



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 24 OF 1997

JAMES MUGO MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Karatina Senior Resident Magistrates' Court Criminal Case No. 578 of 1995 (Hon. Kiarie Waweru Kiarie) in the judgment delivered on 4th November, 1996)

JUDGMENT

The appellant was charged with one count of obtaining by false pretence contrary to **section 313** of the **Penal Code** and two counts of cheating contrary to **section 315** of the **Penal Code**. In the first count it was alleged that between the 4th day of September, 1988 and 17th February, 1991 at Karatina Township in Nyeri District within Central Province with intent to defraud, the appellant obtained from **Charles Vincent Mwangi Kshs. 122,400/=** by falsely pretending that he was selling a piece of land to the said **Charles Vincent Mwangi** for Njogu Rugenya having been authorised by the said Njogu Rugenya.

According to the particulars of the second count, on the 17th February, 1991, at Karatina Township in Nyeri District within Central Province, by a means of a fraudulent trick, the appellant is said to have pretended that he was an appointed agent and was collecting money for the sale of a shamba at Ngariama Range in shares and obtained **Kshs. 36,000/=** from **Charles Vincent Mwangi**.

Finally, in the third count, it was alleged that on the 17th day of February, 1991 at Karatina Township in Nyeri District within Central Province by means of a fraudulent trick the appellant pretended that he was an appointed agent and was collecting money for sale of a shamba at Ngariama range in shares and obtained cash of **Kshs. 6,000/=** from **Joseph Gichia Kungu**.

The appellant was convicted of all the three counts and was sentenced to twenty four months imprisonment on each of those counts with the sentences running concurrently.

He appealed in this court against the conviction and sentence raising the following grounds of appeal:-

1. The learned trial magistrate erred in fact and in law in convicting the appellant on the strength of the handwriting expert's opinion;
2. The learned magistrate erred in fact and in law in convicting the appellant without proper

identification of the parcel allegedly sold by the appellant to the complainant in the first count;

3. The learned magistrate erred in law and in fact in convicting the appellant in respect of counts 2 and 3 without corroboration;

4. The sentence meted out against the appellant was manifestly excessive in the circumstances; and,

5. The conviction and the sentence were against the weight of evidence.

When the appeal came up for hearing the appellant who acted in person appeared to deviate from the foregoing grounds but instead argued that he was not given an opportunity to defend himself. He also told the court that the learned magistrate harassed him and the witnesses against him were step brothers who held a grudge against him because of a dispute over a parcel of land. This land according to the appellant was given to him by the Court of Appeal. It was his case that these witnesses colluded with the magistrate.

Mr Cheboi for the state opposed the appeal and urged that the record is clear that the appellant actively participated in the trial and even called witnesses one of who admitted that he lied to court. Counsel argued that there was no evidence that the learned trial magistrate was partial or biased against the appellant. Counsel also submitted that the apparent delay in the trial was occasioned by the appellant and even then, based on the totality of the prosecution evidence and the defence case, the case against the appellant was proved beyond reasonable doubt and therefore this appeal ought to be dismissed.

Submissions by both the appellant and the state counsel should be considered from the perspective of the evidence on record and the law. As far as the evidence is concerned, it is incumbent upon this court, as the first appellate court, to reconsider the evidence afresh and analyse it before coming to its own conclusions bearing in mind that it is only the trial court that had the advantage of seeing and hearing the witnesses. It is a legal task to which this court is bound and it was so stated in **Okeno versus Republic (1972) EA 32** where the Court of Appeal was emphatic that:-

An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”(See page 36 of the decision thereof.

With this guide, it would be appropriate at this point to navigate through the evidence and analyse it in the context of the provisions of the Penal Code that define the offences for which the appellant was charged and convicted.

Charles Vincent Mwangi (PW1) whom I will refer to as “Charles” told the court that in 1988 a friend of his introduced him to the appellant who told him that he was selling land located at Kibirigwi trading centre in Kiine location. The two of them, that is, Charles and the appellant, together with one **Christopher Wachira (PW3)** visited the land the same year in July. The land is said to have been approximately six acres and fallow. It was agreed that Charles would buy this property at the price of **Kshs. 28,000/=** per acre bringing the total sum payable for the six acres to **Kshs. 168,000/=**.

According to this witness, between the 4th August, 1988 and 17th February, 1991 Charles paid the appellant the total sum of **Kshs. 122,400/=**; the payment was through at least thirteen or so instalments of various amounts. It would appear that most of the transactions were completed at “Elephant Castle” at Karatina and were witnessed by **Christopher Wachira (PW3)**.

At one point, the appellant is said to have mentioned to this witness that the land belonged to his uncle

one Njogu Rukenya and that he had authorised the appellant to dispose of the land as he wished.

It was Charles' testimony that in the course of their dealings, the appellant also offered to sell another parcel of land at Ngariama. On 17th February, 1991 he paid the appellant Kshs. 36,000/= for what he described as "6 pieces" at Ngariama. On the same day one **Joseph Gichie Kungu (PW2)** also paid the appellant Kshs. 6000/=. The witness told the court that the appellant informed them that he was only an agent and that the land belonged to the Government.

What followed, from what I can gather from the testimony of Charles, was a game of hide and seek between him and the appellant; according to him, though the appellant would promise to meet him to deliver the title documents, he would not just appear at the agreed venue. Suspecting that he had been duped Charles took up the issue with the District Officer, Baricho and later the police at Karatina.

The witness later learnt that the land he purportedly purchased was neither Njogu Rukenya's nor the appellant's but belonged to one **Sospeter Kamau Muchiri** and his brother whose title documents were exhibited in court.

Joseph Gichia Kungu (PW2) (Joseph) was Charles' workmate at the City Council of Nairobi at the material time; he testified that he came to know the appellant during his visits to the City Hall whenever he came to meet Charles. The witness told the court that he was with Charles on 17th February, 1991, at the "Elephant castle" when the latter made some payments to the appellant towards the purchase of land. The appellant told them that there was another land at Ngariama he was also selling; this witness paid Kshs. 6,000/= for five acres of that land while Charles paid Kshs. 36,000/= for his share. Joseph testified that although they insisted that the agreement between them and the appellant be reduced into writing, the appellant declined and instead told them that he would issue them with receipts at a later date. The witness testified that he never saw the land and also never saw the appellant again.

Christopher Wachira (PW3) testified that **Charles (PW1)** was his brother-in-law and that he came to know of the appellant while he was transacting with Charles for the sale of Kibirigwi land; in fact, so he testified, he saw the appellant for the first time when he accompanied his brother-in-law to view the land at Kibirigwi. He testified that he witnessed the payments made to the appellant by Charles at the Elephant Castle including the last instalment which was made on 17th February, 1991. The witness recalled **Charles** and **Gichia (PW2)** paying for another parcel of land at Ngariama. According to him, a share in that land cost Kshs.6000/=; Gichia paid for one share while Charles paid for six shares.

Benson Waweru Muturi (PW4) testified that he was with the appellant and **Charles (PW1)** at the Elephant castle on 17th February, 1991 when the appellant was paid the sum of Kshs. 2400/= as part settlement of the purchase of the Kibirigwi land. He also saw Charles and Gichia pay for their respective shares at the Ngariama land. He testified that being the Chief of Mwea where Ngariama is apparently located, he doubted that any land was being sold in Ngariama and his investigations confirmed that indeed no land was being sold at Mwea.

One of the owners of the land at Kibirigwi, **Kabuku Kamau (PW5)** testified that sometimes in 1995 he was summoned by the Chief and informed that his land was being sold by the appellant. He knew the appellant as he hailed from his clan but testified that he had not authorised him to sell the land. The other owner, **Sospeter Kamau (PW6)** testified that his parcel of land shares a common boundary with that of **Kabuku Kamau (PW5)** who was his brother; he too testified that he had not authorised any person, including the appellant, to sell his land. The two witnesses testified that they do not live on the land. The court visited the land parcel of land in issue.

The investigations officer **Police Constable Masika Mang'oli (PW7)** produced thirteen handwritten agreements in which the appellant acknowledged having received money from Charles. He took statements from the complainants and the rest of the prosecution witnesses and arrested the appellant when he established that the land the appellant purported to dispose of belonged to other people. He also took specimen signatures from the appellant and obtained various documents from the appellant's house on which the appellant had appended his signature. The prosecution invoked **section 76** of the **Evidence**

Act and urged the court to compare and find that the signatures by the appellant on the agreements, his specimen signatures and those appended on the documents he recovered from the appellant's house were by one and the same person. In invoking this provision of the law, the prosecution informed the court a document examiner had examined the signatures and confirmed that indeed the signatures on these documents were the appellant's except that he could not procure the attendance of the document examiner in court. He, however, submitted his report to the court.

On his part the appellant opted to give a sworn testimony and in his testimony, he admitted that in 1988 he met **Charles (PW1)** and **Wachira (PW3)** who were introduced to him by one **Alexander Mugweru Gichunge** at Kibirigwi in a bar. Since the two were looking for land to buy he offered them the parcel known as **Kiine/Sagana/30** which belonged to one **Miriam Wambui (DW2)**; he said that he introduced **Miriam Wambui** to these would be buyers. It was his evidence that both Charles and Wachira agreed to buy the land at the price of Kshs. 180,000/= and that the owner, **Miriam Wambui (DW2)** authorised him to receive the money on her behalf. He testified that he later received from **Charles (PW1)** a total of Kshs. 120,000/= which he signed for at the Elephant Castle and which transaction was witnessed by **Wachira (PW3)**. The appellant testified that, apparently, Charles could not raise the balance of the purchase price and therefore they opted to refund him the Kshs. 120,000/= he had paid but that he declined to take it back. The appellant told the court that he was arrested while still waiting for the appellant to take his money. He also testified that Miriam even came with the money to the police station but Charles refused to take it. The appellant denied having offered to sell any land in Kibirigwi and neither did he know anything about the land in Ngariama.

In cross-examination the appellant said that he was related to Miriam because their respective mothers were step-sisters. The witness admitted that the signatures on the documents produced in court were his and that he signed for and collected the money on behalf of Miriam.

Miriam Wambui (DW2) testified on behalf of the appellant and although she initially testified in her evidence in chief that she had met **Charles (PW1)** and **Wachira (PW3)** and even received money from the appellant she recanted her testimony on cross-examination. She denied ever meeting this two people or receiving any money from them through the appellant. She admitted having lied to the court if that was going to "save" the appellant who had assisted her before. In short, she had nothing to do with the transactions between the appellant and the complainants.

This is the evidence that the trial court was confronted with; it was up to that court, as it is now incumbent upon this court, to evaluate the evidence in its totality and decide whether it was sufficient enough to support the offences for which the appellant was charged and convicted. It may help at this juncture, therefore, to consider the legal provisions defining these offences; **section 313** of the **Penal Code** which formed the basis of the first count provides as follows:-

313. Obtaining by false pretences

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.

There is sufficient evidence that the appellant received money from the first complainant. There is also evidence that the purpose for which this money was paid and received was, purportedly, for acquisition of land. The appellant in his evidence appeared to suggest that the land he offered for sale is not the same parcel that was the subject of the offence with which he was charged. In his evidence he stated that the land he was selling was known as **Kiine/Sagana/30** which belonged to **Miriam Wambui (DW2)** but this evidence was controverted by Miriam herself who though she testified on his behalf denied that she had anything to do with the appellant or had even met any of the complainant's.

It is noteworthy that both the prosecution witnesses and the appellant were in agreement that the first complainant together with **Wachira (PW3)** met the appellant with whom they negotiated and agreed to

buy land he had offered to sell. Subsequent to the negotiations, payments were made and received. As noted the appellant admitted to have received the money from the complainant except that, according to his testimony, he was only collecting these monies on behalf of behalf of **Miriam (DW2)**. Again, Miriam, his own witness, denied this and went further to state that the appellant had coached him to testify the way she did in her evidence in chief.

I would agree with the learned magistrate that considering the available evidence, it was proved beyond reasonable doubt that there was false pretence with intent to defraud on the part of the appellant when he held himself out as a person who had land to sell and based on this misrepresentation obtained money from the complainant when he knew that such land did not exist. I hold that the appellant was properly convicted on the first count.

The appellant submitted that the court should not have relied on the evidence of the handwriting expert apparently because his report was not produced by its maker. I would agree with the appellant that considering that the report was an expert opinion, it ought to have been produced by the expert himself. However, considering that the evidence of **Charles Vincent Mwangi (PW1)**, **Joseph Gichia Kungu (PW2)**, **Christopher Wachira (PW3)** and **Benson Waweru Muturi (PW4)** was not controverted, the handwriting expert's opinion was relevant but not pivotal to the finding that the appellant received the money. In any event the appellant himself admitted having received the money and while I appreciate that it is upon the prosecution to prove its case beyond reasonable doubt I am unable to conclude that the appellant's admission discredited or displaced the prosecution's case or in any other way cast any doubt on evidence against him.

The other two counts have their foundation in **section 315** of the Penal Code; this section of the law states:-

315. Cheating

Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years.

Charles Vincent Mwangi (PW1), **Joseph Gichia Kungu (PW2)**, testified that the appellant obtained from them the sum of Kshs. 36,000 and Kshs.6, 000/= respectively allegedly for shares of land in Ngariama. In this particular transaction, the appellant is said to have introduced himself as a government agent selling the land on behalf of the government. From the evidence of the complainants, the transactions were concluded at the Elephant Castle in Karatina. **Benson Waweru Muturi (PW4)** who was with the complainants at Elephant castle on 17th February, 1991 when the payments were made testified that he was the chief of the location where the land being offered for sale is supposed to be located; he undertook his own investigations and confirmed that no government land was being sold at Ngariama.

Although I did not have the advantage of seeing and hearing these three witnesses, their evidence appears to me to have been corroborative, credible and trustworthy. It is appreciated that in his evidence, the appellant denied the offences against him but there is nothing in his defence or in the questions and answers given in cross-examination that would cast these witness' testimony in doubt. I would find and hold that based on the evidence on record the appellant was properly convicted on these two counts.

The final question in his appeal is the question of sentence; the appellant alleged that the sentence meted out against him was excessive in the circumstances. The two provisions of the Penal Code under which the appellant was charged provide a maximum sentence of three years imprisonment for anyone convicted of any of the offences prescribed in those provisions. The appellant was imprisoned for two years on each of the counts he was convicted of and the sentences were to run concurrently. I cannot accept that the sentences were excessive in the circumstances. I note that in sentencing the appellant, the

learned magistrate considered the appellant's mitigation and even deferred the sentence to a later date when the appellant undertook to refund the money he had obtained. I would conclude that there is no reason to disturb the sentences meted out against the appellant.

For the reasons I have given, I do not find any merit in the appellant's appeal and I hereby dismiss it. I note that the appellant has been out on bond pending the determination of his appeal; in view of his failed appeal, he will be taken to prison forthwith to continue serving his sentence for a period of twenty four months less the number of days he had served from 4th November, 1996 when he was sentenced to 23rd January, 1997 when he was released on bond. It is so ordered.

Dated, signed and delivered in open court this 29th May, 2015

Ngaah Jairus

JUDGE