



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 95 OF 2013**

**WALTER OWINYO OMOLLO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**From original Conviction and Sentence in Criminal Case number 308 Of 2012 of the Principal Magistrate's Court at Bondo – Hon. P.W MUTUA (Esq)**

**JUDGMENT**

1. The Appellant was charged with Obtaining Money by False Pretences Contrary to Section 313 of the Penal Code and with Uttering a Document With Intent To Defraud Contrary to Section 357 (b) of the Penal Code. He denied the charges but after hearing six Prosecution Witnesses, the Unsworn Statement of the Appellant and the testimonies of the five Defense Witnesses, the Trial Magistrate found the Appellant guilty, convicted him and sentenced him to a fine of Ksh. 300,000/- or two years Imprisonment on the charge of obtaining money by false pretenses and a fine of Ksh. 50,000/- or one year imprisonment for uttering a document with intent to defraud.

2. Being aggrieved the Appellant filed this Appeal basing it on the following grounds:

**“(I) That the learned Trial Magistrate erred in law and facts by failing to warn himself of danger involved in conviction**

**with a single evidence.**

**(ii) That the learned Trial Magistrate erred in law and fact not to adhere to the required standards of the law in Convicting me in the evidence that were clearly contradicting.**

**(iii) That the learned Trial Magistrate erred not to note that there was no any agreement as evidence which was brought to court connecting me to the said allegation.**

**(iv) That this Prosecution failed to prove beyond any reasonable doubts the single evidence which was before the entire trial period.**

**(v) That this Prosecution failed to prove beyond any reasonable doubts by not producing before court essential Witnesses to whom their evidence was fatal to the prosecution case and it was injustice convicting me without elaborate findings and consideration to my Alibi defence which strong enough to secure an acquittal.”**

Supplementary Grounds:

**“(I) That the Trial Magistrate misdirected himself in Law and facts by convicting me without**

considering that there was no independent Witness to corroborate the evidence of the Complainant.

(ii) That the Trial Magistrate erred in law and facts by convicting me without considering this Complainant did not prove Possession of the said money in question.

((iii) That the Trial Magistrate erred in law and facts by convicting me in absence of essential Witnesses resulting into unfair unfair trial.

(iv) That the Trial Magistrate erred in law and facts by convicting me without considering my demise evidence which violated my rights to fair trial.

(v) That the Trial Magistrate erred in law and facts by convicting me without considering that there was no proof of false pretence and the prosecution had no basis of charging me

(vi) That the Trial Magistrate erred in law and facts by making assumptions in drawing conclusion which was no supported with evidence.

(vii) That the Trial Magistrate erred in law and facts by convicting me without considering hat there was nothing linking me to the Commission of the Offence and there was no other person who saw me giving the Complainant Copy of the marked MFI-P1.

(Viii) That the Trial Magistrate erred in law and facts by convicting me on wrong Section of the Charge.

(ix) That the Trial Magistrate erred in law and facts by convicting me on a defensive Charge Sheet which denied me a fair Trial.

(x) That the Trial Magistrate failed in law and facts by convicting without considering that the Complainant was not consistent in his testimonies and was not credible.

(xi) That the Trial Magistrate erred in law and facts by convicting me without considering that there was glaring contradictions in the Prosecution Witnesses.”

3. Briefly the facts of this case were that on 14th April, 2012, the complainant a trader and retired Teacher, was approached by the Appellant who she knew as a land broker. He told her that he had a parcel of land to sell; that its owner was in Nairobi but she had sent him an Identity -Card a Title Deed, a Certificate of Search and a PIN Certificate. He was to later visit her at home and give the documents to her. He even went and showed her the land-South Sakwa/Barkowino/2868. He told her that the purchase price was Ksh. 650,000/- and in his presence she sent Ksh. 50,000/- to telephone No. *[particulars withheld]*. The Appellant then told her that the proprietor would come on 18th but on that day when she called the number to which she had transferred the money she did not reach the woman. The woman later called her on a different number *[particulars withheld]* and said she was on her way. They subsequently met at Total Petrol Station in Bondo. The Appellant, the woman and herself then proceeded to the offices of Advocate Odongo where a sale agreement was prepared. Thereafter they proceeded to the Kenya Commercial Bank and the Complainant withdrew Ksh. 600,000/- which she paid to the woman in the presence of another woman who the woman introduced as her daughter. The third Accused then paid some money to the Appellant. After the complainant paid the Ksh. 600,000/- to the woman (third accused) they went back to the Advocate`s office and the woman ( third accused at the trial) executed the sale agreement. That was after the lawyer had asked them for their Identity Cards. They then parted ways. The next day she informed the Appellant that she wanted to clear the land but he told her to wait until the transfer was effected. This aroused her suspicion but when she went to see the Advocate, he at first assured her that the transaction was genuine only to later inform her that she had been conned. Together they went to Bondo Teachers Sacco where the woman had said she had an account and they got her details. They then proceeded to the Chief of the area the woman hails from and he took them to her home. They apprehended her and took her to Bondo Police Station. The Appellant was subsequently arrested. Investigations were carried out and he was arraigned in court jointly with two others.

4. The appellant who during the trial was represented by Mr. Kopot Advocate made an unsworn statement and called two witnesses. He stated that he sells motor vehicle spares. He recalled that on **20/4/2012** a police officer asked him to go to Bondo Police Station with **Ksh. 10,000/-** so that he could tell him what was happening. He did not go only for him to be picked by eight Policemen at 1 p.m. He was put in the cells without anything being recorded in the Occurrence Book. The next day he was taken to the Criminal Investigation Department Officers who informed him of the charge and told him to record a statement which he declined to do. One Mr. Koech then went to his house and carted away some goods as he had not been given money. He stated that he was later arraigned in Court and freed on bond. Of his two witnesses one testified that she had sold goods worth Ksh. 41,000/- to him on 7th March, 2013. she identified a receipt she had issued to him. The second witness testified that on 27/3/012 he had sold a sofa set worth **ksh. 24,000/-** to a woman called Pamela. He identified that woman among the people who were in Court on that day.

5. The Appeal was canvassed by the Appellant in person. He submitted that the charges against him were not proved beyond reasonable doubt. That the charge was defective as the sum it alleged he had obtained from the complainant was different from what she testified he had obtained from her. He urged the Court to rely on the case of **Yongo V. Republic** and find that as a result his right to a fair trial was violated and acquit him. He submitted that the deficiency in the charge was not curable under section 382 of the Criminal Procedure Code. He also submitted that no eye witness to the payment of the money to him was called, that the Complainant did not prove that she withdrew the money from her account and neither was her Bank Manager called to confirm that fact. He also wondered why the Land Registrar was not called to prove whether the title deed was genuine or not. He contended that it was not established that the title deed was genuine or fake. He further submitted that the Advocate who allegedly drew the sale agreement and a Safaricom statement to confirm that a sum of ksh. 50,000/- was sent to the alleged phone number ought to have been produced. He contended that failure to call these essential Witnesses arose from fear that their evidence would have weakened the case. He stated that this two was a violation of his right and urged the Court to be guided by **Bukenya V. Uganda ( 1972) EACA 341** on 549. He contended that there was no documentary evidence to show that he received he money in question and that there was no proof of the false pretense. He stated that the Trial Magistrate made assumptions that were not supported by evidence and that he failed to appreciate that the proper charge would have been conspiracy to commit a felony. He stated that as it was never proved the title deed was fake or genuine there was no intent to defraud. He also contended that as there was no eye witness to prove that he gave to title deed to the complainant the offence of uttering was not proved. He urged this court to find that Complainant contradicted herself by stating that she sent the Ksh. 50,000/- to two different numbers; That her testimony in chief differs with her testimony on oath. Further that he ought to have been acquittal of uttering a false document following the Trial Magistrate`s finding that it had not been proved that the 3rd accused had made the documents. He contended that there was no evidence to link him to the offences and that the Complainant had framed him due to greed for money whereas the Trial Magistrate was biased, had already made up his mind and did not consider the defence. He urged this court to find that his right to a fair trial was taken away and to quash the conviction and set the sentence aside.

6. Mr. Ruto Prosecuting Counsel on his part submitted that the charges against the accused were proved beyond reasonable doubt and that the Court was lenient in its sentence. He stated that it had been demonstrated through evidence that the Appellant was the author of the entire transaction; that the investigating Officer had produced the Appellant`s bank statement as proof that he deposited ksh. 150,000/- which was part of the proceeds of the sale. That there was also an inventory of goods seized from the Appellant`s house which the Appellant could not account for and which it was rightfully concluded he bought with the money he obtained from the Complainant. Further that the agreement, title deed and official search which were vital documents were produced. He contended that the punishment meted was within the Law and urged this Court to dismiss the Appeal.

7. In his response the Appellant reiterated his written submissions save to add that the items collected from his house were found to be his since he had purchased them in March yet the offense were allegedly committed in April. As for the sale Agreement he stated that his name did not appear there a fact which the trial Magistrate failed to consider. He stated that he was at work in Kisumu when the documents were recovered from the house of the 3rd accused. As for the bank statement it was his

submission that he had operated that account for a long time. He added that on the first day of the trial the Complainant raised his hand to withdraw the case but the court ordered him to sit down and further that the Trial Magistrate did not allow him to conclude his defence.

8. As the first Appellate Court, I have reconsidered and evaluated the evidence of course bearing in mind that I did not have the benefit of seeing the witnesses. I have also considered the written submissions filed by the Appellant, those of the Prosecuting Counsel and the Appellant's reply. The evidence linking the Appellant to these two officers was water-tight. There is evidence beyond a shadow of doubt that it is him who lured the Complainant to buying land from the 3rd accused person. He was present when she sent ksh. 50,000/- to a telephone number which he himself provided and he was present when the formal sale agreement was drawn. There is also evidence that he was paid some money from what the complainant paid to the 3rd accused. A bank statement showing that he deposited a sum of Ksh. 150,000/- into his account on that very day was produced in evidence and the same goes to support the Complainant's evidence that he was privy to the transaction. It is understandable that he did not append his signature to that sale agreement as not being a party to the transaction he was not expected to do so. The complainant did give evidence and I believed her that the Appellant is the one who gave her the Identity Card, title deed and Pin Number of the alleged seller. He even went and showed her the land and since she knew him and he was a land broker she trusted him. All the documents however, turned out to be forgeries. The identity card number for instance belonged to someone else altogether and evidence to that effect was tendered- ; ( see exhibit P7- Identification report). The 3rd accused had merely juxtaposed image on an identity card belonging to somebody else. As for the title deed (exhibit P1) it was found that whereas the seal belonged to the Siaya land registry the person who purportedly signed it was not known to that registry and had never worked there. A report to that effect was tendered as **Exhibit P5** as was a certified copy of the register ( **exhibit P9**) showing that the land South **Sakwa/Barkowino/2868** belonged to Gilbert Ndolo Owuor not to the 3rd accused who the Appellant had represented to the Complainant as the propretor of the land. The fact that the Appellant dissuaded the Complainant from immediately taking possession of the land betrays that he knew that something was amiss; That the 3rd accused was acquitted on some of the charges does not absolve him from the role he played in this transaction which clearly was intended to defraud the Complainant. Both him and the 3rd accused knew very well that they were not in the position to transfer title to that land to the Complainant as it did not belong to the 3rd accused. It is my finding that there was a false pretence.

9. I do not agree that the Appellant's right to a fair trial was violated. The record shows that he had an Advocate and that his rights were observed. The charge was not defective. It bears the official rubber stamp of the police Station where it was drawn and the officer has aprehended his signature. The charges against the Appellant were supported by the evidence. The Trial Magistrate gave due consideration of all the evidence including the defence and I am satisfied the charges were proved beyond reasonable doubt.

10. The only area in which I would fault the learned Trial Magistrate is in the sentence. The Sections under which the Appellant was charged provide for imprisonment without an option of fine. However, section 26(3) of the Penal Code empowers a Court to impose a fine even under such circumstances the only exception being where the Law provides a minimum sentence-see Section 26 (3) the Penal Code.

11. Section 26 (3) of the Penal Code reads:-

**3. "A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for Imprisonment."**

The learned Trial Magistrate therefore acted within his power to impose a fine. However, having done so he ought to have given heed to Section 28(2) of the Penal Code which sets out the term of Imprisonment to be served in the event that the fine is not paid. The Appellant was sentenced to pay a fine of Ksh 300,000/- or to serve 2 years Imprisonment on Count 1 whereas a **Section 28 (2)** provides for a maximum of 12 months for fines exceeding Ksh. 50,000/-. The default sentence on Count 1 ought to have been 12 months Imprisonment. On Count 3 he was sentenced to a fine of **Ksh. 50,000/-** or 1 year Imprisonment whereas the default Sentence under Section 28 should have been **6 months Imprisonment**. The record

shows that he was sentenced on 16th July 2013 and in the event that he has already served **eighteen months imprisonment** he should be released forthwith. If he has not then his sentence is altered so that in default of the fine imposed on count 1 he shall serve 12 months imprisonment and in default of the fine imposed on count 2 he shall serve six months imprisonment. The appeal is otherwise dismissed.

**Dated, signed and delivered at Kisumu this 12th day of February, 2015**

**E.N. MAINA**

**JUDGE**

**In the presence of:**

Mr. Ruto for State Counsel

Appellant in person

Moses Okumu- Court Interpreter

ENM/aar