



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 34 OF 2018

CONSOLIDATED WITH HCCRA NO. 26 OF 2008

DAVID MULWA NGUMBI.....1ST APPELLANT

MBETHI KITHOME.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of the Senior Resident

Magistrate Hon. C. A. Mayamba dated 12/07/2018 in Kilungu SRM Criminal Case No. 653 of 2016.)

JUDGMENT

1. **David Mulwa Ngumbi** and **Mbethi Kithome** referred to as 1st and 2nd Appellants were charged of various offences as follows:
2. **First count:** Conspiracy to defraud contrary to section 317 of the Penal Code. The particulars being that **both Appellants** on divers dates between 7th day of March, 2015 and 18th December 2015 at Aimi ma Kilungu farm in Mukaa sub-county within Makueni county, jointly with others not before court, conspired with intent to defraud, obtained from Julius Kiamba cash one million nine hundred thousand shillings (Kshs.1,900,000/=) pretending that they were in a position to sell him agricultural plot number 662 at Aimi ma Kilungu a fact they knew to be false.
3. **Second count:** Forgery contrary to section 345 as read with section 349 of the Penal Code. The particulars being that the **2nd Appellant** on or about 6th day of August 2002 at unknown place within Republic of Kenya, with intent to defraud forged a certain document namely National identity card number 3364067 serial number 205239665 in the name of Benedetta Katumi Munguti purporting it to be a genuine and valid National identity card issued by the director National Regional Bureau.
4. **Third count:** Uttering a false document contrary to section 353 of the Penal Code. The particulars being that the **2nd Appellant** on the 7th day of March 2015 at Aimi ma Kilungu farm Mukaa sub-county within Makueni county knowingly and fraudulently uttered a false document namely a National identity card number 3364067 serial number 205239665 in the name of Benedetta Katumi Munguti to Julius Kiamba Kituma, Pauline Nthambi Mutisya and Michael Muli Musyoki.
5. **Fourth count:** Forgery contrary to Section 345 as read with section 349 of the Penal Code. The particulars being that the **2nd Appellant** on or about on 23rd June 2014 at an unknown place within the Republic of Kenya, with intent to defraud forged a certain document namely taxpayer Pin Certificate No. A0017635990J in the name of Benedetta Katumi Munguti, purporting it to be genuine and valid Taxpayer Pin Certificate issued by Kenya Revenue Authority.
6. **Fifth count:** Uttering a false document contrary to section 353 of the Penal Code. The particulars being that the **2nd Appellant** on 7th day of March, 2015 at Aimi ma Kilungu farm Mukaa sub-county within Makueni county, knowingly and fraudulently uttered a false document namely taxpayer Pin Certificate No. A001763590J in the name of Benedetta Katumi Munguti to Julius Kiamba Kituma, Pauline Nthambi Mutisya and Michael Muli.

7. **Sixth count:** Forgery contrary to section 345 as read with section 349 of the Penal Code. The particulars being that the **1st Appellant** on or about 12th day of January 1977 at unknown place within the Republic of Kenya, with intent to defraud forged a certain document namely National identity card number 0150757 serial number 220107077 in the name of Luke Musomba Mutio purporting it to be a genuine and valid National identity card issued by the director National Registration Bureau.

8. **Seventh count:** Obtaining Money by false pretenses contrary to section 313 of the Penal Code. The particulars being that **both Appellants** on 4th day of September 2015 at Aimi ma Kilungu farm in Mukaa sub-county within Makueni county jointly with others not before court with intent to defraud obtained from Julius Kiamba Kituma cash Kshs. Seven hundred and fifty thousand shillings (750,000) pretending that they were in a position to sell him agricultural plot number 662 at Aimi ma Kilungu a fact that you knew to be false.

9. **Eighth count:** Obtaining money by false pretenses contrary to section 313 of the Penal Code. The particulars being that **both Appellants** on 31st day of October 2015 at Aimi ma Kilungu farm in Mukaa sub-county within Makueni county jointly with others not before court with intent to defraud obtained from Julius Kiamba Kituma a sum two hundred and twenty thousand shillings (220,000) pretending that they were in a position to sell him agriculture plot number 662 at Aimi ma Kilungu a fact that you knew to be false.

10. **Ninth count:** Obtaining money by false pretense contrary to section 313 of the Penal Code. The particulars being that **both Appellants** on 3rd day of November 2015 at Aimi ma Kilungu farm in Mukaa sub-county within Makueni county jointly with others not before court with intent to defraud obtained from Pauline Nthambi a sum of two hundred and eighty thousand shillings (280,000) pretending that they were in a position to sell her agriculture plot number 662 at Aimi ma Kilungu a fact that you knew to be false.

11. **Tenth count:** Obtaining money by false pretenses contrary to section 313 of the Penal Code: The particulars being that **both Appellants** on 21st day of November 2015 at Aimi ma Kilungu farm in Mukaa sub-county within Makueni county jointly with others not before court with intent to defraud obtained from Michael Muli Musyoki a sum of sic hundred thousand shillings (600,000) pretending that they were in position to sell him agriculture plot number 662 at Aimi ma Kilungu a fact that you knew to be false.

12. **Eleventh count:** Obtaining money by false pretenses contrary to section 313 of the Penal Code. The particulars being that **both Appellants** on the 18th day of December 2015 at Aimi ma Kilungu farm in Mukaa sub-county within Makueni county jointly with others not before court with intent to defraud obtained from Pauline Nthambi Mutisya a sum of fifty thousand shillings (50,000/=) pretending that they were in a position to sell her agriculture plot number 662 at Aimi ma Kilungu a fact that you knew to be false.

13. **Twelfth count:** Obtaining money by false pretenses contrary to section 313 of the Penal Code. The particulars being that **both Appellants** on 7th day of March 2015 at Aimi ma Kilungu farm in Mukaa sub-county within Makueni county jointly with others not before court with intent to defraud obtained from Julius Kiamba Kituma a sum of one hundred and twenty thousand shillings (120,000/=) pretending that they were in a position to sell him commercial plot number 421 at Aimi ma Kilungu a fact that you knew to be false.

14. The Appellants were found guilty and convicted as charged on the respective counts and sentenced as follows: -

1st Appellant David Mulwa Ngumbi

Count 1: Conspiracy to defraud contrary to section 317 of the Penal Code. He was fined Kshs.200,000/= in default to serve two years in prison.

Count 6: Forgery contrary to section 345 as read with section 349 of the penal Code. He was fined Kshs.200,000/= in default to serve two years in prison.

Count 7: Obtaining money by false pretenses contrary to section 313 of the penal Code. He was fined Kshs.750,000/= in default to serve two years in prison.

Count 8: Obtaining money by false pretenses contrary to section 313 of the Penal Code. He was fined Ksh.200,000 in default to serve two years in prison.

Count 9: Obtaining money by false pretense contrary to section 313 of the Penal Code. He was fined Kshs.200,000/= in default to serve two years in prison.

Count 10: Obtaining money by false pretenses contrary to section 313 of the Penal Code. He was fined Kshs.600,000/= in default to serve two years in prison.

Count 12: Obtaining money by false pretenses contrary to section 313 of the Penal Code. He was fined Kshs.120,000/= in default to serve twelve months in prison.

2nd Appellant Mbethi Kithome

Count1: Conspiracy to defraud contrary to section 317 of the Penal Code. The 2nd Appellant was sentenced to pay a fine of Kshs.200,000/= in default to serve two years in prison.

Count 2: Forgery contrary to section 345 as read with section 349 of the Penal Code. The 2nd Appellant was sentenced to pay fine of Kshs.200,000/= in default to serve two years in prison.

Count 3: Uttering a false document contrary to section 353 of the Penal Code. The 2nd Appellant was sentenced to pay a fine of Kshs.200,000/= in default to serve two years in prison.

Count 4: Forgery contrary to section 345 as read with section 349 of the Penal Code. 2nd Appellant was sentenced to pay a fine of Kshs.200,000/= in default to serve two years in prison.

Count 5: Uttering a false document contrary to section 353 of the Penal Code. The 2nd Appellant is sentenced to pay a fine Kshs.200,000/= in default to serve two years in prison.

Count 7: Obtaining money by false pretenses contrary to section 313 of the penal Code. The 2nd appellant is fined Kshs.750,000/= in default to serves two years in prison.

Count 8: Obtaining money by false pretenses contrary to section 313 of the Penal Code. The 2nd Appellant was fined Kshs.200,000/= in default to serve two years in prison.

Count 9: Obtaining money by false pretense contrary to section 313 of the Penal Code. The Appellant was fined Kshs.200,000/= in default to serve two years in prison.

Count 10: Obtaining money by false pretenses contrary to section 313 of the Penal Code. The 2nd Appellant was fined Kshs.600,000/= in default to serve two years in prison.

Count 12: Obtaining money by false pretenses contrary to section 313 of the Penal Code. The accused was fined Kshs.120,000/= in default to serve 12 months in prison.

15. They were aggrieved by the judgment and filed separate appeals which were consolidated with HCCRA 34 Of 2018 as the lead file. Mr. Muthama purported to appear for the 1st Appellant but did not file the amended petition of appeal applied for nor any submissions.

16. Both Appellants filed amended grounds of appeal as follows:

1st Appellant David Mulwa Ngumbi.

a) That, the learned trial Magistrate erred in both law and facts and misdirected himself by holding that the case for the prosecution was proved to the required standard whereas on the basis of record the burden of proof was not discharged and indeed left reasonable doubts that ought to have been resolved in Appellant's favor.

b) That, the learned trial Magistrate erred in law and fact by convicting him without regard to his basic right of disclosure of the prosecution evidence which was intended to be brought against him by failing to direct that he be supplied with statements.

c) That, the learned trial Magistrate erred in law and fact by wholly relying on prosecution witnesses' testimony yet in the circumstances the case ought to have been backed by evidence linking him to the purported fraud.

d) That, the Honourable Magistrate misdirected himself after failing to cautiously explore statements of Pw1, Pw2 and Pw3 who could not prove that his presence was that of a conspirator

2nd Appellant Mbethi Kithome

a. That, the learned trial Magistrate erred in both law and fact in failing to appreciate the fact that the Appellants fair trial was violated gravely by the prosecution by failing to provide details that the prosecution intended to use in its case contrary to Articles 25 and 50(2), (c) (j) of the constitution occasioning a prejudice since the Appellant was unable to prepare adequately for her defence.

b. That, the learned trial Magistrate erred in both law and fact in accepting the statement of co-accused as a confession whereas the same ought only to affect him again prejudicing the Appellant.

c. That, the learned trial Magistrate erred in both law and fact in failing to appreciate that the prosecution failed to prove its case on all the counts hence insufficient evidence to convict and sentence which occasioned a prejudice.

d. That, and without prejudice to the instant appeal, the learned trial Magistrate erred in not observing that the various counts emanated from the same transaction hence the sentence was manifestly harsh and excessive.

17. The prosecution case is premised on the evidence of six (6) witnesses. Pw1 **Kiamba Kituma** knew the 1st Appellant as Luke Musomba as he had sold him a parcel of land at Ilima Kilungu which was the subject of another investigation. He later learnt that the 1st Appellant is David Mulwa Ngumbi. On 7th March 2015 he was called by the 1st Appellant who told him of one **Benedetta Katumi Munguti** who had a commercial plot at Mukaa sub-county headquarters which she was selling. He later learnt that her true identity is Mbethi Kithome (2nd Appellant)

18. They later met at Kitengela and entered into a sale agreement after exchanging vital documents. The price for the 2nd Appellant's plot No. 421 was Kshs.120,000/= and he paid her Kshs.100,000/= in cash. He later sent her Kshs.10,000/= on 11/5/2015 by M-pesa and Kshs.5,000/= on 19/8/2015. She did not turn up at the Kilungu offices for the transfer.

19. She again told him of plot no.662 at Aimi ma Kilungu. The three of them (both Appellants and Pw1) met and the price for plot no.662 was agreed at Kshs.3,000,000/=. Similar documents as for the first plot were given on 4/9/2015. She was paid cash Kshs.500,000/= while Kshs.250,000/= was deposited in her account No. 0262295978001 Chase bank. On 24/9/2015 he sent her Kshs.20,000/= through M-pesa vide No. 0706226076 (Benedetta); On 31/10/2015 she was paid cash Kshs.220,000/=; On 21/11/2015 Kshs.600,000/= was deposited in the Chase bank account; On 18/12/2015 he sent her Kshs.50,000/= by M-pesa through his colleague Pauline Mutisya on No. 0790292788.

20. Upon payment of Kshs.1.5 million as per the agreement they went to fence off the plot in December 2015. They found somebody there digging holes with a tractor. He called the 2nd Appellant who gave him some explanation. In January 2016 they managed to fence off the plot after some struggle. On 24th March 2016 he went to Aimi ma Kilungu office for purposes of transfer.

21. After paying Kshs.50,000/= records were checked and it was revealed that plot no.421 had been sold to other people by Benedetta Katumi. Further that the 2nd Appellant was not the owner of the plot. Both Appellants subsequently switched off their phones.

22. Pw1 then reported the matter at Salama CID office. The 2nd Appellant was later traced after being charged vide Machakos Criminal Case No. 351 of 2016 in respect to plot no. 662 and she was arrested. The 1st Appellant was later tracked and arrested. He identified the two sale agreements (EXB1A and B); his M-pesa statement (EXB2) plot form (EXB3), A bundle of identity cards and KRA Pin (EXB4); acknowledgement of payment (EXB5), ballot paper for the plots and a receipt (EXB6).

23. In cross examination Pw1 confirmed that the 1st Appellant was always witnessing the payment of the money in cash. He said the 2nd Appellant had given him a guide to the plot as she claimed fear from brokers on the ground.

24. Pw2 **Michael Muli Musyoki** witnessed the signing of the sale agreements and payment of cash by Pw1 and the Appellants. He gave similar evidence to that of Pw1. He was one of those interested in plot no.662. He later met the real Benedetta Katumi who had complained about him fencing her plot no. 662.

25. Pw3 **Pauline Nthambi Mutisya** was one of those buying plot no. 662 which was being sold by the 2nd Appellant whom she knew as Benedetta Katumi Munguti. Later she learnt her real name to be Mbethi Kithome. She confirmed sending the 2nd Appellant Kshs.50,000/= on 18/12/2015 via M-pesa (EXBa).

26. She also gave her a cheque of Kshs.280,000/= (001) through her company Preston Agencies, debited to account 0262395978001 in 2nd Appellant's name. She also identified a deposit slip (EXB10) for Kshs.600,000/=. She knew both Appellants who attended their meetings.

27. Pw4 **Benedetta Katumi Munguti** testified that she owns plot no. 662 Aimi ma Kilungu. In January 2016 she was informed by neighbours of people digging the said plot. On inquiring she was told they had been sent by Musyoki. She reported the matter to Salama police station. Later she received a call from a Mary who wanted to buy the land. She notified the Machakos CID of the callers of a lady impersonating her and using I.D No. 3364067. Later the imposter was arrested. In cross examination she denied having met any of the Appellants or giving them any of her documents.

28. Pw5 **Mary Maneno** is the Registrar of persons at Mukaa. She was requested by NSSF Bureau to give details of I.D No. 3364067 and No. 224963659 belonging to Benedetta Katumi Munguti issued on 11/4/96 at Kaiti. She found the correct S/No to be 205289665.

29. She was also to check on I.D No. 0150757 S/No.220107077. It belonged to Luke Musomba Mutio S/No. 230348452 issued at Kibwezi and date of birth was 1938. She found I.D No. 9583552 S/No. 227315233 to belong to Mbethi Kithome. The true owner of S/No.224963659 was Anne Owendi Makindu of I.D No. 27729351. The S/No. 220107077 belonged to Simon Kinyua Wachira of I.D No. 25111958. She confirmed that the copies of I.D cards forwarded to them were fraudulent.

30. She stated that on 29/3/2018 she requested for ID card holders and particulars. She received finger prints examination request for Mbethi Kithome *alias* Benedetta Katumi Munguti. Her record bore identical finger print impression for Mbethi Kithome of ID No.9583852. She also received a set of finger prints (*illumination finger impression.*) The record showed the same to belong to David Mulwa Ngumbi. She produced the reports as EXB1; 2, 3.

31. Pw6 **No.55380 Corporal Evans Shabisha** was the investigating officer. He confirmed sending a request to NSSF for verification of the copies of I.D cards for Luke Musomba Mutio, Benedetta Kituma and Mbethi Kithome. He received reports showing the following:

- I.D for Benedetta showed the person as emanating from Makueni but the S/No. was for someone from Western.

- The other showed the person as being from Makueni but the S/No was for someone from Kitengela.
- The 3rd I.D showed the person as being from Kitui same to the S/No.

The I.D cards were found to be fake.

32. His investigations revealed that the 1st Appellant was serving sentence in Machakos. He took the Appellant's finger prints and the report from the Registrar of persons showed that:

- 1st Appellant was David Mulwa Ngumbi and not Luke Musomba Mutio
- 2nd Appellant was Mbethi Kithome and not Benedetta Munguli.

33. He produced the sale agreement for plot No. 421 (EXB4) and for plot No. 662 (EXB5), bank statement from Chase bank (EXB6) Mpesa statement for Pw1 (EXB7), Allotment letter (EXB8) – I.D card (copy) for Pw4 (EXB9, I.D card copy for Luke Musomba Mutio EXB10; KRA letter (EXB11) Acknowledgment letter dated 31/10/15 (EXB12); Acknowledgment receipt of 24/3/2016 (EXB13); deposit slip for Kshs.250,000/= (EXB14); deposit slip for Kshs.600,000/= (EXB15), M-pesa transaction for Pw3 (EXB16) deposit slip for Kshs.280,000/= (PEXB 17).

34. In cross examination he said he had the 1st Appellant's copy of I.D card which he gave as a witness in that transaction. That the photocopy had his image.

35. When placed on their defence they each gave unsworn evidence. The 1st Appellant said he is David Mulwa and works as a Mason. In the year 2015 he was in Kitengela, when he met a person who informed him of a woman selling land. He asked for the contacts and searched for a buyer. Pw1 was the buyer. They met in Kitengela and he called the woman and they agreed.

36. After 2-3 days they met and the woman was paid and they separated. They were not able to meet again as Pw1 was offline. He only learnt of this matter while at Machakos prison when this case came up. On reading the statements he noticed that Pw1 and the seller were proceeding with their deals. He identified the seller as the 2nd Appellant.

37. The 2nd Appellant gave her names as Mbethi Kithome. She said on 7/3/2015 she was (sic) at home for three weeks. She produced a card (DEXB1) to confirm. She was arrested at Machakos by Pw1 and was charged. She stated that Pw1 did not know her and that's what he said. He did not also say how he knew the 1st Appellant who introduced her to him.

38. It was her evidence that she lost her I.D card while selling clothes in Makindu. She further said she never took Pw1 to her land. There was no close family member of Pw1 during the alleged sale.

39. The appeal was canvassed by way of written submissions. The 1st Appellant has submitted that he was not issued with witness statements and this violated his rights under Article 50(2) (c)(j) of the constitution. He says he was prejudiced by the said omission.

40. He further argues on grounds 1, 3 and 4 that there was material contradiction in the evidence of the prosecution witnesses. That Pw1 said he gave out his I.D card while Pw2 said it was the 2nd Appellant who gave them his copy of I.D card. He further contends that the prosecution did not prove his involvement in the conspiracy since as per the statements all transactions were made on account of the 2nd Appellant.

41. In her submissions the 2nd Appellant states that she was convicted on the basis of mere suspicion. She refers to the cases of **Tinega Owenga –vs- Republic (2014) eKLR and Sawe –vs- Republic (2003) KLR 364**. She has also raised the issue of witness statements not having been given to them to enable them prepare their defence. She claims there was violation of their rights enshrined in Article 50(2)(c)(j) and Article 25(c) as a result of which she did not have adequate time to prepare her defence.

42. She also submits that her co-accused's confessionary statement should not have been considered by the court. This confession was vide his defence, when he mentioned her, implying they were working in cohorts. The said statement she says should only affect the 1st Appellant alone.

43. She further submits that there was no sufficient evidence to support a conviction. She said no ownership documents were produced to confirm the existence of the land. In short key exhibits were not produced. Further she submits that this was a serious charge and a lot was required in the standard of proof.

44. Finally, she submits that the several counts emanated from the same transaction. That the order for the sentences to run consecutively is too harsh on her as the total fine is Kshs.2.92 million and total sentence is 20 years.

45. The appeal was opposed by the Respondent through the submissions by learned counsel Mr. Kihara. He has submitted that the Appellants were served with all necessary statements and documents to enable them prepare for their defence. He argues that there was no time the 1st Appellant made a confession which was relied on by the court. That when the 1st Appellant stated what they did, the trial court asked the 2nd Appellant if she had any question for the 1st Appellant.

46. Counsel submits that the prosecution adduced sufficient evidence to support the conviction. Further that the 1st Appellant simply told the court what they had done and it was a candid testimony. He further argues that the offences were distinct with distinct particulars. Upon executing the different offences, they falsely acquired the said amount. He submits that the trial court should have ordered the sentences to run concurrently since they were committed in the said transaction.

Analysis and determination

47. This is a first appeal and the court is guided by the principles set out in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

48. From the evidence on record, grounds of appeal, submissions and authorities cited, I find the issues for determination to be:

- i. Whether the Appellants’ rights as envisaged under Article 50(2) (c) (j) of the constitution were violated.
- ii. Whether the prosecution proved its case beyond reasonable doubt.
- iii. Whether the sentence is harsh and excessive.

Issue no.(i) Whether the Appellants’ rights as envisaged under Article 50(2) (c) (j) of the constitution were violated.

49. Article 50 of the constitution provides as hereunder

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- (2) Every accused person has the right to a fair trial, which includes the right –
 - (c) to have adequate time and facilities to prepare a defence;
 - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

50. The right to be provided with copies of the documents that the prosecution intends to rely on in a case was emphasized by the Court of Appeal in **Thomas Patrick Gibert Cholmondeley –vs- Rep Nairobi Court of Appeal Criminal Appeal No. 116 of 2007 (2008) eKLR** where the court observed that:

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under ... our court, the prosecution is now under a duty to provide an accused person with and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items”.

51. This has been followed in numerous decisions like: **Joseph Ndungu Kagiri –vs- Republic (2016) eKLR (Mativo J).** **Joshua Njiiri –vs- Republic Criminal Revision No. 11 of 2017 (2017) eKLR (Nyakundi J.)**

52. The record shows that the Appellants were first arraigned in court on 5th October 2016 when plea was taken. An order was made for them to be supplied with statements and documents. On 6th February 2017 an advocate came on record to represent the Appellants. She never raised any issue of statements and documents not having been supplied. Had the same not been supplied counsel would have raised it.

53. The matter was adjourned severally at the instance of both the prosecution and defence. On 30/4/2018 when the matter finally took off both the Appellants and the prosecution informed the court that they were ready to proceed. The Appellants had all the statements and documents with them for 18 months. They cannot therefore genuinely claim a violation of Article 50(2)(c) and (j). I find that they were well provided for and they had sufficient time to prepare for their defence.

Issue no. (ii) Whether the prosecution proved its case beyond reasonable doubt.

54. There is a claim of inconsistencies and contradictions in the prosecution evidence. The evidence of Pw1 Pw2 and Pw3 is very consistent. They confirmed having dealt with both Appellants in respect to sale of land/plots Nos. 421 and 662 at Aimi ma Kilungu. The 1st Appellant was the agent who used to look for the buyers as identified by Pw1, Pw2 and Pw3. He also confirmed in his defence that the seller was one “Benedatta Katumi Munguti” who was identified as the 2nd Appellant by the said witnesses.

55. The witnesses later learnt that the 2nd Appellant was not the Benedatta they had been made to believe when there was resistance in fencing of the land they had allegedly bought. Both Appellants had no serious questions for Pw1 – Pw3 on this issue.

56. The real Benedetta testified as Pw4. She had never seen or known the Appellants or Pw1 – Pw3. What made her antenna to rise was when she was notified of the fencing of her land by strangers and also being called by persons who wanted to buy her land. The prosecution witnesses identified and produced documents to show signed sale agreements (EXB4 and 5) acknowledgment of receipt of cash (EXB13) money transactions (M-pesa and bank deposits EXB14 – 17).

57. The main counts that faced the Appellants were:

- a) Conspiracy to defraud contrary to section 317 of the Penal Code.
- b) Obtaining by false pretenses contrary to section 313 Penal Code.
- c) Forgery contrary to section 345 as read with section 349 of the Penal Code.
- d) Uttering a false document contrary to section 353 of the Penal Code.

58. It is established that Pw1, Pw2, Pw3 were led by both Appellants into believing that the 2nd Appellant was the owner of plot No. 662. It is the 1st Appellant who first lured Pw1 into buying a non-existent plot No. 421 then plot No. 662. There is all the evidence of receipt of money in respect to the land/plots.

59. The Appellants have not denied receipt of the money. They never explained why they were receiving the money. The learned trial Magistrate captured all this in his judgment at paragraphs 35-47.

60. There being no justification for the receipt of the money, the only conclusion is that it was fraudulently obtained. The 1st Appellant wants to say he got no money. Pw1 said on 4/9/2015 they paid 2nd Appellant cash 500,000/= plus a cheque of 250,000/=. The 1st Appellant was given cash 250,000/= by the 2nd Appellant in the presence of the witnesses. Secondly all these deals were always triggered by him. He can't deny his participation in enjoying the loot.

Forgery and uttering false documents

61. The evidence confirms that in masquerading as Luke Musomba Mutio and Benedetta Katumi Munguti the Appellants respectively presented copies of their I.D cards, Pin and allotment letters which were all found to be forged documents. Pw5 did her examination and presented her reports EXB1,2,3. Its these false documents which were presented to Pw1 – Pw3 as they entered into the alleged sale agreements. (EXB4 and 5).

62. The Appellants did not explain how they came to be in possession of those documents. The answer is that they forged them and they uttered them to Pw1 and Pw2. A KRA Pin Certificate No. A001763590 also issued by the Appellants to Pw1 found to have been computer generated without a signature was found to be a forgery.

63. Pw4 whose details were being used in these clandestine transaction denied knowing the Appellants. Her correct documents were found to have nothing to do with the forged ones. Pw4's details had been forged in order to be used to deprive her of her land.

64. Section 317 Penal Code defines conspiracy to defraud as:

Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.

65. There was a clear conspiracy to defraud committed by the Appellants in the way they conducted themselves. The 1st Appellant would go looking for unsuspecting buyers. Once he got one, then the 2nd Appellant would appear with her forged documents and money would be exchanged.

66. They knew well the lands they purported to sell did not belong to them. They therefore got the names and details of the true owner and started trading using them. They did not even explain why they were using other people's names besides their own identities.

67. After analyzing the evidence on record I do find that the learned trial Magistrate did not err in finding the Appellants guilty and convicting them.

Issue No. (c) Whether the sentence is harsh and excessive.

68. It is clear that all these offences were committed in one and the same transaction and the sentences ought to run concurrently. Following

the trial court's election to give fines there was no way he could have made an order for the sentences to run concurrently. The maximum sentence for each of these offences is three (3) years imprisonment.

69. The upshot is that the appeal against conviction is dismissed. However, appeal against sentence succeeds. The sentences passed by the trial court are hereby set aside and substituted as follows:

i. 1st Appellant David Mulwa Ngumbi

Count 1 – three (3) years imprisonment.

Count 6 – three (3) years imprisonment

Count 7 – three (3) years imprisonment

Count 8 – three (3) years imprisonment

Count 9 – three (3) years imprisonment

Count 10 – three (3) years imprisonment

Count 12 – three (3) years imprisonment

Order:

Sentences to run concurrently from date of conviction.

ii. 2nd Appellant Mbethi Kithome

Count 1 – three (3) years imprisonment

Count 2 – three (3) years imprisonment

Count 3 – three (3) years imprisonment

Count 4 – three (3) years imprisonment

Count 5 – three (3) years imprisonment

Count 7 – three (3) years imprisonment

Count 8 – three (3) years imprisonment

Count 9 – three (3) years imprisonment

Count 10 – three (3) years imprisonment

Count 11 – three (3) years imprisonment.

Count 12 – three (3) years imprisonment.

Order:

Sentences to run concurrently from date of conviction.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge