



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 25 OF 2014

ELIJAH ONYIEGO NYAMASEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellants, Elijah Onyiego Nyamasege and David Mbaka Obochi, were charged with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars were that on the 21st day of October, 2011 at Kisii township within Kisii County obtained cash kshs. 550,000 from Richard Omanga Ngoge by falsely pretending that they were in position to sell to him a parcel of land number KISII TOWN BLOCK III/160, a fact they knew to be false. That was Count I.
2. Alternatively, the first appellant also faced the second for personation contrary to section 382 of the Penal Code. The particulars thereof being that on the 21st day of October, 2011 at Kisii township, within Kisii County, with intent to defraud falsely represented himself to be EZEKIEL ARCHIMEDES ORWENYA the rightful owner of the land title number KISII TOWN BLOCK III/160 to MR. RICHARD OMANGA NOGE, the would be purchaser of the said land, a fact he knew to be false.
3. They both denied the offence. The trial was in the chief magistrate's court at Kisii. They were found guilty, convicted and sentenced to 2 years imprisonment on count I. The 1st accused is sentenced to 2 years in imprisonment on count II. The two sentences to run concurrently.
4. Now both convicts have appealed in Criminal case No. 26 of 2014 by Elijah Onyiego Nyamasege and Criminal appeal No. 25 of 2014, by David Mbaka Obochi.
5. The appellant, Criminal appeal No. 26 of 2014 has given 9 grounds of appeal, namely,
 1. *That the trial magistrate erred in law by convicting me since the complainant never stated how the agreement was stated before the court. He failed to establish how he gave his money.*
 2. *That the learned trial magistrate erred by convicting me since the first prosecution witness failed to bring the person who introduced him to the buyer.*
 3. *That the PW2 who was the brother of the complainant stated clearly that the agreement was signed in the bank whereby it was not so.*
 4. *That the PW3 who is the wife of the complainant stated that the agreement was signed in the house.*
 5. *That the learned trial magistrate erred in law by convicting me since the prosecution failed by calling one witness who was the sister to the complainant and she was the one who introduced the first accused to the complainant.*

6. *That the learned trial magistrate erred in law by convicting me since I was only called in the sister of the complainant whom was even stated in the defence by the first accused.*
7. *That the learned trial magistrate erred in law by convicting me by only considering the verbal story from the first PW1 by mentioning some figures which were not in the agreement and not mentioned anywhere within the whole trial.*
8. *That the learned trial magistrate was compromised by the complainant while I was there before judgment at noon. She was not able to establish how she got the figures she in her judgment.*
9. *That I wish to be present during the hearing of this appeal and that more grounds will be adduced in support of it thereof.*

6. The second appellant, criminal appeal number 25 of 2014 attacks the testimonies of the various witnesses PW1, PW3 and PW4 respectively and asserts that those witnesses proved no case against him. Consequently this honourable court do set aside the conviction against him.
7. In his personal submission, the appellant, Elijah Onyiego Nyamasege, attaches the testimonies of the various witnesses. He states that his health is deteriorating, that this Honourable court consider his bad health as it determines his appeal.
8. **The prosecution's submissions**

Both appellants were identified by PW1- the complainant- the people he dealt with in buying the land in question.

In first appellant-Elijah- introduced himself to the complainant- pW1- as Ezekiel Achmedez Orweyo, as the registered owner of the land in question. pW4 also confirmed that the first appellant, also held himself out as the registered owner of the land in question.

9. The second appellant, David, also introduced the 1st appellant to PW1, pW3 & PW4, as Ezekiel Achmedez Orweyo PW3 & PW4 were present when an agreement was entered into between the 1st appellant and PW1. This agreement was witnessed by PW3 and PW4, included the second appellant.
10. That PW3 & PW4 were also present when the 1st appellant claimed to be too sick to walk and therefore asked PW1 the 2nd appellant on his behalf. That he was too sick to walk to the back.
11. That it was shown that Kshs. 530,000 was indeed paid (or given) to the 2nd appellant.
12. PW5- the document examiner- confirmed that both appellant signed the sale agreement. That it is, therefore, our submission that the prosecution adduced sufficient evidence to show that the two appellants obtained money from PW1- the complainant and they did so falsely, pretending that they were in a position to sell him a parcel of land, a fact they knew to be false, because the 1st appellant was not the registered owner of the said piece of land and in fact was not the person purported to be.
13. In respect of the Count II facing the 1st appellant, it was shown that in fact, this appellant produced a national identity card- a copy thereof- in the name of Ezekiel Archmedes Orweyo, yet it was shown that his real name was Elijah Onyiego Nyamasege.
14. The trial magistrate was therefore correct in convicting the appellant for the offence charged. I therefore urge this court to dismiss the appeal and confirm the conviction and sentence thereof.
15. In the other words, learned counsel for the state, Mr. Otieno, has opposed the appeal and submitted that the prosecution proved all the elements of the offence and that the conviction was proper in the light of the evidence. On the other hand the appellants have raised no new issues in their appeal to warrant consideration in their favour, either on joint count I or on single Count II, respectively.
16. As to whether there was sufficient evidence to support the conviction, this court, as this is the first appellate court, is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify, see *Okeno vs. Republic* [1972] EA 32.
17. In order to succeed in proving the offence of obtaining by false pretence under S.313, the prosecution must prove;

That the accused falsely pretended with intention to defraud and

Obtains from any other person anything capable of being stolen or induces any other person to deliver to any other person any that capable of being stolen

Is guilty of misdemeanor in the alternative court, under s.882 of Penal code, the prosecution must prove i) a person who, with intent to defraud any person ii) falsely represents himself to be some other person, living or dead iii) is guilty of a misdemeanor.

18. Having read the trial court's record of proceedings and the judgment thereof, and having evaluated the evidence, I find that the prosecution had proved all the elements of the offence and that the conviction and the sentence was proper.

19. Accordingly, I dismiss this appeal and uphold the conviction and the sentence of the trial court. Right of appeal within (14) days.

20. Orders accordingly.

Dated and delivered at Kisii this 6th day of March, 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:

Two appellants in person.

Otieno for the respondent

Edwin Mongare Court Clerk.