



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 121 OF 2013**

**WANGAI NDIRANGU GATARI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against Judgement, sentence and conviction in Criminal case number 1154 of 2011, R vs Wangai Ndirangu Gatari at Nyeri, delivered by V. Nyakundi R. M. on 30.9.2013).*

**JUDGEMENT**

**Wangai Ndirangu Gatari** (hereinafter referred to as the appellant) was convicted of the offence of obtaining registration of land title by false pretence contrary to Section 320 of the Penal Code<sup>[1]</sup> and was sentenced to **one year imprisonment**.

Aggrieved by the verdict, the appellant appealed to this court against both conviction and sentence. The appeal filed on 14<sup>th</sup> October 2013 cites **8** grounds which in my view can conveniently be reduced to two namely:-

- a. Whether the prosecution proved its case to the required standard.*
- b. Whether the sentence imposed is excessive in the circumstances.*

This being a first appeal the court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The duty of the Judge is to consider the evidence objectively and dispassionately.<sup>[2]</sup>

On 29<sup>th</sup> February 2016, counsel for the appellant and the DPP asked for 14 days to file written submissions and a mention date was fixed for 24<sup>th</sup> March 2016 to confirm compliance but on the said date, no submissions had been filed by either counsels. **Mr. Kingori** for the appellant informed the court that he would file his submissions by Tuesday the following week while **Mr. Njue** for the DPP said he will file his submissions within two weeks from the date of service. A judgement date was fixed for 19<sup>th</sup> May 2016 and parties were directed to file and exchange written submissions within the period stated above. However, at the close of business on the 12<sup>th</sup> April 2016, long after the expiry of the above time frame, no submissions had been filed, hence, I proceeded to write the judgement.

On whether or not the prosecution proved its case to the required standard, I have carefully considered the

prosecution and defence evidence. Section 320 of the Penal Code<sup>[3]</sup> provides that:-

*Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.*

From the above section, the accused person must:-

- a. wilfully procure for himself or any other person any registration, licence or certificate under any law;
- b. by false pretence.

False pretence is defined in Section 312 of the Penal Code<sup>[4]</sup> as follows:-

*Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to true, is a false pretence.*

The operative word under Section 312 is "**representation**" which is applicable in the following circumstances:-

- i. *A representation by words, writing or conduct.*
- ii. *A representation in either past or present.*
- iii. *A representation that is false.*
- iv. *A representation made knowing it to be false or believed not to be true.*

The High Court of Botswana in *Lesholo & Another vs The State*<sup>[5]</sup> 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 intent 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 even 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.<sup>[6]</sup>*

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 on in the case of *Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria*<sup>[7]</sup> where the court stated in order to succeed in a charge of obtaining by false pretences, the prosecution must prove:-

- a) *that there is a pretence;*

*b) that the pretence emanated from the accused person;*

*c) that it was false;*

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

*e) that there was an intention to defraud;*

*f) that the thing is capable of being stolen;*

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

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

The key question is, does the defence offered by the appellant in the lower court raise doubts on the prosecution case? Does it rebut the above ingredients? I have reviewed and analysed the defence offered by the appellant. A close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case. The testimony of the defence witnesses did not in any manner exonerate him. In my view, the defence did not rebut the serious allegations made in support of the charges against the appellant.

**PW1 Henry Kimani Thairu** testified that he sold his plot **Aguthi/Gatitu/807** to a one **Francis Mwangi Kabure** and handed over the title to him but could not transfer the same immediately because the buyer was ailing. This evidence was corroborated by **PW2 Gilbert Gachare Mwangi** who testified that his father **Francis Mwangi Kabure** died in 2009, that he did a search in 2010 which confirmed that the land was still in the name of **PW1** but a second search done on **13.9.2011** revealed that the land was registered in the name of the appellant. They reported to the police and the appellant was arrested and charged.

**PW3 Timothy Kingori Murrithi** cultivated the land from 1994, but in 2011 the appellant fenced the land, he brought the fence down, he was arrested and released after the appellant dropped the complaint.

Also on record is the crucial evidence of **PW4 John Wanjohi Gichuki** the District Land Registrar, Nyeri who confirmed that at the request of the CID he verified that there was no presentation lodged on 8<sup>th</sup> January 1997, thereby casting serious doubts on the registration in favour of the appellant which was alleged to have been done on the said date.

The appellant did not shed light on how he acquired the title. He never presented documents showing the instrument that transferred the land to him. His testimony was highly contradictory. He stated that he had resided on the land for 50 years but at the same time he stated he bought it on 8<sup>th</sup> January 1997 and during the 50 years none of his relatives was buried in the land, but on cross-examination he admitted he had not built on the land contradicting himself further. I find that the defence by the appellant did not cast doubts on the prosecution case nor did it prove how he acquired the title.

After evaluating the evidence adduced, the law and authorities, I am satisfied that the prosecution proved the offence and that the necessary ingredients of the offence as enumerated above were proved beyond doubt. The upshot is that the learned magistrate correctly analysed the evidence and properly convicted the appellant. Hence, I hereby uphold the conviction.

Regarding the sentence, it is an established fact that sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

The general principles the Court adopts in an appeal relating to sentence was authoritatively stated by **Nicholas J** in the South Africa case of *R v Rabie*<sup>[8]</sup> as follows:-

1. *“In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-*

*(a) should be guided by the principle that punishment is “pre- eminently a matter for the discretion of the trial Court”; and*

*(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised*

2. *The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”.*

Further sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must consider the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances.<sup>[9]</sup>

The appellant was sentenced to one year imprisonment. Section 320 of the Penal Code<sup>[10]</sup> provides that a person convicted under the said section shall be liable to imprisonment for one year. Though the sentence imposed is the maximum given that the word used is "shall be liable" I find that the said sentence is not excessive considering the nature of the offence.

There is nothing to show that the trial court the 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, I find n reason to interfere with the said sentence.

The upshot is that this appeal against both conviction and sentence fails and the same is hereby dismissed. The appellant will serve the remaining part of the sentence imposed by the lower court excluding any period he may have served before being released on bail pending hearing of this appeal. Right of appeal 14 days.

**Signed, delivered and dated** at Nyeri this 19<sup>th</sup> day of May 2016

**John M. Mativo**

**Judge**

---

<sup>[1]</sup> Cap 63, Laws of Kenya

<sup>[2]</sup> See the Supreme Court of India in the case of K. Anbazhagan v. State of Karnataka and Others, Criminal Appeal No. 637 of 2015

<sup>[3]</sup> Supra

<sup>[4]</sup> Ibid

<sup>[5]</sup> {1999} (2) BLR 278

[6] R. vs Dent {1952} 2 Q.B. 590

[7] SC. 41/2003

[8] {1975} (4) SA 855 (A) at 857D-F

[9] Alister Anthony Pareira vs State of Maharashtra {2012}2 S.C.C 648 Para 69

[10] Supra