



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 273 OF 2010**

**(From original conviction and sentence in Criminal Case No.3098 of 2009 of the Chief Magistrate's court at Naivasha – N. N. NJAGI, PM)**

**JAMES KARIUKI KIONGO.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

James Kariuki Kiongo, the appellant herein, was charged with five charges before the Chief Magistrate's Court Naivasha in Criminal Case No. 3098 of 2009. The charges were as follows:-

**Count 1 – Obtaining money by false pretences contrary to Section 313 of the Penal Code.**

**Count 2 - Making a document without authority contrary to Section 357(a) of the Penal Code.**

**Count 3 - Forgery contrary to Section 349 of the Penal Code.**

**Count 4 - Uttering a false document contrary to Section 353 of the Penal Code.**

**Count 5 - Obtaining money by false pretences contrary to Section 313 of the Penal Code.**

After a full trial the appellant was convicted by Honorable N. N. Njagi, Principal Magistrate, on all the five charges and was sentenced to serve prison sentences as follows:-

**Count 1 - 3 years imprisonment**

**Count 2 - 7 years imprisonment**

**Count 3 - 3 years imprisonment**

**Count 4 - 3 years imprisonment**

**Count 5 - 3 years imprisonment**

The sentences were ordered to run consecutively. The appellant was aggrieved by both the convictions and sentences and he filed this appeal based on the grounds which can be summarized as follows:-

- 1. That the charges were not proved beyond any doubt;**
- 2. That crucial witnesses were not called;**

- 3. That the magistrate erred in ordering the sentences to run consecutively instead of concurrently since the charges were contained in same charge sheet;**
- 4. That the appellant's defence was not considered;**
- 5. That the sentence is excessive.**

At the hearing of the appeal, the appellant abandoned all the other grounds save that the court considers the sentence.

Mr. Nyakundi, learned counsel for the State raised issue with Count 1 for reason that the appellant was given money to process a title which relates to the future and yet for an offence of obtaining by false pretences to be proved the action should relate to the present or past. He left the issue of the sentence to the discretion of the court.

The particulars of the offence as relates to the first charge were that on 6/5/09, along Moi South Lake Road in Naivasha, with intent to defraud from Antony Ted Andrew Hoareau, obtained the sum of Kshs.8,500/- by falsely pretending that he was able to process the transfer of land title Naivasha/Mwicingiri Block 5/595 from Stephen N. Ngethe to the said Antony Ted Andrew Hoareau, a thing he could not perform since he was not an employee of the Ministry of Lands. In support of the first charge, the prosecution called the complainant Antony Ted Hoareau, PW1, PW2, Stephen Mwangi Wangethi, PW3 Linda Graciena Horeau.

Antony recalled that in March 2009, he wanted to buy a plot at Villa View Estate, South Lake, Naivasha. He got one. He met a broker, the appellant, who showed him the plot on 7/4/09, while in company of his sister Linda, and Lucy Wanjiru (PW5). They went to the firm of Njuguna Advocate, the appellant had the land certificate, the sale agreement was drawn and PW1 paid Kshs.350,000/- for the plot Naivasha/Mwichiringiri Block 5/595 (Exh.1). He gave the appellant all his personal documents to enable the appellant to go and transfer the land to PW1's name. He gave all original documents in May 2009 and waited till September 2009 but the appellant did not return them. PW1 later learned that the appellant had sold the land to another lady, yet PW1 had not asked him to sell the land.

Stephen Mwangi Wangeci, (PW2), was the original owner of the plot Naivasha Mwichiringiri Block 5/595. He wanted to sell the land, went to the office of G. M. Njuguna Advocate, where he met the appellant who was the broker, an agreement was made and he was paid Kshs.350,000/- by PW1, and he handed over the original title and copy of his Identification Card, his PIN Number for purposes of transfer of the land. Linda (PW3) called him on 3/12/09 and informed him that they had not received the documents and on 4/12/09 he reported to police. The appellant was arrested on 21/12/09, having sold the land to somebody else. PW2 denied knowing who witnessed the sale agreement made later nor did he sell the land to somebody else other than PW1 and he confirmed that the land belongs to PW1. Linda corroborated PW1 and PW2's evidence and added that she waited for the documents to be released to her by the appellant but to no avail. She called the appellant but he told her to wait and she then called PW2 and she too reported to police. She confirmed that the appellant was paid Kshs.8,500/- to effect the transfer.

I have considered the charge and the evidence on record, it all points to the appellant receiving money so that he could facilitate the transfer of the land to the complainant. There is no evidence that the appellant was an employee of the Lands Office. The action of transferring the land was supposed to be done in the future. I do find that both the particulars of the charge and the evidence do not disclose an offence of obtaining money by false pretences and the conviction on Count 1 was made in error. That conviction is hereby quashed and the sentence thereon set aside.

The trial court ordered that the sentences do run consecutively meaning that the appellant would serve 19 years. The offences with which the appellant was charged arose from the same transaction and in my view, the sentences should have been ordered to run concurrently. Besides obtaining by false pretences is a misdemeanor. On the second charge of making a document without authority, the maximum sentence is

7 years. The appellant was handed the maximum sentence yet he was treated as a first offender. Likewise, on the other counts, he was given the maximum sentences. I find that the sentences were excessive and harsh and I will set aside the sentences and substitute them as follows:-

**Count 2 - 5 years imprisonment.**

**Count 3 - 2 years imprisonment.**

**Count 4 - 2 years imprisonment.**

**Count 5 - 2 years imprisonment.**

The sentences will run concurrently from the date of conviction – on 31/8/2010.

It is so ordered.

**DATED and DELIVERED this 20<sup>th</sup> day of December, 2011.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Appellant present – in person

Mr. Omari for the State.

Kennedy – Court Clerk.