



**Kanyotu (alias Joseph Mureithi Kihara) v Republic (Criminal Appeal
199 of 2019) [2024] KEHC 1515 (KLR) (Crim) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1515 (KLR)

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

**CRIMINAL
CRIMINAL APPEAL 199 OF 2019**

**GL NZIOKA, J
JANUARY 24, 2024**

BETWEEN

**WILLY KIHARA NJOKI KANYOTU (ALIAS JOSEPH MUREITHI
KIHARA) APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of; Hon. P. O. Ooko, Senior Principal
Magistrate (SPM), delivered on, 3rd September, 2019, vide Chief Magistrate's
Criminal Case No. 429 of 2011, at Milimani Law Courts, Nairobi)*

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court charged jointly in count (1), with the another (Joseph Walter Anyango Ogutu), (herein "the first accused") vide Criminal Case No. 429 of 2011, with the offences of obtaining money by false pretence contrary to section 313 of the Penal Code (hereinafter "the Code)
2. The particulars of the charge are that, on diverse dates between 25th February and 30th September 2010 at Queensway House at Nairobi City Centre within Nairobi Area, jointly with another with intent to defraud obtained from Morris Mbaro Thuku the sum of Kshs. 5,200,000 by falsely pretending that he was in a position to sell to him L.R. No. 15065/61 situated at Karen, a fact he knew to be false.
3. He was also charged in count (2) with the offence of impersonation contrary to section 382(1) as read with section 36 of the Code. That, on the 25th day of February 2010 at Queensway House in Nairobi City within Nairobi Area with intent to defraud falsely presented himself as Joseph Mureithi Kihara.



4. Finally, he was charged in count (3) with the offence of forgery of an official document contrary to section 351 of the Code. That, on or about 25th February 2010 at Nairobi City Centre within Nairobi Area jointly with another with intent to defraud, forged an official document namely National Identification Card Number 10403461 purporting it to be a genuine Identity Card issued by the Registrar of Persons.
5. He pleaded not guilty to all the counts and the case proceeded to full hearing. The prosecution's case is that, on 25th February 2010, PW1, Marison Mbaro Thuku (herein "the complainant") saw an advertisement in the Daily Nation Newspaper for sale of land situate in Karen. That, the complainant called the mobile number; 0722637056, indicated in the advertisement and the recipient introduced himself as Joseph Kihara Mureithi and the seller and directed the complainant to the land along Bogani/Sagana Road.
6. The complainant, viewed the land and developed an interest in the purchase thereof. The complainant then called the seller, and they agreed to meet at office of Anyango Ogutu, the seller's Advocate's office, situated at Queensway House second floor room number 13.
7. The complainant testified that when he arrived the Advocate's office, he called the seller's mobile number and was picked by a man seated at the reception. That the complainant and the seller discussed about the property and the seller told the complainant he was in the process of sub-dividing the land and that the title would be processed in the name of the payee. Further, the parties negotiated and agreed on the purchase price of; Kshs 5,200,000.
8. That, the seller's Advocate, Ogutu, showed the complainant a copy of the seller's identification card number 10403461, in the name of Joseph Kihara Mureithi, and a copy of the lease for Land Reference No. 15065/61 measuring 0.399 Hectors, in the name of Joseph Kihara Mureithi issued on 14th December, 1998.
9. That the complainant was to pay ten percent (10%) of the purchase price as deposit, which he did being Kshs. 520,000 through a banker's cheque issued by Family Bank Limited in the name of Anyango Ogutu & Company Advocates and thereafter the Advocate prepared the sale agreement for execution and was executed by the parties.
10. That on 23rd August 2010, the seller and the complainant cum the purchaser met at a hotel and the seller informed him that he had problems with sub-division and requested for Kshs. 200,000, which the complainant paid to the Advocate's law firm.
11. Further, on 6th September 2010, the seller and the Advocate informed the complainant that the sub-division was complete and required him to make a further payment sum of; Kshs. 2,500,000. The complainant was then showed the beacons on the property by the surveyor, Mr Gakinya, and being satisfied that the sub-division had been done he transferred a sum of; Ksh. 2,500,500 to the Advocate's client account number 0401045101 at Equatorial Commercial Bank.
12. Furthermore, on 27th September 2010, the seller and the Advocate, Ogutu requested for the balance of the purchase price being Kshs 1,910,000 which he paid. Apparently, the complainant had already paid Kshs. 80,00 directly to seller.
13. Having paid substantial amount of the purchase price, the complainant went to Advocate's office where he was showed a file in his name for the property LR 5065/732 of registration effected on 23rd September 2010.



14. Once again, being convinced that the sale process was complete, he transmitted a sum of; Kshs. 780,000 by RTGS from Barclays Bank to Equatorial Commercial Bank account number 0901005101 in the name of Anyango Ogutu and Company Advocate client account. He further remitted Kshs. 1,115,000 to Equatorial Commercial Bank account number 04005101 in the name of Anyango Ogutu and Company Advocate in completion of payment and he was then given the original file.
15. That on 12th December 2010, the complainant decided to visit the land and found that it had been fenced with wire. He became suspicious and decided to do a search on the property and the search results indicated that the land could not be located in the Land Registry records.
16. The complainant visited the Head office at Ardhi House, where an officer showed him the original file relating to the subject land and informed him that the land had not been transferred to him. Further, there was a caveat over the land. The complainant then reported the matter to the Criminal Investigation Department (CID) Headquarters for investigation and thereafter the Advocate and the appellant were arrested and charged accordingly.
17. At the conclusion of the prosecution case the trial court placed the both accused on their defence. The appellant who was accused (2) vide a sworn statement denied committing the offences, in particular placing the subject advertisement in the daily newspaper for the sale of land in issue, meeting the complainant and/or referring the complainant to the Advocate or receiving any money from the complainant and/or the Advocate.
18. The second accused testified that he met the complainant and Advocate, for the first time in court and never gave the Advocate any documents and/or instructions to represent him in a land transaction and neither did he ever requested David Kirigi Kienji to receive money on his behalf.
19. The appellant stated that he was identified by Beatrice, an informer who had accompanied PW7 corporal Mugambi to arrest him. That, he was never subjected to an identification parade upon arrest. Further, at the time of his arrest he had his identification card No. 13029754. He denied forging the alleged identification card.
20. At the conclusion of the case the trial held that, the prosecution had not proved the charge against the Advocate who was first accused and acquitted him on all counts. However, the appellant who was found guilty on all three counts and convicted him accordingly under section 215 of the Criminal Procedure Code (Cap 75) Laws of Kenya.
21. As a result, the trial court sentenced he appellant as follows: -
 - a. On count 1; to pay a fine of Kshs. 2,000,000 and in default to serve two (2) years imprisonment,
 - b. On count; 2 to pay a fine of Kshs. 50,000 and in default to serve six (6) months imprisonment;
 - c. On count 3; to pay a fine of Kshs. 300,000 and in default to serve two (2) years imprisonment.The court ordered the sentences to run consecutively.
22. However, being aggrieved by the conviction and sentence, the appellant has lodged the appeal herein vide the Memorandum of Appeal dated; 20th May 2019 on the following grounds: -
 - a. The Learned Trial Magistrate erred in law and in fact by holding that the prosecution had proved the case beyond reasonable doubt all the three counts against the appellant.



- b. The Learned Trial Magistrate erred in law and in fact by shifting the burden of proof on to the appellant by severally holding that the appellant had not disproved evidence tendered by the prosecution witnesses and the 1st accused,
 - c. The Learned Trial Magistrate erred in Law and in fact by accepting the evidence tendered by the 1st accused against the appellant (co-accused) as the truth without warning himself on the dangers of relying on a co-accused's evidence.
 - d. The Learned Trial Magistrate errand in Law and in fact by holding that the appellant was the beneficiary of the money obtained from the complainant without enough evidence to support the same,
 - e. The learned Trial Magistrate erred in law and in fact by holding that the appellant was the one who had forged the National Identity Card and a Title Deed without enough evidence to support the same.
 - f. The Learned Trial Magistrate erred in law and in fact by meting out a very harsh and unreasonable sentence against the appellant.
23. Pursuant to the appeal, the appellant consequently prays for orders as follows: -
- a. The appeal be allowed and his conviction be overturned.
 - b. The Honourable court be pleased to set aside the sentence meted by the subordinate court on 3rd September 2019 and do order that the fine of Kshs. 2,344,500 paid by him be refunded back to him.
24. The respondent on its part opposed the appeal through grounds of opposition dated 31st May, 2022, which states that: -
- a. The appeal is not arguable and has no chance of success since the evidence on record adduced by the prosecution during the trial was sufficient to support both the conviction and sentence.
 - b. The Appellant was properly convicted and sentenced lawfully.
 - c. The orders sought on sentencing are discretionary and to that effect the appellant has failed to demonstrate that he deserves revised orders of this court discretion.
25. The appeal was disposed off by way of written submissions. The appellant submitted that the prosecution failed to prove the charges against him to the required standard of beyond reasonable doubt. He relied on the case of; Republic v Bernard Obunga Obunga [2015] eKLR where the court cited to the case of Ramanlal Trambaklal Bhatt e. R [1957] L.A 332 at 334 and 335 and stated that the legal onus is always on the prosecution to prove its case beyond reasonable doubt.
26. He submitted that, the elements of the offence of obtaining money by false pretence were laid out in the case of; Danstone Kwaba Okwako v Republic [2017] eKLR as obtaining something capable of being stolen, obtaining money through false pretence and obtaining the money with intention to defraud.
27. That, in Republic v Sharif Mohammed Hija [2016] eKLR the court set the elements of obtaining money by false pretence to be proved as follows: -
- a. That the accused made a representation of existing or past fact to the complainant. The false representation must relate to a matter of fact, either past or present, but not in the future, (see R vs Dent [1955] 2 ALLER 806; Albert Alexander Age vs The State [1979] PNGLR 589 & Green v R (1949) 79 CLR 353);



- b. That the representation was false;
 - c. That the representation was intended to deceive i.e. the accused must have acted knowingly with intent to cheat or defraud;
 - d. That the complainant was, in fact, deceived by the representation. The prosecution must prove that the complainant parted with the property as result of the representation acting on his/her mind see, for example, *R v Laverty* [1970] 3 All ER 432; (1970) 54 cr App R 495; and
 - e. That the accused thereby obtained something capable of being stolen
28. The appellant argued that, it was not clear who the complainant was dealing with as he gave evidence that he dealt with Joseph Kihara Mureithi. That he is not Joseph Kihara Mureithi and has never used that name.
29. Further, there was no evidence to show he received any money from the complainant or his agents. That the complainant gave evidence that he paid all the money to the Advocate through a banker's cheque of Kshs. 520,000 as the deposit of the purchase price; Kshs. 200,000 for sub-division; Kshs. 2,500,000 to the lawyer's account No. 0401045101 at Equatorial Bank Limited; Kshs. 1,895,000 transferred to the Advocate as the balance of the purchase.
30. Furthermore, there is no evidence that the complainant sent Kshs 80,000 to Joseph Kihara via Mpesa, as alleged as the mobile number the money was sent to was not linked to him.
31. The appellant argued that the evidence of the Advocate that he knew him as Joseph Mureithi Kihara and received money on his behalf which he transferred to third parties on his instructions was unsubstantiated and required corroboration to be considered credible by the court. Further, none of the third parties was called as witnesses and/or charged as co-accused despite their details being readily available.
32. Further, that the learned Trial Magistrate erred in relying on the insufficient evidence of his co-accused and failed to give reasons or consider the law on accomplice testifying as a witness in that section 141 of the *Evidence Act* (Cap 80) Laws of Kenya states that, an accomplice shall not be a competent witness against an accused person. He relied on the case of; *Collins Otieno Madara v Republic* [2017] eKLR where the court stated that: -

“ 8. In the case of *Mwangi V R 1984 (KLR) 595* the Court of Appeal held thus: -

“The trial magistrate should have treated the evidence of Muthoni as that of an accomplice and it had been a serious misdirection to treat her evidence as that of a reliable witness. Muthoni's evidence should have been held to be untrustworthy for the reason that she was likely to swear falsely in order to shift blame from herself and being a participation of the crime, she could easily disregard the sanctity of the oath to tell the truth. ”

‘Similarly in the case of *Nguku v R (1985) KLR 412* the Court of Appeal held thus: - In dealing with the evidence of an accomplice, trial court should first establish whether the accomplice is credible witness and then look for some independent evidence as corroboration connecting the accused person with the offence. In



this case, the evidence of the complainant, (who was a statutory accomplice, had been sufficiently corroborated.

"20. The evidence of an accomplice should be handled with lot of caution. The Court before relying on it must warn itself and proceed to establish whether the accomplice is a credible witness and then look for some other evidence as corroboration connecting the accused person with the offence. "

33. The appellant further submitted that, the prosecution case was marred with inconsistency and contradictions. That, the police gave contradicting evidence on how he was arrested. Further, the complainant claimed he saw him when he was arrested however, the police failed to organise an identification parade as per the law.
34. Furthermore, the 1st accused informed PW7 Corporal Mugambi that he could not remember the parties to the transaction as he had many clients yet indicated that the appellant was the vendor. That, the 1st accused evidence was unreliable as he had suffered a stroke leading to memory loss.
35. The appellant submitted that, the elements of the charge of personation were not established and that Joseph Kihara Mureithi who he was accused of impersonating is a totally different person from PW2 Joseph Mureithi Kihara.
36. That he was charged with pretending to sell property L.R. No. 15065/61 which is totally different from LR. No. 160/65/61 formerly owned by PW2 Mr Kihara. He faulted the trial court for relying on the evidence of the complainant and the 1st accused while disregarding his evidence and that of PW3, Manyari, who is an expert on identification.
37. On the charge of forgery of an official document, the appellant cited the case of Patrick Njuguna Richu v Republic [2018] eKLR where the court quoted the case of; R-v- Dodge and Harris (1971) ALLE.R. 1523 and stated that: -

“ A document is false must tell a lie about itself and not about the maker. We think the position is better put, by stating that; the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: OMAR BINSALEM V R (1950) 17 EACA 158, and to defraud is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, sec SAMUEL -V- REPUBLIC.”

38. He further submitted that, the complainant received the copy of the false identification card from the 1st accused and not himself. That, no evidence was produced to establish how he purportedly forged the identity card and the only evidence against him is that the copy had his photograph on it. Further, the original false identity card was not produced and neither is there evidence on who was the source of the documents.
39. The appellant furthermore submitted that the learned trial Magistrate failed to substantiate how the court arrived at the conclusion that it is the appellant who impersonated Joseph Muerithi, and merely relied on the evidence that the 1st accused received the copy of the alleged identity card from him.
40. The appellant argued that he was not accorded a fair hearing in line with the provisions of; Article 50 of *the Constitution* of Kenya, 2010. That, the trial court in the ruling delivered on; 7th June 2017,



- declined to allow his application for the matter start de novo under section 200 (3) of the Criminal Procedure Code (Cap 75) Laws of Kenya, without giving reasons thus greatly prejudicing him. He relied on the case of; *Abdi Adan Mohamed v Republic* [2017] eKLR where the court noted that, it is highly desirable for magistrate/judge to hear a case to conclusion and render judgment.
41. He further, relied on the case of; *Ndegwa v R* (1985) KLR 535 where the court stated that a trial magistrate should see, hear, assess and gauge the demeanour and credibility of the witness and that the trial is unsatisfactory where the second magistrate does not see and hear all the witnesses. That as a result the trial court not was in a position to assess the personal credibility and demeanour of all witnesses in the case.
 42. The appellant further submitted that he was not properly identified. That, the trial court disregarded his evidence where he denied meeting the complainant and the 1st accused and that he saw them for the first time in court.
 43. Further, the failure to conducted an identification parade was an error leading to the conviction of an innocent person. He relied on the case of; *Republic vs Valentine Maloba & 2 others* [2021] eKLR where the court quoted with approval the case of; *Ajode vs. Republic* [2004] eKLR where it was stated that dock identification is generally worthless and the court should not place much reliance on it unless preceded by an identification parade.
 44. Lastly, the appellant submitted that the sentence requiring him to pay Kshs 2,350,000 or in default serve four (4) years and six (6) months imprisonment is excessive given the fact that the trial court acted on the wrong principles and overlooked some material facts. Further still, none of the charges were proved against him beyond reasonable doubt as there was no iota of evidence produced linking him with the money obtained.
 45. He submitted that in the circumstances, the court has power and jurisdiction to interfere with the sentence passed by the lower court as held in the cases of; *Ogola s/o Owuora* 1954 24 EACA 70; *Wanjema v Republic* [1971] EA 49; *Josiah Mutua Mutunga & another v Republic* [2019] eKLR and *Bernard Kimani Gacheru vs Republic* [2002] eKLR
 46. However, the respondent submitted that the prosecution had proved all the elements of the respective charges beyond reasonable doubt. That, the elements of the offence of obtaining money by false pretence are set out in section 313 of the Code as; the act of obtaining something capable of being stolen, that obtaining the thing was through false pretence, and that obtaining the thing was with intention to defraud.
 47. Further, the elements of the offence of impersonation are the intention to defraud, and falsely representing himself to be some other person.
 48. The respondent submitted that, the complainant lost Kshs 5,200,000, deposited in the Advocate's account being something capable of being stolen and that he never received the land he was purchasing.
 49. Further, the appellant falsely represented himself to both the complainant and the Advocate, as Joseph Mureithi Kihara, the owner and vendor of the said parcel of land, produced the false a national identification card and it was on the strength of this information the Advocate drafted the sale agreement
 50. Furthermore, PW2 Joseph Mureithi Kihara confirmed being the registered proprietor of the parcel of land and that he was in the process of transferring the land to PW4, Mr Kariena and that the true owner did not enter into any agreement with the complainant.



51. That in addition, (PW3) Manyiri, a fingerprint expert, confirmed the copy of the national identification card was not genuine. The respondent submitted that, PW1, PW2, PW3, PW7, PW9 and DW1 all saw the national identity card relied on by the appellant to enter into the transaction indicating the name Joseph Mureithi Kihara and not the real name of the appellant.
52. On whether the trial court relied on the evidence of an accomplice, the respondent cited section 141 of the Evidence that provides; “an accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal because it proceeds upon the uncorroborated evidence of an accomplice.”
53. The respondent relied on the case of; Antony Kinyanjui Kimani vs Republic, Criminal Appeal 157 of 2007 [2011] eKLR where the court held that: -

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of *Watete vs Uganda* [2000] 2 EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial. ‘The same definition was restated by the same court in the case of *Nasolo v Uganda* [2003] 1 EA 181 where the court further stated:

‘On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case.’

54. The respondent argued that the decision to charge the Advocate cum the first accused was ill advised as he was neither a principal nor accessory of the offence. That, an Advocate, took an oath to uphold the rule of law when he joined the profession and gave sworn evidence explaining how he met the appellant, the drafting of the sale agreement, and receiving payments from the complainant.
55. Further, that the Advocate transferred the money to the appellant on the appellant’s instruction produced in court. In the circumstances, the evidence of Advocate did not amount to accomplice evidence.
56. The respondent urged that the fines imposed by the trial court are reasonable taking into consideration the sentences prescribed in the law, the value of the subject matter which is high and ought to have attracted a heavy penalty. That, the sentences were proportionate to the nature of the offence to serve the retributive purpose. That in the circumstances the conviction is safe and sentence is appropriate and therefore the appeal lacks merit and should be dismissed.
57. At the conclusion of the hearing of the appeal and in considering the appeal, I recognize that, the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.
58. In that regard, the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, thus observed: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not



the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

59. Be that as it were, I have considered the appeal in the light of the material placed before the court and in particular the grounds thereof. In dealing with the issues raised, I have taken into account the proceedings and detailed judgment of the trial court.
60. For ease of understanding I shall deal with the grounds raised in the memorandum of appeal as follows:-
- a. That the case was not proved beyond reasonable doubt;
 - b. That the court shifted the burden of proof to the defence.
 - c. That the court relied on a co-accused evidence to convict the appellant.
 - d. That the court erred in holding that, the appellant received the money obtained from the complainant., when he did not;
 - e. The sentence meted out was harsh sentence which is unreasonable in given circumstances.
61. The grounds (a) to (d) above simply begs the question as to whether the prosecution proved its case against the appellant beyond reasonable doubt. In that regard, the provisions of section 107 of the *Evidence Act*, states that:-
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
62. As such the burden of proof always lies on the prosecution and at no time does it shift to the defence and even where it shifts in exceptional cases, the prosecutions still has the primary burden to prove the case beyond reasonable doubt.
63. To revert back to the matter herein the question is; did the prosecution prove the offence of obtaining by false pretence beyond reasonable doubt, I note that the offence is defined under section 313 of the code as follows: -
- “ Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”
64. In the same manner the elements of the offence of obtaining by false pretence were set out the in the case of; Joseph Wanyonyi Wafukho v Republic [2014] eKLR as follows:
- “ Form the said section the following essential elements of the offence of obtaining through false pretences are discernible: that the person: -
- a) Obtained something capable of being stolen;
 - b) Obtained it through a false pretence; and



c) With the intention to defraud.”

65. The question is; did the appellant obtain anything from the complainant capable of being stolen. There is no dispute that PW1 Marison Mbaro Thuku, the complainant responded to an advertisement in the daily newspaper of the sale of the subject property herein. He produced the copy of the advertisement notice and I noticed that it gave the vendors telephone No. as 0722637056 and the advertisement even indicated the seller was the owner and not an agent
66. That he expressed an interest to purchase the plot, negotiated the purchase price with the vendor whom he has identified as the appellant herein and eventually signed a sale agreement dated 25th January 2010, paid the total purchase price of Kshs 5,200,000 for the plot.
67. The evidence of payment of the entire purchase price in the sum of Kshs 5,200,000 for a parcel of land LR No. 15065/61 has been supported by the receipts produced, the RTGS advise notes and the bank statement of the client account maintained by the first accused, Advocate law firm.
68. The evidence further reveals that the complainant did not get the land he was paying for as the entire sale transaction turned out to be fraud. So did the complainant lose anything? Of course yes, the complainant lost the purchase price of in the sum of Kshs 5,200,000.
69. The question is: Is the money something capable of being stolen? Money is a property and in particular cash is a current asset and most liquid type of asset. On the other part, a cheque is a negotiable instrument, a chose in action and capable of ownership and therefore money, in which ever form is capable of being stolen.
70. The next question is: did the appellant obtain any money from the complainant and if so, did he obtain it fraudulently and/or with intent to defraud the complainant. The appellant denied obtaining any money from the complainant and maintained that he had never met the complainant and the first accused before his arrest and only met them for the first time at the Director of Criminal Investigation (DCI) office and/or in court.
71. However, the complainant testified that it is the appellant whom he met at the Advocate’s office after visiting the property and the appellant introduced himself as Joseph Kihara Mureithi, the seller of the land. That, it is the appellant who introduced him to the 1st accused, the Advocate who acted for both parties in the transaction.
72. That, it is the appellant who signed the sale agreement for purchase of the property and gave out the identity card of the seller in the name of Joseph Kihara Mureithi, and the same was used as such in the subject sale agreement. It is noteworthy that the subject impugned identity card bears the photograph of the complainant.
73. That the appellant called the complainant on several occasion and demanded the balance of purchase price and eventually introduced him to a surveyor to confirm sub division was complete. Finally, that he gave the complainant the fraudulent title to the land.
74. It is also noteworthy that it is not in dispute that, prior to the advertisement of the subject property and the complainant subsequently expressing interest in the land, the complainant was not known to the appellant. The question is: why would the complainant then testify against the appellant as against among millions of Kenyans for no appellant reason, if the appellant was never privy to the entire transaction?
75. I have gone through the evidence in the cross-examination of the complainant and I note that, the appellant did not cross him as to the fact that, they only met for the first time at the DCIO or in



- court but instead spent an amount of time questioning the complainant as to whether the original documents to the land were given to him by the appellant or the 1st accused, whether the complainant called him when he found out the property was not genuine and whether the complainant had anything to show that there was a caveat on the land and why the complainant did not ask for his money back when the transaction failed.
76. Further, the appellant never cross examined the complainant as to why he was leading false evidence (if at all) to the effect that the appellant called him on a cell phone number which does not belong to him.
 77. That the appellant never met him at the Advocate's office or at a hotel, that he was not the one who signed the sale agreement and never got any documents or money from him and even more, that the complainant never identified him on any identification parade. The appellant's denial of each and every piece of evidence led against by the complainant was only raised in the defence, which is but an afterthought. Furthermore, other issues for example identification parade are being raised at the appeal stage and in submissions, which is not tenable.
 78. Taking into account the questions put to the complainant, they do not suggest at all that the appellant had never met the complainant before the alleged transaction herein and/or has no knowledge of this subject matter.
 79. Furthermore, the complainant's evidence of the appellant's involvement in the matter was corroborated by the evidence of the first accused. That, it is the appellant who approached him to transact for him as the vendor of the land, gave him, the documentations to the property and introduced the complainant to him as the purchaser
 80. That the appellant gave him instruction to draw the sale agreement and the identity card of the vendor reflected in the agreement. Further, he witnessed both parties execute it. Furthermore, it is the appellant who received the purchase price of the land paid by the complainant.
 81. It also suffices to note that the appellant's own defence is that he had never met the Advocate, first accused and once again the question is: why would the Advocate tender false evidence against the appellant if he was a total stranger to him? Even if the court were to give the appellant the benefit of doubt that the complainant and the Advocate fabricated and planted false evidence against him, how does the appellant account and/or explain how his photograph was found on the identity card he allegedly gave the Advocate to draw the sale agreement?
 82. It is noteworthy that the parties were engaged in a commercial transaction involving payment of a relatively substantial amount of money and therefore naturally the purchaser parting with hard earned money would definitely have a keen eye on the seller, to whom he was paying the money. Therefore, the issue of inadequate identification does not arise.
 83. At this stage I shall deal with some of the issues the appellant has raised in submissions namely; that the complainant never dealt with him as Willy Kihara Njoki but dealt with Joseph Kihara Mureithi. Of course the vendor didn't identify himself as Willy Kihara Njoki but allegedly impersonated the true owner of the land (PW2) Joseph Kihara Mureithi. That is why the appellant was charged with impersonation in count (2)
 84. The appellant further submits that he never received the money from the complainant and that it was paid to the first accused who paid third parties. With due respect, that argument is not tenable. First and foremost, the appellant did not dispute through cross-examination of the complainant that, it is him who introduced the complainant to the 1st accused. Indeed the first accused confirmed that the



- appellant took the complainant to his office as the seller. How would the complainant just walk into a lawyer's firm to transact when he did not know him?
85. If the appellant introduced the complainant to the 1st accused and witnessed the complainant make the 1st instalment of payment of Kshs 520,000 to the 1st accused, and he did not protest, isn't it then a fact that, the 1st accused had the authority of the appellant to receive the purchase price as his Advocate and agent.
 86. Again in a normal sale agreement, it is a practice the purchase price is paid to the vendor's counsel and there is nothing strange about what happened here. Whether the vendor's lawyer transmits the funds or misappropriates the funds becomes none of the business of the purchaser. If the transaction was genuine and the 1st accused did not remit the funds to the appellant, then the appellant would not sue the complainant. Therefore the argument that, the 1st accused did not pay the appellant the money or paid third parties is neither here or there. What needs to be proved is that the appellant authorized the 1st accused to act for him in the transaction and by practice receive funds which the complainant duly paid. Therefore the funds were obtained accordingly.
 87. The appellant further argues that, the trial court erroneously relied on the evidence of an accomplice to convict him. Indeed, the evidence of accomplice per se is not admissible. However, the evidence of an accomplice is admissible if corroborated. The corroboration which is required of an accomplice's evidence is in the nature of some independent additional evidence rendering it probable that, the story of the accomplice is true and that it is reasonable safe to action upon it. (See *Karanja & Another -vs- Republic (1990) KLR*).
 88. That the corroboration evidence must affect the accused by connecting or tending to connect him with the crime, confirm in some material particulars not only the evidence that the crime has been committed but also that the accused committed it. Further, it is not necessary to have confirmation of all circumstances of the crime in the corroboration. Some material particulars tending to implicate the accused is enough and it is sufficient if it is merely circumstantial evidence of his connection with the crime.
 89. In the instant matter, the learned trial magistrate referred to the evidence of the complainant and the 1st accused as being corroborative. Therefore at no stage did the trial court rely on the evidence of the 1st accused alone to convict the appellant. As such the ground of relying on accomplice alone evidence to convict the appellant is not tenable.
 90. The other argument advanced in the appellant's submissions is that the complainant called telephone No. 0722637056 indicated in the advertisement and the recipient is the person whom the complainant dealt with and paid the Kshs 80,000, via Mpesa. That the subject mobile number has not been linked to the appellant.
 91. The appellant also argued that there are contradictions as to whether both the appellant and the complainant went to the 1st accused office together or separately. Further, the land the appellant is alleged to have purported to sell, LR No. 150651 is different from the land owned by PW2 LR No. 150161. Again with due respect, the issue is not whether the complainant and appellant went to the Advocate's office together but the subject purported sale of land and whether it was genuine or fraudulent. Furthermore, PW2 Mr Kihara, stated that the land indicated in the impugned sale agreement was his land and he was not selling it to the complainant.
 92. The appellant also argues that, he should have been subjected to an identification parade. Not all cases call for an identification parade. If the accused and the complainant met in broad day-time on three



- different occasions to discuss sale of a land what would make it difficult for the complainant and 1st accused to identify him that would call for an identification parade?
93. In most cases an identification parade will be called for if the offence occurred in circumstances that would give rise to doubt as to whether the witness claiming to identify the suspect had a proper opportunity or environment to identify the suspect. For example, if the offence occurred at night, or whether there was adequate light or the witness was with the suspect for a short time or only once. That is not the case herein.
 94. Based on the aforesaid, it is the finding of the court that the appellant made a representation to the complainant vide the advertisement notice that he was selling the land in question. The said representation was false as the appellant was not the owner of the land advertised and acting on that false representation, the complainant paid the purchase price and did not get the land. That the appellant made the representation with intent to deceive.
 95. As such, the entire transaction was a fraud. That the appellant obtained money from the complainant by false pretence and therefore the offence on count one was adequately proved beyond reasonable doubt.
 96. As regards the offence in the 2nd count of impersonation, the appellant represented himself as the vendor of a property and presented documents in the name of the true owner of the property. The evidence revealed that the name used in the sale agreement in issue are not the true names of the appellant, therefore having given an identity card in the name of PW2 Kihara, as the seller of the land he impersonated PW 2 and therefore the trial court properly guided itself in the finding that the prosecution had proved the offence of impersonation on the required standard.
 97. That the issue he raises of different titles does not arise, as it is indicated that, the title 15065/61 is said to have been a subdivision of 15065/61. Even then the particulars of count 2, do not speak to any title number.
 98. Finally, as regards, the 3rd count, I find that having held that the appellant presented the subject identity card being his photograph, and the identity card having been found forged. The burden shifts to the appellant to explain how he came into possession thereof. He did not.
 99. As regards the sentence, I find that other than the default period in count one, which should have been 12 months and which has not occasioned the appellant any prejudice as he paid the fine, the sentence imposed is lawful and legal as such I shall not interfere with it.
 100. Finally, at the expense of repeating what is already stated, the defence of the appellant that he has no knowledge of the matter herein is insincere as the entire documents speak to his benefit.
 101. The entire appeal has no merit and therefore the upshot is that appeal dismissed in its entirety.

DATED, DELIVERED AND SIGNED THIS 24TH DAY OF JANUARY 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Ruiru for the appellant

Mr. Mongare for the respondent



Ms. Ogutu: court assistant

