



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 97 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. OCHOI – PM delivered on 30th February 2016 in Kibera CMC. Cr. Case No.3134 of 2013)

BERNARD MBUGUA KINYANJUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Bernard Mbugua Kinyanjui, with another, was charged with two (2) counts of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 3rd September 2013 at Fig Tree, Ngara in Nairobi County, the Appellant, jointly with others not before court, with the intent to defraud obtained the sum of Kshs.320,000/- and Kshs.220,000/- respectively from Ephantus Kanyuira Maina and Erastus Njoroge Mbogo (hereinafter referred to as the complainants) by falsely pretending that he was in a position to sell them parcels of land registered as LR. No. 14899/54 and 14899/60 Utawala a fact he knew to be false. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve a custodial sentence of six (6) months imprisonment and to serve a further term of six (6) months imprisonment if he failed to compensate the complainants. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal against the conviction and sentence to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence that did not support the charge. In particular, he challenged the trial court's finding that he had sold the two parcels of land to the complainants while knowing that the same did not belong to the company that he purported to represent. The Appellant was aggrieved that the trial magistrate had failed to take into consideration the totality of the evidence adduced including his defence which would have revealed that the charges brought against him were unsustainable. He was aggrieved that the trial magistrate had relied on inconsistent and uncorroborated evidence adduced by the complainants that he had been paid certain sums of money which was not supported by documentary evidence. He faulted the trial magistrate for failing to properly evaluate the evidence, which in his view was a result of shoddy investigations undertaken by the police. He pointed out that the trial magistrate did not consider the fact that there were other criminal cases which had been lodged against one John Gachau Kamuhu, implying that it is the said John Gachau Kamuhu who should have been charged instead of him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission and sworn affidavits in support of his appeal. He also made oral submission urging the court to allow his appeal. Ms. Aluda for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which connected the Appellant to the commission of the crime to the required standard of proof. She urged the court not to disturb the finding reached by the trial court nor interfere with the sentences that were imposed. This court shall revert to the arguments made on this appeal after briefly setting out the facts of the case.

The complainants in this case Ephantus Kanyuira Mbogo (PW1) and Erastus Njoroge Mbogo (PW2) were friends. They were interested in purchasing land for residential purposes in Utawala area. They visited the area and saw certain vacant parcels of land. They were informed by an agent called John Nga'ang'a (the Appellant's co-accused in the trial court) that the person authorized to sell the parcels of land on behalf of a land buying company known as Pumwani Mwiikaria Company Limited was the Appellant. The complainants, at different times, visited the offices of the Appellant. They met with the Appellant who assured them that indeed the said parcels of land were on sale and that he had the authority of the company to sell the same. The Appellant told them that the titles of the parcels of land had not been issued because the larger parcel of land had been subdivided. He was awaiting the issuance of the titles of the subdivided portions of land from the Land Registry. Both complainants were shown the map of the area where the land was situate. They were convinced. They were each told that the cost of purchasing each parcel of land was Kshs.320,000/-. This sum included legal fees. PW1 paid the entire purchase consideration while PW2 paid the sum of Kshs.220,000/-. Two agreements were prepared in the absence of the complainants. The complainants were handed over duly executed agreements by the Appellant when they paid the purchase consideration.

After making the payments, the complainants visited the suit parcels of land. They were shocked to be informed that the owner of the suit parcel of land was not actually the land buying company which the Appellant purported to represent but by an individual by the name Francis Munene Hiram. They were given his address by a person on the ground. They visited the said Francis Munene Hiram (he testified as PW3) who confirmed to them that indeed he was the owner of the suit parcels of land and had no connection whatsoever with the Appellant. The complainants made the decision to report the incident to the police. The case was investigated by PW6 Inspector Emily Njeri Matanu. After concluding her investigation, including confirming the fact that the Appellant was not a director or an official of the land buying company, she made the decision to charge the Appellant. She also confirmed that the particulars presented by the Appellant to the complainants when he purported to sell them the suit parcels of land were not tallying with the particulars in the genuine title documents.

When he was put on his defence, the Appellant denied committing the offence. From his testimony, and the evidence of his witnesses, it was the Appellant's case that he had indeed genuinely sold the two parcels of land to the complainants. It was the Appellant's case that he had the authority of the owners of the suit parcels of land to sell the same to the complainants. He denied the thrust of the prosecution's case that he had duped the complainants into purchasing the suit parcels of land which he had no authority to sell. In essence, the Appellant was saying that the prosecution had no legal basis to charge him. This is the same position that the Appellant took when he argued his appeal before this court.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **obtaining by false pretences** contrary to **Section 313** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the parties, both written and oral. For the prosecution to establish the charge of **obtaining by false pretences** contrary to **Section 313** of the **Penal Code**, it was required to prove certain essential ingredients. In **Joseph Amunga Ochieng -vs- Republic [2016] eKLR** Makau J held thus:

“It is evident 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 the intention to defraud.”

The Learned Judge then cited the definition of **“false pretence”** under **Section 312** of the **Penal Code**. He then went ahead and stated as follows:

“The operative word under the said section is “representation” which is applicable in the following circumstances:

(a) A representation by words, writing or conduct.

(b) A representation in either past or present.

(c) A representation that is false.

(d) A representation made knowing it to be false or believed not to be true.”

This court adopts the above definition of the ingredients of the charge of obtaining by false pretences as espoused by the Learned Judge.

Did the prosecution establish the charges that were brought against the Appellant to the required standard of proof beyond any reasonable doubt?

Upon analysis of the evidence, this court makes the following findings:

I. That the Appellant represented himself to the complainants as having the requisite authority from the land buying company to sell the two parcels of land to the complainants.

II. That the Appellant knew that he had no authority to represent the land buying company or to sell the suit parcels of land either as

an agent or as official of the land buying company.

III. That the Appellant took the complainants through the motions of apparently facilitating a legitimate sale of land knowing very well that the entire exercise was a charade.

IV. That the Appellant obtained money from the complainants purportedly under the guise that he was in a position to sell the suit parcels of land to the complainant.

V. That even after the truth had been established, the Appellant made no effort to refund the sums that he had obtained from the complainants and continued to insist (without any justification) that he had legitimately sold the suit parcels of land to the complainants.

VI. That the trial court, and this court gave the Appellant the opportunity to compensate the complainants. The Appellant spurned the opportunity offered to him by the court to compensate the complainants so as to secure a reduced custodial sentence.

VII. That the Appellant's continued denial of the reality that was proved to the required standard of proof beyond any reasonable doubt that he had duped the complainants is proof of the Appellant's state of mind that he set out from the word go to falsely obtain the said sums of money from the complainants and was not prepared to admit the unlawful conduct.

VIII. That this court's evaluation of the Appellant's ground of appeal and the Appellant's insistence that he is innocent leads it to the conclusion that the Appellant was someone who is prepared to bend reality to suit his imagination and circumstances. This court was not at all persuaded that the Appellant is innocent or that he was not properly found to be guilty by the trial court.

From the foregoing, it is clear that the Appellant's appeal both on conviction and sentence cannot be allowed. The Appellant's appeal lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2018

L. KIMARU

JUDGE