



**Gichoi v Republic (Criminal Appeal E053 of 2022)
[2023] KEHC 25642 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E053 OF 2022
MW MUIGAI, J
NOVEMBER 22, 2023**

BETWEEN

FRANCIS GITHAIGA GICHOI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the Learned Senior Resident Magistrate Hon. Martha Opanga in Criminal Case No. 766 of 2019 delivered on 3rd November, 2022)

JUDGMENT

Background

1. The Appellant Francis Guthega Gichohi was charged with the offence of obtaining money by false pretenses.
2. The information that led to the arraignment of the Appellant before the trial court was as follows:

Obtaining money by false pretenses contrary to Section 313 of the Penal Code.

Particulars of the offences were as follows:

Francis Githaiga Gichohi: on the 31ST day of March, 2017 at Joska area of Matungulu sub-county within Machakos County, with intent to defraud falsely obtained from Denis Sabila Kshs. 880,000 by false pretending that you would sell to him two plots Lukenya Scheme no. 454 and 455 both measuring 40 by 60 ft to the said Denis Sabila a fact you knew to be false.

3. The Appellant pleaded not guilty to charge and the matter proceeded to full trial.

Prosecution Case At The Trial Court

4. Prosecution case was anchored on the evidence of four [4] witnesses.



5. PW1 was Denis Sabila. He testified that on 31/3/2017 his wife Prisca Onkundi and her friend Esther had told him prior to that day that there was a plot being sold at Lukenya Scheme. They told PW1 that the Appellant was selling two plots and that the Appellant was a church elder where Esther went to church. PW1 believed them and had no doubts about the Appellant. They urged PW1 to buy Appellant's plots and that they had gone to the area prior to 31/3/2017. Appellant had shown them to Esther who showed them to PW1's wife and then to PW1. According to PW1 he could not recall the size of the plots as it had been a while and the Title of plots were not out yet.
6. It was his testimony that on 31/3/2020 Appellant took them to Queeneel Properties Limited where their offices were and they found the Director. Appellant produced his Certificates and Director confirmed plots were his. They agreed on purchase price and told PW1 that he would sell each plot at Kshs 400,000/=.
7. They looked for a lawyer to draft the agreement and Esther referred them to a lawyer at NSSF building Cheruiyot and Company Advocates. Appellant agreed they use the lawyer as he did not have any himself. They agreed at the Advocates office that he would pay Kshs. 370,000/= for each plot and the balance was payable after the transfer cost of processing title Appellant told them was Kshs. 70,000/=. Appellant told them he would have the title processed in his name before he transferred to them because it was easier to process title that way. PW1 paid Kshs. 140,000 for the same. Copy of the agreement was before court MFI-PMFI-1. According to PW1 he went to KCB bank within the building and they transferred the money electronically. PW1 told the Trial Court that he deposited Kshs. 600,000/= to Appellant's account, PW1 deposited Kshs. 140,000/= to account of Queeneel. PW1 claimed to have deposit slip dated 31/3/2020 to account name Francis G.G. 019xxxxxxx for Kshs.600,000/= Equity Bank MFI-2. Deposit slip for account name Queeneel Royal Account No. 144xxxxxxxxx for Kshs. 140,000 Equity Bank Community Branch MFI-3.
8. According to PW1, there were two witnesses who said they pay Kshs 140,000/= in cash to the Appellant and PW1 told the Appellant they meet on 1/4/2017 so that he shows them the plot. He told them he was travelling to Embu next day but assured them that his wife would show them the plots. It PW1's testimony that next day they went to his home and called him on phone to direct them because there four plots there. He said them the toilet that was there was a land mark. PW1's wife and Esther were present. PW1 saw the beacons; he thanked the Appellant on phone and that he had put his phone loud speaker. PW1 testified that they fenced the plots and cultivated the land and Appellant told them they build a borehole for farming. They did farm until August 2017 when they were told titles were out.
9. PW1 went to the Appellant's home and Appellant's wife told them her husband had gone to the office to confirm the same and that she had not seen the said titles herself. PW1 told the trial court that he called the Appellant to go to Nairobi for transfer. Appellant said he was busy at his farm in Embu on his Macadamia farm and told the Appellant after he called severally that PW1 was disturbing him. Appellant showed them plots that were not his as his plots were adjacent and he kept using his certificate to mislead them.
10. PW1's wife went to the office of Queeneel properties and requested for map of the area and the director told PW1's wife that the two plots they were cultivating were not Appellant's. PW1 continued to talk to Appellant to either refund money or show them other plots. That later in 2018 Appellant sent him a text message saying that the two plots were family land and agreed to refund all the money Kshs. 600,000/=, 140,000/=, 20,000/= for the lawyer and 10% on the clause in total he was to refund Kshs. 990,000/=.



11. The Appellant did not refund the money. He said he was waiting for a cheque and on 14/9/2018 he sent a text telling PW1 to be patient. Appellant on a later date requested for the PW1's account number and in October he sent a text saying he was posting the cheque and mid that month he told PW1 to be patient. On 18/10/2018 Appellant told PW1 that he had a cheque of 4.8 million and said PW1 be patient and later that he was not successful and asked PW1 to allow him look for another way. Appellant kept promising to pay to no avail. PW1 in 2019 decided to report the matter at Mala KBC police station. On 23/6/19 the Investigating Officer called them and told them that they summoned the Appellant. Appellant had showed the copy of land certificates that were his 455 and 454. Certificates of ownership for plot 454 dated 27/2/1995 PMFI-4 and plot 455 dated 27/2/1995 PMFI-5.
12. On 8/5/19 They Returned To Advocate Cheruiyot who wrote to the Appellant rescinding contract letter PMFI-6. PW1 had paid the lawyer Kshs 20,000/= for the transaction, he had receipt dated 31/3/17 PMFI-7. PW1 told the Trial Court that the Appellant not known to him but his wife knew him well as well as Esther. PW1 knew Appellant on 31/3/17. Appellant kept sending him messages through SMS, greetings, Xmas, new year.
13. In cross-examination, he told the Trial Court that the Appellant was not known to him, Appellant directed him on phone where the land was and that he has never been on land with the Appellant and that the Plot numbers were 455 and 454 in Queeneel properties. Registered owner was Queeneel. Francis Githaiga was the owner. Testifying that the plots still exists; Appellant has built a perimeter wall; Appellant said he wanted the same family property because he had two sons. According to PW1 plots are adjacent to the road.
14. Appellant told them plots he was selling were behind the toilet he used as a landmark and when they realized they settled on a wrong his wife went to the office of Queeneel and was told likewise. PW1 told Court that the Appellant had obtained the Title deeds he was to transfer title to them and that he has never showed PW1's title.
15. PW1 had filed a civil suit seeking the refund of the purchase offer from the Appellant as Kshs 990,000/= . Money was to the Appellant plus 10%. PW1 was not interested in the number of plots Appellant owned but he knew Appellant owned four plots next to each other that even the neighbours confirmed. They worked on trust because Appellant also signed the agreement before receiving money.
16. In re-examination, PW1 testified that they met Mr. Githaiga's wife at his home, PW1 called him and put him on loud speaker and that there were four plots in front. Appellant directed them to the two plots behind his house and it directed Appellant where the beacons were and he was able to see them. According to the civil case PW1 sought purchase money plus 100%. He sent to the Appellant Kshs 740,000/= and paid Kshs. 140,000 for the title.
17. PW2 was Prisca Nyabiari Nyabiange. She testified that in March,2017 they had an interest to invest with her husband. A friend of her's Esther who lives at Joska told her that Francis Githaiga Gichohi had two plots to sell at Joska. As per PW2, they arranged for a day to go see the plots. PW2 went with Esther and Francis. She saw the plots 40x 60. Testifying that Francis had called Esther and showed her the plots so it was Esther who showed her the plots. PW2 liked the plots and told her husband. It was PW2's testimony that on 31/3/2017 Esther Owuor and Francis called her to the office of Queeneel Nairobi and they all met there.
18. According to PW2, Francis came with the titles for the two plots and they did a search at the said offices. The Plots were in the Appellant's name PMFI-4 and 5 was identified. They agreed to get a lawyer to write an agreement, purchase price was Kshs 440,000/= and plots were 455 and 454 within the



large block. As per PW2's testimony, the husband of Esther advised them to go to the lawyer at NSSF building. Francis and her husband wrote Agreement for sale of the plots PMFI-1 identified. PW2's husband suggested to do a bank transfer for money. Francis refused saying PW2's husband should just withdraw money and pay him. Francis said they pay 370,000/= total 740/= balance was to be paid when title was out. Francis requested that the other amount they deposit to his Equity Account for each Plot Kshs. 70,000/= total Kshs. 140,000/= was paid to Queeneel account so that when title was out it could be transferred to them PMFI-2 & 3 identified. According to PW2, in total they paid Kshs. 880,000/=, Kshs 140,000/=, Kshs. 600,000/= cash, balance of Kshs 50,000/= was to be paid upon coming out of the titles.

19. They went their separate ways and Francis told them they could start developing the Plot. Next day, they went to the plots to fence it they did not find Francis as he was called by PW2's husband on a loud speaker, and he spoke to his wife to them the photos. PW2 planted beans and maize that season and harvested end of the year. She claimed that Francis called her husband to pay the balance. He did and Francis became evasive. He told PW2's husband that plots were family property. He did not wish to sell any more. They stopped cultivating the land and PW2 went to Queeneel offices and was told they had relocated to Kamulu and went to the said offices; PW2 found the Secretary and explained herself and she was shown a big map and learnt that the two plots sold to them by Francis were not his.
20. The Secretary showed PW2 four others which were for Francis totally different from the one she was cultivating. Testifying that her husband called Francis and Francis said that he wanted to post a cheque to refund them their money, if it matured. He gave empty promises. PW2 went to Cheruiyot & Company Advocates for advice. He wrote a demand notice to Francis and PW2 personally took the notice to wife of the Appellant and the wife called him.
21. After 21 days the Advocate advised they report to the nearest police station at KB. He was summoned and they sat down, he explained himself and PW2 also explained herself. The Appellant was arrested. PMFI-6 identified. Prosecutor showed a bank statement that PW1 withdrew money from his account PMFI -8
22. PW2 continued, and told the trial court that Francis was not known to her before; she knew him through Esther Awuor and that to date he has not refunded the money.
23. In cross-examination, PW2 testified that as per the Agreement Kshs 370,000/= was paid for each plot Kshs. 740,000/=, Kshs. 600,000/= was paid in cash Kshs. 140,000. Testifying that Francis showed Esther Awuor the plots and she is the one who showed them the plots. The wife was not present during the writing of the agreement. According to PW2 Francis told them that his wife will show them the plots as the Appellant said he was busy. Appellant told them to wait for title deed to come out so that they continue the process. Appellant called and directed his wife to show them where the beacons were. Plot 454/455 belongs to Mr. Francis. He showed them the wrong plots. Francis wrote PW2, husband SMS to indicate he did not wish to proceed with the sale.
24. In re-examination, PW2 told the trial court that on the next day after the agreement they went to see the plots. Her husband called Francis and he instructed them to get his wife whom he spoke to on loud speaker and directed them where the beacons were.
25. PW3 was Esther Awuor Kambogo. She testified that in 2017 Prisca Sabila went to visit her at Joska. She built her house there. They told her they wished to buy land in the area. PW3 inquired around and found out that Francis was selling plots. PW3 spoke to Francis on phone, he told her that two plots behind the electric posts were the ones he was selling. PW3 called Prisca and showed her the plots.



26. Francis told PW3 that plots were going for Kshs. 440,000/= per plot. They set the process to purchase in motion and they did a search at Queeneel offices and found out plot 454/455 were in Francis's name. they went to lawyer and wrote down an agreement. PW3 witnessed Sabila pay for the plots. Francis told them to use the plots in the meantime. According to PW3 Francis told them that balance was payable when title deed was out. PW3 testified that Sabila and Prisca called and told her Francis told them title was out and she told Francis to transfer the plots and Francis told her they had no agreement with her. PW3 claimed that Francis knows her through church and Francis told her the physical location of the plots. PW3 told the trial court that there was a water tank near the electricity post. The plots behind were the ones he showed PW3. Francis had the Certificates and that they verified in the office of Queeneel that they were his plots and that Francis was before court.
27. In cross-examination, PW3 in her testimony told trial court that Francis did not come physically to show her the plots. She is the one who showed PW1 and PW2 plots as described by Francis and that even now the water tank and posts are still there. PW3 claimed that she knows the plots in the area are 40x 60 as she resides from there. Titles came out in the name of Francis and Sabila had paid for the transfer of title. That is when Francis started bringing issues. Kshs. 740,000/= was paid as Kshs 140,000/= was to go to transfer of title. Kshs. 140,000/= was paid. Francis wife was present when Francis was directing her on location of plots.
28. PW4 was Force No. 95843 PC W. Jecinta Mwongeli. She testified that she is attached at DCI Ruai and she performs general investigation duties. PW4 told court that she is the Investigating Officer and that the matter was reported at DCI Matungulu on 20/6/2019 and she was formerly stationed there. The Complainant was Denis Sabila who reported that on 31/3/17 the Appellant obtained from him Kshs 880,000/= with an agreement of purchasing two plots No. 454 and 455 in plot NO. 488 Lukenya Scheme registered under Queeneel Property Limited located at Joska next to his homestead. Testifying that later the Appellant told the Complainant that the two plots were family property so he could not continue owning those plots.
29. PW4 commenced investigation and recorded witness statements from complainant and his witnesses. According to PW4 Complainant availed two sale agreements dated 31/3/17, two deposit slip from Equity bank, agreement PMFI-1 exhibit 1, 2 deposit slips dated 30/3/17 of Kshs 140,000/=, Kshs 600,000/= PMFI-2- Exhibit 2, Kshs 140,000/= deposited in Queeneel Account PMFI-3 exhibit-3, Appellant convinced complainant with two certificates of ownership of the two plots PMFI-4 and 5 produced as exhibit 4 and 5 respectively. According to PW4 during the drafting of the agreement the Complainant paid KSHS. 20,000/= to Cheruiyot and Company Advocates exhibit 6. PW4 visited the scene homestead of the Appellant and saw the two plots fenced with the iron sheets later she arrested Appellant and charged him with this offense. She claimed that the Appellant was known to her before as complainant identified him to her and the Appellant was before the trial court.
30. In cross-examination. PW4 testified further that the plots belonged to the Appellant and that he had the capacity to sell at the time. According to PW4, she tried to reach Queeneel but they had closed the office. there is no existing office. she told court that no one disputes ownership of plots by the Appellant and that she does not whether caution was registered. PW4 did not know about the civil case and is not aware of any breach of a contract by the Appellant. She did not know whether the demand notice was served on Appellant. She testified that the Complainant paid for transfer of property and she recorded a statement of the complainant.
31. In re-examination, it was PW4'S testimony that Complainant deposited 600,000/= to account of the accused and paid some other amount in cash total was Kshs. 880,000/=.
32. The prosecution closed their case.



33. The matter was canvassed vide written submissions.

Trial Court Ruling On A Case To Answer

34. The Trial Court in its Ruling dated 6/12/2021, upon considering the evidence on record, and the submissions filed found that the prosecution had establishes a prima facie case against the Appellant to warrant him being put on his defence and found that the Appellant had a case to answer.

The Defence Case At The Trial Court

35. The defence case was anchored on the evidence of one (1) witness the Appellant herein.

36. DW1 was Francis Githaiga Gichohi. He told the Trial Court that he comes from Meru and further that he stammers. Testifying that in regards to the charge, it is not true. DW1 told Court that in 2017 he decided to liquidate some property at Joska 454 AND 455 registered under Queeneel properties. They issued him with the documents of ownership in his name and he produced the certificates as Exhibit (1) and (2) they also issued title deeds later on and produced the title deed as exhibit (3) and (4) respectively. DW1 found a purchaser through a broker and gave him the two Certificates and the broker is known to him by the name of Ruth.

37. He gave the said broker his phone number and after a while he called him and said he got some interested buyer. He arranged for their conversation through DW1's phone and that the buyers also had their own agent in the name of Esther. They discussed with Esther so that she could advise her clients Denis Sabila. They agreed on the purchase price and he never met Denis physically as the first time he met the buyer was the pay day and was the same date they entered into an agreement.

38. DW1 produced the Sale Agreement as Exhibit 5. According to DW1 his brother made all the arrangements for them to view the plots. Denis later said they were shown the wrong plot. They called DW1 and said they had decided to withdraw unprocedurally. They have never demanded for a transfer and that land is still in his name. They sued DW1 in a civil case and they wanted refund and that he counter claimed alleged breach of a contract. Testifying that according to their agreement, if the vendor wanted to cancel agreement, it was a requirement they send a notice through a registered post to him.

39. DW1 does not reside in Joska he resides in Meru. He told court that his house is in 452 and 453. They fenced 450 and 451 whereas he sold 454 and 455. They are neighboring parcels. DW1 told Trial Court that he has the capacity to sell and that he has a copy of a deed plan which he produced as Exhibit 6 and that the Civil Case is 786/2019 still pending.

40. In cross-examination, DW1 testified further that he sold 454 and 455. DW1 had title deeds. Titles were issued after the purchase and that at the time of sale he did not have the title deeds; he had certificates only. DW1 used a broker and could not tell whether the said broker was registered or not; he only instructed him look for a buyer for him. He did not have any agency agreement.

41. DW1 told the Trial Court that agreement is dated 31/3/2017 which he confirmed had his signature and that 488 was the mother title. According to DW1 he sold 454 and 455 personally and that he did not show the buyer the land as that is why they pay brokers. He gave him the certificates and was to show the plots up for sale. He claimed that his broker showed the plots. DW1 received Kshs. 740,000/= for the plots and there are default clauses on the agreement. DW1 testified further that Denis does not know his home in Meru and that he has a home in Joska. He acknowledged his statement and signature but disowned and that there is additional 140,000/= which he did not agree to and that he did not transfer the property as they still owe him some money. DW1 had not refunded the purchase price he received a total of 740,000/= and the total price was 800,000 each plot was 400,000/=.



42. In re-examination, it was his testimony that he is not aware of any law requiring that a broker be registered. He claimed that he 27 plots at Queeneel and that then he only had four titles and that they wanted a refund.
43. The matter was canvassed vide written submissions.

Trial Court Judgment

44. The Trial Court vide its judgment delivered on 3rd November,2022 found that the prosecution had proved their case against the accused person beyond reasonable doubt and was convicted of the offence as charged under Section 215 of the Criminal Procedure Code.

The Appeal

45. Dissatisfied by the judgment on the conviction and sentence, the Appellant vide Petition of Appeal dated and filed in court on 14th November,2022, wherein he prayed that the conviction and sentence be set aside and this appeal be allowed as prayed and the fine paid be reimbursed to the Appellant.
46. The Appeal was premised on the following grounds that:
 1. The learned Magistrate erred in law and failing to appreciate that issues raised during trial were issues that could not be entertained in criminal proceedings.
 2. The learned Magistrate erred in law and in fact by misapplying the law and shifting the burden of proof to the Appellant.
 3. The learned Magistrate erred in law and failing to appreciate that the Appellant was the registered owner of the suit properties and had the capacity to transfer a valid title to the complainant which was a future event.
 4. The learned Magistrate erred in failing to appreciate that the dispute herein was civil in nature and the Appellant had filed a suit against the complainant where he was seeking damages for breach of contract from the complainant.
 5. The learned Magistrate erred in law and in fact in holding that the Appellant had misled the complainant to believe that titles were not yet out and even asked the Complainant to pay Kshs. 140,000, despite absence of such testimony and evidence that the Appellant had received titles from Queeneel Properties.
 6. The learned Magistrate Judgement did not conform to Section 169 of the CPC.
 7. The learned Magistrate erred in law and in fact by not considering that the said agreement had specific clauses on rescission of the same which the Complainant never invoked.
 8. The learned Magistrate erred in law by imposing on the Appellant a sentence that was unduly harsh and excessive in the circumstances.
47. The matter was disposed by written submissions.



Submissions

Appellant's Submissions

48. The Appellant in his submissions dated and filed in court on 20th June, 2023, Mr. Munguti, Counsel for the Appellant raised an issue of whether the offence of obtaining money by false pretence was proved. Counsel relied on section 313 of the Penal Code which provides as follows:
- “Any person who by 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 misdemeanor and is liable to imprisonment for three years”
49. To buttress the above provision counsel relied on the case of GERAL NDOHO MUNJUGA V R HC CRIMINAL APPEAL NO. 213 OF 2011, and submitted that from the foregoing it is evident that there are three essential elements of the offence of obtaining by false pretences as follows;
- i. Obtaining something capable of being stolen;
 - ii. Obtaining through false pretences; and
 - iii. Obtaining with intent to defraud
50. As to did the Appellant obtain something capable of being stolen, Counsel opined that from the record there is witness evidence that the Appellant obtained money. It was PW1's evidence that the Appellant received Kshs 740,000/= from Denis Saliba vide agreement for purchase of Plot Numbers 454 and 455. Averring that the receipt of 740,000/= by the Accused did not constitute an offence and the prosecution was duty bound to prove that the same was obtained with an intention to defraud.
51. On did the Appellant obtain money by false pretence or with the intention to defraud the Purchaser, Counsel relied on Section 312 of the Penal Code which defines 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”
52. Submitting that from the above definition it connoted that the offence of obtaining by false pretence does not relate to future events. Contending that the transfer of the subject land to the purchaser was dependent on the Appellant receiving title documents hence prosecution had to prove that the transfer of the land was not a future event. Counsel placed reliance on the dictum of Bowen L.J expressed in the case of Edgington vs Fitzmaurice that: “there must be a misstatement of an existing fact”
53. It was the position of the Appellant that titles to land can be issued later by the land officers that the date entered in the title documents and in fact the date that appears in the title documents is the date when the documents are lodged/booked with the land offices. Averring that the agreement had clear clauses on rescission of the agreement which the complainant did not follow but instead took advantage of the criminal process to compel the accused to refund despite the fact that it is indeed the complainant who had breached the agreement.
54. Counsel urged the court to find and hold that the offence of obtaining money by false pretence was not proved to the required standard.



Respondent's Submissions

55. Respondent in its submissions dated and filed in court on 4th July, 2023, Mr. Mwongera, the state Counsel submitted that they have scrutinized in detail the issues emerging in this Appeal. Contending that it is evident that the charge of obtaining by false pretence will not suffice. Averring that the issue at hand is of a contractual nature and criminal proceedings should not be used to settle civil disputes. State Counsel relied on the case of Imperial Tobacco Ltd V Att. Gen [1981] A.C 718 wherein the House of Lords held:

“Where criminal proceedings have been properly instituted and are not vexatious or an abuse of the court process, it is not a proper exercise of the court’s discretion to grant a declaration to the defendant in those proceedings that the facts alleged by prosecution do not in law prove the offence charged”

56. Similarly, State Counsel relied on the case of Francis Kirima M’Ikunyua & Others Vs Director of Public Prosecutions Petition No. 461 of 2012, to support his position where there exist situations of criminal and civil proceedings arising from the same facts.

57. Consequently, State Counsel relied on Article 157(11) of 2010 and submitted they concede this appeal and invited the court to vacate the conviction and the sentences imposed by the trial court.

Determination/analysis

58. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

59. Having looked at the Grounds of Appeal, his Written Submissions and those of the State, it appeared to this court that the issues that had been placed before it for determination were as follows:-

- a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
- b. Whether or not in the circumstances of this case, sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.

41. The Appellant referred to Section 313 of the Penal Code which provides that:-

“Any person who by 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.”

He submitted that the essential elements of the offence of obtaining through false pretences can be summed up as follows:-

- a. Obtaining something capable of being stolen .
- b. Obtaining the money through a false pretence.



- c. Obtaining the money with intention to defraud.
42. This court therefore found it prudent to deal with the ingredients of the offence of obtaining by false pretences under the distinct and separate heads shown herein below.

A. Thing Obtained Must Be Capable Of Being Stolen

43. PW1 the complainant testified that his wife and her friend who are PW2 and PW3 respectively informed him that the accused was selling two of his plots situated at Lukenya Scheme and they encouraged him to buy the plots.
44. The accused then proceeded to take them to Queeneel properties Limited Offices where he presented copies of his certificate of ownership of the plots and were confirmed as his by the company's director and they agreed on the purchase price to be kshs 400,000.
45. PW1 testified that they then went to a lawyer's office where they agreed that he would pay kshs 370,000 for each plot and balance payable upon the transfer of title. The accused told then that he would do the transfer of the properties in his name before transferring them to PW1. A sale agreement was duly executed copy which was produced as exhibit 1.
46. It was PW1's testimony that they went to KCB bank and transferred the money electronically to the accused. Some money was paid to through cash deposit slip for kshs 600,000 belonging to the accused.
47. The appellant in his testimony stated that he found a buyer for his properties, agreed on the purchase price, a sale agreement produced as exhibit 5 was drawn and purchase price was paid.
48. it was evident that the Appellant received money from PW 1 through PW 2, which was something that was capable of being stolen.

B. False Pretence With Intent To Defraud

49. The other ingredient for the offence of obtaining money by false pretences is to demonstrate that there was false pretence.
50. The Appellant submitted that it was not the act of taking of money that constituted the offence but rather that it was taken with intention to defraud. He added that the fraud was to be found in the false pretence. He argued that the operative word under Section 312 of the Penal Code was "representation" which was by a representation by words, writing or conduct, a representation in either past or present, a representation that was false and a representation that was made knowing it to be false or believed not to be true.
51. The Appellant further submitted that the above definition connotes that the offence of obtaining by false pretence does not relate to future events and that the transfer of the land was a future event.
52. It was the appellant's submission that the facts of this case reveal that the suit land existed, had been surveyed and a boundary delineated. The Accused was the proprietor of the suit land as confirmed by certificates and later title deeds, there was no doubt that he owned the property and there was nothing false in the Sale Agreement or the land itself and it cannot be said that the accused made a false representation of fact about the land and thus the fact do not disclose an offence of obtaining money by false pretences.
53. The State on the other hand submitted that they did not oppose appeal on the ground that the criminal process should not be used to settle contractual disputes and that the charge of obtaining by false pretence will not suffice as the issue is contractual in nature thus a civil dispute.



54. In Gerald Ndoho Munjuga v Republic [2016] eKLR Mativo J (as he then was) stated as follows;

Section 312 of the Penal Code [6] defines false pretence in the following terms:-

“ 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 pretense”

The operative word under Section 312 is "representation" which is applicable in the following circumstances: -

- a. A representation by words, writing or conduct.
- b. A representation in either past or present.
- c. A representation that is false.
- d. A representation made knowing it to be false or believed not to be true.

Charles Mutua Mutemi v Republic [2022] eKLR LJ Kamau

There did not appear to have been false pretence as envisaged in Section 312 of the Penal Code or intention to defraud on the part of the Appellant herein. The ingredients of fraud were also absent. Fraud is a common law tort of deceit whose ingredients are false representation of a false fact with the intention that the other party should act on it and that party suffers damage. Concealment of a material fact to induce another party to act on false misrepresentation is another important ingredient.

55. In this case PW1’s testimony, is that there were four plots and the Accused person told him the toilet was a land mark; where the 2 Plots were. PW1, his wife PW2 and friend Esther PW3 were present. PW1 saw the beacons they fenced the plots and cultivated the land until August 2017 when they were told titles were out.
56. PW1 went to the Appellant’s home PW1’s wife went to the office of Queeneel properties and requested for map of the area and the director told PW1’s wife that the two plots they were cultivating were not Appellant’s. The Appellant claimed he was not selling as it was family land and caution was put on the land. The Appellant opted to pay back the money but did not pay even make a part payment. PW1 sought refund from the Appellant or show them their Plots. Later he refused to pay refund.
57. PW2, stated that Francis came with the titles for the two plots and they did a search at the said offices. The Plots were in the Appellant’s name PMFI-4 and 5 was identified. PW2 stated her husband that Plots were family property. He did not wish to sell any more. They stopped cultivating the land and PW2 went to Queeneel offices and was told they had relocated to Kamulu and went to the said offices. PW2 found the Secretary and explained herself and she was shown a big map and learnt that the two plots sold to them by Francis were not his.
58. PW3 inquired around and found out that Francis was selling plots. PW3 spoke to Francis on phone, he told her that two plots behind the electric posts were the ones he was selling. PW3 called Prisca and showed her the plots. Francis told PW3 that plots were going for Kshs. 440,000/= per plot. They set the process to purchase in motion and they did a search at Queeneel offices and found out plot 454/455 were in Francis’s name. They went to lawyer and wrote down an agreement. PW3 witnessed Sabila PW1 pay for the plots.



59. PW3 in her testimony told Trial court that Francis did not come physically to show her the plots. She is the one who showed PW1 and PW2 plots as described by Francis and that even now the water tank and posts are still there. PW3 claimed that she knows the plots in the area are 40x 60 as she resides from there. Titles came out in the name of Francis and Sabila had paid for the transfer of title. That is when Francis started bringing issues.
60. The Court finds that the Accused did not show the Plots for sale and received money for 2 Plots and later when confronted said that were not for sale. DW1/Appellant told court that his house is in 452 and 453. They fenced 450 and 451 whereas he sold 454 and 455. They are neighboring parcels. DW1 told Trial Court that he had the capacity to sell and that he had a copy of a deed plan which he produced as Exhibit 6 and that the Civil Case 786/2019 still pending.
61. The Accused owned 4 Plots sold 2 Plots received money from PW1 & PW2 and then later obtained titles and retracted the transfer. PW1& PW2 retracted the sale after earlier they were informed at Queeneel offices that according to the maps the Plots sold were not the Accused persons. The accused retained all Plots and the proceeds of sale and refused to release either or refund the Purchase Price to the Respondent.
62. Section 193A CPC provides for concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
63. The fact of Civil Suit ongoing where a Counter claim by Accused is made is not a bar to ongoing criminal proceedings as long as the criminal offence is proved beyond reasonable doubt by the Prosecution.
64. This court finds that the combined evidence of PW1 PW2 & PW3 which corroborated each other was not controverted by the Accused persons Defence. DW1 while admitting ownership of 4 Plots and obtaining title documents could not confirm what was available for him to sell and which Plots were available to sell. He claimed on being confronted that the sold Plots belonged to the family and had a Caution. If that was the case and he knew he could not sell why did he sell when he knew the Plots were not for sale? Why receive Purchase price and allow the Buyers PW1 & PW2 to fence and cultivate and later own up on being challenged that the land belonged to the family and could not sell?
65. The Appellant ought to have established the object of sale specifically the Plots that were for sale and identified them to the buyers; instead he left the same for his wife and/or PW3 to show PW1& PW2 the Plots near a toilet and they fenced and cultivated the same until the Accused told them that he was not selling and declined to repay the Purchase price even make Part payment in refund.
66. If later , it was found the Plots were the wrong Plots the Accused ought to have taken the initiative to show PW1 & PW2 the correct Plots and regularize the same or invited a Surveyor to point to the correct Plots sold and size, instead he said the Plots were not for sale; which means he knew so at the time of sale he would be challenged by his family and did not disclose to the buyers but concealed such material information, then on being sued made a counterclaim for breach of contract and non-completion of payment of the Purchase price. PW1& PW2 lost purchase price, Plots, funds incurred to fence and cultivate wrong Plots and litigation costs.
67. The Trial Court detailed judgment of 3/11/2022 discloses false pretense of the Accused by receiving payment for 2 Plots and failed to show them the actual Plots. PW1 & PW2 fenced and cultivated



wrong Plots the Accused gave no explanation nor made any effort to rectify the situation. Later, he obtained title deeds and refused to transfer to PW1. The Accused rescinded the contract and the Accused demanded payment for recession of contract.

68. The totality of the above evidence on record discloses deceit on the part of the Appellant to sell Plots though in his names knew were not for sale due to family obligation and caution was lodged, received money for Plots he did not confirm ownership by showing them the Plots and on being questioned refused to sell and opted to refund the Purchase price. For 7 years PW1& PW2 lost money and investment plots cost of fencing and cultivation.
69. This Court finds that the Prosecution proved its case beyond reasonable doubt and upholds conviction and sentence.

Disposition

1. For the foregoing reasons, the upshot of this court's decision is that the Appellant's Petition of Appeal that was lodged on 14th November 2022 is dismissed and the judgment of Hon Martha Opanga (SRM) delivered in Criminal Case No 766 of 2019 upheld.

It is so ordered.

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON
22/11/2023 (VIRTUAL/PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

