



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL CASE NO. 414 of 2002**

( From original conviction and sentence in Criminal Case No. 201 of  
2001 of R.M.'S Court at Gichugu – B.G. MAINA – D.M.1)

MUCHIRA KAGWA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

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

**Muchira Kagwa** hereinafter referred to as the Appellant was convicted by the District Magistrate Gichugu Court for the offence of obtaining by false pretences contrary to Section 313 of the Penal Code. He was sentenced to serve 3 years imprisonment . He has now appealed against his conviction and sentence.

The particulars of the charge against the Appellant was that on the 16th December, 2000 with intent to defraud . He obtained from Ngure Ndinwa cash Kshs. 125,000/- by falsely pretending that he had a shamba land No. Baragwi/Kariru/1590 to sale to the said Ngure Ndinwa.

The facts were that the Appellant entered into an agreement with the complainant Ngure Ndirwa to sell him one acre out of his land known as Baragwe/Kariru/1590 at a price of Kshs.180,000/- . The complainant paid the Appellant an initial payment of Kshs.125,000/- it being agreed that the balance of Kshs.55,000/- was to be paid upon the transfer of the land. However upon receipt of this money the Appellant became evasive and failed to effect the subdivision or to transfer the land to the complainant. The complainant made a report at Kianyaga police station and the Appellant was arrested and charged.

In his defence the Appellant denied having entered into any agreement to sell his land to the complainant.

The trial magistrate in his judgment found that the appellant had entered into an agreement of sale with the complainant and that he had received Kshs.125,000/- as part of the purchase price from the complainant . He rejected the defence of the appellant and found that he obtained Kshs.125,000/- from the complainant by falsely pretending that he was in a position to sell him land.

False pretence is defined in Section 312 of the Penal Code as follows;

**“ Any representation, made by words, writing or conduct of a matter of fact either past or present which representation is false in fact and which the person making it knows to be false or does not believe to be true, is a false**

**pretence.”**

In this case the particulars of the charge stated the false pretence to be “ that He (i.e. Appellant) had a shamba land No. Baragwi/Kariru/1590 to sell to the said Ngare Ndinwa”.

The trial magistrate in his judgment modified the false pretence slightly to the effect that “He (i.e. Appellant) was in a position to sell him (i.e. complainant) land”.

From the evidence adduced before the trial court it was not disputed that the appellant was the registered owner of Baragwi/kariru/1590 . It was therefore a fact that the appellant had land known as Baragwi/Kariru/1590 and as the sole registered proprietor could sell the land to whomever he wished. It is evident that there was no false pretences proved. It is obvious that the appellant reneged on the agreement to sell the land to the complainant however this was a matter for a civil court and not a criminal process.

The trial magistrate therefore erred and misdirected himself in finding the offence proved.

Moreover as observed by Mr Obuo learned state counsel, there was a procedural defective in that the hearing of the case in the lower court was taken over by another magistrate after the trial had commenced. There was [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) 4 however no compliance with Section 200 of the Criminal Procedure Code thereby prejudicing the appellant.

All in all this conviction is not safe. The appeal is therefore allowed conviction quashed and sentence set aside.

The Appellant shall be set free unless otherwise lawfully held. Dated Signed and Delivered at Nyeri this 19th day of December. 2003.

**H.M. OKWENGU**

**JUDGE**