



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.11B OF 2016

JOHN KIMATHI KIRIGIA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case No.809 of 2016 of the Chief Magistrate's Court at Meru by C. Kutwa – Principal Magistrate)

JUDGMENT

The appellant, **JOHN KIMATHI KIRIGIA**, was convicted on four counts after pleading guilty to all of them. The counts were as follows:

COUNT 1. CONSPIRACY TO DEFRAUD, CONTRARY TO SECTION 317 THE PENAL CODE.

The particulars of the offence were that on diverse dates between 13th day of January 2016 and 14th March 2016 at unknown place within the Republic of Kenya jointly with others not before court conspired to defraud **AYUB MUTWIRI KINOTI** of Kshs. four hundred thousand.

COUNT 2. FALSE SWEARING CONTRARY TO SECTION 114 OF THE PENAL CODE.

The particulars of the offence were that on 8th February 2016 at Meru Township within Meru County, before Ashford Riungu advocate, a person authorized to minister an oath swore an affidavit falsely upon a matter of public concern to the effect that he was **EMILIO MURIUNGI RUCHA** holder of identity card number 8284914.

COUNT 3. OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE.

The particulars of the offence were that on 8th February 2016 at Meru town in Imenti North District within Meru County with intent to defraud, obtained Kshs. three hundred thousand from **AYUB MUTWIRI KINOTI** by false pretending that he was in a position to sell land parcel No. **KIAMURI A/982** a fact he knew to be false.

COUNT 4. OBTAINING BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE.

The particulars of the offence were that on 14th February 2016 at Meru town in Imenti North District within Meru County, with intent to defraud, obtained Kshs. one hundred thousand from **AYUB**

MUTWIRI KINOTI by false pretending that he was in a position to sell land parcel No. **KIAMURI A/982** a fact he knew to be false.

The appellant was convicted after he had pleaded guilty to the offences. He was sentenced to serve two years imprisonment on each count and the sentence was ordered to run consecutively. He now appeals against the sentence.

The appellant was represented by Mr. Mutunga instructed by the firm M/s Joan W.G Ndorongo. They raised ten grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in convicting on unequivocal plea of guilty.
2. That the learned trial magistrate erred in law and fact by not appreciating that the offences were repeated.
3. That the learned trial magistrate erred in law and fact by denying the appellant a chance to compensate the complainant.
4. That the trial magistrate erred by making an order for the sentence to run consecutively.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel, who contended that the appellant was precluded by section 348 of the Criminal Procedure Code from challenging his conviction.

When an accused person has pleaded guilty to an offence, he is estopped from challenging his conviction. He can raise issues of legality of the sentence or issues of the manner in which the plea was recorded.

I have perused the record and I am satisfied that the plea was taken in the manner prescribed in **ADAN vs. REPUBLIC [1973] EA 443**. The plea in the instant case was taken in similar manner with that in **Eldoret High Court Criminal Appeal number 78 of 2011**. The court observed at page 4

" ...no single procedure of taking plea was omitted by the trial court. It is also erroneous to contend that the appellant did not understand the proceedings due to the language barrier. The record is clear that the charges were read in the language he understands namely Kimeru".

I make similar observations here.

Though it was submitted that the charges were based on a land sale agreement, this is not the correct position. The correct position was that the appellant was offering to sell what he did not have. This was purely criminal.

The third and fourth count were not a duplicity. From the dates it is clear the offences in the two counts were committed on two different dates. The charges are correct.

Although the appellant at the time of plea indicated that he was ready to pay the complainant and the sentence adjourned for six days, he did not repeat his offer when he went to court for sentencing. The duty was on him to inform the court how soon he intended to do so for a criminal court cannot be taken as a debt collecting court. Even at the time the appeal was argued, I would have expected to be informed that he has already paid the complainant. This would have definitely mitigated the sentence.

The offences were committed in the same transaction. The correct order ought to have been that the sentences to run concurrently. I therefore set aside the learned trial magistrate's order and order that the sentences to run concurrently. To that extent only does the appeal of the appellant succeed.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE