REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NOS. 21 & 23 OF 2019

JUSTUS MUSAU WAMBUA.....1ST APPELLANT

MUTIO WAMBUA NDOLO.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal arising from the original judgment and Sentence in Kangundo Senior Principal Magistrates' Court Criminal Case no.579 of 2015, Republic Versus Justus Musau Wambua and Mutio Wambua Ndolo delivered by Hon. D. Orimba on the 8th day of February 2019).

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JUSTUS MUSAU WAMBUA.....2ND ACCUSED

MUTIO WAMBUA NDOLO.....1ST ACCUSED

JUDGEMENT

1. The appellants herein were charged with and convicted of the offence of obtaining by false pretence contrary to section 313 of the ***Penal Code***, the particulars being that the appellant on diverse dates of the year 1995 at Ndovoini village in Matungulu Sub County within Machakos County, with intent to defraud, the Appellants falsely obtained Kshs. 1,000,000 from one **Moses Ndungu Mungai** claiming that they were in a position to sale him a piece of land of 40 acres of plot No. 325 of which they knew to be false.

2. In support of its case the prosecution called 5 witnesses.

3. It was the evidence of PW1 that under his company known as Okoa Development Company Limited he does the business of buying and selling land. In the year 1995 March, the 1st Appellant, through an agent, approached him in the company of two ladies and they told him that they had a land for sale. PW1 averred that the Appellants showed him letters of allotment and upon conducting a search, he confirmed that the land belonged to the three who were related the 1st Appellant being a son to the 2nd Appellant. According to PW1, one of the said ladies had since passed on. The said land, according to PW1, was next to KBC and they agreed on Kshs. 25,000.00 per acre and since the land was 40 acres, they agreed on the total sum of Kshs 1 million.

4. Pursuant to the foregoing, a sale agreement dated 7th March, 1995 (MFI-1) in relation to the sale was entered into before advocate Kingara and PW1 made payment through cheques dated 1st May, 1995 in the sum of Kshs 250,000.00, 16th May, 1995 in the sum of Kshs 100,000.00 (MFI2, and 3) and 8th June, 1995 in the sum of Kshs 200,000.00. The balance was paid by vouchers but some documents were destroyed by fire in his office. In his evidence, he paid a total of one million, proceeded to take possession of the land, placed the beacons and sub divided the land. However, later, PW1 discovered that the title deed had come out in the names of the three (1st & 2nd Appellant and the other deceased lady). When PW1 sought for ex planation from the 1st Appellant, 1st Appellant claimed that PW1 had not paid in full and later,

PW1 realized that someone had erected fence on the land. It was then that PW1 reported to the police.

5. According to PW1, the title to the land had come out in the year 2005 and the 1st Appellant was demanding to be paid more on top of the agreed amount. As result PW1 placed a caution on the land when he learned that the Appellants had sold that land to a third party the same year.

6. According to PW1, he did not know the vendors prior to the transaction and at the time of PW1's testimony, the land was in the name of the 2nd Appellant's son.

7. In cross–examination by the 1st Appellant, PW1 testified that the company Okoa development Company Limited was registered in the late 1990's and he is the director of the company. According to PW1, he was the one who bought the land, plot No. 325, and not the company. When he did the search on the land and the same was in the names of the Appellants and the other deceased lady. Similarly, there were letters of allotment for the land in the names of the two Appellants and the deceased lady and PW1 was given the same. Though the appellants had been taken to PW1 by an agent, PW1 could not remember the name of the broker. He however, visited the land in the company of the broker who showed him the land in the absence of the Appellants. PW1 had a map of the area and he had visited with a surveyor before he signed the agreement. It was his evidence that the sub-division was done by the surveyor. PW1 testified that he bought the land in the year 1995 but came back in 2015 and found the land still there. He confirmed that the land was never transferred to him or anyone else.

8. It was averred that the agreement for the purchase of the land was drawn by **Mr. Kingara** and company advocates but PW1 confirmed that the agreement bore neither of the signatures of the Appellants. He however reiterated that the total agreed amount was Kshs. 1 million which he paid in full and he had photocopies of three cheques with amounted of Kshs. 550,000. From the cheques, the balance was Kshs. 450,000. Though the cheques did not have the cheque numbers, PW1 insisted that he paid the full amount, the balance being paid in vouchers though he did not have any of the said vouchers. While admitting that he did not have anything to show that the land belonged to him, he insisted that he bought the land in his name.

9. Cross-examined by the 2nd Appellant, PW1 stated that he met the 2nd Appellant in his office prior to the case and at the police station. Referred to the agreement dated 7th March, 1995, PW1 admitted that in his statement recorded with the police, it was indicated that the date of the agreement was 15th February, 2015. He however conceded that the 2nd appellant did not sign the agreement. Similarly, the three cheques which PW1 allegedly issued to the 1st Appellant were not acknowledged by the 2nd Appellant and the 2nd Appellant was not with the 1st Appellant when they demanded for more.

10. In re-examination, PW1 testified that he did a search but was not issued with a copy of the same though he was shown the book. According to him, while he issued the cheques marked as MFI-2 and MFI-3, MFI-1 was issued by someone else. However, all the cheques were issued to the 1st Appellant on behalf of the rest.

11. PW2, a gazetted finger print expert whose work entailed identifying persons by means of finger print on 20th September, 2016, received from **PC Moses Okello** an exhibit marked B1-B3 which was a sale of land agreement. He also received a finger print impression of the 2nd Appellant on police form 20A. He compared the thumbs print impression on exhibit 2 pointed with blue arrow against the print impression on form 20A and found them identical in their rich character. To the right print on form 20A in the name of the 2nd Appellant hence they were made by one and the same person in the name of the 2nd Appellant. He signed the findings, dated the same and produced the report, exhibit memo exhibit, the sale agreement, the finger print and form 20A as exhibits.

12. In cross-examination by the 1st Appellant, PW2 testified that he received two sets of documents from the investigation officer in relation to this matter. The two were sale agreement dated 7th March but without the year. The sale agreement was in reference to parcel No. 325. He also received the memo referring to parcel No. Mavoko Town Block/ 2194. According to him, the thumb print was in the original form. It was his evidence that the thumb print on the land sale agreement was a photocopy but they do not use photocopies since they don't present 100% result. He stated that the right thumb print was clear in the form and he concluded that they were similar.

13. Cross-examined by the 2nd appellant, PW2 testified that he was given the originals and it was done well with the original copies. It was the evidence of PW2 that B2 marched with finger print in form 20A and that the age did not affect the finger print.

14. PW3, an advocate of the high court practicing as Kingara and Company advocates, testified that in 1995 while in the ordinary course of his practice, he had as one of his clients PW1 who was trading under the name Okoa Development who was based in the same floor with PW3. It was his evidence that he had undertaken a number of transactions for PW1 who was dealing in buying large chunks of land which he would sub-divide and sell to the public. On 7th March, 1995, he received instructions from PW1 to draw a sale agreement for the purchase of a parcel of land known as No. 325 in Lukenya Ranching and Farming Co-Operative Society Limited measuring 40 acres and was being sold by three people, the two Appellants and one **Wanza Wambua Ndolo**. The trio were taken to PW3's office by PW1 and they confirmed that they were selling the land. PW3 then took the details of the sale and farm form and both parties. He prepared the sale agreement, read it to them and they all signed the same. The 1st Appellant signed designation above his name, the 2nd Appellant fixed her right hand print and the other seller also fixed her right hand print. PW1 also signed using his signature and PW3 then witnessed the same. According to him, the terms of the agreement were contained in the agreement. PW3 released the original agreement to the purchaser and gave a copy to the sellers.

15. It was his testimony that at the time of execution clause No. 2, Kshs. 100,000.00 was paid in cash and the remaining Kshs. 900,000 was to be pain in two instalments of Kshs. 450,000.00 the first instalment being due in 120 days. After signing of the sale agreement, he did not know whether it was done.

16. According to him, the two ladies who went to his office were co–wives while the 1st Appellant was one of their sons. PW3 could not however remember seeing the copy of the title. Since it was many years since the transaction, he could not remember the sellers but he

believed that the 1st Appellant was **Justus Musau Wambua**. He disclosed that he took the details of the seller's ID cards. He produced a certified copy of the sale agreement and the complete agreement as exhibits.

17. In cross-examination by the 1st Appellant, PW3 testified that he was the author of the sale agreement produced. The Agreement had 3 copies and a copy was given to each of the party. It was his evidence that the one he exhibited had been in his custody since the time he drew it and that he had handed over a copy to the police. He confirmed that generally, an agreement has terms and conditions and failure to comply with a condition, may cause revocation of agreement but one has to revoke. He could not however recall the document the parties had though he confirmed that the land was No. 325 in Lukenya. He also agreed that he did not conduct a search since the same is only done on registered land which the Lukenya land was not.

18. PW3 revealed that a transfer cannot be done without the consent of land board and in case of death of one party, transfer cannot be affected without letters of administration. He was however not aware of the death of one of the sellers. According to him, at the time of giving his testimony, PW3 did not know whether the land was registered. While the purchase price of the land was Kshs. 1,000,000.00 he only witnessed the payment of Kshs. 100,000.00 and was not aware whether the balance was paid. He agreed that a transfer could not be effected before full payment.

19. It was his testimony that in the transaction, there was a term of payment and all the three parties signed the agreement. The agreement had 3 pages and the signatures were in pages 2 and 3. It was his position that it was not necessary for the parties to sign on the first page. He therefore denied that the document was doctored.

20. In answer to the questions posed by the 2nd Appellant in cross-examination, PW3 stated that by the time the parties went to his office, they had an agreement which he only reduced into writing and never did a transfer for the parties. It was his evidence that conveyance is complete when the possession is taken.

21. PW4, the Investigating officer testified that on 10th July, 1995 he went through the OB and discovered a case had been minuted for him for investigation. The complainant (PW1) was alleging that he bought land in 1995 from 3 sellers but when he went to check on the land in 2015, he found the plot had been fenced without his knowledge. Upon inquiry, PW1 realized that the land was being owned by one **Njoroge** so he decided to seek for assistance.

22. In the company of his colleague, PW4 visited the scene and confirmed that the land had been fenced and that it belonged said **Njoroge**. PW4 called **Njoroge** and when he went to the station, he confirmed having bought the land in the years 2007 from the same 3 individuals who had sold it to PW1. PW4 contracted PW1 who availed a sale agreement. He also contacted PW3 who drafted the agreement and he further got a receipt for payment. On further investigations, PW4 discovered that one of the sellers had passed away. Since the Appellants denied being the signatories of the said agreement, PW4 got an order to take the signature of the 1st Appellant and finger print for the 2nd Appellant for examination to confirm and the document examiner confirmed indeed that the two were the ones who signed the agreement.

23. According to PW4, the said **Njoroge** also had an agreement and the said **Njoroge** had sued PW1 in Machakos and the case was still pending in Court. However, **Njoroge** did not record his statement because he was not cooperative. According to PW4, the agreement was between **Peter Mwanzia Wambua** a representative of **Wanza Mutiso** and the Appellants and one **George W. Josiah Njoroge**. The said agreement was marked MFI-9. Upon conducting a search on the land which was Mavoko town block/294, PW4 found that the owners of the land were **Peter Mwanzia Wambua**, the 1st and the 2nd Appellant. The land was 16.21 ha and had a caution placed against it by PW1.

24. During his investigations, PW4 discovered that some payment had been made by PW1 to the 1st Appellant through 3 cheques which he produced as exhibit 2, 3 and 4 respectively and which cheques had been acknowledged by the 1st Appellant. According to PW4, PW1 informed him that he made all the payment through the 1st Appellant and some money was paid in cash.

25. Arising from his investigations, PW4 arrested the Appellants because they were both signatories to the agreement and they had sold the land to PW1 and later sold it to a third party without refunding PW1 his money.

26. In cross-examination by the 1st Appellant, PW4 testified that the land was parcel No. Mavoko Town 3/2194 but the plot No. in the sale agreement was No. 325 Lukenya. He stated that he visited the land on 10th July, 2015 in the company of PW1 who showed him the land. The Appellants were not present at the time of PW4's visit. PW4 also engaged the service of a surveyor but he could not recall his name. PW4 met the said **George Njoroge** and although he did not show letters of allotment to PW4, the said Njoroge had filed a suit claiming ownership of the land. According to PW4, the search conducted did not reveal that **George Njoroge** was the registered owner. According to him, the purchase price was Kshs1 million but the cheques were for 550,000. Kshs. 100,000 had been paid during the signing of the agreement making the total amount Kshs. 650,000. The cheques were drawn by Okoa Development Company Limited and PW1 was the registered owner of the said company. He testified that the balance was paid by petty cash totalling to Kshs. 450,000 though PW1 did not hand over to PW4 copies of the petty cash. The money had been paid to the 1st Appellant on behalf of the family. It was his evidence that he took known signature of the 1st Appellant then took the sale agreement to the expert for examination. There was a thump print in the specimen.

27. Cross-examined by the 2nd Appellant, PW4 testified that the 1st Appellant received the money on behalf of other family members. It was the testimony of PW4 that the land was sold by 3 people two of them being the Appellants.

28. In re-examination, PW4 testified that the land had been bought by the first buyer before it was sub divided. The land was No. 325 which gave birth to Mavoko Town Block 3/2194. PW4 met the 1st Appellant in Mavoko and he gave him the specimen voluntarily. According to him, he met **Njoroge** at the police station in the presence of the Appellants but he refused to record a statement.

29. PW5, was the forensic document examiner who had worked with **IP Moses Makokha** for 3 years and was acquainted with his

handwriting and signature. The said **IP Moses Makokha** had since left the service. The two used to work in the same department and he had seen memos signed by **IP Makokha**. According to his evidence, on 22nd September, 2016, the forensic document laboratory received a memo accompanying the following exhibits B1-B3, C1-C3 the questionable document and Exhibit 2, a specimen signature E. The exhibits were allocated to **IP Makokha** who analysed them and made formed an opinion that the signatures were made by the author. PW5 explained the methodology used by the examiner to arrive at his findings. The report was signed and dated 23rd December, 2016. The document presented for examination were attached to the report. B1 and B3 was a sale agreement dated 7th March, 1995 while C1 C3 was a sale agreement dated 24th October, 2007. PW5 produced the report and the attachments MFI-6 – MFI-9 as exhibit 6-9 respectively.

30. Cross-examined by the 1st Appellant, PW5 testified that he was not the author of the report and he had not participated in the preparation of the report. After the author left the service, all his files were surrendered to him to handle. It was the evidence of PW5 that there are instances when photocopies are used for comparison when the original cannot be traced and that copies could not be manipulated.

31. In cross-examination by the 2nd Appellant, PW5 testified that the maker of the document was in Kenya and he had been summoned severally but he failed to appear and as such, the department made a decision to hand all his files to another document examiner. One of the documents was a photocopy while the other one was an original. They had machines to help identify individual character and that they did not have other documents for the Appellants.

32. At the close of the prosecution's case the appellants were placed on their defence and both the Appellants opted to give sworn testimony and each had one witness.

33. In his defence, the 1st Appellant testified that he knew PW1 and that he did not receive money from him by false pretence. He testified that in the year 1995, they decided to sell to PW1 a land, plot No. 325 measuring 40 acres. During the transaction, the 1st Appellant was with the 2nd Appellant and the deceased one **Wanza Wambua**. They agreed that PW1 was to pay in three instalments in three months and they were to transfer the land to him upon payment but PW1 did not pay all as agreed. He only paid a total of Kshs. 550,000 and he had a balance of Kshs. 450,000.00 after which PW1 disappeared and he had not left them with his contact. In the same year 1995, the 1st Appellant tried to look for PW1 but was not able to trace him. He went to the office of PW1 in Nairobi and met one **Wambua Kiema** and inquired about PW1 but his whereabouts of were unknown. The said **Kiema**, gave him the contact of **Moses Ndungu Mungai**.

34. It was the appellant's case that he had not sold the plot to anybody and stated that the said **Moses Mungai** had taken possession of the plot, subdivided it and sold and that he was not prevented from taking possession. It was the testimony of the 1st Appellant that there was no one in that plot and that it had the beacon placed thereon by **Moses**. The 1st Appellant again saw PW1 in the year 2015 when he went to his house at around 8:00pm in the company of police officers. He called his brother but PW1 dismissed them and told them all was going to be handled by the police.

35. It was his testimony that he did not accompany PW1 and the police to confirm the plot. According to him, they never took PW1 to the land even after the sale but he had informed them that the broker knew where the land was. In his evidence, they were two plots namely No. 325 with its allotment produced as D-exhibit 2 and plot No. 323 letter of allotment D-exhibit 3. They had two plot 40 acres each and the 1st Appellant did not sell plot No. 325 to Njoroge as alleged and that he actually did not know the said **Njoroge** and he had never signed any agreement with him. He stated that **Njoroge** did not pay him any money. He reiterated that one of the sellers was deceased and PW1 had not paid the balance of Kshs. 450,000. The 1st Appellant denied that he had an intention of receiving money from PW1 by false pretence. He was not using the plot and that the same was in the custody of PW1. The 1st Appellant concluded his testimony by stating that it was PW1 who had failed to fulfil the contract and prayed that he be acquitted.

36. In cross-examination by the prosecution, the 1st Appellant testified that he knew PW1 and that they had gotten into a sale agreement for land but he did not know his contact. He stated that he was paid Kshs. 100,000, 200,000 and 250,000 by PW1 who was trading as Okoa Development Company. He denied that he was not paid by voucher and averred that that he had tried to reach PW1 in vain. He testified that he signed the agreement and the sellers were three and according to the agreement, it stated that he got all the money. The agreement was signed in the office of Kingara advocates.

37. In re-examination, the 1st Appellant stated that he acknowledged 3 cheques totalling to Kshs. 550,000 and that there was no other exhibit showing that he received any other money. He was not paid the Kshs. 450,000 within 60 days as agreed.

38. The 2nd Appellant never gave her testimony in defence for reasons that she had absconded court after they were placed on their defence and despite matter being mentioned severally for her to attend court and even warrants of arrest being issued against her, she was never traced by the time of defence hearing hence the matter proceeded in her absence.

39. The appeal was conceded by **Miss Mogoi**, learned prosecution counsel. According to her, it is not in dispute that at the time of the sale of the land, the Appellant and his family had the capacity to sell the land to PW1 and there is nothing to show that they did not have such capacity. Though it was alleged by PW1 that after the Appellant sold the land to him, they later sold it to a third party one **Njoroge,** there was no evidence availed in court in support of the allegation other than that PW1 has found someone in his said land after having stayed away for very many years. It was noted that the said Njoroge, who ought to have been the complainant, was not even called as witness to ascertain whether or not he had purchased the same land. According to learned counsel, if this charge was to stand, the said **Njoroge** should have been the complainant here in since he was the second person to be sold to the land after the same had been sold to PW1. After selling the land to PW1, the Appellant lacked capacity to sell the same land to any other person and if indeed they did sell the land to another person, the said person would have been the suitable person to complain against the Appellant for obtaining his money by false pretence since they lacked the capacity to sell the land.

40. It was further submitted that in his testimony, PW1 did testify that the sellers never took him to where the land was, he was taken there

by the agent who indicated that he knew where the land was. The same was confirmed by the Appellant that they never showed the piece of land to PW1 and that the same was still lying unattended. Therefore, without a surveyor's report on the current situation on the land, there was no evidence to dispute the Appellant's evidence that the land they had sold to PW1 was still available for him to take physical possession. Without the evidence of the second buyer, there was no evidence to show that they had sold the land to another person, and if the same was available, that would have not proved the offence with PW1 being the complainant, the same would have stood if the second buyer was the complainant.

41. Further, there was a dispute as to whether or not PW1 had completely fulfilled his part of the agreement as agreed since there was no evidence to confirm payment of the balance of the purchase price. However, this is a dispute that can be solved under the civil proceedings and not a criminal case.

42. In view of the foregoing, it was the position of the Respondent that the trial court applied wrong principles in deciding this matter since the evidence on record, did not support the offence the Appellant was charged with hence making it an error to convict the Appellant on the same evidence.

Determination

43. I have considered the evidence adduced before the trial court. This is a first appellate court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

44. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus;

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

45. The first issue for determination is the status of documents marked for identification but not produced as exhibits. That a marked but unproduced document is hearsay, untested and unauthenticated account was set out in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** where the court held;-

> **"16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?**
>
> **17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.**
>
> **18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case" Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.**
>
> **19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.**

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification……."

46. I therefore agree with the appellants that the learned trial magistrate fell in error when he relied on the documents which were never produced to find that the appellants had entered into agreements with PW1 and the said Njoroge and that the appellants received the cheques in question.

47. Turning to the merits, even though the State conceded the appeal, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

48. The appellants, as stated hereinabove were charged with three counts of obtaining money by false pretences contrary to section 313 of the ***Penal Code***, Forgery Contrary to Section 349 of the ***Penal Code*** and Uttering a document with intention to deceive Contrary to Section 357(b) of the ***Penal Code***.

49. In **Samat Bhima Keswala vs. Republic [1992] eKLR**, **Aganyanya, J** (as he then was) held that:

"The offence of obtaining by false pretences has seven possible ingredients which have to be proved beyond doubt before an accused person is convicted. They are (a) a false representation (b) which is made (c) by words or writing or conduct (d) of a matter of fact (e) either past or present (f) with knowledge of the falsehood or without belief that the presentation is true, and (g) the representation causing the giver to part with the thing obtained. See *Amugo v Republic* High Court Criminal Appeal No 320 of 1980."

50. In **Irene Rose Wanjira Mararo vs. Republic [2016] eKLR**, it was held by **Mativo, J** that:

"The High Court of Botswana in Lesholo & Another vs The State {1999} (2) BLR 278 dealing with an offence of this nature held that:-

i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intend to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.

ii. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not a false pretence if it is made in relation to the future event if it is made fraudulently. Where however, the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false. R. vs Dent {1952} 2 Q.B. 590

The offence of obtaining by false pretence means knowingly obtaining another person's property by means of a misrepresentation of fact with intent to defraud. For the offence of obtaining by false pretences to be committed, the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen.

Perhaps the most explicit exposition of the ingredients of the offence of obtaining by false pretences is to be found in the decision rendered by the Nigerian Supreme Court in the case of Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria SC. 41/2003 where the court stated in order to succeed in a charge of obtaining by false pretences, the prosecution must prove:-

a) that there is a pretence;

b) that the pretence emanated from the accused person;

c) that it was false;

d) that the accused person knew of its falsity or did not believe in its truth;

e) that there was an intention to defraud;

f) that the thing is capable of being stolen;

g) that the accused person induced the owner to transfer his whole interest in the property."

The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest believe in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence. The above adequately presents the law as in the Penal Code."

51. In this case, it was not disputed that there was an agreement between the appellants and another person on one hand and PW1 regarding the sale of the suit land. There was however a dispute as regards whether the full purchase price was paid by PW1. That, however, as rightly submitted by **Miss Mogoi**, learned prosecution counsel, is a matter that falls within the realms of civil law. While PW1 alleged that the same parcel of land was subsequently sold to one **Njoroge**, that allegation was denied by the appellants. There was no evidence that the said land was actually sold. In fact, the evidence on record showed that the said land had never been transferred to anyone else. It was the evidence of PW1 that he had taken possession of the said land but when he returned nearly 9 years later he found that the said land been fenced off by the said **Njoroge**. If that allegation was true, and there was no proof of that, it was incumbent upon the prosecution to prove that the appellants are the ones who authorised the said **Njoroge** to take possession of the said land. That evidence was clearly lacking as the said **Njoroge** was never called as a witness in the case.

52. As rightly submitted by the Respondent, if any money was obtained by false pretence, then the same could only have been obtained from the said **Njoroge**. This is so because at the time the transaction was entered into between PW1 and the appellants, the appellants had the capacity to enter into the same and the land was available for sale. There was no pretence at that point in time. In other words, the facts disclosed did not and could not sustain a charge of obtaining by false pretences. It is true that for there to be the offence of obtaining by false pretences the representation made must be about a past or a present fact not a future fact. In this case the prosecution's case seems to have been that the pretence arose from the failure by the appellants to transfer the suit land and the alleged sale of the same to a third party. I agree with **Gikonyo, J** in **Joseph Wanyonyi Wafukho vs. Republic [2004] eKLR** where he quoted the words of ***Devlin, J.*** *in* **R vs. Dent (1955) 2 Q.B. pp 594/5** that the fact of obtaining by false pretence does not relate to future events.

53. In the end the trial court made an order of restitution in its final orders and ordered as follows:

"It is apparent that the complainant acquired forty (40) acres for value which was agreed at 1 million. The same thereof should be transferred by the current registered owners namely Justus Musau Wambua, Peter Muasya Wambua and Mutito Wambua. I rely on section 177 and 178 of the CPC."

54. I agree with the appellants that the fundamental legal question is whether the circumstances of the case the trial court has power to compel a party to transfer a parcel of land in favour of the complainant whereas the said parcel of land is subject to an existing suit before another court with specialized jurisdiction to hear and determine land disputes which essentially are civil in nature.

55. Sections 177 and 178 of the ***Criminal Procedure Code*** provide that:

177. Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order -

(a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or

(b) that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.

178. (1) If a person guilty of an offence mentioned in Chapters XXVI to XXXI, both inclusive, of the Penal Code, in stealing, taking, obtaining, extorting, converting or disposing of, or in knowingly receiving, any property, is prosecuted to conviction by or on behalf of the owner of the property, the property shall be restored to the owner or his representative.

(2) In every case referred to in this section, the court before whom the offender is convicted may award from time to time writs of restitution for the property or order the restitution thereof in a summary manner:

Provided that –

(i) where goods as defined in the Sale of Goods Act have been obtained by obtained by fraud or other wrongful means not amounting to stealing, the property in the goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender;

(ii) nothing in this section shall apply to the case of a valuable security which has been in good faith paid or discharged by a person liable to the payment thereof, or, being a negotiable instrument, has been taken or received in good faith by transfer or delivery by a person for a just and valuable consideration without notice or without reasonable cause to suspect that it has been stolen.

(3) On the restitution of stolen property, if it appears to the court by the evidence that the offender has sold the stolen property to a person, and that that person has had no knowledge that it was stolen, and that moneys have been taken from the offender on his apprehension, the court may, on the application of the purchaser, order that out of those moneys a sum not exceeding the amount of the proceeds of the sale be delivered to the purchaser.

(4) The operation of an order under this section shall (unless the court before which the conviction takes place directs to the contrary in any case in which the title to the property is not in dispute) be suspended –

(i) in any case, until the time for appeal has elapsed; and

(ii) in a case where an appeal is lodged, until the determination of the appeal, and in cases where the operation of any such order is suspended until the determination of the appeal, the order shall not take effect as to the property in question if the conviction is quashed on appeal.

(5) The Chief Justice may make rules for securing the safe custody of property, pending the suspension of the operation of an order made under this section.

(6) A person aggrieved by an order made under this section may appeal to the High Court, and upon the hearing of the appeal the court may by order annul or vary an order made on a trial for the restitution of property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

(7) In this section and in section 177, "property" includes, in the case of property regarding which the offence appears to have been committed, not only property which was originally in the possession or under the control of a person but also property into which or for which it may have been converted or exchanged and anything acquired by the conversion or exchange whether immediately or otherwise.

56. In this case the property in question was registered in favour of the Appellant and her co-accused even prior to the transaction that preceded the criminal proceedings. I therefore agree that it cannot be said to constitute the very property stolen or the proceeds of its disposition as contemplated under sections 177 and 178 of the ***Criminal Procedure Code***. To that extent, the trial court erred in law and in fact in ordering that the land to be transferred in favour of the Complainant. Further there is doubt as to whether the Complainant completed the purchase price as agreed in the sale agreement since there is no material evidence in support of this assertion. I therefore agree that in the circumstances of this case, this was not a proper case in which restitution should have been ordered. I associate myself with the decision in **Kagiri vs. Republic [1989] eKLR** where the court of appeal at Mombasa held as follows:

"These provisions suggest that an order of restitution should be made where the very property stolen or the proceeds of its disposition are traceable and can be easily restored to the complainant. In the circumstances of this appeal various transactions have occurred in relation to the stolen negotiable instrument and issues of liability for the complainant's loss may require to be sorted out between various parties in a civil suit. In the circumstances, we do not consider that this is a proper case in which restitution should have been ordered. We therefore set aside the order made by the trial court and confirmed by the superior court for restitution of the sum of Ksh 422,980…"

57. **Bwonwong'a, J** in **Stephen Muria Mwangi vs. Republic [2017] eKLR** dealing with the same subject expressed himself as hereunder:

"The restitution orders made in favour of PW1, PW2 and PW3 involved colossal sums of money. The orders for restitution and the invocation of the provisions of section 334 (1) of the Criminal Procedure Code in the event of failure to restitute are not proper. Orders of restitution in terms of section178 the Criminal Procedure Code are made in cases involving minor injuries and small amounts of money. This is clear from the case of *Terrah Mukindia v. R (1966) EA 425*. Additionally, where substantial amounts of money are involved as in the instant appeal, the issue of restitution should be left to the parties to settle it in a civil court. Trial courts will be faced with practical problems of enforcing restitution orders of this nature. For instance, if the subject land of the appeal is to be sold in execution of a restitution order, a search has to be carried out in the land registry. If the appellant is found to be the owner, his land may have been mortgaged or charged to a financial institution as security. Again if it is agricultural land,

there will be the necessity of obtaining the consent of the Land Control Board in terms of section 6 (Cap 302) Laws of Kenya. These are but a few obstacles a trial court may be faced with in imposing restitution orders such as those made in the instant appeal. Moreover, in law orders of restitution in terms of section 178 (1) of the Criminal Procedure Code are limited to properties that have been produced in the trial court as exhibits. In the circumstances, I find that the restitution orders should not have been made and I hereby set them aside."

58. In the premises, it is my view and I find that the appeal was properly conceded by the Respondent. I allow the appeal, set aside the appellants' conviction and quash the sentence. For avoidance of doubt the order made pursuant to sections 177 and 178 of the ***Criminal Procedure Code*** is similarly set aside. I direct that the Appellants be at liberty unless otherwise lawfully held.

59. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 12th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

Miss Watta for Mr Kariuki for the 1st Appellant

Miss Karuri for Mr Mutua for the 2nd Appellant

Miss Mogoi for the Respondent

CA Geoffrey