IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA, M'INOTI & MURGOR JJ.A)

CRIMINAL APPEAL NO.132 OF 2014

BETWEEN

CAROLYNE NABWIRE WAWIRE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma (Mabeya, J.) dated 9th June 2014

in

H.C. CR.A. No. 33 of 2011)

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JUDGMENT OF THE COURT

On 28th February 2011, the Chief Magistrate's Court at Bungoma convicted the ***appellant, Carolyne Nabwire Wawire,*** of obtaining money by false pretences contrary to ***section 313*** of the ***Penal Code*** and sentenced her to probation for a period of one year. The appellant was aggrieved and lodged an appeal in the High Court, which ***Mabeya, J***. dismissed by a judgment dated 9th June 2011. The appellant was yet again aggrieved and preferred the second appeal now before us.

The particulars of the offence with which the appellant was charged were that on 22nd May 2004, at ***Mateka Market***, in the present day ***Bungoma County***, with intent to defraud, she obtained ***Kshs. 48,000/=*** from ***Rita Kwatsima Kuloba (Rita)*** by falsely pretending that she was able to sell to her a plot of land measuring ***50 by 100 feet***, information which she knew to be false. The appellant pleaded not guilty and her trial ensued, in which the prosecution called five witnesses, while the appellant gave sworn defence and called three witnesses.

The substance of the prosecution case was that on 22nd May 2004, the appellant offered to sell to Rita the plot of land to be excised from ***Title No. West Bukusu/Mateka/1650*** for Kshs 48,000. The appellant showed Rita the plot at Mateka Market and represented to her that the parcel of land was in the process of being transferred and registered in the appellant's name by her Advocate, ***Ben Waswa***. The two signed an agreement for the sale of the plot and Rita paid to the appellant ***Kshs. 34,000*** immediately and the balance of ***Kshs. 14,000*** in June 2004. The payments were witnessed by a village elder, ***Charles Mukhwana Mandu (PW3)***, a surveyor, ***Richard Makhanu Sudi (PW 4)*** and the appellant's brother, ***Anthony Wekesa***.

After more than four years, the appellant had not transferred the plot to Rita as agreed or at all. That however did not stop Rita from purporting to sell the same plot to ***Robert Wafula Nyongesa (Robert)*** for ***Kshs 132,000.00.*** However when Robert fenced the plot and started developing the same, he received a cease and desist letter from the appellant's advocates, on the basis that he was a trespasser on the plot. That prompted Rita to conduct a search on the parcel of land and after discovering that the same was registered on 30th July 1993 in the name of ***Albert Mangoli Wawire***, the appellant's step son, she reported the matter to the police after which the appellant was arrested and charged as aforesaid.

In her defence, the appellant admitted having sold the plot in question to Rita and having received the purchase price. She maintained that the understanding between the parties was that the plot of 50 by 100 feet was to be excised from West Bukusu/Mateka/1650 which she was expecting to inherit from her deceased husband. However, when Rita sold the plot to Robert, she excised a plot of 60 by 100 feet contrary to the agreement, prompting the appellant to stop Robert from developing the plot. She maintained that she intended to transfer the 50 by 100 feet plot to Rita as soon as the succession cause involving her husband's estate was concluded. A surveyor, ***Claude Mwembe (DW3)*** testified on behalf of the appellant and informed the court that the plot as excised by Rita was 60 by 100 feet instead of 50 x 100 feet.

Also testifying on behalf of the appellant was ***Nancy Wakhungu (DW2***), a senior clerical officer at the High Court, Bungoma,who produced a succession cause file ***No. 14 of 2003*** relating to the estate of ***Christopher Wawire Maudo***, the appellant's deceased husband. In that cause, the appellant and Albert Mangoli Wawire were listed as the petitioners. DW2 further testified that on 15th November 2007, the parties to the succession cause had recorded a consent order under which West Bukusu /Mateka/1650 was distributed to the appellant and that what was pending was only confirmation of the grant.

As earlier indicated, on the above evidence, the trial court convicted the appellant and sentenced her to probation for a period of one year, a verdict which was upheld by the High Court on first appeal. Because the appellant has raised the issue of succession of trial magistrates during her trial, it is apt to point out that her trial commenced before ***Sogomo, SRM,*** who heard the entire prosecution case and the evidence of the appellant and DW2. Thereafter he was transferred and ***Ngarngar, SRM,*** took over the trial and heard the evidence of the remaining two defence witnesses, DW3 and DW4, before writing the judgment.

In the appeal before us, the appellant impugns the judgment of the High Court on three grounds, contending that the court erred by failing to fully re-evaluate the evidence; by holding that ***section 200*** of the ***Criminal Procedure Code*** was properly complied with; and by upholding the appellant's conviction.

Pressing the appeal, Mr. Waswa, learned counsel for the appellant, submitted that the first appellate court failed in its duty to exhaustively re-evaluate the evidence and come to its own conclusion. Had the court done so, he submitted, it would have noticed that the prosecution did not prove *mens rea* or an intention to defraud on the part of the appellant. He added that the plot, which the appellant sold to Rita, was to be excised from land that the appellant expected to inherit from her late husband and that she adduced evidence to show the existence of the succession cause and a consent order therein to transfer the land to her. In these circumstances, counsel contended that the appellant could not in law be convicted of obtaining money by false pretences. In any event, it was urged, the dispute was a civil matter rather than an issue for criminal prosecution.

Next, counsel submitted that the appellant's trial was null and void for failure to comply with section 200 of the Criminal Procedure Code when the magistrate who wrote the judgment took over the conduct of the case from the magistrate who had commenced the hearing. He added that it was for the appellant herself and not for her advocate, to state whether she wanted her case to continue from where the previous magistrate had left or to commence *de novo*. On that basis, counsel urged us to allow the appeal, quash the conviction and set aside the sentence.

In a rather brief and fleeting response, *Mr. Sirtuy,* learned prosecution counsel, urged us to find that the High Court had properly evaluated the evidence as it was bound to do. He added that *mens rea* was proved on the part of the appellant because she did not have title to the property from which the plot was to be excised. As for compliance with section 200 of the Criminal Procedure Code, counsel submitted that from the record, there was full compliance with the provision. He accordingly urged us to find no merit in the appeal and to dismiss the same.

Having carefully considered this appeal, we are satisfied that it raises only two questions of law, namely whether there was compliance with section 200 of the Criminal Procedure Code and whether the prosecution proved beyond reasonable doubt intention on the part of the appellant to defraud.

On the first issue, we are satisfied that it is completely bereft of merit and the appellant's complaint is not borne out by the record, which shows that when Ngarngar, SRM, took over the case on 18th February 2010, he explained the provisions of section 200 of the Criminal Procedure Code to the appellant who indicated that her advocate was not in court, as a result of which the trial was adjourned for mention on 18th March 2010. On the appointed date the appellant's counsel applied for the typed proceedings and when the matter next came to court on 6th May 2010, counsel applied for the trial to commence *de novo*, which the prosecution opposed. The court did not give directions on how the trial was to proceed. However, when the matter came up on 18th October 2010, the appellant's counsel is recorded informing the court that he wished the proceedings to continue from where the previous magistrate had left. The new magistrate accordingly heard the remaining two defence witnesses and delivered the judgment.

Beyond the fact that the record shows that the appellant was informed of the provisions of section 200 of the Criminal Procedure Code and willingly elected to proceed from where the previous magistrate had left, the circumstances of this case militated against *de novo* commencement of the hearing. The trial had gone on for two years and the prosecution had closed its case. Two defence witnesses, including the appellant had already testified, leaving only two more witnesses. In ***Nyabutu & Another v. Republic [2009] KLR 409***, this Court expressed itself as follows on some of the considerations to bear in mind on theapplication of section 200 of the Criminal Procedure Code

> ***"By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."***

(See also ***Joseph Kamau Gichuki v. R, CR. App. No.523 of 2010*** and ***Abdi Adan Mohamed v. Republic [2017] eKLR).***

We agree with the above pronouncement and affirm that this ground of appeal has no merit.

Regarding whether the prosecution proved beyond reasonable doubtintention to defraud on the part of the appellant, it is apt to set out the terms of the relevant statutory provisions. Section 313 of the Penal Code under which the appellant was charged provides as follows:

> ***"Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years." [Emphasis added]***

Section 313 of the same Code defines "false pretence" to mean:

> ***"Any representation, made by words, writing or conduct, of a matter of fact, either past orpresent, which representation is false in fact, and which the person making it knows to be falseor does not believe to be true, is a false pretence." [Emphasis added].***

With respect, we are not persuaded that the prosecution proved beyond reasonabledoubt false pretence and intention to defraud on the part of the appellant. The parcel of land known as West Bukusu/Mateka/1650, from which the plot in question was to be excised was in existence. There was a pending succession cause pursuant to which the appellant expected to inherit West Bukusu/Mateka/1650 and excise the plot for Rita. There was evidence that indeed a consent order had been recorded in the succession cause by which the appellant was to inherit West Bukusu /Mateka/1650. There was an agreement for sale with Rita, which the appellant did not deny, or dispute. In light of all that evidence, it is difficult to see how it could be concluded that the appellant made false factual representations which she knew to be false or did not believe to be true and with intent to defraud. It is even more difficult to conclude that she made false representations to Rita with the intention of defrauding her of Kshs 48,000.

To constitute a false representation under section 313 of the Penal Code, the representation in question must be of a matter of fact, either past or present. It has been held consistently that a representation about future events cannot form the basis of a charge of obtaining money by false pretences. (See

for example ***Abdallah v. Republic [1970] E A 657)*** and ***Oware v. Republic [1984] KLR 2001)***. The dicta of ***Devlin J.*** (as he then was), in ***R. v. Dent [1955] 2. Q.B. 594***, where he stated that:

> ***"a long course of authorities in criminal cases has laid down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law",***

has been cited with approval in this jurisdiction and we agree with the same.

For the above reasons, we find that this appeal has considerable merit and hereby allow the same. This was really a purely civil dispute in which the criminal process should never have been invoked. Accordingly we quash the appellant's conviction and set aside the sentence. It is so ordered.

Dated and delivered at Kisumu this 7th day of December, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR