



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 101 OF 2017

REPUBLIC.....APPELLANT

VERSUS

SAMUEL ONGERI.....1ST RESPONDENT

LINAH MULAKI CHEYWE...2ND RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable S. N Telewa in Eldoret Criminal Case No. 5417 of 2013 dated 11th November, 2016)

JUDGMENT

SAMUEL ONGERI and *LINAH MULAKI CHEYWE*, the Respondents herein were charged in the lower court with the offence of obtaining by false pretences, contrary to *Section 313* of the *Penal Code*.

The particulars of this offence being that on the diverse dates between 3rd day of July 2009 and 31st day of August 2009 in Eldoret West District within Uasin Gishu County, the respondent jointly with intent to defraud obtained from *Wellington Musungu* the sum of Kshs.580,000/- by falsely pretending that they were in a position to sell to him a parcel of land No. Tulwet/Kesses Block 4 (Lelmokwo)59 measuring 4.046Ha a fact they knew to be false.

The prosecution case is that the complainant gave evidence as PW-1 was introduced to the 1st Respondent by the 2nd Respondent who indicated that the 1st Respondent could sell the complainant a parcel of land. The 1st Respondent was a neighbor of PW-2 and was as well his former teacher. The 2nd Respondent was introduced to PW-2 as a wife of the deceased 1st Respondent's brother. In 02, December, the PW-2 met the 1st respondent at Kesses. The 1st Respondent informed him that he had land for sale. On 3rd July, 2009 PW-2 met PW-1. PW-2 told him that there was a land for sale going for Kshs. 70,000/- to 100,000/-. He showed him a copy of title Deed to that land. They went to meet the owner, the 1st Respondent. They met him in his house and he prayed for them after singing. He said he had land for sale. He took them to the land at Lelmock, Kesses area. The land was registered in the name of the 1st Respondent. They had a copy of the Title Deed and an official search. The complainant promised to pay for it. On the date of payment the 1st Respondent went in company of the 2nd Respondent. The complainant thought the 2nd Respondent was the wife of the 1st Respondent. The two opened a joint account at Equity Bank into which the complainant deposited or transferred 580,000/-. A neighbor called *Kiptoo* advised the complainant to have possession of the land. He moved into it. After a few days he noted the same land had been sold to two other persons. The complainant demand for a refund of his money. He reported to the village elder and it did not work. The Respondent threatened to kill him. He reported to the CID. The Respondent were arrested. They claimed they had leased the said land to the complainant and had not sold it to him.

The 1st Respondent in his defence stated that he had met the complainant through an in law. The complainant leased land parcel No. Lumakanda 58. The 1st Respondent owned land parcel Lumakanda 59. The 1st Respondent moved into land parcel Lumakanda 59. 1st Respondent gave him notice. He did not make a land sale agreement with the 1st Respondent. He signed no sale agreement. The agreement was forged as well as his name in it.

DW-2 in her defence stated that the 1st Respondent leased her land in the year 2008 for 5 years. He was to pay 580,000/-. The land belongs to her late husband. The 1st Respondent who is her in law had given the complainant a house to live in. they both later gave him notice to vacate and he reported them to the D.O. He alleged that he had bought the land. He however had no sale agreement then. She made no agreement. Her name was put in it and even the name of her deceased mother-in-law. The land goes an acre for a million. She never sold the land.

Their witness, the DW-3 stated that the 2nd Respondent and the complainant went to the bank and left him outside. He then heard them say the money was for leasing and not buying.

The trial magistrate evaluated the evidence and found that the prosecution case was contradictory and the witness inconsistent. The evidence was thus unreliable and on the grounds accorded the Respondent the benefit of doubt. She acquitted them under *Section 215* of the *Criminal Procedure Code*.

The state dissatisfied with the said acquittal, appealed to this court on the grounds that:-

- (1) The prosecution evidence was totally disregarded leading to the acquittal of the Respondents.
- (2) The evidence on record was not properly evaluated and hence the acquittal.
- (3) The appellant had established all the ingredients of the charge beyond reasonable doubt.
- (4) It was an error by the court to find there were major inconsistencies and contradictions in the evidence by the prosecution witnesses.

They urged this court to set aside the judgment and convict and sentence the Respondent for the offence.

I have evaluated the evidence afresh and I can state that the trial court was correct in finding that the prosecution case was riddled with inconsistencies and contradictions. When PW-1, the complainant herein was cross examined, he contradicted his evidence in chief when he said he was to buy 10 acres for 140,000/- per acre. He stated the consideration for it was 1.4 million. This is even inconsistent with the particulars of the charge which discloses that he was being sold land No. Tulwet/Kesses Block 4 (Lelmokwo) 59, measuring 4.06 Ha for 580,000/. PW-1 in his evidence in chief stated it's the 1st Respondent who was selling him the land. He had a copy of Title Deed in his name and a search certificate which he produced in court as exhibits. It is therefore questionable how on cross examination he alleged the agreement was written that it is the 2nd Respondent who was selling the land and the 1st Respondent was just a witness. He claimed that the 1st Respondent told him that the 2nd Respondent was a wife to his deceased brother and had a land to sell to him. This claim is a diversion from his evidence in chief.

There are also glaring inconsistencies and contradictions between the evidence of PW-1 and PW-2. PW-2 alleged that when the 1st Respondent took them to view the land, he stated that he had 1.5 acres and the 2nd Respondent 2.5 acres and they were selling it jointly. They negotiated and agreed at 145,000/- per acre. PW-1 never disclosed anywhere of land that was being sold to him jointly by the two Respondents. He also on cross examination disclosed an acre was to go for 140,000/-. These inconsistencies and contradictions were not resolved by the time of closure of the prosecution case.

As was rightly submitted by the Respondents, relying on the case of *Richard Appela vs Republic, C.A No. 45 of 1981*, two contradictory accounts can't be admitted in a court of law as evidence of the truth. One is true and the other is false, or both are false. There is no possibility of both to be admissible due to their contradictory nature.

Another case relied on is of *Ndungu Kimaru vs Republic, Appeal No. 22 of 1979 (KLR)* where the court held that:-

“The witness in a criminal case upon whose evidence is supposed to be relied on, should not give the impression in the court's mind that he is not straight forward or that is of doubtful integrity. It is unsafe to accept his evidence.”

The evidence of PW-1 and PW-2, given the inconsistencies and contradictions in it, cannot safely be relied to arrive at a conviction. The trial court was right in finding so and this appeal by the state was not warranted. It is accordingly dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of December, 2018

In the presence of:-

- (1) Ms Wabomba for the appellant
- (2) Ms Mumu for State
- (3) Mr. Mwelem - Court clerk