



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 19 OF 2018

FREDRICK REMARQUE CHITECHI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(from the conviction and sentence by Hon. F. Makoyo, SRM in Kakamega CMC

Criminal Case No. 1752 of 2013 delivered on 13/2/2018)

JUDGEMENT

1. The appellant was convicted of the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code and sentenced to serve 18 months imprisonment. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are:-

- 1. THAT the learned trial magistrate erred in both law and facts by not informing the appellant of his rights as outlined under Article 50 of the Constitution and failing to accord him those rights thereby occasioning prejudice.**
- 2. THAT the learned trial magistrate erred in law and facts by failing to observe essential elements of an offence of obtaining money through false pretence.**
- 3. THAT the learned trial magistrate grossly erred in law and facts by placing more weight on the prosecution evidence without inquiring into its failure to prove the case beyond reasonable doubt.**
- 4. THAT the learned trial magistrate misdirected himself by holding the evidence in record as the whole truth and free from doubt and malice without adequately interrogating the same vis-à-vis the appellant's defence.**
- 5. THAT the learned trial magistrate shifted the burden of proof to the appellant.**
- 6. THAT the trial magistrate erred in law and fact in ignoring the appellant's mitigation.**

2. The particulars of the charge against the appellant were that on diverse dates between 13th December, 2010 and 9th February, 2011 at Shieye Location in Kakamega Central District within Kakamega County with intent to defraud obtained a sum of Ksh. 520,900/= from Nathan Lungaho Mamboleo (herein referred to as the complainant) by falsely pretending that he was in a position to sell him land parcel No. Butsotso/Indangalasia/2064 a fact he knew to be false.

3. The prosecution opposed the appeal through the oral submissions of the prosecution counsel, Mr. Ng'etich.

Case for Prosecution –

4. The prosecution case was that the appellant and the complainant were friends. They were previously working together at the Kakamega branch of the Kenya Chamber of Commerce and Industry. That sometimes in the year 2010 the appellant learnt that the complainant wanted to buy a piece of land along Kakamega – Mumias road. The appellant then offered to sell the complainant his piece of land at Shimalavandu land parcel Butsotso/Indangalasia/2064. He took him to the parcel of land. The appellant introduced the complainant to the person he had bought the parcel of land from, Ernest Ong'ayo PW4. PW4 confirmed that he had sold the land to the appellant. The appellant gave the complainant a copy of a title deed to the land, P.Ex.1. The complainant agreed to buy the parcel of land from the appellant. They agreed at a

purchase price of Ksh. 500,000/= to be paid in instalments. The complainant paid part of the money in cash, partly through Mpesa and part of it to a hotel operator PW4 who was providing lunch to the appellant's school going children. The appellant acknowledged the cash payments by signing the complainant's note book, P.Exh-4. In the cause of the payment they entered into a sale agreement, P.Exh.2. A total of over Ksh. 500,000/= was paid between 2010 and 2011. When the complainant wanted to occupy the land the appellant denied him access. The complainant reported to the area Chief and to the area District Officer. The appellant was summoned to appear at the offices of the said officers but he declined to do so. The complainant reported to the police.

An official search was conducted on 9/12/2010, P.Ex.5 that indicated that the land was charged to the Co-operative Bank of Kenya Limited for a loan of Ksh. 940,000/=. Another search was conducted on 6/2/2012 vide P.Ex.7 that confirmed the said charge. A green Card, P.Ex.8, also confirmed the charge. The appellant was arrested and charged. He denied the charge.

5. Samples of the appellant's known handwriting and specimen signatures were taken to the document examination offices for comparison with the appellant's handwriting and signatures on the note book where he was writing and signing on receiving the money. The document examiner returned an opinion that the acknowledgment notes on the note book and the signatures thereof were made by the appellant. During the hearing the above said documents were produced as exhibits.

Defence Case –

6. When placed to his defence the appellant gave a sworn statement in which he stated that he was the Chairman of Kakamega Branch of Kenya National Chamber of Commerce and Industry. That the complainant was the acting Branch CEO. He was his friend. That the complainant approached him and requested for permission to cultivate his land parcel No. Butsotso/Indangalasia/2064. He gave him permission to do so. Later he learnt that the complainant was claiming that he had bought the land from him. The complainant entered into the land and cut down trees. He denied that he sold the said parcel of land to the complainant. He said that PW2 was lying that he took the complainant to the said parcel of land and told PW2 that he was selling the parcel of land to the complainant.

7. The appellant further said that the complainant had paid him Ksh. 340,000/= as shown by the confirmation of payment in P.Exh.2. He however denied that the money was for the sale of land parcel No. Butsotso/Indangalasia/2064. He said that the payment was for rent arrears owing to Kenya Chamber of Commerce and Industry.

8. The appellant called one witness, Levy Wafula Aliandha, who said that he operates an auctioneering firm by the name of Bukhungu Auctioneers. That on the 20/3/2012 he was instructed by the appellant to serve a demand notice of Ksh. 147,000/= to the complainant on behalf of the Kakamega Chamber of Commerce. In cross-examination the witness said that he was not aware of any dispute in respect to land parcel Butsotso/Indangalasia/2064.

Submissions –

9. The appellant tendered written submissions. He submitted that there was no evidence to prove sale of land to the complainant. That the charge sheet indicated the alleged money obtained as Ksh. 520,900/= while the complainant claimed that it was Ksh. 500,000/=. That the investigating officer stated that it was Ksh. 520,560/=. Therefore that the charge sheet was incurably defective. That the trial court failed to consider his defence that he admitted receiving money from the complainant being payment for rent arrears for Chamber of Commerce and Industry and not for sale of land to the complainant. That in dismissing the defence the trial court shifted the burden of proof to him.

10. The appellant further submitted that the transaction between the parties related to a future event which cannot amount to obtaining by false pretences.

11. The prosecution counsel, Mr. Ng'etich, in opposing the appeal submitted that the prosecution had proved payment of money to the appellant for sale of land. That it was proved that the appellant had no capacity to pass title to the complainant as the land was charged to a bank. That the appellant had initially denied that he had received the money but that during trial he admitted that he had received the money but changed the story to that he had received the money on behalf of Chamber of Commerce. That the documents produced by the prosecution proved that the money was paid for the sale of the land. That the evidence of the document examiner proved that the documents were made by the appellant. That is why the appellant shifted his defence to that he did not receive the money for sale of land.

Analysis and Determination –

12. This being a first appeal, the duty of the court is to analyse and evaluate the evidence adduced at the lower court and draw its own conclusions whilst bearing in mind that the lower court had the advantage of hearing and seeing the witnesses testify – See **Okeno –Vs- Republic (1972) E.A. 32.**

13. The appellant states that he was not informed of his rights under Article 50 of the Constitution. He however did not explain which rights under the said article were infringed. I therefore do not find any substance under this ground.

14. The trial court convicted the appellant on the basis that the documents produced before the court and the evidence of the witnesses proved beyond reasonable doubt that the appellant obtained the money by false pretences as the subject land was charged to a bank.

15. False pretence is defined in Section 312 of the Penal Code 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.

16. A representation therefore encompasses the following:-

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

17. The offence of obtaining by false pretence is defined in 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.”

The essential ingredients of the offence under this section are:-

- (1) The act of obtaining something capable of being stolen.
- (2) Obtaining the thing by false pretences.
- (3) Obtaining the thing with intent to defraud.

18. The prosecution evidence was that the appellant sold land to the complainant whilst knowing that the subject land was charged to Co-operative Bank of Kenya Limited for a loan of Ksh. 940,000/= which meant that the appellant could not pass title to the complainant. A search certificate, P.Ex.5 dated 9/12/2010 was produced to prove that the land was charged to the said bank. The said search indicates that the land was charged in 1996.

19. There was overwhelming evidence that the complainant paid some money to the appellant. The complainant's Mpesa statements in P.Ex.3 proved that the complainant made some money transfers to the appellant's Mpesa account between 24/6/2011 and 12/12/2011. There was sufficient evidence that some of the money was paid through Fredrick Obuya PW4 vide the instructions of the appellant to cater for lunch for the appellant's children. There was also no doubt that the complainant made cash payments to the appellant which the appellant acknowledged in the complainant's note book, P.Ex.4. The document examiner examined the handwriting and the signatures on the note book and formed the opinion that they were made by the same person, the appellant. Payment of money was therefore proved.

20. The appellant admitted receiving a sum of Ksh. 340,000/= from the complainant as indicated in the confirmation of payment chit, P.Ex.2. He however stated that he was paid the said sum of money on behalf of Kenya National Chamber of Commerce.

21. The confirmation of payment by the appellant of Ksh. 340,000/= in P.Ex.2 clearly stated that the payment was in respect “*for the land transaction No. title deed 2064 Butso/Indangalasia pending the final payment and transfer of the same with immediate effect.*”

22. It is then clear from P.Ex.2 that the payment was in respect to sale of land parcel Butso/Indangalasia/2064 to the complainant. There was no mention in the acknowledgment that the payment was being made for anything connected to the Kenya National Chamber of Commerce and Industry.

23. The payments made through the note book were made between 10/12/2010 and 17/12/2010. The confirmation of payment of Ksh. 340,000/= in the P.Ex.2 was made on 21/12/2010. P.Ex.2 indicated that by that date the appellant had received a sum of Ksh. 340,000/=. That therefore included the payments paid through the note book which were made a few days before 21/12/2010 when the confirmation in P.Ex.2 was made. If then the appellant received the money on behalf of the National Chamber of Commerce and Industry why would it be recorded in the complainant's note book? Why was there no receipt issued by the Chamber? There was no explanation why the appellant would have been paid the money on behalf of the Chamber and the payment recorded in the complainant's note book instead of a receipt being issued by the Chamber. The defence that the appellant received the money on behalf of Kenya National Chamber of Commerce and Industry cannot have been true. The trial court considered the appellant's defence on the matter and did not believe it. I see no reason of faulting the trial magistrate on his findings on that issue. The appellant thereby received the money in pursuance of a sale of land agreement to the complainant.

24. The question was whether the appellant obtained the money by false pretences. The appellant entered into an oral agreement with the complainant for him to sell the stated parcel of land to the complainant. The appellant by words and conduct made a representation to the complainant of a statement of fact that he was in a position to sell the land to him. This encompassed passing of good title to the complainant. Unfortunately it happened that the land was charged to a bank and therefore the appellant could not pass title to the complainant. Land charged to a bank cannot be sold without the consent of the bank. The representation that the appellant was in a position to sell the land to the complainant was therefore false. At the time of sale, the appellant knew that he was not in a position to sell the land and pass good title to the complainant as the land was charged to a bank. The appellant therefore intended to defraud the complainant of his money when he purported to sell the land to him. The appellant obtained the money by false pretences. The charge of obtaining money by false pretences was proved beyond all reasonable doubt.

25. The amount of money stolen as proved by the documents tendered before the court was Ksh. 520,000/=. The sentence provided for the

offence under Section 313 of the Penal Code is imprisonment for 3 years. The appellant was sentenced to 18 months imprisonment.

26. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) KLR**, Bosire J. (as he then was) observed that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

27. When sentencing the appellant, the sentencing magistrate stated that he had considered the mitigation by the appellant and also that the complainant had lost a substantial amount of money. Indeed the appellant stole a relatively large amount of money from the complainant. It is my considered view that the sentence of 18 months imprisonment was not manifestly harsh or excessive so as to warrant interference by this court.

28. The upshot is that the charge against the appellant was proved beyond all reasonable doubt and the appellant convicted on solid evidence. There is no merit in the appeal. The same is accordingly dismissed.

Delivered, dated and signed in open court at Kakamega this 18th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kibet for State

Appellant - present

Court Assistant - George

14 days right of appeal.