



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 773 OF 2002**

FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO.

5884 OF 2000 OF THE CHIEF MAGISTRATE'S COURT AT THIKA

NICHOLAS KAMAMI.....1ST APPELLANT

SALOME WAMBUI WAWERU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

The two appellants, **NICHOLAS KAMAMI** and **SALOME WAMBUI WAWERU** were convicted for the offence of **OBTAINING BY FALSE PRETENCES**, contrary to Section 313 of the Penal Code. The particulars of the charge are that the appellants jointly, with intent to defraud, obtained Kshs 150,000/= from Nicholas Nganga Gicharu, by falsely pretending that they would sell him Plot No. 556.

Following their trial and conviction, the appellants were jailed for two and a half (2 ½ ) years imprisonment, each. They have now appealed against the verdict of the trial court.

PW1, Nicholas Nganga Gicheru, testified that he had wished to purchase a plot.

He then met PW2, Peter Gikori Gathemba, who told him that he (PW2) had been requested to look for a buyer, for a plot belonging to the 2nd appellant. PW1 was shown the plot, and he liked it. He therefore met with the 2nd appellant, at the offices of the 1st appellant, and PW1 paid Kshs 150,000/= which was the agreed purchase price. The said sum was paid to the 2nd appellant, in the presence of the 1st appellant, PW3 and PW4.

Thereafter, PW1 put up a mabati walled house, on the plot. But in less than two weeks, PW5, Moses Kinyanjui Makumi, arrived at the plot, and notified PW1's family that the plot was his. He therefore told PW1 to remove the building from the plot, and PW1 complied.

PW1 testified that the 1st appellant had re-assured him that the plot (NO 556) belonged to the 2nd appellant. Indeed, PW1 emphasized that he bought the plot, on the strength of the assurance given by the 1st appellant.

PW2, Peter Gikori Gathemba, testified that he had been commissioned by the 2nd appellant to try and find her a buyer for her plot, NO. 556. Shortly thereafter, PW1 approached PW2 and told him that he wished to buy a plot. PW2 took PW1 to see the plot, and PW1 like it. The pair then went to the offices of the Githunguri Constituency Ranching Company Limited, where they found the 1st appellant. The said

1st appellant was working at those offices, as a clerk. This is what PW2 said:

***“The plot in the register was in the name of Salome Wambui i.e 1st accused. In the office 2nd accused is the one who told us the plot belonged to 1st accused.”***

Having been thus persuaded that the plot belonged to the 2nd appellant, PW1 paid Kshs 150,000/= to the 2nd appellant. That sum was the agreed purchase price.

PW3, Daniel Gacheru Nganga, is the son to PW1. He, too, witnessed PW1 paying the purchase price to the 2nd appellant. He also testified that when PW5 turned up at the offices of Githunguri Constituency Ranching company Ltd., and claimed ownership of plot No. 556, the 1st appellant cancelled the name of the 2nd appellant from the register and re-entered the names of PW5.

PW4, Ag. IP John Kiarie, is a police officer. At the material time, he was attached to the Ruiru Police Station. He caused the 1st appellant to be charged because he is the one who confirmed to PW1 that Plot 556 belonged to the 2nd appellant. He also charged the 2nd appellant because she was the recipient of Kshs 150,000/= which was the purchase price for a plot which did not belong to her. In his assessment, PW4 was convinced that the 1st appellant well knew that the plot did not belong to the 2nd appellant.

When the appellants were put on their defence, the 1st appellant admitted having told PW1 that the plot belonged to the 2nd appellant. However, he explained that he only did so after verifying the information by checking through the company’s register. He also said that the 2nd appellant had the original certificate NO. 556, which had been duly signed by the company secretary.

Meanwhile, the 2nd appellant insisted that she sold the plot because she believed that it belonged to her. She also said that she had only met the 1st appellant in court, having not known him before.

Having given due consideration to the evidence adduced by both the prosecution and the accused persons, the learned trial magistrate held that it was common ground that PW1 paid Kshs 150,000/= as purchase price for plot no. 556, at Githunguri Constituency Ranching company Limited. Therefore, as far as the trial court was concerned, the only issue for determination was whether or not the appellants had obtained that sum of money with intent to defraud, or whether they genuinely believe that the plot belonged to the 2nd appellant. In that regard the learned trial Magistrate cannot be faulted.

She then went on to hold as follows:

***“The court finds that 2nd accused person took advantage of his position as the clerk in Githunguri Ranching Company that had plots to sell, to convince, with 1st accused, falsify the register pretending that Makumi’s name had been cancelled and that of the 1st accused inserted. 2nd accused even went further, on the day PW1 paid 1st accused 150,000/=-, and cancelled name of 1st accused from register and inserted that of PW1 conclusively convincing PW1 that he had indeed bought the plot and even told PW1 to go ahead, take possession of the plot and develop /farm it.”***

Upon my re-evaluation of the evidence on record, I am convinced that the appellants were upto no good. I believe that the plot in issue was targeted by them for the reason that PW1 had purchased it some 32 years before, but had not developed it. The appellants must have concluded that the legitimate owner of the plot was no more.

However, although I am convinced of the foregoing, I note that there was no evidence tendered before the court to prove that the 1st appellant is the person who actually cancelled the name of PW1 from the register, and replaced it with that of the 2nd appellant. Therefore, when the learned trial magistrate expressly so held, I do reluctantly hold that the learned trial magistrate attributed to the 1st appellant matters about which no witness had testified.

The record of the proceedings does not show that it was the 1st appellant who cancelled PW1’s name

from the register. None of the prosecution witnesses said that they had seen the 1st appellant make such a cancellation. The only cancellation which PW3 witnessed was that of the 2nd appellant's name from the register, and its replacement with the name of PW5.

However, inasmuch as the 1st appellant was not charged with the offence of forgery, it did not matter that no prosecution witness testified that he (the 1st appellant) was the person who inserted the 2nd appellant's name in the register.

The offence with which the appellants were charged, tried and convicted is to be found in section 313 of the Penal Code, which reads as follows:

***“Any person who by false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to delivered to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”***

In this case, the prosecution witnesses proved that the 2nd Appellant received a sum of Kshs 150,000/= from PW1. The appellants do not deny that fact.

The said sum was to be the purchase price of Plot No. 556, which was said to belong to the 2nd appellant. However, the truth was that the plot belonged to PW5. But the ownership notwithstanding, the 1st appellant, who was in a position which enabled him to verify the facts, nonetheless gave assurances to PW1 that the plot belonged to the 2nd appellant. By giving the said assurances, the 1st appellant induced PW1 to pay the money to the 2nd appellant. In effect, by virtue of the definition of the offence, as found in section 313 of the Penal Code, the 1st appellant could be properly convicted, even though he may not have actually received the purchase price or any part thereof.

But the question which must still be tackled is that of the appellants' mens rea. Did they intend to defraud the complainant?

In my understanding, the appellants promised to give PW1 plot No. 556, in exchange for the sum of Kshs 150,000/=. They actually did give the plot to PW1, and he managed to put up a house upon it. The only thing that they did not, and could not do, is to pass title of that plot to PW1. In effect, the appellants did mislead PW1 to believe that he was acquiring a property, which the appellants could not pass onto him, in law.

Did the 2nd appellant believe the plot to be hers, as she said in her defence? I do not think so at all, for PW5 expressly denied having ever sold the plot to her. Therefore, as the 1st appellant said that the cancellation of PW5's name in the register implied that PW5 had sold the plot to the 2nd appellant which was untrue, there was no way that the 2nd appellant could have honestly believed the plot to have been hers. In my reading of the evidence, this is not a case of a person being shown the wrong plot, and believing it to be hers.

The 1st appellant clearly knew that cancellation implied purchase from the person whose name was on the register earlier. But as the 2nd appellant had not bought the plot from PW5, there was no way she could honestly believe that the plot was hers.

In the circumstances, I am satisfied that the appellants conviction was well founded.

Meanwhile, as regards the sentence of imprisonment for 2 ½ years, I find the same to be lawful. The maximum penalty prescribed by law is imprisonment for three years. I find no reason to interfere with the sentence.

Accordingly, I dismiss these appeals, and uphold both conviction and sentence

Dated at Nairobi this 16th day of May, 2005

**FRED A. OCHEING**

**JUDGE**

Delivered in the presence of:

For State

1st Appellant present

2nd Appellant present

Mr. Odera Court Clerk