Case Number:	Criminal Appeal 15 of 2018
Date Delivered:	06 Nov 2019
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Grace Wangui Ngenye-Macharia
Citation:	Republic v Julius Njoroge Kamau [2019] eKLR
Advocates:	M/s Akunja h/b for M/s Sigei for the Appellant.
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Sinkiyian Tobiko (RM)
County:	Nairobi
Docket Number:	-
History Docket Number:	Cr. Case No. 323 of 2015
Case Outcome:	-
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 15 OF 2018

BETWEEN

REPUBLIC.....APPELLANT

AND

JULIUS NJOROGE KAMAU.....RESPONDENT

(An appeal from the acquittal of the Respondent under Section 210 of the CPC

in the Chief Magistrate's Court at Milimani Cr. Case No. 323 of 2015

delivered by Hon. Sinkiyian Tobiko (RM) on 9th November 2017).

JUDGMENT

1. The Respondent, **Julius Njoroge Kimani** was charged with the offence of obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on diverse dates between 6th day of June, 2010 and 8th October, 2010 within Nairobi County with intent to defraud obtained Kenya Shillings one million six hundred (Kshs. 1,600,000/=) from **Young Traders (Tigoni) Ltd** by falsely pretending that he was in a position to sell to them a parcel of land **Lamu/Hindi Magogoni/640** a fact he knew to be false.

2. The Respondent pleaded not guilty to the charge. Upon the close of the prosecution case, he was acquitted under **Section 210** of the **Criminal Procedure Code**. The Appellant was aggrieved by that decision and has now preferred the instant appeal.

Grounds of Appeal

3. The Appellant raised seven (7) grounds of appeal in its Petition of Appeal filed on 18th January, 2018. The said grounds have been reproduced as hereunder:

i. That the learned trial magistrate erred in law and fact by finding that the prosecution had not established a prima facie case against the Respondent;

ii. That the learned trial magistrate erred in law and fact by failing to analyze the evidence of all the prosecution witnesses before arriving at the decision that the evidence tendered by the prosecution was insufficient;

iii. That the learned trial magistrate erred in law and fact by not allowing the prosecution time to procure crucial witnesses and ordering the prosecution to close its case despite being informed that the witnesses were engaged in other cases;

iv. That the learned trial magistrate erred in law and fact by finding that the prosecution had failed to prove the element of false pretence;

v. That the learned trial magistrate erred in law and fact by finding that the prosecution had failed to prove the intent to

defraud;

vi. That the learned trial magistrate erred in law and fact by finding that the case was an abuse of the court process for subjecting the Respondent to a criminal trial for a civil dispute;

vii. That the learned trial magistrate erred in law and fact by finding that the pendency of CMCC No. 15 of 2014 filed by the complainant seeking a refund of Kshs. 1,600,000/= plus interest thereon vitiated the instant case when indeed both cases can legally run simultaneously.

Summary of Evidence

4. This being a first appeal, this court, as a matter of law, is enjoined to analyze and re-evaluate the evidence adduced by the witnesses before the trial court afresh so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard any of the witnesses. (See **Okeno v Republic (1972) EA 32)**.

5. The evidence tendered by the two Prosecution witnesses can be summarized as follows: sometime in 2010, the Respondent approached the complainant **PW1, Monica Wambui Kinuthia** and informed her that he wanted to sell the suit property. PW1 conducted a search which confirmed that the Respondent was the sole proprietor of the land. Thereafter, the two parties entered into a sale of land agreement for the sale of fifteen (15) acres of the land at Kshs. 2,300,000/=. Upon the execution of the sale agreement on 4th June, 2010, PW1 paid the Respondent an initial deposit of Kshs. 600,000/=. She also paid him a further Kshs. 1,000,000/= upon registering a Power of Attorney donated to Young Traders (Tigoni) Ltd by the Respondent in respect to the suit property. They agreed that the balance would be paid upon obtaining the consent of the Land Control Board.

6. PW1 paid another sum of Kshs. 5,000/= to the *Settlement Fund Trustee and obtained a discharge. Thereafter, she conducted another search at the Lands Registry in Lamu* on 9th September, 2014. The search revealed that the suit property was registered in the name of the Respondent and one Daniel Kimani Chege. She registered a caution on the land on 11th September, 2014 and reported the incident to the Criminal Investigation Department in Nairobi thereby leading to the arrest of the Respondent.

7. In cross examination, PW1 confirmed that she had also lodged a civil suit in Malindi seeking reimbursement of the Kshs. 1,600,000/= paid to the Respondent together with interest thereon. PW1 also stated that she was not aware that the Respondent had deposited a total sum of Kshs. 2,000,000/= in a Lamu court in full and final settlement of her claim. Further, PW1 stated that she was not aware that the Respondent had rescinded the sale agreement as she has always been interested in finalizing the transaction.

8. PW2, Benedict Mane Mwangale was an assistant Land Registrar from the Lamu Lands Registry. He confirmed that the subject property was registered in the Respondent's name on 28th August, 2006 and title deed issued. However, in September 2013, they received an order issued in **Judicial Review Application No. 25 of 2011** to the effect that the suit property be subdivided into two equal portions and be registered in the names of the Respondent and one Daniel Kimani respectively. Accordingly, PW2 issued the two parties with title deeds. On 11th September, 2013, he received a Caution from PW1 claiming purchaser's interest. Later on 1st October, 2014, he received an inhibition from the Chief Magistrate's Court in Lamu against any transactions on the suit property.

Analysis and determination

9. The Appeal was canvassed by both written and oral submissions. The Appellant filed its written submissions on 3rd October, 2018 whilst the Respondent filed his on 12th March, 2019. The Appellant was represented by learned State Counsel, Ms. Sigei whilst the Respondent was represented by learned counsel, Mr. Nyaberi.

10. The Appellant's main contention was that the trial court erred by finding that the prosecution had not established a *prima facie* case. The learned State Counsel submitted that the sum of Kshs. 1,600,000/= paid to the Respondent by the complainant on account of the purchase price for the subject land was something capable of being stolen. She argued that the Respondent commenced his false pretences by falsely representing to the complainant that he was willing to sell her the suit property. She stated that the same was cemented in writing when the Respondent entered into a sale of land agreement with the complainant. Counsel further submitted that the intention to defraud the complainant could be deduced from the Respondent's failure to disclose that there was a court order quashing his absolute ownership of the suit property coupled with his failure to reimburse the complainant the sum of

money paid to him. In her view therefore, the evidence on record established a *prima facie* case which warranted the putting of the Respondent on his defence.

11. Counsel further argued that it was not necessary that a *prima facie* case be proved beyond a reasonable doubt. She stated that the said standard of proof is only applicable upon the close of the defence case.

12. Counsel for the Respondent on his part submitted that the prosecution's case did not establish a *prima facie* case as envisaged in the case of **R. T. Bhatt v Republic [1957] EA 332.** He submitted that as at the date of the sale agreement, the suit property was solely owned by the Respondent. However, a subdivision of the land was occasioned by a court order issued on 16th September 2013. Counsel stated that a further order was issued on 2nd October 2014 forbidding transactions in the suit property thereby forcing the Respondent to rescind the sale agreement. However, the complainant declined to accept a refund of the purchase price. Counsel further submitted that the sum of Kshs 1,600,000/= paid to the Respondent has since been deposited in a Lamu court together with a further sum of Kshs. 400,000/= on account of security for costs of a civil case lodged by the complainant therein.

13. The main issue for determination is therefore whether a prima facie case was established at the close of the prosecution case to warrant the placing of the Respondent on his defence. A *prima facie* case was defined by the then East African Court of Appeal in the case of **Ramanlal Trambaklal Bhatt v Republic (1957) EA 332** as follows:

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilia of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, …, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a "prima facie case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

14. See also Lord Parker C.J., in **Practice Note[1962] 1 All ER 448**, that:

"A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

…If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal can convict on the evidence so far laid before it, there is a case to answer."

15. From the foregoing authorities, it is clear that a *prima facie* case does not require proof beyond a reasonable doubt. The court's duty is to determine whether a reasonable court may convict the Respondent based on the evidence laid by the prosecution if no explanation was tendered by the Respondent.

16. The offence of obtaining through false pretences is defined by **Section 313** of the ***Penal Code*** 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."

17. The essential elements of the offence are:

i) The act of obtaining something capable of being stolen.

ii) Obtaining the thing through false pretence.

iii) Obtaining the thing with intention to defraud.

18. Section 312 of the **Penal Code** defines what constitutes false pretence as follows:

"Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

19. There is no doubt from the evidence on record that the Respondent made representations of fact to PW1 by words and in writing through a sale agreement dated 4th June, 2010 that he was interested in selling the suit property. The suit property existed and in fact, a search conducted by PW1 in 2010 confirmed that the Respondent was indeed the registered proprietor of the land. Thereafter, the Respondent received a sum of Kshs. 1,600,000/= from PW1 on account of the purchase price of the suit property. In my view therefore, it is clear that at the time, the Respondent had the capacity to enter into the sale agreement and fulfill the terms of thereof. In the circumstances, it cannot be said that the Respondent made a false representation of fact about the land and no evidence was tendered in that regard.

20. Further, I do not agree with the Appellant's submissions that the Respondent's failure to disclose that there was a court order quashing his absolute ownership of the suit property amounted to an intention to defraud PW1. I say so in view of PW2's evidence that the court order requiring that the suit property be subdivided into two portions and be registered in the names of the Respondent and another person, was issued later in September 2013. This was long after the Respondent and PW1 had executed their sale agreement dated 4th June, 2010. Further and in any event, I have noted from the trial court's proceedings of 24th January, 2017 that the prosecutor acknowledged that the Respondent had deposited a sum of Kshs. 2,000,000/= in Lamu CMCC No. 15 of 2014. This position has been confirmed by counsel for the Respondent. The Respondent's acts cannot therefore be deemed as fraudulent since he had already shown his willingness to reimburse PW1 the sum of money paid to him.

21. In totality, I find that the evidence laid out by the prosecution before the trial court do not establish all the crucial elements of the offence in question. I cannot therefore fault the trial court for reaching the verdict that the prosecution did not make out a prima facie case against the Respondent to warrant him being put on his defence. Further and in any event, it is clear that the dispute between PW1 and the Respondent is civil in nature since they had entered into a binding agreement. As such, PW1's recourse lay in a civil process and not a criminal court. In the premises, I cannot fault the trial court for holding that the criminal case from which this appeal lies was an abuse of the court process.

22. The Appellant further contends that the trial court erred by failing to afford the prosecution time to procure crucial witnesses. In this regard, learned State Counsel submitted that the investigating officer was denied an opportunity to testify despite having a valid reason for his absence as he was engaged in a murder trial in the High Court at Kitui. She argued that the witness would have filled in any gaps in the prosecution case by stating what investigations he had carried out and why he decided to charge the Respondent with the offence in question. Counsel for the Respondent opposed these submissions arguing that the prosecution occasioned a delay of the trial on several occasions.

23. I have carefully perused the trial court's proceedings and confirmed that only two prosecution witnesses testified between 20th February, 2015 when the Respondent took plea and 20th September, 2017. I have also noted that the hearing of the case was adjourned at the behest of the prosecution on several occasions. I therefore find that the learned trial magistrate was not at fault when he declined to allow a further adjournment when the matter came up for hearing on 20th September, 2017. Furthermore, I do not think that the evidence of the investigating officer would have tilted the weight or direction of the evidence already on record as he was not a party to the agreement for sale of the suit property.

24. In view of the foregoing, I find that the acquittal of the Respondent was proper and is hereby upheld. This appeal is therefore dismissed for lack of merit. It is so ordered.

Dated and Delivered at Nairobi This 6th November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. M/s Akunja h/b for M/s Sigei for the Appellant.

2. Respondent present in person.