



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 182 OF 2010**

**ANTONY MWANGI NGARI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an Appeal against the conviction and sentence in Eldoret Chief Magistrate's Court Criminal case No. 4816 of 2005 delivered on 30.12.2010 by HON. I. MAISIBA (Resident Magistrate))**

**JUDGMENT**

The appellant pleaded not guilty to the charge of obtaining money by false pretences contrary to S. 313 of the Penal Code when he appeared before the Chief Magistrate at Eldoret on the 18<sup>th</sup> July 2005.

It was alleged that on diverse dates between 4<sup>th</sup> May 2000 and 8<sup>th</sup> July 2000 at Eldoret Township with intent to defraud, the appellant obtained Ksh. 471,080/- from Miriam Jebor Komen by falsely pretending that he was in a position to sell to her a half acre plot No. Eldoret Municipality/Kimumu/632, a fact he knew to be false.

After trial before the Resident Magistrate at Eldoret, the appellant was convicted and sentenced to serve three (3) years imprisonment but being dissatisfied with the conviction and sentence preferred this appeal on grounds contained in his petition of appeal filed herein on 7<sup>th</sup> December 2010.

In essence, the appellant complains that the learned trial Magistrate erred in law and fact by turning a civil agreement between Eldoret Commercial Agencies Limited and the complainant (PW 1) into a criminal offence and that notwithstanding, he was arrested, detained and arraigned in Court for a matter which was a civil land matter.

The appellant also complains that the learned trial Magistrate failed to wholly evaluate and analyze the prosecution case so as to come up with a fair judgment not prejudicial to any of the party in the civil matter. The appellant further complains that his defence was disregarded by the learned trial Magistrate and that the conviction and sentence was based on a defective charge sheet.

In arguing the appeal on behalf of the appellant, learned Counsel, **MR. OBUDHO**, concentrated on ground two of the appeal and submitted that an agreement entered into between Eldoret Commercial Agencies and the complainant did not go through. The agreement was executed by the parties. It therefore constituted a contract between the complainant and the appellant. The contract was of a civil nature but was rescinded by a subsequent agreement made between the complainant and the appellant. Learned Counsel went on to submit that the first agreement was entered on the 4<sup>th</sup> May 2000. Subsequently, the principle proprietor of the subject property passed on leading to the frustration of the sale agreement and necessitating the execution of the subsequent agreement for the refund of all monies paid to the appellant by the complainant.

Learned Counsel contended that the subsequent agreement for a refund also constituted a contract under the civil law and could not be construed as an act of obtaining money by false pretences.

On sentence, learned Counsel, contended that the learned trial Magistrate erred by imposing a term of three years imprisonment without considering that a non-custodial sentence of a remedial nature would have sufficed and without the option of a fine. Learned Counsel further contended that the sentence was harsh and unreasonable.

**MR. OLUOCH**, the learned Senior Deputy Prosecution Counsel, opposed the appeal on behalf of the respondent and submitted that since an offence was disclosed, any matter of a civil nature did not arise. In that regard, S. 193 A of the Criminal Procedure Code was cited.

The learned Prosecution Counsel also submitted that the appellant represented to the complainant that he was in a position to sell her a portion of land and went ahead to identify the land. Consequently, money was paid to him for the land which did not belong to him but PW 2. The learned Prosecution Counsel contended that the representation made by the appellant was false and that if he had not received money then he would not have entered into an agreement to refund the same.

It was further contended by the learned Prosecution Counsel that the appellant was arrested by PW 4 as he made a bid to escape to Uganda. His conduct was inconsistent with innocence and was a corroboration of the prosecution case against him.

On sentence, the learned Prosecution Counsel submitted that it was lawful but left the issue at the discretion of the Court.

Having heard both the appellant and respondent, the duty of the Court is to revisit the evidence availed before the trial Court and arrive at its own conclusion bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that between the 4<sup>th</sup> May 2000 and 8<sup>th</sup> July 2000, the complainant **MIRIAM CHEBOR KOMEN (PW 1)**, was looking for a commercial plot within the Kimumu area of Eldoret with the intention of purchasing it. In the process, she was referred by one Enock Chepkonga to a firm known as Eldoret Commercial Agencies which dealt with land. She proceeded there and met the appellant who told her that he had a half acre plot for sale at Hawaii area for a sum of Ksh. 450,000/-. The plot was described as No. Eldoret Municipality/Kimumu/632.

The complainant paid for the plot in two instalments of Ksh. 200,000/- and Ksh. 250,000/-. An agreement was signed but no payment receipts were issued by the appellant for reason that the plot owner was out.

The complainant asked for the title deed but the appellant kept on dodging her and later said that he had not obtained the title and was in need of Ksh. 21,080/= for the same. The amount was paid to him by the complainant and a receipt was issued. However, the complainant felt frustrated by the appellant for long. She sought the assistance of an Advocate. An agreement to refund money paid by her to the appellant was made. The refund was expected to be complete by end of February 2001 but all in vain. A title deed for a different plot was given to the complainant as security but she became impatient and reported the matter to the police.

**DANIEL NDUNGU MWANGI (PW 2)**, is an evangelist in Eldoret. He indicated that the material plot belonged to his late father who did not sell it to anybody. He further indicated that the appellant was a stranger to him and was not related to him in any way.

**KOMEN AMON CHEPKONGA (PW 3)**, witnessed the payment of a total of Ksh. 471,000/- to the appellant by the complainant. The money was inclusive of the purchase price and the stamp duty. **P.C. JAMES CHOGE (PW 4)**, of the CID Eldoret arrested the appellant on the 14<sup>th</sup> July 2006 while **JOSHUA KIPKOSGEI KEITANY (PW 5)** of the Eldoret Municipal Council produced the record

showing that the material plot No. Kimumu 632 was registered in the name of one Benjamin Mboga. Retired police Constable **SILAS KIPRUTO CHEPKWONY (PW 6)** investigated the case and thereafter charged the appellant with the present offence.

An officer from the Uasin Gishu Lands Office produced a green card to show that title deed respecting Plot No. U.G/Maili 13/112 measuring 3.2 hectares was issued to one Francis C. Kipkeino on the 2<sup>nd</sup> December 1994.

At the close of the prosecution case, the appellant was placed on his defence. He made a sworn statement and said that he was an estate agent dealing in the sale of property including land. His firm traded as Eldoret Commercial Agencies with its registered office at Sakong House. He was in partnership with his wife Teresia Githinji. On 20<sup>th</sup> January 2001 the complainant went to his office with the intention of buying the material plot which he was authorized to sell on behalf of a client called Mwangi Mbugua. An agreement was executed to that effect and the purchase price was paid to the owner. Another agreement was executed on 20<sup>th</sup> January 2007 between himself and the complainant to the effect that the complainant would be given an alternative piece of land. However, before the completion of the transaction, a demand for payment of a sum of Ksh. 505,080/= by the appellant was made on 3<sup>rd</sup> May 2005. But instead of instituting civil proceedings, the complainant caused the arrest and arraignment of the appellant.

After considering the appellant's defence alongside the evidence adduced against him by the prosecution, the learned trial Magistrate while acknowledging that there was a contract entered between the firm known as Eldoret Commercial Agencies and the complainant for the purchase of the material property nonetheless went ahead to find that the appellant received money but failed to perform his part of the contract and could not therefore hide under an unregistered entity while not having the necessary authority to sell property belonging to a third party.

On its part and after revisiting the evidence, this Court agrees that there was an agreement entered between the complainant and Eldoret Commercial Agencies for the sale of the material Plot No. 632. In furtherance of the agreement the appellant received the purchase price and additional sums from the complainant.

The receipt of the money by the appellant was on behalf of the firm Eldoret Commercial Agencies. The appellant indicated that Eldoret Commercial Agencies was a partnership between himself and his wife. However, there was nothing to show that the firm was a legally registered entity. Be that as it may, although the purchase price was fully paid to the appellant trading under Eldoret Commercial Agencies the material plot was never transferred to the complainant as it should have.

On the face of it, this appeared to have been a simple contract which was breached by the appellant hence giving rise to a civil cause of action against him. Indeed, the appellant acknowledged the breach and sought to remedy it by executing a further agreement with the complainant for the refund of the purchase price. This subsequent agreement was also breached by the appellant thereby raising a very strong inference that his intention was to defraud the complainant and did in fact defraud her. His criminal intention was manifested in the initial sale agreement by the description of the vendor as the authorized agent of Eldoret Municipality/Kimumu/632. How could the vendor be an agent of a piece of land instead of the owner of the land? The name of the actual owner of the land was not reflected in the agreement. The evidence by the investigation officer (PW 6) showed that the material plot belonged to the late Benjamin Mwangi Mboga who was the father of Daniel Ndungu Mwangi (PW 2).

Daniel (PW 2) denied that his late father ever sold the material plot to anybody. He also said that he had not previously known the appellant and only came to know him after this case was instituted. So, even if the agreement between the complainant and Eldoret Commercial Agencies (read the appellant) was a simple contract, it was based on false representations made by the appellant with a view to defrauding the complainant. It was a contract with criminal undertones perpetrated by the appellant against the complainant. As it were, the complainant was "conned" off her money by the appellant under cover of an illegal outfit i.e. the Eldoret Commercial Agencies. The contract was to the knowledge of the

appellant a criminal transaction disguised as a genuine contractual agreement between the appellant and the complainant.

In the circumstances, the defence raised by the appellant was unsustainable. The charge was fully proved against him beyond any reasonable doubt. His conviction by the learned trial Magistrate is hereby affirmed. On sentence, a term of three years imprisonment was lawful. It was neither harsh nor excessive.

In any event, the learned trial Magistrate had the discretion to impose a term of imprisonment not exceeding three years.

In the end result, this appeal must fail in its entirety. It is accordingly dismissed.

**J. R. KARANJA**  
**JUDGE**

**[Delivered and signed this 21<sup>st</sup> day of July 2011]**