



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CRA NO.75 OF 2013

(Appeal originating from the judgment and conviction of Hon. N. Shiundu (SPM)

in Malindi Cr. No.593 of 2010)

KURSHED BEGUM MIRZA.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars were that on diverse dates between 16/3/2010 and 14/4/2010 at Malindi Township in Malindi District within Coast Province, the appellant, with intent to defraud, obtained from Roberto Manganeli cash ksh.11,000,000/= by false pretending that you were in position to sell a piece of land in Watamu, a fact you knew to be false or untrue.

The appellant was placed on probation for three years. The grounds of appeal are that the charge was defective, that prosecution evidence did not disclose any *prima facie* case to warrant placing the appellant on her defence, that the ingredients of the offence were not proved, that the conviction is against the weight of the evidence; that the appellant was not accorded the benefit of doubt and that the trial court erred by concluding that the appellant was aware that the land she was selling had ownership dispute.

Mr. Odongo, counsel for the appellant submitted that the appeal is against conviction only. Counsel said the charge sheet was defective as it did not include the plot number. The transfer document and sale agreement did indicate the plot number. The transfer document and sale agreement did indicate the plot number being sold and the charge sheet did not conform to the provisions of section 137 of the Criminal Procedure Code. This led to miscarriage of justice. PW2 alleged to be the owner of two plots and these plots were totally different from the appellant's plot.

Mr. Odongo further maintains that, the ingredients of obtaining by false pretence were not proved. The appellant was selling 7/48 share out of Plot No.21. There was no evidence that this plot did not belong to the appellant. There was no proof of intent to defraud. The title deed for Plot No.21 has many entries. Entry No.68 is a transfer in favour of the appellant. The court visited the land and the record shows that the plot was there and there is a cinema hall. Entry No.6 and 7 on the title is transfer in favour of Mirza Shali who is the appellant's husband who is deceased and the appellant obtained letters of administration. It is further contended that the appellant ought not to have been put on her defence as even the complainant's evidence confirms that the plot is there on the ground. If there was overlap of plots, a

survey ought to have been done and this could have been a civil dispute.

Mr. Odongo contends that, the trial magistrate did not understand the matter. The judgment refers to Plot Number 7. The court held that the appellant did not produce any document of ownership yet the land entry in the title is in favour of the appellant. PW2 sued appellant's husband and the suit was dismissed. By 1980, the appellant's husband was already owning his share before he died in 1997.

Mr. Nyongesa, state counsel, opposed the appeal. Counsel maintains that no prejudice was suffered by the appellant due to the non inclusion of the plot number in the charge sheet. The issue was not raised before the trial court. The appellant knew very well that she did own the plots and therefore was stealing by intending to sell the plots. She knew that she had no ownership documents. PW5 testified that he had sold the plot to PW2. Something capable of being stolen was indeed stolen. The trial court visited the scene and even drew a sketch map in the judgment.

The record of the trial court shows that **PW1 Roberto Manganeli** was the complainant. He entered into a sale agreement with the appellant to purchase a plot at Watamu. The plot being sold was 7/48 shares out of Plot No.21 for Ksh.11 million (Ksh.Eleven Million). He fully paid the purchase price. The transaction was done before Mr. Kupalia Advocate. He visited the plot and there were some old buildings and a fence. According to him, the plot was ½ an acre, but later noted that, it was 1.77479 acres. He paid the 4% transfer fee of Ksh.400,000/= to Kupalia Advocate. He later discovered that **PW2, Jackson Kaibunga** was claiming part of the plot he bought. He signed a transfer for a plot size of 1.77479 acres but was later shown a transfer for a plot size of 0.1100 hectares. It is PW1's evidence that **Jackson Kaibunga (PW2)** showed him documents proving that the plot was his. The appellant had not told him that a section of the plot she was selling belonged to Kaibunga. Kaibunga owned plot number 670 and 809. PW1 reported the matter to the police. It is his further evidence that the appellant's plot had old building ruins a part of which used to be a disco place. There is no house belonging to PW2 on the ground. The disco building belonged to the appellant. A portion of the sold plot had a restaurant known as Happy Night.

PW2 Jackson Kaibunga testified that he bought plot numbers 670 and 809 out of the mother title plot number 21. He has owned the two plots since 1995. He heard that the appellant who is his neighbour had sold a plot to PW1. On investigations, he noted that the appellant had sold a plot which included part of his two plots. He had not authorized the appellant to sell his plots. It is his evidence that Happy Night Restaurant was on the ground by the time he bought his plot. The restaurant belonged to the appellant's husband. The plot with buildings on the ground belongs to the appellant and his plots are not developed.

PW3 John Kebaso is a Registrar of titles. He testified that plot numbers 809 and 670 belonged to PW2. **PW4 P C Kariuki Njeru** was based at the Malindi Police Station. He investigated the case and found out that money was paid to the appellant yet the plots being sold belonged to PW2. He decided to charge the appellant with the offence.

PW5, Ali Suleiman Ali is the son of the original owner of Plot No.21 Suleiman Bin Ali. He testified that together with his brother they became administrators of their father's estate. He sold two plots to **PW2, Jackson Kaibunga**. He denied selling 7/48 undivided share to the appellant. He knows the appellant. His late father had sold one share to the appellant's husband, Mirza. Mirza developed the plot and built Dolly cinema and Happy Night Club. There is an old water well on Nurza's plot.

The appellant in her sworn evidence testified that her late husband, Mirza Sharif bought a plot from the original owners Suleiman Ali Suleiman and Sheikh Omar Dhaman Al-amoody in 1979. Her husband passed on and he obtained letters of administration that were confirmed. Her husband developed a Cinema Hall and a night club called Happy Night. She produced development permit from the Municipal Council of Malindi. It is her evidence that the whole plot has buildings and she had stayed on the plot since 1979. She later leased the premises to one Emmanuel Charo. PW1 went to the plot and found beacons had been placed on the floor. PW2 had sued her husband in 1996 and the suit was dismissed.

DW2 Mohamed Suleiman Ali is the son of the original owner and a brother to PW5. His evidence is

that his father sold a portion of Plot No.21 to the appellant's husband. The appellant's husband developed a Cinema Hall and a night club on the plot. The plot was then fenced. He is one of the administrators of their father's estate with PW5 who is his younger brother. It is his evidence that **Jackson Kaibunga (PW2)** bought shares but at a distance from appellant's plot. **DW3 Ali Abdalla Twaha** is the village elder at Watamu. He testified that he settled in Watamu in 1955. The appellant's husband went to Watamu in 1978. He built a Cinema Hall in 1979. The owner of the suit land sold land to the appellant's husband.

The main issue for determination is whether the appellant obtained money from PW1 by false pretences as per the charge sheet. The prosecution evidence was to the effect that the appellant purported to sell some land that belonged to **PW2 Jackson Kaibunga**. PW2 confirmed that the appellant is his neighbour. It is the evidence of PW5 that the appellant's husband bought a plot from their late father. This is corroborated by the evidence of **DW2 Mohamed Suleiman Ali**.

The evidence on record shows that the mother title, Plot No.21 has not been sub-divided. The original title is about 12.17 acres. The owners of the land have been transferring shares to purchasers. The 6th entry on the title is a transfer dated 30/6/1980 in favour of Mirza Shah and it is for 1/48th undivided share. On 10th July 1980, Mirza Shah also bought 1/48th second share and this is entry no.7. The last entry no.68 is a transfer of 7/48th undivided share in favour of the appellant. The record shows that the appellant owns a plot on the mother title Plot No.21. The shares are undivided.

PW2 bought two plots out of Plot No.21. It appears that when PW2 fixed his beacons, he extended his plot up-to the appellant's plot. The appellant was already on the ground. Although the trial court held that the accused had no ownership document, under the ownership system of undivided shares, there is no need for a separate title. All what one need to do as proof of ownership is to refer to the mother title. The finding by the trial court that failure to produce ownership documents on the part of the appellant proved the case of obtaining by false pretences was misplaced. Apart from the entries in the mother title, the appellant had buildings on the ground. PW2 was clever enough to process some title documents. The mother title has to be extinguished and all the shareholders get their respective titles. That is the only way the problem can be resolved. When each shareholder has his/her title processed, the mother title will be closed. The appellant is one of the shareholders of the land.

Although PW5 alleged that he did not sign the transfer in favour of the appellant, his brother's evidence is to the contrary. More still, it is the original owner who sold the land to the appellant's husband. The appellant's built a building and within his plot there is a well. What was sold was not PW2's plots but the appellant's share. That is why the sale agreement and the transfer were quite clear on what was being sold.

I will not dwell on the issues relating to the charge sheet as I am satisfied that the investigators of the case as well as the trial court failed to understand the problem. The complainant alleged that he was buying half an acre of land but later claimed it was 1.77479 acres. The transfer document is clear. It is 0.1100 hectares which is less than half an acre. There is a postal search dated 6/11/2007 which shows that the appellant owns 7/48 shares in the suit land. I believe this includes her late husband's share.

In the end, I do find that there was a total misunderstanding of the dispute. There is no plot overlap. According to DW2, plots for Jackson Kaibunga are separate from those of the appellant, the trial court visited the land and was able to see the appellant's buildings. There was no false pretence on the part of the appellant. She was genuinely selling her property. The ingredients of the charge were not proved. The appeal is merited and is hereby allowed. The conviction and sentence of the trial court is set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 2nd day of July, 2015.

SAID J. CHITEMBWE

JUDGE