REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE APPEAL NO.57 OF 2017

CHRISTOPHER MWAI MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L Mutai Chief Magistrate dated 16th March 2017 in Nanyuki Chief Magistrate Court Criminal Case No. 333 of 2013)

JUDGMENT

1. **CHRISTOPHER MWAI MACHARIA (the appellant**) was charged on **four counts** before the Nanyuki Chief Magistrate's court, that is **offences of obtaining money by false pretence contrary to Section 313 of the Penal Code.** After trial he was convicted on one count and was acquitted on the other three counts on the ground that the prosecution failed adduce evidence in support of the same. On being convicted he was sentenced to serve 2 years imprisonment. The appellant has filed this appeal against his conviction and sentence.

2. This being the first appellant court the appellant is entitled to have this court's own consideration of the evidence as a whole and is entitled to this court's own decision. This court therefore has a duty to re-hear the case and reconsider the material before the trial court, however, bearing in mind that this court did not hear or see the witnesses who testified at the trial: See the cases **KARIUKI KARANJA – V- REPUBLIC [1986] KLR 190 and NYANDO MUKUTA MWAMBANGA – V- REPUBLIC [2008] eKLR.**

3. The prosecution's case is that the appellant, by false pretence collected money from **JANE WANGUI MUGACIA**, totalling Ksh. 364,200, falsely pretending he was in a position to sell to her land at Gitaraga Farm Limited, in Nanyuki, a fact he knew to be false or not true.

4. The appellant's trial commenced on 28th June, 2013 before the then Nanyuki Chief Magistrate J N Nyagah (as he then was). That Learned Chief Magistrate received evidence of four prosecution's witnesses before the trial was taken over by the then Nanyuki Chief Magistrate Hon. T. W. Cherere (as she then was).

5. The said Learned trial Magistrate T. W. Cherere after explaining to the appellant the provisions of **Section 200 (3)** of the Criminal Procedure Code obtained a request from the appellant for the trial to start de novo. Accordingly on 20th May, 2014 the Learned Magistrate ordered the trial to commence de novo.

6. That Learned trial Magistrate T. W. Cherere received the evidence of Jane Wangui Mugachia who narrated the various sums she paid to both the accused and the person she names as Kamau. She stated that she paid a total of Kshs. 364, 2000 for purchase of land, but that she, and others that she made payment on their behalf, did not get the land.

7. Even though the Learned trial Magistrate had previously ordered the trial to start de novo on 3rd March 2015, contrary to the order for hearing de novo, the Learned Magistrate ordered that the previous recorded evidence before Learned Magistrate J. N. Nyaga be adopted. The following is how the exchange between the prosecutor and the trial Magistrate proceeded:

> ***"Prosecutor: I have one witness but. I need time to prepare the witness. The other 3 are not in court. Later: The witness Ntanyaku had testified before accused. Court may adopt evidence of witnesses who had testified so that they are not recalled.***
>
> ***Court: P W 2 and P W 's evidence to be adopted as taken before Hon. Nyagah."***

8. The trial proceeded on 17th March, 2015 with the evidence of the investigating officer, namely Sergeant Johnson Kirua then the prosecution closed its case.

9. On 9th July 2015 the trial was taken over by the then Nanyuki Chief Magistrate T. Matheka (as she then was). The appellant on that same day elected to have his trial start de novo. The prosecution objected and it seems because of that objection the appellant chose to proceed with the case from where it had stopped before Learned trial Magistrate T. W. Cherere.

10. Before the Learned trial Magistrate T. Matheka the appellant gave his unsworn defence. He was granted an adjournment to enable him engage an advocate.

11. The trial was yet again taken by another Magistrate. Learned Chief Magistrate L. Mutai took over the trial on 16th June 2016. This Magistrate received further unsworn defence of the appellant on 30th September, 2012, when the appellant elected to proceed with his trial from where it had last ended.

12. The appellant by his unsworn defence stated that he was the

Treasure of Gitaraga Farm and that he receive money in that capacity. He Produced minute of the Gitaraga Farm meeting which elected him as the treasurer. Those minutes were recorded by the acting Secretary called Kamau. He also produced a photograph and a video, which are not contained in the trial file. I am unable therefore to determine the relevance of those missing exhibits to the appellant's defence.

13. The appellant also produced a letter of Equity bank which was evidence of the title document of Gitaraga Farm being deposited in safe deposit box of that bank. That bank by a letter dated 17th March, 2015 confirmed that it still had the custody of that title.

14. It is unfortunate to state that after my review of the trial court's evidence I am of the firm view that the conviction of the appellant was a travesty of justice.

15. It is obvious from the entire record of the trial court that the appellant had been engaged by the officials of Gitaraga Farm to assist them obtain the title of the farm. The title was still in the name of the person who sold the farm and who had died before transferring the title to Gitaraga Farm. It therefore follows that the appellant was not entirely a stranger to the matter relating to the tile of Gitaraga Farm. This finding is bolstered by the evidence of the document from Equity Bank; prosecution's exhibit No. 45 (a), which reveals that the title of the farm was deposited at Equity Bank on 15th March 2013 by five people namely; the appellant, Gathukumi Mathagu, Peter Wanjohi Dismas Riri and Daniel Mwebia. No effort was made by the prosecution to call these persons for purposes of giving evidence in which capacity the title was deposited by the five persons at Equity Bank. This would have assisted the trial court reach a just decision, in the case, since the appellant was charged with obtaining money under false pretence that he was in a position to sell land on that farm.

16 The failure of adducing evidence that could lead to the conviction of the appellant lay at the door of the investigating officer and the prosecution.

17. The reason I make that bold statement is because having gone through all the receipts produced in evidence by Jane Wangui Mugacia (Jane). I can confirm that her evidence only revealed that she allegedly paid total of Kshs. 260,200 to the appellant directly. Not the amount stated in the charge sheet, that is, Ksh 364,200. The balance of the money was received as follows; someone called Kamau received Ksh. 61,000 and someone who was not named by the complainant Jane received Ksh. 38,000/=

18. The fact the amount stated in the charge sheet is differing from amount represented by receipts would not be a basis of overturning the appellant's conviction Not at all. In this regard see the case :**J M A- V- REPUBLIC [2009]KLR 67.**

> "It ***was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the C P C was meant to cure such an irregularity where prejudice to the appellant is not discernible***".

What would lead to overturning of his conviction is that, after the court ordered the case to start de novo, the prosecution did not call evidence to prove that, firstly the appellant was not an official of Gitaraga Farm; Secondly that the appellant was not permitted to collect money from the would be buyers of that farm, and thirdly that the money received by the appellant was never transmitted to Gitaraga Farm Limited.

19. After the trial court ordered the case to start de novo the prosecution only called Jane Wangui Mugacia, who narrated how she paid money to the appellant and another person called Kamau with a view to buying land of Gitaraga Farm; and also called the investigating officer.

20. The prosecution's case was poorly investigated and poorly prosecuted. The trial Magistrate T. W. Cherere when she took over the trial of the case, and after receiving evidence of the complainant Jane Wangui Mugachia, seemed sceptical on the investigations done. The learned trial Magistrate stated this:

> "***Court: The court hereby directs that the investigating officer conduct further investigating on this case."***

21. It is obvious from that order of the trial Magistrate that she found the evidence adduced by the complainant wanting.

22. Even though the trial Magistrate made that order for further investigating to be conducted, the prosecution failed to provide further evidence other than calling an investigation officer. That officer's evidence was simply a report of what the witness had stated to him.

23. It is also disturbing that the trial court after ordering the trial do start de novo on 20th May, 2014; On 3rd March 2015 when the matter

was scheduled for further hearing the trial court, unilaterally and without informing appellant, proceeded to order that the evidence that had been adduced before the previous trial Magistrate be adopted. That negation of the order that the trial do start de novo was without the participation of the appellant and was prejudicial.

24. The Learned trial Magistrate who wrote the judgment fell in error in view of what is stated above. The Learned Magistrate fell in error in stating in the judgment that the prosecution had demonstrated that the Farm was not available for sale. That was not in evidence because of the order of 20th May 2014 that the trial do start de novo. The order to start the case de novo negated or obliterated the evidence adduced previously. The word de novo means starting from the beginning or a new. The trial Magistrate, in her judgment, could not therefore refer to evidence adduced before 20th May, 2014.

25. It is unfortunate, and it does explain the muddles proceeding that this case was handled by four Magistrates. The fourth Magistrate who wrote the judgment only heard the latter part of the unsworn defence of the appellant. This scenario was contrary to an observation made by Justice Makhandia (as he then was) in a case adopted in **P H N – V- RESPONDENT [2016] eKLR**, that is the case **MUNYI MWOBE – V- REPUBLIC** where stated thus:

> ***"It was very important that the trial Magistrate who saw the evidence and heard the witnesses should have been the one to write judgment as the demeanour and credibility of the witnesses was of utmost important, failing which the trial ought to have started de novo."***

26. Having perused and evaluated the trial court's proceeding and judgment I have great reservation whether indeed justice was done in this case. This was a view held in the case **NDEGWA- V- REPUBLIC WHERE MADAN, KNELLER AND NYARANGI** in the court of appeal held.

> ***"It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second Magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion. ……. for these reasons we have stated, in our view the trial was unsatisfactory."***

27. In the end I find that the prosecution failed to meet the criminal standard of proof and I also find that the appellant was materially prejudiced by his case being heard by successive Magistrate: see Section 200 (4) of the Criminal Procedure Code which provides:

> ***" where an accused person in convicted upon evidence that was not wholly recorded by the convicting Magistrate , the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

28. In this case I will not order for a new trial because to so do would enable the prosecution to fill in the gaps in its evidence. A new trial would only be ordered where the interest of justice require it and it is unlikely to cause prejudice to the appellant. The other factor that would leads this court to find that a new trial should not be ordered is because the events surrounding this case occurred in the years 2012 and 2013. Today it is 27th February 2018. There is every possibility that the prosecution will not succeed in tracing the witnesses. More over the basis upon which the conviction of the appellant will be set aside is partly due to the poor investigation and prosecution but also because of disjointed process of trial by the trial court.

29. It follows that the orders of the court are:

> **(a) The conviction of the appellant is hereby quashed and the sentence of the trial court is hereby set aside.**
>
> **(b) I order CHRISTOPHER MWAI MACHARIA be set free unless he is otherwise lawfully held**.

Dated and Delivered at Nanyuki this 27th February 2018

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Christopher Mwai Macharia

For state:.....

Language.....

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE