



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 11 OF 2018

DAVID MUTSOTSO WENDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant herein, **David Mutsotso Wendo**, was charged various counts and convicted for the offences of obtaining by false pretence contrary to section 313 of the *Penal Code*, forgery contrary to section 349 of the *Penal Code*, and two separate counts of uttering a false document with intent to deceive contrary to section 357(b) of the *Penal Code*.
2. In count I, the facts were that the appellant jointly with others, with intent to defraud obtained Kshs 1,560,000/- from **Daniel Mutiso Makau** by falsely pretending that he was to sell to the said complainant plot no. **Athi River/Athi River/Block 1/262** situated at Kyumbi, Machakos County, a fact he knew to be false.
3. In count II, the particulars were that at an unknown date and time, at an undisclosed place within the Republic of Kenya, with intent to defraud, jointly with others not before court, the appellant forged an identification card of one **Paul Josiah Kithome** purporting the same to have been issued by the National Registration Bureau.
4. In count III, the appellant was charged that on the 8th September, 2014 at the Machakos Land Registrar's office within Machakos Township, with intent to deceive, knowingly uttered an Identification Card. No. 21569324 to the Land Registrar Machakos, which document the appellant had made without lawful authority.
5. In count IV, the appellant was charged that on 8th September, 2014, at the Machakos Land Registrar's office, with intent to deceive, he knowingly uttered a Tax Payer PIN No. A007208756C to The Land Registrar, Machakos, which document the appellant, had made without lawful authority.
6. In support of its case, the prosecution called 6 witnesses. PW1, the complainant herein, **Daniel Mutiso Makau**, a land surveyor testified that he was informed by one **Timothy Ndonge** about a land and upon conducting a search he discovered that the same belonged to **Paul Josiah Kithome**. The said **Timothy Ndonge** then informed him that the said land Athi River/Athi River Block 1/262 was sold to **David Mutsotso Wendo**, the appellant herein but since the same had not yet been transferred, it was still in the name of **Paul**. It was therefore agreed that the appellant would avail himself together with the said **Paul** on 27th February, 2015, in the office of the complainant's advocate.
7. On the said date they met in the office of Mulei & Co Advocates and present were the appellant, a person who identified himself as **Paul Josiah Kithome**, **Onesmus Ndonge** and one **Gachini**. According to the complainant, the appellant produced the agreement done before Thoronjo Advocate between him and **Paul Kithome** which showed that he had bought the same for Kshs 1.5 million. Having confirmed that the documents were in order, the complainant, the appellant and the said **Paul Kithome** produced their ID Cards, PIN Certificates and the said advocate commenced the preparation of the agreement at an agreed purchase price of Kshs 2.2 million. It was agreed that the complaint would deposit Kshs 1.5 million the same day and the balance was to be paid after obtaining the consent for transfer after 60 days. According to the complainant he gave the appellant Kshs 550,000.00 in cash and the agreement was signed with on the understanding that he would deposit Kshs 950,000.00 in the appellant's account No. 1490162414648 held in Equity bank, Machakos Branch in the appellant's name, the following day which he did. After signing the necessary transfer forms, they parted having agreed to meet the following week before the Land Control Board at Athi River. However, on the agreed day, the complainant having arranged for everything for the Board, the appellant appeared alone and was advised to avail **Paul Kithome** and their spouses and the next meeting was scheduled after the appellant promised to comply.

8. PW1 testified that during the month of March, 2015 the appellant informed him that he had some problems and asked the complainant for assistance with cash. The complainant then sent him Kshs 50,000.00 and another Kshs 10,000.00 through Mpesa to the appellant's phone number 0725609087 on various dates, the money which the appellant said he was to use in facilitating **Paul Kithome**. However, at the next Board meeting the appellant failed to appear and stopped receiving the complainant's calls. After a week the complainant managed to get him on phone and he informed the complainant that the reason he did not attend the Board meeting was because he did not get **Paul Kithome** and promised to attend the next Board meeting. Suspicious of the appellant's conduct, the complainant sought advice from his advocate and they decided to scrutinise the documents that they had received. It was then that they discovered some forged documents such as the ID and PIN for **Paul Kithome**. The advocate then advised the complainant to report the matter to the police and with the assistance of the complainant the police arrested the appellant at the Advocate's office after the complainant told him to come for some money. PW1 identified the agreement, the said forged PIN Certificate and ID of **Paul Kithome**, the search certificate, the title deed that the appellant presented, the executed documents, the deposit slip for Kshs 950,000.00, the agreement between the appellant and **Paul Kithome** and the application for Land Control Board's consent.

9. In cross-examination by the appellant, the complainant confirmed that after getting the title he was taken to the land in question by **Onesmus Ndonge** and being a surveyor and armed with the map he confirmed the site was in tandem with the Map. According to the complainant the agreement that was executed was between himself and the person who purported to be **Paul Kithome** but it was the appellant who received the money and witnessed the agreement. According to the complainant he paid the appellant Kshs 550,000.00 and deposited Kshs 950,000.00 whose deposit slip he produced. Prior to the agreement the complainant stated that he did not know the appellant and that the cash was received in the presence of the advocate.

10. PW2, **Onesmus Ndonge**, a land broker, confirmed that he brokered the sale of the land to the complainant herein which land was being sold by the appellant. According to him, the person who asked him to look for a buyer was **James Mwangi Gichini**, PW3, who gave him a copy of the title and showed him the land. He then got the complainant who was interested in the said land and after carrying out a search they met on 27th May, 2015 to conclude the transaction. On that PW3 went with the appellant and another man called **Paul Josiah Kithome** and the agreement was executed. The complainant then went to the bank withdrew cash of Kshs 600,000.00 out of which he gave the appellant Kshs 550,000.00 and was to deposit the balance of Kshs 950,000.00 the following day. According to him he was with the complainant on that day when the complainant deposited the said sum in the appellant's account number that was furnished by the appellant. It was his evidence that the appellant was the one selling the land which was to be transferred from **Paul Kithome** to the complainant. After the complainant booked the Land Control Board, the appellant appeared alone and thereafter did not attend after which the appellant was arrested.

11. According to PW2, he saw the appellant for the first time on 27th February, 2015, the day he was brought by PW3, and that the search revealed that the land belonged to **Paul Josiah Kithome** though the sale price was agreed with the appellant. PW2 stated in cross-examination that he was informed by the complainant that the complainant further sent to the appellant a total of Kshs 60,000.00 by Mpesa. Though PW2 did not know the appellant he knew PW3 who for a long time was a DO Kathiani and was the one who introduced the appellant.

12. PW3, **James Gachini**, testified that he knew the complainant who was buying land from the appellant, a person he had known for 3-4 years having been his agent in a land transaction when PW3 was selling their family land. In February, 2015, because the appellant knew that PW3 buys and sells land, asked PW3 to get him a buyer of a land he had bought from someone else but had not transferred the same as he had some financial problems. According to PW3 the land, according to the title which the appellant showed him was in the name of **Paul Josiah Kithome**. At the request of PW3, the appellant took him to the said land which was about 2-3 acres. PW3 then approached an agent, PW2, who had a person who was looking for land in Kyumbi area. Two days later they visited the land with PW2 who later conducted a search and arranged for the intended buyer, whom he later came to know as the complainant herein, to view the land. On 27th February, 2015 at the request of PW2, he went to the office of Makau and Mulei Advocates, Machakos where they met a lady advocate. It was his evidence that the appellant was accompanied by a person whom he introduced as Josiah **Peter Kithome** and after negotiation the purchase price was agreed at Kshs 2.2 million to be paid to the appellant. On that day the appellant was paid some of the money in cash while and the rest was to be deposited in the appellant's account, whose account number the appellant provided. According to PW3, the appellant was paid the said Kshs 1.5 million with the balance agreed to be paid before the transfer. Later, PW3 was called at the CID offices over the said transaction where he recorded his statement since he was a witness to the sale transaction between **Josiah Kithome** and the complainant at which the said Josiah confirmed that he had sold the land to the appellant, who was entitled to the sale price.

13. PW4, **Rosaline Soo**, the land registrar, Machakos, on 18th September, 2014 received a letter from Katelembo Athiani Muputi Farming and ranching Co-operative Society dated 12th June, 2012 requesting the land registrar to issue title in respect of land parcel Athi River/Athi River Block 1/262 also referred to plot no. 1269 to one **Margaret Wanjiru Nzioka** of ID No. 0331912. However, upon checking the list of members, she found that the plot belonged to **Paul Josiah Kithome** though the letter alleged that the owner had been reallocated another plot – Machakos Town Block 3/1000. Since, according to PW4, the list is considered as the final record of ownership, they advised the bearer of the letter that even if **Paul Josiah** had been allocated land elsewhere, the record could only be opened in the name of **Paul Josiah Kithome** who would then transfer the same to **Margaret Wanjiru Nzioka** through the Land Control Board. Accordingly, they prepared a surrender document to the allottee and the man who was presented as **Josiah Kithome** signed the document and produced copies of his ID and PIN and they prepared the Green Card. She could not however remember the person who took the letter, which she produced as exhibit as well as the surrender bearing the photo of **Paul Josiah Kithome**. The witness could not however recall the appellant.

14. PW5, **Morris Mulei**, an advocate of the High Court of Kenya practising under the firm name and style of O N Makau & Mulei Advocates testified that on 27th February, 2015 one of his clients, the complainant herein went to his office accompanied by the appellant and informed him that he wanted to purchase a property from the appellant and showed him the title from which it was apparent that the appellant was not the owner thereof. The land, Athi River/Athi River Block 1/262, was informed by the appellant had been purchased from the registered owner, one **Paul Josiah Kithome**, but the appellant had not been able to raise the full purchase price. According to PW5, both the appellant and the said registered owner agreed he could sell the land and recover the purchase price while the balance would be turned over to the owner. He advised them to go back with the said owner and on 27th February, 2015, they returned with a man identified by the appellant as **Paul Josiah Kithome** and a witness, PW3 while the complainant was accompanied by PW2 as his witness. After perusing the documents presented to him as well as the certified copies of the IDs which he compared with the originals, and being satisfied with his due

diligence, PW5 prepared a sale agreement for the sum of Kshs 2.2 million out of which Kshs 1.5 million was to be paid at the execution of the agreement, Kshs 550,000.00 in cash and Kshs 950,000.00 to be deposited in the appellant's account the following day with the balance of Kshs 700,000.00 payable on completion which was to be within 60 days. According to him, the said agreement was executed by the said parties and he witnessed the same. However, after the lapse of 60 days the complainant went back to him and informed him that he was unable to reach the appellant on phone to conclude the agreement. He then advised the complainant to report the matter to the police. According to him, he was shown by the police the forgery that had been done on the ID Cards by insertion of the name of the seller, **Paul Josiah Kithome** by a typewriter which was not obvious to a layman. It was his evidence that the person who was taken to his office as **Paul Josiah** by the appellant vanished.

15. PW6, PC **Joshua Kiambati**, the investigating officer on 18th May, 2015 received a call from the complainant that a person had sold land to him in which transaction he had made part payment of Kshs 1.5 million with the balance of Kshs payable within 60 days. Though the complainant had been given the documents it turned out that the same were fake when he went to lodge the same at the lands office. When they arrested the appellant they found him in possession of a laminated ID Card for one **Paul Josiah Kithome** and upon interrogation the appellant informed them that he was given the land by one **Paul Josiah Kithome** who lives in Mlolongo then sold it to the complainant. He however refused to take them to the said **Paul Josiah Kithome** who was never found. During their investigations they collected the documents which had been given to the complainant. Upon further investigations, it was discovered that the purported ID Card of **Paul Josiah Kithome** was in fact held by **George Omondo Oyeko** hence the same was fake. Further investigations revealed that the purported PIN Certificate was also fake though the account number in which the money was deposited belonged to the appellant. The Co-operative Society however confirmed that the land in question was registered in the name of **Paul Josiah Kithome** but they did not know the person. According to PW6, the said person was never traced and in his evidence, he could be deceased. It was PW6's evidence that the appellant was the one who forged the documents in order to steal from the complainant.

16. At the close of the prosecution case, the appellant was placed on his defence and he opted to give sworn testimony but had no witness.

17. According to the appellant, he was in the business of buying and selling land. In the year 2014, he was looking for land to buy in Konza, Malili and Makutano. He accordingly bought land in malili and Konza. On 12th December, 2014 when he was in Nakuru, he was called to buy land in Kyumbi-Makutano and he travelled the following day. According to him, he was taken to the land by PW3 and father to Mike Sonko and he liked the land. He was then given a copy of the title deed to land parcel no. Athi River Block 1/262 and was directed to the offices of Katelembo Athiani-Muputi. According to him, he was called by the said persons on 3rd January, 2015 and informed that the original title had been found and upon conducting the search, they found that it was clear. He then called for the owner who was called and he met the said **Paul Josiah**, PW3 and the father to **Mike Sonko** at Mlolongo Connection, Restaurant and Bar. After negotiating, they agreed at Kshs 1.5 million as the purchase price and he directed them to his lawyer, **Anne Nzololo** Advocate in whose Nairobi office they met and an agreement was entered into and he paid the said sum of Kshs 1.5 million. According to the appellant, the said **Paul Josiah Mwangi** handed over the relevant documents and the advocate was to book Land Control Board meeting at Machakos which was done on 15th January, 2015 and they were to meet with the said **Paul Josiah Mwangi** at the Athi River DC's office but the said person did not turn up. Upon calling the said person, he informed the appellant that he was unavailable on that date and asked for another date but on two subsequent dates, he similarly did not turn up. Since he was informed by the said **Paul** that the subdivision of the land was not permitted, he asked the said **Paul** to resell the land and refund him his money. On 15th February, he was called by the said **Paul Josiah**, PW3 and Sonko's father who informed him that they had found a client and they wanted him to meet with the buyer at Kitengela. However, he only met PW3 alone. On 22nd February, 2015 they met with PW3, PW2 and **Paul Josiah** but since the client was absent, the appellant went back to Nairobi. At 8.00pm he was called by PW3 who informed him that the client was busy and that they had found another client. On 27th February, 2015 the appellant met with **Paul Josiah** at T-Tot Hotel and he was told that the client had requested that they go to his lawyers, Mulei & Company Advocates. According to the appellant the said advocates told him that **Paul Josiah** would be the seller and though the appellant would receive the only he would only be a witness since the land had not been transferred to him. Present was the complainant, PW3 and PW2. Although the agreement showed that **Paul** had received Kshs 1.5 million, the banks were already closed. Although the complainant promised to deposit the money in his account there was no money reflected in his account the following day. At around 3.00pm he received a call from the complainant informing him that he had paid **Paul Josiah** Kshs 550,000.00 cash and asked to deposit Kshs 950,000.00 in the appellant's account which he did and was reflected at 4.00 pm. According to the appellant he was supposed to be paid Kshs 700,000.00 which was the balance but after 60 days he did not receive any communication and his calls to **Paul Josiah**, PW3 and the complainant all went unanswered. Upon calling the complainant's advocate, **Mr Mulei**, the advocate informed him that he was done. Later he was called at the advocate's office where he was with PW3, **Paul** and PW2 and after the three left the complainant arrived with police officers and the complainant informed him that he had no money to pay and that if he had the Kshs 950,000.00 he should refund the same after which they would return to him his documents. He was then taken to Machakos Police Station where he was determined and interrogated. According to him, he had no problem refunding the money.

18. According to the appellant, he gave the DCIO the numbers of **Paul Josiah** which was tracked to Malili while PW3 was tracked along Mombasa Road. While the others became the complainant's witness, **Paul** disappeared. According to the appellant he also lost his money.

19. In his cross-examination the appellant confirmed that he met **Paul** who sold him the land and they signed an agreement executed on 5th January, 2015 in the sum of Kshs 1.5 million which he paid in cash withdrawn from Co-operative Bank and Equity Bank in batches of Kshs 750,000.00 each. Though he had slips, he stated the same were taken by officers as well as the title. However, stated that there was no acknowledgement slip to show that the money exchanged hands. It was his evidence that PW3 and Sonko's father were his witnesses but Sonko's father passed away. It was his evidence that at the meeting of 27th February, 2015 in **Mr Mulei's** office, **Josiah** was present and that the meeting was arranged by PW3 and PW2 as brokers. He however insisted that no money was paid on 27th February, 2015 and instead his money was paid on 28th February, 2015. He however stated that he did not know Josiah's home.

20. In cross-examination he stated that he had quarrelled with PW2 over some land in Konza. Though he stated that he saw the complainant for the first time in **Mulei's** office, he stated that he had sold him land many years and that the grudge between him and the others arose from the fact that they were seeking commission. Though he stated that he was ready to refund the money by the time of his testimony he had not done so, despite having been given 30 days to do so.

21. In his judgement, the learned trial magistrate took into account the fact that the appellant did not call any of the people he mentioned in his transactions and did not produce any of the documents through which he allegedly purchased the land. He further did not challenge the fact that he was found with a fake ID Card purportedly belonging to **Paul Josiah Kithome**. He also did not challenge the fact that he was the one who produced the PIN Certificate for the said **Paul Josiah Kithome** and that it was his evidence against the 6 prosecution witnesses.

22. The court found that the appellant was a con-artist who engineered the transaction by sounding out **James** who knew him from way back and trusted him. According to the court, the appellant knew the documents were all fake. The court therefore believed the prosecution's case and convicted the appellant on all the counts.

23. In this case the appellant appeals on the following grounds:

1) That the learned trial magistrate did not accord him a fair trial since he was compelled to proceed with the trial without being supplied with witnesses' statements as per Article 50 of the Constitution.

2) That the learned trial magistrate based his conviction and sentence on flawed and scanty evidence that was not proved beyond reasonable threshold of the standard of criminal law.

3) That the learned trial magistrate failed to observe that his conviction and sentence was unsafe due to the credibility of the witnesses and contradictory uncorroborated evidence.

4) That his defence was dismissed without giving tangible reasons.

5) That he was sentenced to serve consecutive sentences instead of concurrent in circumstances that did not warrant consecutive sentencing.

24. In the submissions made on behalf of the appellant, **Mr Mulwa** contended that though Article 50(2)(j) places a duty of the prosecution to supply the defence with witness statements and other evidentiary documents and exhibits it intends to rely on, the appellant did not have the benefit of this hence he was not afforded a fair trial rendering the trial a nullity. In this respect the appellant relied on **Simon Githaka Malombe vs. Republic [2015] eKLR** where it was held that:

25. It was further submitted that no tangible evidence was led in support of the count relating to forgery since the alleged title deed, passport photos, copy of the ID and KRA PIN belonging to **Paul Josiah Kithome** were never tabled before the court as exhibits. It was contended that no witness corroborated the allegation and no proof of payment was ever produced before the court. Based on **Abdi Mohamed Duble vs. Republic [2017] eKLR**, it was submitted that since before the court were only assertions and not evidence, it was unsafe to convict the appellant since the charges against him were not proved beyond reasonable doubt.

26. The appellant also took issue with the fact that no document examiner was called to substantiate the allegations of forgery and it was not proved to whom the same were uttered and there were contradictions between the evidence of PW2 and PW3. According to the appellant the best person to have testified on the falsity of the documents was the Land Registrar, PW4 pursuant to section 22 of the ***Evidence Act***.

27. It was contended that though the appellant gave a plausible defence the same was dismissed without any tangible reason for doing so.

28. As regards the sentence, the appellant relied on Article 50(2)(p) and based on **Caroline Wanjiku Ngugi vs. Republic [2015] eKLR**, the court was urged to consider the health of the appellant, in that he was suffering from HIV and TB as well as recurrent pneumonia and opportunistic infections and to give him non-custodial sentence.

29. It was however submitted that the appellant was convicted on insufficient evidence and the appeal ought to be allowed.

30. On behalf of the Respondent, it was submitted through **Mr David Mwakio**, learned prosecution counsel, that the prosecution's case was cogent, consistent, watertight and in sync, a fact that was noted by the trial court in its fair judgment. In any event, courts have held that the mere mention of a discrepancy or contradiction is not fatal. It was however submitted that *there was no such alleged discrepancy in evidence during the trial and this ground of appeal is therefore moot. According to him, inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.* The question to be addressed is whether the contradictions cited by the appellant are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In the instant case, they do not.

31. As regards the sentence the Respondent relied on the case of **Irene Rose Wanjira Mararo vs Republic (2016) eKLR**.

32. It was submitted that there is nothing to show that the trial court took into account irrelevant factors or that a wrong principle was applied nor is the sentence so harsh and excessive that an error in principle must be inferred. Accordingly, there is no reason to interfere with the said sentence.

33. It was further submitted that the appellant is a deceitful individual, a trouble maker and a menace to society. He has demonstrated so through his despicable conduct. He preyed on PW1 in a transaction which he knew right from the start would never materialize. The appellant continues to play innocent despite the overwhelming evidence against him. He is not remorseful for his actions. The appellant deserves to be put away to correct his errant behaviour hence this court ought not to interfere with the sentence.

34. Accordingly, the appellants' appeal lacks merit and the same should be dismissed.

Determination

35. 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.”

36. 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.

37. The first issue for determination is whether the appellant’s trial complied with the provisions of Article 50 of the Constitution. 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—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
- (r) information shall be given in language that the person understands.
- (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.
- (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
- (5) An accused person—
- (a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and
- (b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.
- (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—
- (a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
- (b) new and compelling evidence has become available.
- (7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.
- (8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.
- (9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

38. It is therefore clear that the appellant was entitled to be informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence. In Dennis Edmond Apaa & Others vs. Ethics & Anti Corruption Commission [2012] eKLR the court had this to say on the same: -

“The words of Article 52(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be updated when additional information was received.”

39. In R vs. Ward [1993] 2 All ER 557, Glidewell, Nolan and Steyn, LJJ held that:-

“The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.”

40. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront. That is my understanding of the decision of the Court of Appeal in Simon Githaka Malombe vs. Republic [2015] eKLR, where the said Court expressed itself as

follows:

“We do not quite fathom how the appellant can possibly be to blame for the prosecution’s failure to supply the witnesses’ statements requested by the appellant and ordered by the trial court. It would seem that both courts below somehow considered the appellant to blame for not having money to photocopy the statements. This notwithstanding that he was in custody and had indicated on the record that his kin had not been to see him. To adopt the stance of the two courts would be to stigmatize and even criminalize poverty or inability to pay for statements. It is rather surreal...It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2) (c) and (j) be real.”

41. In this case, on 4th August, 2015, the learned trial magistrate ordered that the documentary exhibits be supplied to the accused. Thereafter there was no mention of the statements and the documentary evidence. It would in fact seem that during part of the trial the appellant had the benefit of legal representation since on 27th February, 2017, **Mr Nthiwa** is recorded as applying to be discharged for want of sufficient instructions. Taking into account the state of the proceedings, there is no basis upon which I can find that Article 50(2)(j) of the Constitution was violated. In **Simon Githaka Malombe vs. Republic** (supra) the Court went ahead to consider the effect of the failure to comply with the said Article on the fairness of the proceedings that were undertaken and expressed itself as follows:

“The denial of witness statements in the present case reduced the trial to a farcical sham. The appellant, finding himself incapacitated without the witness statements, elected not to cross-examine any of the witnesses. In doing so he was making a dignified protest against a process so unfairly weighed and tilted against him as to be wholly unacceptable. The result was that all of the evidence on record lacked the searching test of cross-examination. Cross examination has long been described as being, quite aptly in our view, “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” Per Judge S.C. Sarkar in Sarkar’s Law of Evidence (India, Pakistan, Burma and Ceylon) 9th Edn. P.1120. Only after testimony has been interrogated and confronted through the crucible of cross examination can it be entitled to the tag of veracity.

So critical is cross-examination in a criminal trial that where an accused person is unrepresented, a trial Magistrate is required under Section 208(3) of the Criminal Procedure Code to expressly explain it to the accused person and be careful to record exactly what he said in response to the explanation. It is not expected that the court would maintain a detached neutrality and act as some kind of impartial umpire in the strict tradition of the adversarial system. Rather, he is statutorily enjoined to assume a didactic role as an educator of process. That clearly did not occur herein.

In the end, the appellant was relegated to the position of a mere observer, a passive attendant of his own trial yet, in a criminal trial, the accused person is the most central character in the sometimes complex human drama of attempting to test the truth about criminal allegations. He cannot, by no fault of his own be made a mere spectator.”

42. In the present case taking into account the fact that the appellant fully participated in cross-examining the witnesses I cannot say that he was in fact not supplied with witness statements and copies of documentary evidence to be relied upon by the prosecution as ordered by the Court. This does not mean that the mere fact that an accused person participates in cross-examining the witnesses relieves the prosecution of its constitutional duty to comply with Article 50(2)(j) aforesaid. Where it is proved to the satisfaction of the court that the said provision was not complied with I agree with the decision in **Simon Githaka Malombe vs. Republic** (supra) that such proceedings are thereby rendered a nullity. In this case, I however, do not have the benefit of sufficient material to arrive at that conclusion.

43. In this case, the evidence against the appellant was that the complainant in the course of searching for land was referred to the appellant by PW2, a land broker who informed him that the appellant was selling land parcel no. **Athi River/Athi River/Block 1/262** situated at Kyumbi, Machakos County. It however turned out that the said parcel of land was not in the name of the appellant but was in fact in the name of a person known as **Paul Josiah Kithome** though the information that was given to the complainant was that the appellant had bought the same but had not transferred the same into his name. However, due to financial difficulties, he was disposing of the same. Accordingly, an arrangement was made to have the appellant and the said **Paul Josiah Kithome** appear before an advocate for the purposes of transfer process. On the agreed date, the appellant appeared with a person who was introduced as **Paul Josiah Kithome** and in the presence of PW2 and PW3, an agreement was entered into in which the said property was to be sold in the sum of Kshs 2.2 million. Out of this, according to the prosecution, the complainant paid Kshs 550,000.00 in cash and another Kshs 950,000.00 was deposited in the appellant’s account the following day. Leaving a balance of Kshs 700,000.00 to be paid within 60 days. According to the complainant, he transferred Kshs 60,000.00 later to the appellant at the appellant’s request by Mpesa, a mobile money transfer system.

44. The Appellant’s version however was that he similarly had entered into an agreement with the said **Paul Josiah Kithome** for the sale of the said parcel of land at the cost of Kshs 1.5 million and that the persons who introduced him to the said vendor was actually PW3. However, he was unable to transfer the same into his name due to the lack of co-operation from the vendor. Accordingly, he asked PW3 and the vendor to source for a buyer, resell the land and refund him his money since he had been informed that the land could not be subdivided further. According to him, it was this attempt at reselling the land that brought him face to face with the complainant in the transaction the subject of these proceedings. According to him, he received Kshs 950,000.00 and was to be paid further sum of Kshs 700,000.00. Assuming his version was correct, it would seem that he would have received a total of Kshs. 1,650,000.00. He did not explain what the Kshs 150,000.00 that he was to receive was for when he was only interested in the recovery of his money.

45. According to PW3, he was approached by the appellant to buy the suit land but because he had no money, he approached PW2 who knew that the complainant was interested in the land and it was agreed that since the land was not registered in the name of the appellant, the appellant was to avail the registered owner for the purposes of transfer. According to PW3, the reason given to him by the appellant for failing to transfer the land into his name was due to cash flow problems. That the appellant was well known to PW3 is not in doubt. In fact, according to the appellant, it was PW3 and one other person who introduced him to **Paul Josiah Kithome**. It is therefore clear that the

appellant's version was materially different from that of PW3. The Appellant however did not put his case to PW3 when PW3 was testifying. In fact, his defence was never put to any of the prosecution witnesses. He similarly did not produce any documentary evidence in support of his case that the said land was sold to him by the said **Paul Josiah Kithome**. Though he said that his documents were taken by the investigators, he never raised the issue in the course of his trial. What is striking however is that a copy of the laminated ID purportedly belonging to the said **Paul Josiah Kithome** was found in his possession and he never refuted this nor offered any explanation as to where he got the same. My view is supported by the decision of the Court of Appeal in **Oremo vs. Republic [1991] eKLR**, where it was held that:

“Our understanding of the law is that the prosecution is not required to negative each and every imaginable possibility; the prosecution is only required to negative such possibilities as are reasonably raised by the evidence, either of the prosecution itself, in cross-examination, or of the defence. The appellant had ample opportunity both at his trial and on the first appeal to raise such possibilities and to explain how he came to possess the false vouchers, but he did not do so, this is not the same thing as shifting the burden of proof to him. The issue of his possession of the false vouchers was a matter so peculiarly within his own knowledge that it was only him who could have explained it. The prosecution could not have been expected to know how the appellant came to possess the vouchers. It is too late in the day to try to explain that possession in the face of the concurrent findings of fact on that issue by the two lower courts.”

46. After considering the evidence on record it is clear that the prosecution evidence was consistent that it was the appellant who introduced the said **Paul Josiah Kithome** to the complainant and to the other witnesses. After pocketing part of the purchase price he failed to complete the transaction considering the fact that the documents he availed were fake. The evidence of the prosecution witnesses corroborated each other in material respect as opposed to the evidence of the appellant which seemed to have been an afterthought. That evidence was supported by the documentary evidence that was produced before the learned trial magistrate.

47. The appellant, as stated hereinabove was 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.

48. 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.”

49. In **Irene Rose Wanjira Mararo v 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 belief 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."

50. In this case there was clearly a false representation by the appellant. He falsely represented to the complainant that he was the beneficial owner of the property in issue. From the evidence, it is clear that he had no such interest. From the conduct of the said vendor, even assuming that he was similarly defrauded, he clearly had no belief in the presentation that he owned the property since he himself had been put on alert that the said vendor was not a person that could be trusted. However, the appellant's evidence clearly showed that there was no representation by the alleged vendor. His evidence was clearly an afterthought and was contradicted by the very persons on whom he relied to support his case. Apart from bare allegations, he had no evidence, at all, documentary or otherwise, to support his case. As a result of false representation he caused the complainant to part with money. It is therefore my finding that the offence of obtaining by false pretence was proved to the standard required.

51. As regards the offence of forgery, **Phillimore L.J** broke down the definition of forgery in **R vs. Dodge and Harris [1971] 2 All ER 1523** as follows:

"A document is false...if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it or authorize its making...or if, though made by or on behalf of or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material...is falsely stated therein; and in particular a document is false:- (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it."

52. In this case the appellant was charged with forgery of an identification card of one **Paul Josiah Kithome** purporting the same to have been issued by the National Registration Bureau. In this case the prosecution only attempted to prove that the ID Card which was recovered in possession of the appellant was fake. No attempt was made to prove that it was the appellant who actually forged the same. It would have been a simple matter of simply calling the handwriting expert to testify as to the similarities between the appellant's handwriting and those in the ID. However, from the evidence, it would seem that the insertions were by a typewriter. In my view the prosecution failed to prove the offence of forgery. In any case the prosecution ought to have called the persons whose opinions were relied on to conclude that the said document was a forgery.

53. With respect to the offence of uttering a false document, it was held by the Court of Appeal in **Joseph Mukuha Kimani vs. Republic [1984] eKLR**, that:

"The prosecution must prove that:

(a) the document was false; in the sense that, it was forged

(b) the accused knew it was forged

(c) the utterer intended to defraud.

In the case of *Kilee v Republic* [1967] EA 713 at p 717, it was said that the false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: *Omar bin Salem v R* (1950) 17 EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see *Samuels v Republic* [1968] E A 1."

54. Having failed to prove forgery this count must similarly fail. The same reasoning must apply to count IV with respect to uttering a Tax Payer PIN No. A007208756C to the Land Registrar, Machakos, which document the appellant was alleged to have made without lawful authority.

55. In the premises, I allow the appellant's appeal as regards counts II, III and IV, set aside his conviction in respect thereof and quash the sentence therein. I however affirm his conviction in respect of count I as well as the sentence.

56. In conclusion, the learned trial magistrate seems to have been influenced by the fact that the appellant absconded attending court on two occasions. In my view there exist sufficient legal mechanisms for dealing with accused persons when they jump bail and that ought not to be a consideration in either determining the guilt of the accused or the sentence to be meted against him.

57. Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 29th day of May, 2019.

G V ODUNGA

JUDGE

In the presence of:

Miss Mwanzia for Mr Mulwa for the Appellant

Ms Mogoi for the Respondent

CA Geoffrey