



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO. 181 OF 2010**

**FREDRICK WACHIRA MWANGI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in criminal case No.1686 of 2009 of the Chief Magistrate's Court at Meru by Hon. J.Ndubi – SRM)*

**JUDGMENT**

The appellant, **FREDRICK WACHIRA MWANGI**, was convicted for the offence obtaining by false pretences contrary to section 313 of the Penal Code.

The particulars of the offence were that on diverse dates between the 6<sup>th</sup> day of February 2002 and 29th April 2009 at Meru township in Meru Central District within Eastern Province with intent to defraud obtained from David Kiogora Kshs. 28,600 by falsely pretending that he was in a position to sub divide a [portion of land parcel number Kiirua /Kiirua 1013 a fact he knew to be false and untrue.

He was sentenced and fined Kshs.50,600 and in default to serve 12 months imprisonment.

He now appeals against both conviction and sentence.

The appellant was represented by Mr. Mwanzia of Muia Mwanzia & company Advocates. He raised five grounds that can be summarized as follows:

1. That the learned trial magistrate erred in law and fact in convicting the appellant without sufficient evidence.
2. That the learned trial magistrate erred in law and fact in rejecting his defence.
3. That the learned trial magistrate erred in law and fact by meting out an excessive sentence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

Briefly the facts of the prosecution case were as follows:

The complainant approached the appellant for land surveying services. He made some payments but the appellant did not do his part as agreed. This gave rise to this suit.

At the time of the trial the appellant contended that he was a land surveyor and that in the year 2002 he entered a service contract with the complainant. The latter made some payments to him and undertook to take his mother to the Land Control Board for consent to excise one acre from her land for the complainant. He (the complainant) then disappeared until 2009. When he reappeared, he said he had gone to pursue further education in South Africa. They negotiated another contract over the same land for subdivision of three portions. He paid in four installments.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32**.

Before we analyze the evidence in this case it would be prudent that we appreciate the ingredients of obtaining by false pretences under section 313. This was very well put in the case of **Amugo vs. Republic High court (Kisumu) Cr. Appeal No. 320 of 1980** The court held:

**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.**

It must be borne in mind that the fact must be either past or present but never in future. Devlin J in **J.R v Dent [1955]2 QB 594** observed as follows:

**"... a long course of authorities in criminal case has laid down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in a criminal law. "**

Although the complainant wanted the court to believe that after the initial payment in 2002 he reported to the police, this betrayed his later action in 2009 when he made further payments for the subdivision. He could not be telling the truth. In 2009 if his version was true, the right course of action was for him to report to the police and not to make further payment to a person he claimed had conned him.

The learned trial magistrate misdirected himself when he convicted the appellant on facts that clearly pointed to a future conduct. Before any agricultural land is subdivided, the proprietor must apply for and obtain the consent of the Land Control Board. Without it no legal subdivision can be made. It is fallacious for the complainant to contend that the appellant had promised to obtain the same.

From the foregoing analysis of evidence, I do agree with the contention that the conviction of the appellant was based on insufficient evidence and that his defence ought not to have been rejected.

The conviction is therefore quashed and the sentence set aside. If the appellant had paid the fine, the same to be refunded to him.

**DATED at Meru this 19<sup>th</sup> day of December 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**