the appellant did not give him any official search certificate.

At reexamination, he confirmed that a total of Kshs.400,000/- was given to the appellant and he later discovered that the land belongs to one Stephen Ngige.

PW2 Ahmed Mohamed Lausi the Assistant Chief at Hindi told the court that on 11th June, 2016 the appellant came to him and told him that he a family problem. That he told him to talk to **(PW1)** to assist him with money so that he could attend to a family case in Garsen. He said that once the case was concluded, he would allocate **(PW1)** a portion of their land which was a quarter an acre. He stated that he told **(PW1)** that the appellant had a problem and he asked him to give the appellant money. That **(PW1)** gave the appellant the money, Kshs.100,000/- in his presence and later an agreement was made together with the appellant, **(PW1)** and one other person who was not before the court.

The agreement showed that the buyer was **(PW1)** and the appellant was the seller and one **Muhat** was a witness. That he stamped the agreement and the same was produced as **P.Exb 1**. That the appellant told him that they need to look for another portion of land so that he came be given more money. He also confirmed to court that the appellant was given Kshs.300,000/- in his presence and that the agreement was reduced into writing. The agreement was produced as **P.Exb 2** while the agreement dated 28th October, 2016 as **P.Exb 3**. That the appellant failed to transfer the land to the buyer within the agreed time lines and that there is a family dispute that is preventing the appellant from transferring the land to **(PW1)**.

At cross examination he confirmed that the appellant did not show him any summons for ELC and that it was **(PW1)** who had given him money.

PW3 Stephen Ngige Njuguna told the court that he recalls that on the 16th of January, 2002 he did an agreement to purchase Plot No. 269 Hindi Magogoni Scheme which was owned by **Ngumbao Kombe Munga**. That there was an FIC loan on the plot and the original allottee was **Michael Odhiambo Nyagwa** who had taken the loan.

That **Ngumbao Kombe** told him that he was not in a position to pay the loan so they agreed that he would pay him Kshs.40,000/- and he would continue servicing the loan of Kshs.50,000/-. He paid the loan and stayed on the plot and even built his house. He told the court that he had a copy of the title deed No. 269/ Hindi magogoni Scheme which was issued on 28th May, 2007 and that the parcel of land has since been sub divided and the original title deed handed over to the Ministry of land.

He further stated that from the mother title he got two titles i.e. title deed No. 1780 Hindi Magogoni and 1790 Hindi Magogoni. He also told the court that he had the discharge of charge dated 22nd October, 2012 and that the appellant had brought him to court stating that he had invaded the family land. The land dispute ended and the copy of the judgment was dated 2nd November, 2015 and the court confirmed that the land belonged to him. That the appellant purported to the sell the same piece of land between June-July, 2007.

At cross examination he confirmed that he had bought the said parcel of land from the appellant's father in 2002 and the public trustee later transferred the title.

PW4 No. 95918 Pc Pascal Malala attached to Mokowe Police Station stated that during the months of 2016 the complainant made an agreement with the appellant with the intention to sell to him a parcel of land, the first agreement was made in the presence of assistant Chief Hindi Township dated 11th June, 2016 and the amount that had been transferred was Kshs. 100,000/-. The 2nd agreement involved an amount of Kshs. 300,000/- signed by the appellant, the complainant and a witness.

That there was another agreement giving the appellant time lines to process the parcel of land and give it to the complainant, the agreement was dated the 28th day of October, 2016 produced as **P. Exb. 3** and the appellant's Identification Card was attached to the agreement. That after the said agreements were entered into, the appellant started dodging him. The complainant sought the assistance of the Assistance chief who advised him to report the matter to Mokowe Police Station and the appellant was arrested.

Statements of witnesses were recorded and one witness, **Stephen Ngige Njuguna** claimed that the parcel of land in question belonged to him. That the said allocation was supported by Certificate of search from the Lands office; **Lamu/Hindi/Magogoni/269 Search No. 102/3/17** dated 23rd March, 2017 produced as **P. Exb 4**. That the same witness produced two title deeds the first No. **Lamu/Hindi/Magogoni/269** Approximately 4.2 Hectares belonging to Stephen Ngige Njuguna issued from Lamu Tana District Land Registry on 25th May, 2007 produced as P. Exb. 5 and Title Deed No. **Lamu/Hindi/Magogoni 11600 789** Approx area 2.2 Hectares owned

by **Stephen Ngige Njuguna** issued on the 25th of June, 2013 produced as **P.Exb 6**.

A Settlement Fund Trustee Form dated 13th September, 2012 as well as transfer of land and settlement scheme for **Lamu/Hindi/ Magogoni 269** was also produced as well as a Discharge of Charge. That based on the investigations, the appellant was charged with the two counts before court and arraigned before court.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence and he elected to give a sworn statement.

He stated that in the year 2013, his family went to the Chief who gave them a letter of succession concerning their father's land who was deceased. The letter was dated 22nd July, 2013 produced as **D.Exb 1**. That they carried out a search of plot No. 269 and found out that the name of his late father had been cancelled out and was now under the name of **(PW3) Stephen Ngige Njuguna** and **Ngumbao Kobe Munga**.

He further stated that he went back to the Chief at Hindi to report **(PW3)**. That he was directed to CID Lamu to report that incident and that both **(PW3)** and **Justus Charo Ngumbao** were charged in court, he produced the Charge Sheet as **D.Exb 4** and that the court during its proceedings directed them to do a proper succession of the property. A copy of the Kenya Gazette was also produced as **D.Exb. 6** and that a month later, he was issued with letters of Administration. He also told the court that the C.I.D placed a caution on the land and that the matter was taken to Garsen High Court for confirmation of grant. He also produced a Power of Attorney dated 27th May, 2016 as **D. Exb. 10**. That sometime in 2016 he met the complainant who was willing to fund the family land case, he requested for a sum of Kshs.400,000/- and that the complainant's profit will be subdividing a piece of land from the said profit. That they agreed that the appellant would give him 3 parcels of land and as such, the appellant paid him Kshs.100,000/- and thereafter he called **Mr. Omwanja** who did not do any legal work after receiving the money as agreed.

That the Kshs.300,000/- was given to **Chief Lausi** and later a case filed against **Stephen Ngige** and **Justus Charo Ngumbao**, the Environment and Land Case is yet to be concluded and that he in deed took the complainant's money which was taken as a loan to be repaid. He also told the court that when the complainant called him, he told him to take possession of the land as they process the title. That the complainant agreed but he refused to withdraw the case to enable him finish the E.L.C case.

DW2 Harrison Katana Ngumbao informed court that there was a case involving their land and that they went to follow up on the succession in Lamu. They found the title of their deceased father's land had been cancelled, they went to the chief who referred them to the CID Lamu who carried out investigations. That **Stephen Ngige Njuguna** were the culprits and he was not aware how the case was dismissed in Lamu and that it is the appellant who has been following up on the land case in Malindi.

At cross examination, he told the court that their father died leaving a total of 10 acres to both him and his brother the appellant. That it was agreed by the family that both of them take the parcel of land and that they were both the administrators of the estate. He also confirmed that they did not consent to the appellant selling the land to the complainant.

Analysis and determination

In criminal cases before a trial Court one of the fundamental duties of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence. In **R v Subordinate Court of the First Class Magistrate at City Hall {2006} EA 330** it was held that:

“When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person.”

The general provisions on the legal and evidential burden is to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence framed against an accused to create a doubt in the mind of the Court that he cannot be entitled a right of presumption to innocence. In **Woolmington v DPP {1935} AC 462 Lord Sankey** stated in the following terms:

“But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty.”

Having stated that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. (**See Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR**).

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the appellant.

The appellant faced the charge of obtaining money by false pretence contrary to section 313 of the Penal Code. **Section 313** of the Penal Code provides as follows; -

“Any person who by false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.” Emphasis my own.

From the above section the essential elements of the offence of obtaining through false pretences can be summed up as follows; -

(a) Obtaining something capable of being stolen

(b) Obtaining the money through a false pretence.

(c) Obtaining the money with intention to defraud.

The Penal Code defines “**false Pretence**” under **Section 312** to be;

“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.”

Having carefully considered the evidence afresh together with the submissions by the appellant and after hearing the rival argument by the respondent I find that there is just one issue for determination:

(a) Whether the trial court erred in convicting the appellant under Section 313 of the CPC and then included a 1 year sentence if he failed to repay the Kshs. 100,000.00/- for count 1 and a 2 year sentence if failed to repay the Kshs. 200,000.00/-

This court has been asked to interfere with the sentence. Sentencing is discretionary and unless it is shown that the sentence imposed is manifestly harsh and excessive, an appellate court would hardly interfere. (See **Wanjema Vs Republic (1971) EA 493**). In the instant case, the appellant was fined Kshs.100,000/- in default a jail term of one year for the first Count and a fine of Kshs.200,000/- in default two years imprisonment for the second count. The sentence is obviously legal.

Taking a closer look at Sentencing; The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”

This sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict. In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

A closer look at case law points us to The Privy Council in **Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes) (unreported, 2 April 2001) (Byron CJ)** was of the view that:

“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review...”

The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

Further in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, the Court pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”

Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -

“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 (see also Sayeka –vs- R. (1989 KLR 306)”

Though the appellant was a first offender, it does not appear to me that the sentence is manifestly harsh nor excessive as submitted by the appellant. Indeed, the appellant offered no mitigation at all that would have assisted the learned magistrate in arriving at the appropriate sentence. He was given an opportunity to mitigate which opportunity he did not seize. Considering what the complainant went through and the conduct of the appellant as he committed the offences, the sentences imposed were more than deserving. In fact they were even lenient.

When all these circumstances are considered, I am of the view that the trial magistrate did not grossly misdirect himself on the sentences he came to nor did he err in principle by failing to take into account the core factors of the case.

The end result of this appeal is for dismissal. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARSEN ON 14TH DAY OF OCTOBER 2021

.....

R. NYAKUNDI

JUDGE

IN THE PRESENCE OF:

1. MR MWANGI FOR THE STATE

2. APPELLANT