



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO.106 & 107 OF 2012

**(An Appeal arising out of the conviction and sentence of Hon.B.A. Ojoo P.M. in BSA.C.M.
CR.CASE NO.62 of 2010 delivered on the 19th November 2012)**

DISMAS OBARASA ESIBA.....1.....ST APPELLANT

GEORGE OGOLLA OJWANG2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. At the heart of these Criminal proceedings is a sale agreement dated 13th October 2009. That agreement is the basis upon which the Appellants herein were convicted of the offence of Obtaining money by False Pretence contrary to Section 313 of the Penal Code and Conspiracy to Commit a Felony contrary to Section 393 of the Penal Code. Upon conviction, each Appellant was sentenced to three (3) years imprisonment on each count. The sentences were to run concurrently.
2. At the Appeal, the State conceded to the challenge and conviction on count II. In respect to count 1, the State did not oppose the Appeal of the 2nd Appellant but urged the Court to uphold the conviction and sentence of the 1st Appellant. In count 1, it had been alleged that on the 13th October, 2009 at Barclays Bank of Kenya Ltd, Busia Branch within Busia County with intent to defraud, jointly with another not before Court, the Appellants obtained cash ksh.3,5000.00 from JOSEPHAT AMADI OGWERO by falsely pretending that they would sell him a plot housing African Retail Traders Business situated in Busia township, Central Business district which they referred to as S/TESO/ANGOROM/5174.
3. Josphate Amadi Ogweno (PW1) is a Roads Engineer. Desirous of owning property within Busia Town, he requested Zainabu Murunga (PW2) to scout around for land. In turn, Zainabu asked William Asembo (PW3) to assist her. PW3 met Aggrey Odhiambo (PW 4) who together with one Richard Okuombi informed him that a friend of theirs was selling a plot with a building. PW4 had received word from George Ogolla Ojwang (The 2nd Appellant) about the availability of a property on sale.
4. PW4 introduced the 2nd Appellant to PW3. It was then agreed that the 2nd Appellant and PW3 were to put the seller and the buyer together. In the first week of October 2009, a meeting was held in respect to the prospective transaction at a hotel called Blue York in Busia Town. It was in that meeting that both Appellants were introduced to the Complainant. A purchase price of ksh.3.5 million was agreed, whereupon the Complainant requested to visit the property. It was the testimony of the complainant that the Appellants led him to a property on which a Building stands and is leased by African Retail Traders (hereinafter the “**ART building**”). During the visit, PW 2

- and PW3 were also present. It is said that the 1st Appellant introduced the visitors to the Manager of ART whereafter he showed the building to them. It is also said that the 1st Appellant introduced the complainant to the Manager as his new Landlord.
5. Later on 13th October 2009, the 1st Appellant gave the title deed to the complainant. The complainant requested Maxmilla Ajiambo Ouma (PW5) to conduct an official search on the property. On that same day a sale agreement was drawn between the purchaser and the seller at the offices of Ashioya & company. The agreement was prepared by Sabastian Tikolo Omubakala (PW 10) who is a clerk in the said Law Firm. Both the 1st Appellant and the complainant executed the sale agreement as parties. PW2, PW3, PW4, one Alloys Okumu(DW 2) and the 2nd Appellant signed as witnesses. The following day, accompanied by PW3 and the 1st Appellant, the Complainant proceeded to Barclays Bank Kenya Ltd. At the Bank, the Complainant paid a sum of ksh.2.4 million into the account of Fagilia Bros Traders Ltd and a sum of ksh.700,000/= into the account of PW3. The payments were by way of money transfers.
 6. Once the money was paid, the complainant requested to take possession of the purchased property and asked the 1st Appellant to take him to the ART Manager. But the 1st Appellant was reluctant and evasive. On visiting the Municipal Council, the complainant discovered that the property that he had purchased was not the plot on which the ART building stands. Silvanus Opondo (PW7) testified that plot No.5174 is in Angoromo Ward which is about 5.7 kilometers away from the Busia Court. It was his further testimony that the ART Building stands on plot No.115 and is registered in the name of Michael Ndeda Mubweka now deceased. In the meantime, the plot No.5174 had been transferred to the Complainant and a title deed was subsequently issued to him on 15th October 2009. The Complainant's grievance is that the 1st and 2nd Appellant misled him into thinking that the property he was purchasing was the one that housed African Retail Traders and was located within Busia Town. He lodged a complaint on the 15th December 2009 and IP Calvin Abaga (PW 8) and Sgt. Odenyo now deceased were asked to investigate the complaint. Upon his death, Philip Rotich (PW9) took over the role of investigating the case.
 7. Invited to make his defence, the 1st Appellant readily admitted that he agreed to sell land described as South Teso/Angoromo/5174 to the complainant. He also admitted that he signed an agreement for the sale of that parcel of land at a sum of ksh.3.5 million. It was his further admission that he was paid a total sum of ksh.2.9 million by the Complainant. The difference was paid to the many brokers who put together the deal and a sum of ksh.26,000/= had been deducted being an advance payment by the Complainant in respect to land rates. He concedes that he is not the owner of the property which houses African Retail Traders building but vehemently denies that he misled the Complainant into believing that the building was his property. He also denied ever taking the complainant to that building.
 8. DW 2 is a nephew of the 1st Appellant and he is aware that his uncle owned South Teso/Angoromo/5174. At the invitation of the 1st Appellant he was one of the five (5) witnesses to the sale agreement of 13th October 2009 entered between the complainant and the 1st Appellant. He was not aware that the parties visited the suit property but was certain that the 1st Appellant is not the owner of the African Retail Traders building.
 9. The 2nd Appellant made a sworn statement. He is known to the 1st Appellant. That on 13th October 2009, the 1st Appellant requested him to witness the execution of an agreement at the offices of Ashioya & co. Whilst there, he saw a certificate of search and the original title to land described as South Teso/Angoromo/5174. He then, as requested, appended his signature as a witness on the part of the 1st Appellant. He recalls that sometime later, on the 1st November 2009 he was asked to meet the complainant. That in a meeting attended by the complainant PW2, PW3 and PW4, the complainant informed him that he had changed his mind over the sale agreement with the 1st Appellant and wanted his money back. The plan was that the complainant would allege that the building he wanted to buy was the African Retail Traders Building. That the complainant was seeking to recruit him to be on his side in this scheme. But when he declined, the Complainant threatened him with dire consequences. He denied conspiring with the 1st Appellant to misrepresent certain facts to the complainant.
 10. The Appellants filed two separate Petitions of Appeal on the 29th of November 2012. The

grounds of Appeal in the two Petitions were substantially the same. For the sake of brevity this Court paraphrases the grounds as follows,

1. **THAT** there was a variance between the particulars of the offence of obtaining by false pretence in count 1 and the contents of a sale agreement dated 13th of October 2009.
 2. **THAT** a conviction could not be entered when there was substantial variation between the false pretence proved in the case and the false pretence alleged in the indictment.
 3. **THAT** where an accused assumes a burden of proof to explain certain matters which are peculiarly within his knowledge, then the law places a lower standard of proof being proof on a balance of probability and where an explanation given by the accused person is probably true then the accused must be given the benefit of doubt.
 4. **THAT** the trial magistrate shifted the burden of proof to the Appellant to prove his innocence.
 5. **THAT** the trial magistrate did not address facts established in the case that proved, on a balance of probabilities that the representations made by the Appellant during the sale of the property were true.
 6. **THAT** the trial magistrate failed to adequately consider and analyze the legal implication of the sale agreement.
 7. **THAT** the trial magistrate did not properly evaluate the 1st Appellants defence in the context of the alleged visit to the African Retail Traders Building.
 8. **THAT** a crucial witness being the Manager of African Retail Traders was not called to give evidence and an adverse inference should have been made against the Prosecution.
 9. **THAT** the Learned Magistrate erred in holding that the Appellant had received kshs.3.5 million from the Complainant.
 10. **THAT** generally the conviction was against the weight of evidence.
 11. **THAT** the sentence imposed was excessive.
11. At the hearing of the Appeal the State through Mr. Kelwon conceded entirely to the Appeal in respect to count II. In respect to count 1 the State was opposed to the Appeal by the 1st Appellant but conceded to that of the 2nd Appellant.
 12. Before undertaking a re-evaluation of the evidence before the Trial Court, I am obliged to make some observations in respect to the appeal on count II which was conceded. In that count, the Appellants faced a charge of conspiracy to commit a felony contrary to Section 393 of the Penal Code. The allegation being that they had on dates between the 9th and 13th October 2009 conspired to falsely obtain ksh.3.5 million from the complainant. That count was troubled. First, the offence of obtaining money by false pretences is a misdemeanor. A conspiracy to commit that offence cannot therefore be a conspiracy to commit a felony. That charge was defective.
 13. But even more fundamentally is that at the conclusion of the trial, the Trial Court found the accused persons guilty of obtaining the said sum from the complainant by false pretences. The finding of the Trial Court was that the conspiracy had been successfully executed. I have to agree that as conspiracy presupposes planning, accused persons cannot be convicted for the offence of conspiracy when the plan was successfully executed. In the present case the offence of conspiracy should have been an alternative charge to the main charge.
 14. This is a first Appeal. This Court is under an obligation to relook at the evidence afresh, re-evaluate it and reach its own conclusions. In doing so, the Court must be minded that unlike the Trial Court, it did not hear and see the witnesses testify. (see **Okeno -vs- Republic [1972] E.A 32**).

15. Arguing the Appeal on behalf of the Appellants, retired Justice Etyang submitted that the first Appellant entered into a sale agreement with PW1 for the purchase of SOUTH TESO/ANGOROMO/5174 and that the complainant received what he bargained for. Counsel stated that transfer of the purchased property was effected in favour of the complainant on 15th of October 2009 and remains registered in his name to date. He further urged the Court to find that the contents of the sale agreement dated 13th of October 2009 were critical. That in that agreement, the property being sold was simply described as SOUTH TESO/ANGOROMO/5174 and no reference was made to an "ART BUILDING". Counsel submitted that the reason for exclusion of the description in the agreement was because no such building had been discussed between the parties to the contract. It was a further argument of Counsel that the complainant is a Road Engineer and a man of knowledge. Given his training, he would be particular about location of property that he intended to buy. That in any event he had the benefit of a surveyor (PW5) to verify the location of the property. The failure of the private surveyor to visit the purchased property before the sale was complete could therefore not be attributed to the Appellant.
16. It was also the position of the 1st Appellant that no payment of money was made by the complainant to the 1st Appellant. That it was the evidence by the Prosecution that the Appellant received this money from **Fagilia Bros Traders Ltd.** The point made was that a charge against the 1st Appellant of receiving money from the complainant was therefore not sustainable. If anything the complainant ought to have been **Fagilia Bros Traders Ltd.**
17. The Appellants Counsel also asked this Court to adopt his submissions at trial. One of the arguments made then was that on a charge of obtaining by false pretences the Prosecution was under duty to prove the making of the pretence as stated in the indictment. (see Silumu & Another -vs- Republic [1986] KLR 259. Counsel submitted that the false pretence allegedly proved by the Prosecution was substantially at variance with the false pretence alleged in the indictment. This shall be discussed in the course of the Courts analysis of the evidence.
18. Mention needs to be made of the position taken by the Appellants in respect to the alleged visit to the African Retail Traders Building. Counsel questioned the sequence of events that led to that visit. It being alleged that the complainant and the accused persons met at Blue York Hotel on or about the 12th of October 2009 and in the company of some brokers discussed and agreed on the purchase price of KShs.3.5 million. That they thereafter drove to African Retail Traders Building where they inspected the property. Counsel questioned the credibility of that evidence because in his view a property to be sold is inspected first before the purchase price is agreed and not the other way round. It was also argument of Counsel that it was curious that the purchaser did not take an official valuation of the African Retail Traders Building nor was that building referred to in the sale agreement. The 1st Appellant in his Defence had denied the visit and it was the Defence case that the Court being called upon to reconcile this variance ought to give the Appellants the benefit of doubt.
19. In reply, the State Counsel asked this Court to find that the visit of the African Retail Traders Building on 13th of October 2009 had been established. Counsel argued that prior to the signing of the agreement there was a discussion about the location of the building. The Prosecution case was that the 1st Appellant misrepresented to the complainant that the property on sale was the African Retail Traders Building. That as evidence of his guilt the 1st Appellant became evasive about putting the complainant in possession of the African Retail Traders Building once he had received the purchase price. In addition, the Court was asked to give weight to the disappearance of the Manager of African Retail Traders who is said to have colluded with the 1st Appellant in the misrepresentation.
20. As to the payment of the purchase price, Counsel stated that the complainant paid the 1st Appellant through the account of Fagilia Bros Traders Ltd.
21. Looking at both the Prosecution and the Defence case, it is common ground that on 13th of October 2009 a sale agreement was entered between the 1st Appellant and the complainant. Both executed the agreement and the same was witnessed by six (6) persons who also signed the agreement. All those persons being the 2nd Appellant, PW2, PW3, PW4, PW10 and DW2 confirmed the making and execution of the said sale agreement.
22. That agreement is central enough to these proceedings that it deserves to be reproduced in full,

“REPUBLIC OF KENYA

LAND SALE AGREEMENT

An Agreement is today the 13th day of October 2009 entered between DISMAS OBARASA ESIBA of ID.NO.6671819 herein known as the VENDOR and JOSPHAT AMADIOGWERO of ID.No.6283277 herein known as the PURCHASER.

TERMS AND CONDITION OF THE THIS SALE AGREEMENT

1. THAT the VENDOR is selling LR NO.SOUTH TESO/ANGOROMO/5174 together with developments on it to the PURCHASER.
2. THAT the agreed purchase price is kshs.3,500,000/= (Three million, five hundred thousand only)
3. THAT the VENDOR shall pay the PURCHASER the agreed purchase price of kshs.3,500,000/= upon signing of this agreement.
4. THAT the PURCHASER shall take possession/occupation immediately after signing of this agreement.
5. THAT the VENDOR shall assist the PURCHASER obtain land title deed.
6. THAT this agreement has been contracted voluntarily and upon consensus of the parties hereto.
7. THAT whoever breaches the terms and condition of this agreement shall pay the aggrieved party general and special damages in a court of law.
8. THAT the vendor and the purchaser have both appended their signatures on this agreement without any coercion and or intimidation whatsoever.

COVENATED at BUSIA this 13th day of October 2009.

Signed:

JOSEPHAT AMADIOGWERO

ID.NO.6283277

VENDOR

Signed:

DISMAS OBARASA ESIBA

ID.NO.6671819

PURCHASER

WITNESSED BY:-

1. signed:

GEORGE OGOLA OJWANG

ID.NO.11672904

2. signed:

AGGREY ODHIAMBO GANO

ID.NO.21632766

3. signed:

ALLOYS OKUMU EMUKORA

ID.NO.6671145

IN THE PRESENCE OF:

Signed:

COMMISISONER FOR OATHS”

23.Taken up in this Appeal is that the Prosecution evidence proved that money in respect to that agreement was received from Fagilia Bros Traders Ltd. and not the complainant. Further that the complainant had not shown any link with the said company. To that extent, it is a matter in contention at the Appeal. But that was not so at trial because the 1st Appellant himself in his Defence admitted receiving the purchase price. This was his evidence in Defence,

“My plot which I was selling is located within South Tso Angorom locality. I was paid and I received money for the said plot. I was paid what we agreed for the plot. I sold plot No. South Teso Angorom 5174.”(my emphasis)

24.In addition, there was evidence by the complainant that he first paid kshs.26,000/= to the 1st Appellant to enable him pay outstanding rates in respect to the property. The payment to Busia Municipality Counsel was confirmed by Silvas Obondo (PW7). A receipt of 13th of October 2013 in respect thereof was produced as evidence (Exhibit 4). The further evidence of the complainant was that as requested by the 1st Appellant the balance of the purchase price was paid through the account of PW3. After payment of certain amounts to the brokers as instructed by the 1st Appellant, PW3 transferred 2.7 million shillings into the account of the 1st Appellant. Documentary evidence of those transfers were produced (P Exhibits 6,7, and 8). PW3 was a signatory to the account of Fagilia Bros Traders Ltd. This Court has no difficulty in reaching the decision that indeed the 1st Appellant received the sum of kshs.3.5 million shillings from the Complainant being the consideration in the sale agreement entered on 13th of October 2009.

25) Given that finding, the guilt or otherwise of the Appellants would have to turn on whether before the entering of a sale agreement the Appellants led the complainant to believe that the land sold being LR.No.SOUTH TESO/ANGOROMO/5174 was the property on which the African Retail Traders Building stood. This Court was asked to find that the contents of the sale agreement spoke for themselves and the question of the ART Building could not arise. Also emphasized was that given the status of the buyer, it cannot be that he was misled. Further that the purchaser had the advantage of a surveyor who for some unexplained reason, failed to make a verification of the location of the purchased property.

26.The Prosecution case was that PW3 informed PW4 that there was a person interested in buying some property. Although it is unclear how PW4 met the 2nd Appellant, it was his testimony that prior to the sale agreement, the 2nd Appellant showed him the African Retail Traders Building as the one for sale. PW4 thereafter introduced the 2nd Appellant to PW3. There was evidence by PW3 that he was shown the same building by the 1st and 2nd Appellants. While PW2 in her re-examination evidence testified,

“The plot had been shown to us by Dismas Barasa at least 3 times.”

Dismas Barasa is the 1st Appellant.

27. So prior to the visit of 12th October 2009, the evidence was that PW4 had been shown the ART Building by the 2nd Appellant. While PW2 was shown the same building by 1st Appellant on at least 2 occasions. For PW3 he was shown the building by the 1st and 2nd Appellant. That evidence suggests that even before the 12th day of October 2009, the 1st and 2nd Appellants had given an impression to PW2, PW3 and PW4 that the building on sale was the ART Building.

28. So did the 1st Appellant and the 2nd Appellant lead the complainant to a visit of the building on 12th October 2009? The evidence of the complainant is that after the meeting at Blue York the 1st Appellant led them to the African Retail Traders Building. Also present were PW2, PW3 and the 2nd Appellant. PW2 says that they all used the complainant's vehicle from Blue York Hotel to the ART Building. This was corroborated by PW3 when he said,

“we then headed to the motor vehicle of Amedi and went to Art Building which is near Royal Hotel old.”

The Prosecution witnesses were consistent in their testimony.

29. What happened at the ART Building? The complainant testified that the ART business was still open and the 1st Appellant conducted them around the shop. The complainant was with PW2 and PW3. He was shown the rear of the shop where other tenants occupied. The complainant gave a detained account about the visit. After visiting the rear they returned to the African Retail Traders shop and the 1st Appellant told the Manager that the complainant was his new “boss”. At that point the Complainant took the mobile number of the Manager. PW2's evidence supported that of the complainant. She said,

“Myself, Amedi, Ekasiba, Asembo and Amadi entered the ART Building. We met the Manager called Odhiambo and we inspected the building.”

So did PW3,

“A1 one took us inside and then introduced us to the business Manager. He took us around and Esiba introduced Amadi to the business Manager as he would be the landlord in two months”.

Esiba is the 1st Appellant while Amadi is the complainant. The above evidence was not seriously challenged in cross-examination.

30. This Court is aware that the 1st Appellant denied this visit to the ART Building. He however confirmed that the meeting of 12th October 2009 took place. He also confirmed that all the persons who attended that meeting left in the complainant's car. Up to there, the Defence evidence converges with that of the Prosecution. The 1st Appellant thereafter says that their first stop was at the complainant's offices. I was asked that because of this account, a doubt was created and the Appellants should benefit from it. The Trial Court believed the Prosecution and remarked,

“I however find the Defences of the accused untenable and totally displaced by the evidence of the Prosecution.”

31. On my part, I have looked at the Prosecution evidence on the aforesaid visit. That evidence was provided by the complainant, PW2 and PW3. The witnesses were extensively cross-examined. The complainant was infact cross-examined on three occasions. While PW2 and PW3 on two occasions. At all times they stood their ground and their evidence was unshaken. In addition, there was consistent evidence of the misrepresentations made by the Appellants to PW2, PW3 and

PW4 about the ART Building prior to the visit of 12th of October 2009. Those misrepresentations climaxed to the main misrepresentation which was the visit to the building on 12th October 2009.

32. Just like the Trial Court, this Court believes the consistent and corroborative evidence of the three witnesses as to how they left Blue York Hotel in the complainant's car and in the company of the 1st and 2nd Appellant for African Retail Traders Building and how the 1st Appellant conducted them around the Building. And the prior misrepresentations supports this Prosecution theory. It is of course true that the Manager of African Retail Traders played a role in the events of that day as he was introduced to the complainant by the 1st Appellant as the new landlord. It is true therefore as argued by the Appellants that he would be a crucial witness. Sgt Orengo Odenyo (PW6) explained his absence,

“The Manager of Art who later deserted (sic) from duty. He comes from Rachuonyo district. I have not been able to trace(sic). I was to charge him with for the offence before Court as he misled the buyer.”

The Court is satisfied by the explanation given by the Prosecution as to why the Manager could not be availed as a witness. He is at large and he was infact to be charged alongside the two Appellants. No negative inference can be made against the Prosecution for his absence.

33. Although the Appellants argued that it was most unusual that a purchaser would negotiate a price before inspecting the property to be sold, the evidence is that it happened between the parties herein. What is critical in terms of the culpability of the 1st Appellant is what happened after the visit to the ART Shop. On 13th October 2009 the 1st Appellant and the Complainant entered an agreement for the purchase of South Teso/Angoromo/5174. Although the ART Building was not mentioned in the agreement, the agreement to the mind of the Complainant was in respect to that building because he had been led to believe it in the visit to the building which took place only a day earlier. Although the 1st Appellant says that he left it to the Complainant to verify the property including location, the evidence is that he led the Complainant into believing that the property on sale was the African Retail Traders Building. The role of the 1st Appellant in the identification of the building was active not passive. He never led the Complainant to the property near Alupe where plot 5174 truly stood. On the other hand, the Complainant, who had the services of a surveyor, never bothered to make an independent verification. That was his undoing. It is little wonder that he was conned. But his lack of vigilance cannot exonerate the 1st Appellants conduct of misrepresenting such a primary fact to him.

34. On the basis of the title document itself, title to plot 5174 was transferred to the complainant on 12.10.09 and a title deed issued to him on 15.10.09. It was therefore argued that he now holds title to what he bought. It may not be that simple because at the time the change of registration was effected and title issued to him the Complainant was still under the impression that the title was to the ART Building. It was only in December 2009 that the Complainant says he discovered he had been cheated. This was after he visited the Municipal Council with a view of changing the names in the Council records.

35. The alleged indictment against the Appellant's was that on 13th October, 2009 at Barclays Bank of Kenya Ltd, Busia Branch within Busia County with intent to defraud, the Appellants jointly with another not before Court, obtained cash ksh.3,5000.000 from JOSEPHAT AMADI OGWERO by falsely pretending that they would sell to him a plot housing African Retail Traders Business situated in Busia township, Central Business district which they referred to as S/TESO/ANGOROM/5174.

Although it could be more happily worded, the indictment is that the Appellants obtained the sum of ksh.3.5 million by misrepresenting to him that the property sold being SOUTH TESO/ANGOROMO/5174 was the property on which the ART business was housed. In my view, at least for the 1st Appellant, the Prosecution proved this charge beyond reasonable doubt. That is the conclusion that this Court has drawn from the analysis of the evidence.

36. What about the 2nd Appellant? It is the evidence of the three key Prosecution witnesses that although he was at the meeting of Blue York and accompanied them to the ART Building he did not enter into the building or participate in its inspection. There was however evidence that prior to the visit he had shown the African Retail Traders Building to PW3 and given the impression that it was the one for sale. It may of course be argued on his behalf that he too was misled. That proposition was not displaced because there was no evidence led by the Prosecution that he knew that the representation he made to PW3 was infact untrue. That is a doubt he should benefit from. For this reason, this Court, accepts the concession by the State in respect to the Appeal by the 2nd Appellant.

37. This Court finds no reason to upset the finding of the Trial Magistrate in respect to the 1st Appellant on count 1 and dismisses the Appeal on conviction. The Trial Magistrate convicted the 1st Appellant for the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. An offence under that Section attracts a maximum sentence of three (3) years. The sentence imposed by the Court was the maximum sentence. Although the amount involved was substantial, the 1st Appellant was nevertheless a first offender. The general rule is that a maximum sentence should not be imposed on a first offender (Arissol –vs – Republic [1957] E.A 447). It would therefore unusual to impose a maximum sentence on a first offender. But there would be occasion when a Court can depart from the general rule. Some come to mind. Misconduct of an accused person during trial, lack of remorse on the part of an accused person, the gravity of the offence or substantial harm or loss suffered by the victim could sway a sentencing Court to depart from the general rule. Here, the Learned Magistrate explained himself as follows,

“In my view even though accused’s are first offenders, the amount involved was colossal by any standards. They deserve a punitive sentence having been found guilty by the court.”

This Court is not told that any of the defrauded amount has been recovered by the complainant and sees no reason to disagree with the position taken by the Learned Magistrate. For this reason, I would also dismiss his Appeal on sentence. The result is the 1st Appellants Appeal on count 1 fails in its entirety.

38) In respect to both Appellants, their conviction in respect to **count II** is hereby quashed and sentence set aside. In respect to count 1, I do hereby quash the conviction of the 2nd Appellant and set aside the sentence. The 2nd Appellant is hereby set at liberty unless for other lawful reason his detained.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 25TH DAY OF FEBRUARY 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

WANYAMA holding brief for ETYANG.....FOR 1ST APPELLANT

WANYAMA holding brief for ETYANG.....FOR 2ND APPELLANT

KELWON.....FOR RESPONDENT