

IN THE CIRCUIT COURT "A", TEMA, HELD ON THURSDAY, THE 31<sup>ST</sup> DAY  
OF AUGUST, 2023, BEFORE HER HONOUR AGNES OPOKU-BARNIEH,  
CIRCUIT COURT JUDGE

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SUIT NO: D6/02/20

THE REPUBLIC

VRS:

EBENEZER ORACCA-TETTEH MONCAR

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ACCUSED PERSON

PRESENT

C/INSP. SUSANA AKPEERE FOR PROSECUTION PRESENT

EMMANUEL KYEI-YANKSON, ESQ. HOLDING THE BRIEF OF ERIC  
ASUMAN ADU, ESQ FOR ACCUSED PERSON. PRESENT

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JUDGMENT

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**FACTS:**

The accused person was charged and arraigned before this court on a charge of Defrauding by False Pretences contrary to **Section 131** of the Criminal Offences Act, 1960(Act 29).

The brief facts narrated by the prosecution are that the complainant, Eric Yaaro is a National Security Operative and the accused person is unemployed and resides at Community 7, Tema. The prosecution claims that in the year 2017, one Ernest Noi who lives in the United States of America requested the accused to look for a potential buyer for his house *No. AN 1&3* located at Community 7, Tema. Consequently, on 16<sup>th</sup> August, 2019, the accused person took advantage of the absence of the owner and decided to rent the house. Pursuant to that, the accused person contacted an estate agent to look for someone to rent the house and the said agent led the complainant to the accused person.

The prosecution further alleges that the accused person took the complainant to the three bedrooms self- contain house for inspection. After the inspection, the complainant became interested in renting and paid a total amount of Twenty-Seven Thousand Ghana Cedis (GH¢27,000.00) for a period of three (3) years to the accused person. The prosecution states that the accused person, upon receiving the money assured the complainant that the apartment would be ready in three weeks' time. However, when the owner of the land returned to Ghana and met the complainant, he informed him that he was the actual owner and that he had no intention to rent the house but rather to sell it. The complainant later confronted the accused person and subsequently lodged a complaint with the police leading to the arrest of the accused. The prosecution further sates that investigations disclosed that the accused person made the representation when he knew he had no authority to rent the house to the complainant. After investigations, he was charged and arraigned before this court.

### **THE PLEA**

The accused person who was self-represented at the time his plea was taken pleaded not guilty to the charge after it had been read and explained to him in the English Language. The prosecution therefore assumed the burden to prove the guilt of the accused person beyond reasonable doubt.

### **BURDEN OF PROOF**

It is trite learning that in criminal cases, the burden is on the prosecution to prove the guilt of the accused person beyond reasonable doubt. See Sections 11, 13, and 15 of the Evidence Act, 1975, (N.R.C.D. 323). In the case of **Asare v. The Republic** [1978] GLR, 193, the court held in its holding two that:

*“As a general rule, there was no burden on the accused to establish his innocence, rather it was the prosecution that was required to prove the guilt of the accused beyond all reasonable doubt.*

The term "reasonable doubt" as explained by Lord Denning in the famous case of **Miller vs. Minister of Pensions** (1947) 2 All ER 372 is as follows;

*“It needs not reach certainty but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful positions to deflect the course of justice”*

### **ANALYSIS**

The accused person in the instant case is charged with defrauding by false pretences contrary to **Section 131** of Act 29, which provides that:

*“Whoever defrauds any person by any false pretence shall be guilty of a second-degree felony”*

The offence is defined under **Section 132** of Act 29 as follows:

*“a person is guilty of defrauding by false pretence, if by any false pretence or by personation, he obtains the consent of another person to part with or transfer the ownership of anything”.*

**Section 133 (1)** of Act 29 also defines false pretence as:

*“a representation of the existence of a state of facts made by a person either with the knowledge that such representation is false or without the belief that it is true and made with an intent to defraud. A representation may be made either by written or spoken words or by personation or by any other conduct, sign or means of whatsoever kind”.*

**Section 133(2)(b)** of Act 29 further defines a “representation as to existence of a state of facts” as including;

*“a representation as to the non-existence of a thing or condition of things, and a representation of any right, liability, authority, ability, dignity or ground of credit or*

*confidence as resulting from any alleged past facts or state of facts, but does not include a mere representation of an intention or state of mind in the person making the representation, nor mere representation or promise that anything will happen or will be done, or is likely to happen or be done"*

In the case of the **Republic v Selormey [2001-2002] 2 GLR 424, HC**, the essential elements of a charge of defrauding by false pretence were identified as follows;

- a. That the accused made a representation of the existence of a state of facts.
- b. That the representation was made either in writing or spoken words or by impersonation.
- c. That the representation was made with the knowledge that it was false or made without the belief that it was true.
- d. That the representation was made with intent to defraud.
- e. That the representation was made by the accused and that by that representation he obtained the consent of another person to part with something.

In the case of **Adobor v. The Republic [2007] GHACA 5 (20 December, 2007), CA**, the court held that:

*"to constitute an offence of fraud by false pretence, the accused should have made a representation which to his knowledge is false, the representation should be made to a person who believed it and as a result was induced to part with or transfer the ownership of anything."*

The court further held that:

*"to induce is to persuade, to prevail upon another person to believe something and act upon it. In the case of false pretence, the victim must have been persuaded to accept the representation made to him as true and to act upon it to his detriment."*

Therefore, to secure conviction, the prosecution must prove beyond reasonable doubt that the accused person made a representation either in writing or orally or by impersonation with the knowledge that the representation is false or without a belief that it is true, with intent to defraud which representation induced the complainant to part with the amount of Twenty-Seven Thousand Ghana Cedis.

To discharge their legal burden, the prosecution called four witnesses. The first prosecution witness (PW1) Eric Yaro, testified that on 16<sup>th</sup> August, 2019, he was looking for an apartment to rent and contacted one Baba Musah who is an agent to assist him to secure accommodation. He also contacted another person by name Thomas Opoku who informed him about a three-bedroom apartment located at Community 7, Tema and introduced the accused person as the owner. PW1 states further that he went and inspected the place with Baba Musah and the accused person who claimed he was the rightful owner to the said house. Accordingly, he negotiated with the accused person on the rent, and they both agreed on an amount of GH¢750 per month for a period of three years totalling an amount of Twenty-Seven Thousand Ghana Cedis (GH¢27,000.00). PW1 states that he paid the monies in three instalments to the accused person and the accused person issued official receipts to him which was handed over to the investigator. In support, he tendered in evidence **Exhibits "A" and "A1"**.

Additionally, PW1 testified that after collecting the monies, the accused person assured him that the apartment would be ready in three weeks' time. However, after the three weeks, he had information that one Mr. Ernest Noi is rather the rightful owner of the apartment. The rightful owner invited him for a discussion and when he went, he informed him that the property was not for renting but rather for sale and that he instructed the accused person to sell the house and not to rent it out.

According to PW1, after obtaining this information, he proceeded to the police station to lodge a complaint against the accused person since he was not truthful to him. PW1 under cross-examination by Counsel for the accused person, the following ensued;

*Q: Mr. Yaro, the accused person opened the doors of the house to you. Is that correct.*

*A: Yes, My Lord.*

*Q: You will agree with me that at the time that you came into contact with him, he was in possession of the house.*

*A: Yes, My Lord.*

*Q: The accused person did not tell you that he was the owner of the house.*

*A: He just told me that he is renting his house.*

*Q: He made you aware that he was just a caretaker at the house.*

*A: It is not correct.*

The second prosecution witness (PW2) Musah Chimsa testified that he is an Estate Agent and that somewhere in August, 2019, PW1 contacted him to assist him rent an apartment. He also contacted one Mr. Opoku and the accused person took him to a three-bedroom apartment located at Community 7, Tema. He was later informed that the accused defrauded PW1 and that the house was for a different person. PW2 states that it was at this stage that he got to know that the accused person was only a care taker of the house.

The third prosecution witness (PW3), Thomas Opoku, also testified that sometime in the year 2019, one Kwaku Tenkrong informed him that someone was looking for a room to rent. Prior to that, the accused person had informed him that he had an apartment located at Community 7, Tema for rent. Later, one Baba who is also an

agent brought PW1 and introduced him as someone interested in renting the accommodation. He led PW1 to the accused person where he was sent to the apartment for inspection and after inspection expressed interest in renting the apartment. The accused person and PW1 bargained the price with the accused person in his presence and agreed on a monthly rent of Seven Hundred and Fifty Ghana Cedis (GH¢750) for a period of three years. PW1 paid an amount of Twenty-Seven Thousand Ghana Cedis (GH¢27,000) and the accused person gave him 5% of the money which was GH¢1,400 which he shared with the said Tenkrong. When he was invited to the police station, he refunded the money the accused person gave to him to the police.

The fourth prosecution witness, No. 48088 D/L/CPL Richard Owusu Asante stationed at the Community 1 Police Station testified that on 2<sup>nd</sup> September, 2019, he was on duty when a case reported by PW1 was referred to him for investigations. He tendered in evidence the investigation caution statement obtained from the accused person admitted and marked as **Exhibit "A"**. According to him, during investigations, he visited the house in issue and noticed that it was under renovation after the accused person had collected the money of PW1. He also met Mr. Ernest Noi, the rightful owner of the house and he said he asked the accused person to look for a buyer for the house but not to rent out the place. According to him, he also told him that the accused person did not give him any money after collecting the money from PW1 in respect of the rent. According to PW4, his investigations revealed that based on the assurances made by the accused person, PW1 parted with an amount of GH¢27,000 on three different occasions and in support, he tendered in evidence **Exhibits "B" and "B1"** evidencing this fact.

Additionally, PW4 testified that after receiving the money, the accused person promised to renovate the house in three weeks. The owner of the house was surprised when he saw the house under renovation. Again, the owner of the house also revealed that the accused person was a caretaker and was only mandated to look for a purchaser for the house. He noticed further that the owner did not receive any money from the accused person in respect of the house. However, the owner declined to give a written statement. He tendered in evidence photographs of the said house admitted and marked as **Exhibit "C"** and the charge statement of the accused person admitted and marked as **Exhibit "D"**.

The accused person in his defence vehemently denied the offence and testified that the landlord Ernest Noi is the eldest of his siblings who inherited House No. AN 1/3 Community 7, Tema. The accused person states that he has been a family friend of the Noi's family for about fifty years now and that they all grew up in the same neighbourhood. According to the testimony of the accused person, previously the house was occupied by a tenant by name Mr. Wiafe and he helped the landlord to evict the tenant. It was then that the landlord gave him the keys to the house and instructed him to look for a new tenant, preferably a company, because the earlier tenants could not keep the place in tenantable condition. The accused person states that he informed people he knew who were working in companies that the house was for rental but those companies did not show any interest.

Additionally, the accused person testified that around August, 2019, PW3, who is an Estate Agent informed him that people have interest in renting the house and that they have requested to inspect the property. The accused person further testified that after inspecting the property, PW1 expressed interest in renting same and he informed he that the landlord who is resident abroad is interested in renting the

property to a company. PW1 informed him that he works with the Ghana Ports and Harbours authority. He then quoted the rent as GH¢800 per month but PW1 offered to pay GH¢750 for three years in advance for the money to be used to renovate the property for him to move in within a month. He then told PW1 that the landlord would visit Ghana within one month so PW1 could discuss outright purchase or long lease with the landlord which PW1 agreed. PW1 then stated that he was in need of accommodation and proposed to renovate one side of the apartment and move in. PW1 then informed him that he would send his brother called Ali to make instalment payments to enable them purchase the materials needed for the renovation to avoid dispute on the amount spent on renovations. Three days later, PW1 made some payment through Ali and they went to town to purchase the materials needed for the renovation. According to him, when the landlord arrived and saw the progress of renovation, he asked if PW1 would be interested in purchasing same. Subsequently, the landlord had a meeting with PW1 to enquire from him if he would want to buy the house. PW1 then informed the landlord that he was interested in the house that is why he started the renovations and asked for the purchase price for him to arrange for payment of the house in three instalments. The landlord quoted an amount of \$150,000 as the purchase price and PW1 bargained with him to \$120,000 but the parties did not conclude on the purchase price. PW1 requested for one week to think about it but when they went back to meet the owners, PW1 indicated that he had confirmed the market price of the house at TDC Company Ltd and that the \$120,000 he was offering was adequate. This led to a misunderstanding between the PW1 and the landlord and later PW1 lodged a complaint against him at the Police Headquarters.

In support of his defence, the accused person called DW1, Joseph Aryittey who testified that he first met PW1 at House No. AN 1/3 Community 7, Tema when he was the caretaker of the house. He further says that about three years prior to his

testimony before the court, the accused person and PW1, accompanied by two other persons were introduced to him as painters and that they were tasked by PW1 to take estimates to start painting works on the house. According to him, the painters began their work the next day and on number of times PW1 came to inspect the progress of work and rejected the paint that the workers were using. He states further that he took part in the renovation of the house as a mason, extended the wall between the very house and the next-door neighbour at the back of the house by three steps higher and was paid with one additional labourer.

From the evidence led by the prosecution and the defence put up by the accused person, the agreement between the accused person and PW1 to rent the property is not in dispute. The amount of money paid by PW1 pursuant to the agreement between the accused person and PW1 is also not denied. The contention of PW1 is that the accused person informed him that he was the owner of the property which the accused person vehemently denies same. PW1 under cross-examination by Counsel for the accused person testified that he opened the doors of the house and that the accused person was in possession of the house and that the accused person informed him that he was renting his house. PW1 also denied inspecting the property and authorising the accused person to carry out renovations on the property before his occupation. The testimony of the first prosecution witness that he did not inspect the house and never authorised renovation works is contradicted by the testimony of the second prosecution witness under cross-examination by Counsel for the accused person where the following ensued;

*Q: Can you tell the court the terms of the tenancy agreement?*

*A: My Lord, he came to inform me that they were supposed to do maintenance work to be done so when he went to check on the maintenance work that was when he realised that the accused person did not own the house.*

*Q: Did you know that part of the money was paid in part for renovations and maintenance work?*

*A: All I know is that he came to pay the money and he paid money for maintenance works. I do not know how the money was paid.*

Again, the third prosecution witness, the agent to the transaction under cross-examination by the accused person, the following ensued;

*Q: You are aware that the money paid by PW1 was used for the renovation of the house. Is that correct?*

*A: He said he was going to use part for renovation.*

*Q: Did you see any renovation going on in the house.?*

*A: Yes, My Lord.*

*Q: And you are aware that PW1 provided the employees to do the renovation?*

*A: Yes, My Lord.*

*Q: I am suggesting to you that the accused made PW1 aware that the house was for sale but in the interim he could rent it to him.*

*A: What he told me was that the house was for rental.*

The above reproduced cross-examination firmly corroborates the account of the accused person and DW1 that it was PW1 who requested for the property to be renovated, provided money to purchase the building materials for the renovation and also provided workmen to carry out the works on the property.

Additionally, PW4 testified under cross-examination that during investigations, he inspected the property in dispute, he also got to know the owner of the property and

that when he visited the scene, renovations were underway. He described some of the ongoing works at the scene at the time of his visit that the wall had been laid 2-layer blocks on it, 50 pieces of blocks were packed in the car park and when he visited the rooms, screeding works had been done. Under further cross-examination of PW4 by Counsel for the accused person, the following exchanges took place;

*Q: In the course of your investigations, did you get to know that it was PW1 who purchased all the items for the renovation.*

*A: Yes, my Lord.*

*Q: Can you tell the court how much was spent on the purchase of the item.*

*A: My Lord, PW1 paid an amount of GH¢27,000 to the accused person.*

Additionally, the fourth prosecution witness who claims that during investigations, he met the owner of the property who had returned from the United States of America and he informed him that he did not authorise the accused person to rent the property but rather to look for a buyer and that he did not receive any money from the accused person as proceeds of rent received by the accused person, testified that he did not obtain witness statement from this material witness for the prosecution since he was about to leave to the United States and the owner declined to give a statement to the police. In the case of **Adams v. The Republic** [1990] 2 GLR 150, the court held in its holding 6 that:

*“In a criminal prosecution a “material witness” was one whose evidence would help the court decide on the ingredients of the charge before it or whose evidence would help remove any doubt that might exist in the prosecution’s case, or whose evidence would help displace any reasonably probable defence that the accused might have. Accordingly, a material witness was necessarily a witness for the prosecution and not the defence since the prosecution assumed the burden of proving guilt., However the prosecution could refuse to call a material witness if he would not speak the truth; or*

*his evidence would negative that of the prosecution and strengthen that of the accused; he was a close relative of the accused; or his identity was not sufficiently established to enable the prosecution contact him before the trial, or he could be an accomplice or co-accused; or there were several witnesses who could testify on the point."*

In the instant case, in the considered opinion of the court, the owner of the property is a material witness to the case of the prosecution that the accused person made a representation as to a state of facts which he knew at the time of making it to be false and based on that false representation, he succeeded in obtaining the consent of the PW1 to part with money. In the instant case, the identity of the owner of the property is known to the prosecution. During investigations, the owner was in the country but according to prosecution, he declined to give a statement to assist the police to prosecute such a crucial case regarding a landed property that he has an interest in. The out of court statement that he allegedly made that he only authorised the accused person to look for buyers and not to rent out the property and that he did not receive the rent paid is inadmissible. The prosecution has not demonstrated that the owner of the property if called would not speak the truth. The accused person on the other hand has been consistent and his statement on caution as contained in **Exhibit "B"** and his testimony on oath. There is nowhere on record that the accused person has admitted being the owner of the property and that he was renting his own property to PW1. The effect of the failure of the prosecution to call the owner of the property as a witness is firmly stated in the case of **Tsatsu Tsikata v. The Republic** [2003-2004] 1 GLR 296, CA the court held in its holding 4 that:

*"The question of failing to call a material witness might be properly raised after evidence from both the prosecution and the defence had been heard. Any failure on the prosecution's part to call such a witness, if that witness's evidence could settle the matter one way or the other, would result in the failure of their case because they would not have proved their case beyond reasonable doubt. On the authorities, therefore, it was clear that the concept of*

*“material” or “vital witness” as well as the legal consequences that flowed from the prosecution’s failure to call such a witness to give evidence, subject to qualifications and exceptions, was another way of stating and applying the basic legal principle of “burden of proof” or “burden of persuasion” within the meaning of sections 11(2), 13(1) and 15(1) of NRCD 323...”*

In the instant case, the evidence on record shows that the accused person was a caretaker of the house. From the testimony of PW4, the accused person was authorised to sell and not to rent out the property. Assuming, without admitting that the accused person was only to sell the house and not to rent it out and thereby went beyond the scope of his authority, the prosecution has not established that the accused person intended to defraud PW1. Intent to defraud is defined in **Section 16 of Act 29** as *“intent to cause, by means of forgery, falsification, or other unlawful act, a gain capable of being measured in money, or the possibility of that gain, to a person at the expense or to the loss of any other person”*.

In the instant case, investigations into the matter disclosed that the money paid was used to purchase materials for the renovation as instructed by PW1 and that the accused person did not obtain a direct personal benefit. The remedy of PW1 in the circumstances lies in a civil court and not a criminal case if at any point the accused person breached the agreement between them for the renting of the property. It is not every case of default in performing an obligation that amounts to fraud, which must end at the police station. See the case of **Heman v. Cofie** [1997-1998] 1 GLR 144-158

On the totality of the evidence led by the prosecution and the defence put up by the accused, I hold that the prosecution failed to prove their case beyond reasonable doubt that the accused person made a representation which he knew to be false

which induced the PW1 to part with money with intend to defraud. Accordingly, I pronounce the accused person not guilty of the charge and acquit and discharge him on a charge of defrauding by false pretences.

**H/H AGNES OPOKU-BARNIEH**

**(CIRCUIT COURT JUDGE)**