



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Criminal Appeal 270 of 2005**

**ELIUD MWANGI PHILIP.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

*(From original judgment Criminal Case No. 6030 in the Chief Magistrate's Court at Thika – S. M. Mokuu SRM)*

**J U D G M E N T**

**ELIUD MWANGI PHILIP**, the appellant, was charged with obtaining money by false pretences contrary to Section 313 of the Penal code. The particulars of offence were that on diverse dates between 26<sup>th</sup> and 30<sup>th</sup> May 2001 at Kandara in Maragua District within Central Province, with intent to defraud obtained Kshs.165,000/= from **GRACE WANJIKU KARANJA** by falsely pretending that Plot No. 167 at Kandara township was his and sold the said plot to the said **GRACE WANJIKU KARANJA** a fact he knew to be false. After a full trial, he was convicted and ordered to serve 4 months community service at Kandara Primary School. Being aggrieved by the decision of the subordinate court, he appealed to this court.

At the hearing of this appeal, his counsel Mr. Gikonyo made submissions in support of the appeal. Counsel submitted that the offence was not proved, and that the appellant was treated with a lot of injustice by the lower court. The case was initially presided over by Ms Kiptoo up to the last prosecution witness. However, the same Ms Kiptoo later became the counsel holding watching brief for the complainant. The objections raised by the appellant's counsel in those circumstances were overruled. Counsel contended therefore, that the main presiding Magistrate (Ms. Kiptoo) had an interest. Consequently, the appellant could not expect to have a fair trial. This interest, in his view, was manifested by the many adjournments granted by Ms. Kiptoo. In counsel's view, justice was not done.

Counsel also submitted that the evidence on record showed that the plot in question, plot 167, indeed, belonged to the appellant. That fact was confirmed by the evidence of PW1, PW2, and PW3, and the **KANDARA COUNTY COUNCIL** records. In counsel's view, most of the confusion came because of a civil case that was filed by one called **KATHUKU** against the complainant in respect of Plot No. 79 which was a different plot. In those civil proceedings the appellant was not made a party, nor did the **COUNTY COUNCIL** testify. In our present case however, the officers from the **COUNTY COUNCIL** testified that Plot No. 167 belonged to the appellant. Counsel contended that the finding that the appellant showed the complainant plot No. 79 is not anywhere in the evidence. Counsel contended that all the evidence was that the plot which the appellant sold to the complainant was Plot No. 167. Therefore there was no proof of misrepresentation.

The learned State Counsel, Mrs. Kagiri, opposed the appeal. On the contention of injustice, the learned State Counsel submitted that there was nothing on record to show any injustice done to the appellant. The previous Magistrate merely held watching brief for the complainant. Therefore, the allegation of prejudice was mere speculation.

The learned State Counsel, submitted that the prosecution proved its case against the appellant beyond any reasonable doubt. Counsel submitted that the evidence was clear that the appellant showed the complainant what he described as Plot No. 167, only for the complainant to fence it and realize later that the plot was Number 79 which was owned by someone else. The appellant therefore presented that he had good title for a plot for which he did not have any title. That fact was proved in the civil litigation. Counsel submitted that the evidence on record established that the appellant purported to be the owner of Plot No. 167, which he was not. The defence also did not controvert the prosecution case.

In a short response, Mr. Gikonyo, submitted that a presentation for the future could not be a basis for convicting for a charge of obtaining by false pretences. Counsel also submitted that all the evidence from the documents and officials of the **COUNTY COUNCIL** showed that the appellant was the owner of Plot No. 167 and that plot No. 79 was a totally different plot.

I have re-evaluated the evidence on record as I am required to do in a first appeal.

I will first of all deal with the issue of injustice due to the appearance of Ms Kiptoo as counsel holding watching brief for the complainant, in the same case, after Ms. Kiptoo retired from the Judiciary. Ms Kiptoo was indeed, the Magistrate who conducted most of the case. Ideally, she should not have been involved in any capacity in the said case. Justice should not merely be done, but must actually be seen to be done. She however did not do anything in the proceedings other than holding watching brief. In that case, she was not likely to influence the trial. If she had acted in any other way in the proceedings, I would find no hesitation in declaring that the said involvement would have prejudiced the appellant. In the circumstances of this case however, I find no prejudice occasioned to the appellant by the fact that Ms Kiptoo held a watching brief for the complainant. The many adjournments were not, in themselves, a sign of prejudice.

Counsel for the appellant submitted that the Magistrate erred in finding that the appellant showed the complainant Plot 79. Counsel submitted that the said finding is not founded on the evidence.

The counsel is correct. All the evidence on record from the complainant PW1 **GRACE WANJIKU KARANJA** and even defence witnesses who came from the **COUNTY COUNCIL** was that the plot sold by the appellant was No. 167. There is no evidence that the appellant showed the complainant plot No. 79. The plot which was fenced by the complainant was No. 79. However, the complainant did not state specifically that this was the plot she was shown, though she stated clearly that this was the plot that she fenced. Even the witness PW2 **JOSEPH WAITHAKA NGUGI**, who stated in evidence that he had been shown the subject Plot together with the complainant by the appellant, did not, during investigations, confirm whether the fenced plot was the plot which they were shown by the appellant. He stated in examination in chief –

***“Some days earlier, I and the accused together with the complainant went to the said plot and he showed us the plot. The same had beacons. I saw documents regarding this plot. Later I heard another person came and claimed the plot and it ended up in a civil suit.”***

Therefore, in my view, the prosecution did not establish by evidence that, indeed, the appellant pointed plot 79 to the complainant as the plot which he had sold to her. The prosecution should have taken the witness to go and confirm, if the fenced plot, was the plot which was shown to the complainant by the appellant.

I now turn to the proof of the actual charge. I need to state from the outset that the burden is always on the prosecution to prove a criminal case against an accused person beyond any reasonable doubt. That burden does not shift to an accused person – see **MUIRURI – VS – REPUBLIC [1983] KLR 205.**

In our present case, the prosecution did not prove that the appellant obtained money by false pretences. The allegation was that he represented that he was selling to the complainant plot 79. There is no evidence to that effect. All the evidence from the prosecution, as well as the defence, is that the appellant sold to the complainant plot 167. The complainant however, appears to have fenced plot 79 rather than plot No. 167. The defence witnesses DW 2 **SAMUEL KERORGO GITUNGU**, who sold plot No. 167 to the appellant and DW3: **PETER KIRAGU**, a Revenue Officer and Committee Clerk of **KANDARA COUNTY COUNCIL** confirm that plots 167 and plot 79 exist as separate and distinct plots. Also even the **COUNTY COUNCIL** official admits that the appellant sold to the complainant plot No. 167 which is in the official documents. The appellant also maintains that he sold plot No. 167 to the complainant and transferred the same to the complainant and had no claim over that plot. The complainant also confirmed so. In these circumstances, the prosecution, in my view, did not prove the allegation in the charge sheet against the appellant. The thing that should have happened is for the complainant to ask the surveyor and officers of the **COUNTY COUNCIL** to show her the plot 167, which she does not appear to have done. The **COUNTY COUNCIL** should show her the correct plot sold. As to the conviction it cannot be sustained and I will quash the same.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that if the appellant is in custody for the offence, he be released unless otherwise lawfully held.

Dated and delivered at Nairobi this 16<sup>th</sup> June, 2008.

**George Dulu**

**Judge**

**In the presence of –**

Mr. Gikonyo for appellant -absent

Appellant -absent

Mrs. Kagiri for State - absent

Kariuki - Court clerk