



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 1277 of 2001

PATRICK MACHARIA NDERITU.....APPELLANT

-AND-

REPUBLICRESPONDENT

(An Appeal from the judgment of Senior Resident Magistrate Mrs. M. W. Muigai dated 30th November, 2001 in Criminal Case No. 2737 of 2000 at Nairobi Law Courts)

JUDGEMENT

There were two accused persons, *John Murithi Mugo* and *Patrick Macharia Nderitu* in Criminal Case No. 2737 at the Nairobi Chief Magistrate's Court, and these were then the subject of appeal to the High Court, numbered as High Court Criminal Appeal Nos. 1277 and 1279 of 2001 respectively – ***Patrick Macharia Nderitu & Another v. Republic.***

Due to the 2nd appellant's repeated non-appearance in Court for the hearing of the Appeal cases, learned counsel ***Mr. Wandugi***, for ***Partick Macharia Nderitu*** applied on 23rd May, 2007 that the two matters be separated, and Criminal Appeal No. 1277 heard separately, which application was granted.

The charge brought against the appellants in both cases had been, that they, on 20th April, 2000 at Victoria Courts House, Tom Mboya street in Nairobi, jointly with others not before the Court, and with intent to defraud, obtained cash in the sum Kshs.185,000/= from ***Thomas Kamau***, by falsely pretending that they were in a position to sell a piece of land, L.R No. Nairobi/Block 116/1161 to the said ***Thomas Kamau.***

The trial Court found both accused persons guilty, convicted them, and sentenced each to serve a prison term of two years and half.

For the appellant herein, ***Mr. Wandugi*** urged that the facts of the case did not lead to a charge of obtaining money by false pretences, as it was clear from the testimony of witnesses, particularly PW1, PW2, PW3 and PW9, who did the impugned transactions and who received the money, and it was not the appellant herein. The appellant, it was urged, did not offer to sell any property, and did not receive any money from the complainant. The ingredients of the offence as specified in the Penal Code, were not, in the circumstances, satisfied. Counsel urged that there was no evidence that the appellant acted in any way to defraud the complainant (PW1), nor did the appellant persuade the complainant to pay any money to a third party.

Counsel submitted that the trial Court's finding that the appellant had presented himself to the complainant offering to sell property, as not supported by the evidence. Since it is recorded by the trial Court that the sale proceeds had been received by one **Anne Muthoni**, counsel urged, there was no basis for the conviction of the appellant herein. Counsel submitted that the holding by the trial Court (p.J12) that the relevant property documents were in the name of **Anne Muthoni** but that this fact did not absolve the appellant, amounted to an attempt to incriminate the appellant without evidence.

Learned State Counsel **Mr. Makura** conceded to the appeal, on the ground that the charge was not proven as required in a criminal case. The conviction had been founded on the evidence of the complainant (PW1), PW2 and PW3 who were present during the transaction; but the appellant was an agent for **Anne Muthoni** and **Anne Muthoni** herself was the one who received the money; the said witnesses relied on by the Court (PW1, PW2 and PW3) had said that the appellant is not the one who received the said money. **Mr. Mukura** noted that such exculpatory evidence emanating from the prosecution, in relation to the appellant, had been replicated in the defence evidence; and consequently, counsel urged, there was no basis for conviction; it was not a safe conviction; and the appeal should be allowed.

It is an established principle of criminal law that there is to be no conviction unless proof has been effected beyond reasonable doubt, showing the guilt of the accused. The instant appeal turns on the mode of application of evidence, so as to arrive at the verdict of the Court; and it is urged that parity is wanting, as between evidence and verdict. I have perused the record and the judgment; and I come to the conclusion that the gravamen in the appeal is justified. An outcome was arrived at by the trial Court which did not flow from the evidence; and hence proof beyond reasonable doubt was not achieved.

I hereby allow the appeal, and set aside the conviction and sentence. I acquit the appellant of the charge which had been laid against him.

Orders accordingly

DATED and **DELIVERED** at Nairobi this 3rd day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Wandugi

For the Respondent: Mr. Makura