



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL APPEAL NO. 26 OF 2017**

**[Being an appeal from the original Criminal Case No. 632 of 2012 in Narok Senior Resident Magistrate court, R. v. Stephen Muria Mwangi]**

**STEPHEN MURIA MWANGI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence as follows. In count 1, he was convicted and sentenced to 2 years imprisonment in respect of obtaining money by false pretences contrary to section 313 of the Penal Code (Cap 63) Laws of Kenya. In count 2, he was similarly convicted of obtaining money by false pretences and sentenced to 2 years imprisonment. In count 3, the appellant was similarly convicted of obtaining money by false pretence and was sentenced to 2 years imprisonment. In count 4, the appellant was convicted of being in possession of another person's national identity card contrary to section 14 (1) (j) and (iii) of the Registration of Persons Act (Cap 107) Laws of Kenya and was sentenced to a fine of Sh. 15,000/- in default to serve 12 months imprisonment. In count 5, the appellant was convicted of uttering a false document contrary to section 357 (b) of the Penal Code and was sentenced to 3 years imprisonment. The default sentences were ordered to run consecutively.

2. Furthermore, in addition to the sentences imposed, the court ordered the appellant to refund Sh.825,000/= to Wesley Tuwei failing which recovery procedures under section 334 (1) and (2) of the Criminal Procedure Code (Cap 75) were to be invoked. The order of restitution was made pursuant to section 178 (1) of the Criminal Procedure Code [Cap. 75] Laws of Kenya. A similar restitution order in the sum of Sh.300,000/= was made in favour of Elijah Towett and David Maritim. Similarly, another order of restitution in the sum of Sh.560,000 was made in favour of Richard Murungeng and Samuel Molomet.

3. The state supported both the conviction and sentence including the orders of restitution.

4. The appellant was convicted on the evidence of Wesley Tuwei (PW1), Elijah Towett (PW2) and Richard Kipkemoi Murungeng. (PW3). Additionally, he was convicted on the evidence of Patrick Kuria Michuki (PW5).

5. The defence of the appellant was a bare denial. He denied entering into land sale agreement with PW1, PW2 and PW3.

6. The appellant has raised 7 grounds in his petition of appeal to this court. In ground 1, he has faulted the trial court for convicting him on a multiplicity of counts in one charge sheet, which have

compromised, his defence. I find that the charges filed against the appellant are distinct charges and are framed in accordance with section 137 of the Criminal Procedure Code. I further find that there is no multiplicity of the charges as filed. I finally find that the charges as filed did not compromise his defence. In the circumstances, I find no merit in this ground of appeal and is hereby dismissed.

7. In ground 2, the appellant has faulted the trial court for ignoring material inconsistencies in the evidence of the prosecution witnesses, in respect of the land sale agreements. In this regard, I find that the evidence of the complainants (PW1, PW2 and PW3) is that they entered into the sale agreement with the appellant, who introduced and described himself as Patrick Kuria Michuki. Following police investigations, it came to light that his real name is Stephen Muria Mwangi and this is clear from the evidence of No. 84046 PC Nicholas Njoroge (PW 10), who was the investigating officer. The real Patrick Kuria Michuki testified as PW5 and he produced the title deed in respect of his land parcel No. Cismara/Nkobon/155, which was issued to him on 15/10/1985 as exhibit 7. The sale agreement between PW1 and the appellant was witnessed by Ernest Kipng'eywo Rono (PW4). It is the evidence of PW4 that the appellant introduced himself as Patrick Kuria Michuki, which name appears in his fake identity card. In the circumstances, I find that the evidence of the prosecution witnesses was cogent and consistent. I therefore find that this ground of appeal is without merit and is hereby dismissed.

8. In ground 4, the appellant has faulted the trial court for allowing the document examiner (PW7) to testify in respect of the expert report when he was not the maker of that report. PW7 was not competent to testify in respect of that report. However, there was ample evidence to support the convictions recorded against the appellant. In the circumstances, I find that there is no merit in this ground and is hereby dismissed.

9. In ground 5, the appellant has faulted the trial court for permitting the investigating officer to give evidence on behalf of the Land Registrar who was not called as a witness. The investigating officer was not a competent witness in respect of the evidence of the Land Registrar. However, I find that there is ample evidence to support the conviction recorded against the appellant even though the Land Registrar, was not called as a witness. In other words, the non-calling of the Land Registrar is a curable defect in terms of section 382 of the Criminal Procedure Code.

10. In grounds 6 and 7, the appellant has faulted the trial court for imposing consecutive sentences as opposed to imposing concurrent sentences, which in the circumstances of his case was manifestly excessive. In this regard, I find that the maximum sentence provided for in respect of the offence of obtaining money by false pretences is 3 years imprisonment. I also find that the offence of making a document without authority carries a maximum sentence of 7 years imprisonment.

11. I have considered the mitigation of the appellant that he was a first offender and that he was a family person. On the other hand I have taken into account that the appellant defrauded the complainants of huge sums of money amounting to over 1 million. After taking into account all the circumstances of this case and in the light of the statutory penal provisions, I find that the sentences imposed were merited.

12. The restitution orders made in favour of PW1, PW2 and PW3 involved colossal sums of money. The orders for restitution and the invocation of the provisions of section 334 (1) of the Criminal Procedure Code in the event of failure to retribute are not proper. Orders of restitution in terms of section 178 the Criminal Procedure Code are made in cases involving minor injuries and small amounts of money. This is clear from the case of *Terrah Mukindia v. R (1966) EA 425*. Additionally, where substantial amounts of money are involved as in the instant appeal, the issue of restitution should be left to the parties to settle it in a civil court. Trial courts will be faced with practical problems of enforcing restitution orders of this nature. For instance, if the subject land of the appeal is to be sold in execution of a restitution order, a search has to be carried out in the land registry. If the appellant is found to be the owner, his land may have been mortgaged or charged to a financial institution as security. Again if it is agricultural land, there will be the necessity of obtaining the consent of the Land Control Board in terms of section 6 (Cap 302) Laws of Kenya. These are but a few obstacles a trial court may be faced with in imposing restitution orders such as those made in the instant appeal. Moreover, in law orders of restitution in terms of section 178 (1) of the Criminal Procedure Code are limited to properties that have been produced in the trial court

as exhibits.

13. In the circumstances, I find that the restitution orders should not have been made and I hereby set them aside.

14. This is a first appeal. As a first appeal court, according to *Okeno v. R. (1972) EA 32*, I am required to scrutinize the evidence upon which the convictions were based. I have done so and I find that the appellant was convicted on sound evidence. I therefore confirm both the conviction and the sentence.

15. The upshot of the foregoing is that the appellant's appeal is hereby dismissed in its entirety, except the restitution orders, which are hereby set aside.

Judgement delivered in open court this 25th day of July 2017 in the presence of the Appellant and Ms Nyaroita for Respondent.

**J. M. Bwonwonga**

**Judge**

**25/7/2017**