



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Wafukho v Republic (Criminal Appeal 200 of 2012)  
[2014] KEHC 7538 (KLR) (20 January 2014) (Judgment)**

*Joseph Wanyonyi Wafukho v Republic [2014] eKLR*

Neutral citation: [2014] KEHC 7538 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 200 OF 2012  
F GIKONYO, J  
JANUARY 20, 2014**

**BETWEEN**

**JOSEPH WANYONYI WAFUKHO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the original conviction and sentence by M.A.  
Nanzushi, RM in Kimilili PMCCRC No 21 of 2011 on 31.10.2012)*

**Elements of the offence of obtaining money through false pretense.**

Reported by Njeri Githang'a Kamau

***Criminal Law** - Obtaining through false pretense - elements of the Offence - definition of false pretense - where the appellant had entered into a sale agreement for sale of land with the complainant - however the appellant failed to deliver vacant possession of the land to the complainant because the Appellant's relatives did not approve of the sale - whether the charge of obtaining money through false pretense was proved beyond any reasonable doubt - Penal Code, section 313, 312 - Land Control Act sections 6,7,22.*

**Brief facts**

The Appellant made a representation of fact in writing to the complainant through an agreement for sale of 1 acre of land. He received a sum of Kshs 252,000 leaving a balance of Kshs 18,000 which was to be paid by the complainant upon transfer of the land. The suit land was surveyed and a boundary demarcated but the complainant was not able to enter the suit land because he was prevented from doing so by the relatives of the Appellant. The Appellant did not also deliver vacant possession of the land to the Complainant because he had not obtained the consent of the relevant Land Control Board (LCB). The Appellant was consequently charged with the offence of obtaining money through false pretense contrary to section 313 of the Penal Code. He was tried for the offence, convicted and sentenced to pay a fine of Kshs 50,000 or in default to serve 12 months imprisonment hence the Appeal.



## Issues

- i. What were the elements of the offence of obtaining money through false pretense?
- ii. Did the facts of the case support a charge of obtaining money through false pretense?
- iii. Whether the charge of obtaining money through false pretense was proved beyond any reasonable doubt.
- iv. Whether the judgment of the trial court conformed to section 169 of the CPC (Criminal Procedure Code).

## Relevant provisions of the Law

### Penal Code

#### Section 313 Obtaining through false pretenses

*Any person who by any false pretense, 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 misdemeanor and is liable to imprisonment for three years.*

#### Section 312 Definition of false pretense

*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 be true, is a false pretense.*

### Land Control Act, cap 302 of the Laws of Kenya

#### section 6

*6 An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:*

*Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.*

**Section 7** provides for the remedy as follows:

*7 If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.*

**Section 22** provides for penalties as follows:

*22 Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—*

*(a) pays or receives any money; or*

*(b) enters into or remains in possession of any land,*

*In such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.*

## Held

1. Under section 313 of the Penal Code, the essential elements of the offence of obtaining through false pretenses were: that the person; a) Obtained something capable of being stolen; b) Obtained it through a false pretense; and c) With the intention to defraud.
2. The Appellant received a sum of Kshs 252,000 from the Complainant, which was something capable of being stolen under the law. However, it was not the taking of money that constituted the offence, but rather that it was taken with the intention to defraud. The fraud was found in the false pretense



3. Section 312 of the Penal Code provided the elements of false pretense to include: a) A representation of fact by word, writing or conduct; b) The representation is either past or present; c) The representation must be false; and d) The person made the representation knowing it to be false or did not believe it to be true.
4. The offence of obtaining did not relate to future events. The representation had to be of either a past or present fact, not future fact.
5. A statement of intention about future conduct, whether or not it be a statement of existing fact, was not such a statement as would amount to a false pretense in criminal law. *Devlin, JR v Dent* [1955] 2 QB pp 594/5
6. The Appellant was the registered proprietor of the suit land and had proprietary interest in the suit land. The only problem was that family members did not support or approve of the sale. There was nothing false or untrue about the agreement for sale of the land or the land itself. Therefore, it could not be said in the circumstances of the case, that the Appellant made a false representation of fact about the land.
7. The sale was a controlled transaction covered by section 6 of the Land Control Act, Cap 302 and as a matter of law, it needed consent from the relevant Land Control Board (LCB) in order to complete and validate the sale of the suit land. Under section 8 of the said Act, the Appellant ought to have applied for consent from LCB within six months of the making of the agreement for sale or within such period of time as shall have been extended by the High court.
8. The grant or refusal to grant consent to a controlled transaction was a preserve of the LCB, and was dependent upon certain conditions being met by the transaction and the applicant. Grant of consent was not automatic or under the control of the applicant. Therefore, the fact that consent from the LCB was not applied for or obtained did not in itself convert the representation to sell land into a false pretense for purposes of section 313 of the Penal Code.
9. Under section 6 of cap 302 of the Laws of Kenya, where consent was not obtained within the prescribed period, the controlled transaction became void. As a consequence thereof, the law provided the remedy for the purchaser under section 7 of the said Act and penalties for furtherance of voided transactions.
10. The legal framework which governed the transaction in controversy; made the transaction a purely civil action, thus removing it from the realm of criminal law except where section 22 of cap 302 had been called into play; and provided for a complete mechanism for and the relief in the event the transaction became void.
11. Section 7 had to be read together with the conditions of sale in the agreement, especially the clause dealing with default, which offered relief to the Complainant's gravamen. Guided by the relevant law attending the case, the transaction did not constitute a false pretense or intention to defraud for purposes of the offence of obtaining through false pretenses under section 313 of the Penal Code and further, the charge before the trial court was not a charge under section 22 of cap 302.
12. A criminal process is never a substitute for criminal remedy or to be used as a means to settle a civil claim or to avail a party in a commercial transaction undue or collateral advantage over the other. That kind of practice was fraudulent, demented and abuse of the Court process; should always be avoided by parties, resisted and forcefully suppressed by courts of law whenever it manifested itself before court.
13. The judgment by the trial court fell short of compliance with section 169 of the Criminal Procedure Code. It did not, *inter alia*, contain the point(s) for determination; the evaluation of the defence; the decision arrived at; and reasons for that decision.

*Appeal allowed.*

### **Orders**

*Conviction quashed and the sentence set aside.*

### **Citations**

#### ***East Africa***

1. *.Okeno v Republic* [1973] EA 32 - (Followed)
2. *Peters v Sunday Post* [1958] EA 424 - (Mentioned)



## ***United Kingdom***

1. *Edgington v Fitzmaurice* (1885) 29 Ch D 459 - (Followed)
2. *R v Dent* [1955] 2 QB 590 - (Followed)

## **Statutes**

### ***East Africa***

1. Criminal Procedure Code section 169 - (Interpreted)
2. Land Control Act (cap 302) sections 6,7,8,22 - (Interpreted)
3. Penal Code (cap 63) sections 312, 313 - (Interpreted)

## **JUDGMENT**

### **The Charge he faced**

1. Joseph Wanyonyi Wafukho, the Appellant, faced a charge of obtaining money through false pretence contrary to section 313 of the *Penal Code*. The particulars of the offence were that, on 30<sup>th</sup> of July, 2010, at Mt Crest Hotel in Kimilili township, in Kimilili District within Bungoma County, with intent to defraud, obtained from Francis Nakitari the sum of shs 252,000 by falsely pretending to be in a position to sell him a piece of land measuring 1% acres at Maeni.
2. He was tried for the offence, convicted and sentenced to pay a fine of shs 50,000 or in default to serve 12 months imprisonment.

He filed appeal

3. He was dissatisfied with the conviction and sentence, and he filed this appeal. The Appeal carries the following seven (7) Grounds of Appeal:
  - a) That the learned trial magistrate misunderstood and misapplied the provisions of section 313 of the penal code.
  - b) That the learned trial magistrate erred in law and fact by failing to consider all the evidence on the record and the submissions by the defence.
  - c) That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant when the elements of the offence under section 313 of the penal code had not been proved at all by the prosecution.
  - d) That the findings of the learned trial magistrate were against the weight of the available evidence.
  - e) That the learned trial magistrate erred in law and by failing to appreciate that the issues raised during the trial were issues that could not be entertained in criminal proceedings.
  - f) That the learned trial magistrate erred in law and fact by misapplying the law and shifting the burden of proof to the Appellant.
  - g) That the learned trial magistrate's judgement does not conform to the relevant laws.
4. Mr Nyamu, the learned counsel for the Appellant argued all the grounds of appeal together. He submitted that the transaction forming the basis of the offence was a land sale between the Appellant and the Complainant. The offence of obtaining through false pretences needed proof;



- 1) that the subject matter was not in existence; and
- 2) that it does not relate to future events.

According to Mr Nyamu, the record shows that the land was in existence and demarcated. It was only possession that was to be in the future. The Investigation Officer acknowledged that the land was in existence and that the Complainant was to pay the balance of shs 18,000 to complete the purchase price which he has not paid up to now. Therefore, the offence of obtaining through false pretences could not arise.

5. He argued further that, the dispute was purely civil in nature, for the Complainant wanted a refund of his money or land. The conviction was based on the fact that the Appellant did not deliver the land to the Complainant. The trial court did not realize that land transactions require much more than just delivery of possession; they require consent from the relevant Land Control Board, which had not been obtained in this case. The Appellant was the absolute owner of the land in controversy and so he needed no consent from any other person to sell the land. No formal objections that were raised and therefore, the remedy of the Complainant lay in a civil claim.
6. Counsel argued that the trial court ought to have considered one other important factor; that it is not the Appellant who refused to give vacant possession but his son, Robert. The said Robert was never called as a witness- the omission is critical in a criminal proceeding.
7. Finally, the Judgment of the trial court did not consider the submissions of the defence on the case. Under section 169 of the *CPC*, the trial court must discern the issues for determination. Counsel made it absolutely clear that the Appellant was appealing for purposes of cleaning his otherwise good name but which has been tarnished by the criminal conviction and sentence.

### **The state opposed the Appeal**

8. Mr Kibelion learned State Counsel opposed the Appeal. He submitted that the trial court properly evaluated the evidence and arrived at the correct decision. The Appellant was charged with obtaining money through false pretences because he had not delivered his part of the bargain. It was established that he received money but did not deliver the land. The Appellant did not have any authority to enter into the transaction in issue, for he did not consult his wife as required in law. His wife then resisted the sale in question and so was the chairman of the clan. Therefore, the Appellant did not act in good faith. So, every element of the offence was proved. Possession of the land was supposed to be delivered in November, 2010 and it is only when the Appellant failed to so deliver, the Complainant reported the matter. For those reasons he asked the Court to dismiss the Appeal.

### **Court's Rendition**

9. The Court is under a duty to evaluate evidence recorded by the trial court and come to own findings and conclusions, except, however, I should make an allowance for the fact that I neither saw nor heard the witnesses. See *Okeno v Republic* [1973. EA 32 where it was held:

An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [*Pandya v Republic* (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal M Ruwala v Republic* [1957] EA 570.) 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



magistrate's findings should 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 *Peters v Sunday Post*, [1958] EA 424.)”

10. I have considered all the rival arguments by parties and I am convinced the issues I need to determine are:
- a) What are the elements of the offence of obtaining money through false pretence?
  - b) Did the facts of the case support a charge of obtaining money through false pretence?
  - c) Whether the charge of obtaining money through false pretence was proved beyond any reasonable doubt.
  - d) Whether the judgment conform to section 169 of the [CPC](#).

Issue (b) and (c) are inextricable and their difference is quite tenuous but for clarity I have listed them separately.

### **Essential elements: Obtaining through false pretence**

11. The offence of obtaining through false pretences is established in section 313 of the [Penal code](#) as reproduced below:

313 Obtaining through 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.

From the said section; the following essential elements of the offence of obtaining through false pretences are discernible: that the person;

- a) Obtained something capable of being stolen;
  - b) Obtained it through a false pretence; and
  - c) With the intention to defraud.
12. From the evidence, there is no doubt the Appellant received a sum of shs 252,000 from the complainant, which is something capable of being stolen under the law. But it is not the taking of money that constitutes the offence, but rather that it was taken with the intention to defraud. The fraud is found in the false pretence?
13. What is false pretence? It is defined in section 312 of the [Penal code](#) as below:
- 312 Definition of false pretence 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 be true, is a false pretence.
14. Let us un-pack the above definition of false pretence further. There must be:
- a) A representation of fact by word, writing or conduct;
  - b) The representation is either past or present;
  - c) The representation must be false; and
  - d) The person made the representation knowing it to be false or did not believe it to be true.



15. Was there a false pretence in the sense of the law? Before I dwell on this issue, let me first settle one issue that Mr Nyamu raised; that the offence of obtaining does not relate to future events. I agree. The section itself proclaims that the representation should be of either a past or present fact, not future fact. Case law as well posits the same position. See the celebrated dictum of Bowen, L J expressed in the case of *Edgington v Fitzmaurice* that:

There must be a misstatement of an existing fact...”

Further illumination on what constitutes an existing fact is drawn from the words of Devlin, *JR v Dent* 1955 2 QB pp 594/5 that:

...a long course of authorities in criminal cases 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 criminal law”.

Section 313 of the *Penal Code* codified the position in the above cases; the representation of fact must be either past or present, and not future.

16. I now resume the substantive question I had posed earlier before the foregone necessary detour. Brief relevant facts are that; the Appellant made a representation of fact in writing to the Complainant through an agreement dated 23.7.2010 for sale of 1<sup>^</sup> acre of land in Maeni/Kimilili/139. He received a sum of shs 252,000 leaving a balance of shs 18,000 which was to be paid by the complainant upon transfer of the land. The suit land was surveyed and a boundary demarcated. But the complainant was not able to enter the suit land because he was prevented from doing so by the relatives of the Appellant. The Appellant did not also deliver vacant possession of the land to the complainant because he had not obtained the consent of the relevant Land Control Board (hereafter LCB).
17. A cursory treatment of the above facts may create a feeling that there could be some criminal liability on the part of the Appellant for failing to deliver the land; after he had sold it and received the sum of shs 252,000 which is not a small sum in the circumstances of this case. But such is just but a false feeling which, if not careful, might blur the mind of the court. However, courts of law are experienced at unravelling such assumed dilemmas by carefully considering the facts of the case and the law applicable. The facts of this case reveal that the suit land existed; had been surveyed and a boundary delineated. Also, although there was no formal document to show that the Appellant was the registered proprietor of the suit land, there was no doubt, [and that was not contested], that he owned or had proprietary interest in the suit land. The only problem is that family members did not support or approve of the sale. He was selling was real land, and not what I would call ‘air’. There was nothing false or untrue about the agreement for sale of the land or the land itself.

Therefore, it cannot be said, in the circumstances of this case, that the Appellant made a false representation of fact about the land. I am not persuaded at all by the argument by the learned state counsel that the Appellant did not have any authority to enter into the sale agreement with the Complainant. The fact that the wife and other family members did not support or objected to the sale does not take away the power and authority of an owner of land to enter into a sale or any other legal transaction on the suit land. I however, reckon that this was a controlled transaction covered by section 6 of the *Land Control Act*, cap 302 of the Laws of Kenya and as a matter of law, it needed consent from the relevant LCB in order to complete and validate the sale of the suit land. Under section 8 of the said *Act*, the Appellant ought to have applied for consent from LCB within six months of the making of the agreement for sale or within such period of time as shall have been extended by the High Court. The section provides:



8 “An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”

But still, the grant or refusal to grant consent to a controlled transaction is a preserve of the LCB, and is dependent upon certain conditions being met by the transaction and the Applicant. Grant of consent is not automatic or under the control of the Applicant. Therefore, the fact that consent from LCB was not applied for or obtained does not in itself convert the representation to sell land into a false pretence for purposes of section 313 of the *Penal Code*.

18. One more thing; under section 6 of *cap 302* of the Laws of Kenya, where consent is not obtained within the prescribed period, the controlled transaction becomes void. As a consequence thereof, the law provides the remedy for the purchaser under section 7 of the said *Act* and penalties for furtherance of voided transactions in the following manner. Section 7 provides for the remedy as follows:

7 “If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

Section 22 provides for penalties as follows:

22 “Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—

(a) pays or receives any money; or

(b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.”

19. The above recapitulation of the facts of this case and the law applicable brings me to the point where I must state that, the legal framework which governed the transaction in controversy; makes the transaction a purely civil action, thus removing it from the realm of criminal law except where section 22 of *cap 302* has been called into play; and provides for a complete mechanism for and the relief in the event the transaction becomes void. Section 7 should be read together with the conditions of sale in the agreement, especially the clause dealing with default, which should offer relief to the complainant’s gravamen. Guided by the relevant law attending this case, the transaction herein does not constitute a false pretence or intention to defraud for purposes of the offence of obtaining through false pretences under section 313 of the *Penal Code*. And, note that the charge before the trial court was not a charge under section 22 of *cap 302*.

20. After taking all legal considerations into account, it is clear the direction the law is taking the court. But before I close, hear this, all those to whom these presents may come greeting; that criminal process is never a substitute for criminal remedy or to be used as a means to settle a civil claim or to avail a



party in a commercial transaction undue or collateral advantage over the other. That kind of practice is fraudulent, demented and abuse of the Court process; should always be avoided by parties, resisted and forcefully suppressed by courts of law whenever it manifests itself before court.

21. The upshot is that the trial court erred in law and fact in convicting the Appellant on a charge which was not supported by evidence. Indeed, had the trial magistrate considered the submissions by the defence- which I admit pointed out in no uncertain terms that the matter in issue was civil in nature- I am sure would have come to the correct decision? The points for determination by the trial court lay in the plain eye-sight of the trial court. But there was, the omission which is glaring in the judgment by the trial magistrate and, with tremendous respect, the judgment fell short of compliance with section 169 of the *Criminal Procedure Code*. It did not, inter alia, contain the point(s) for determination; the evaluation of the defence; the decision arrived at; and reasons for that decision. Ultimately, I find that the charge of obtaining money through false pretences was not proved at all. For those reasons, I allow the Appeal; quash the conviction and set aside the sentence. The Appellant shall be set to liberty forthwith unless he is lawfully held in custody.

**DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2014**

**F. GIKONYO**

**JUDGE**

**DELIVERED AND SIGNED AT BUNGOMA THIS 20TH DAY OF JANUARY, 2014**

**A MABEYA**

**JUDGE**

