



REPUBLIC OF KENYA



KENYA LAW
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**Kantai v Republic (Criminal Appeal E013 of 2022)
[2024] KEHC 2153 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E013 OF 2022**

F GIKONYO, J

MARCH 5, 2024

BETWEEN

WILSON KUYA KANTAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. R.M. Oanda (P.M) in
Kilgoris SPMCR No. E 118 and 119 of 2022 were delivered on 17th May 2021)*

JUDGMENT

1. The appellant was charged with the offence of obtaining by false pretense contrary to section 313 of the *Penal Code*. The particulars are that the upper on 6th February 2022 at Keiyan in Transmara sub-county within narok county with intent to defraud obtained from Beatrice Andanje Omutiti the sum of Kenya shillings one 160,000 by falsely pretending to lease the said Beatrice Andanje Omutiti four (4) acres of land to plant sugar cane for four seasons.
2. The appellant faced a second charge of obtaining by false pretenses contrary to section 313 of the *Penal Code*. The particulars of the charge that on the 1st February 2021 at Keiyan in Transmara West Subcounty within Narrow County with intent to defraud obtain from Joshua Ntoror the sum of Kshs 240,000 by falsely pretending to lease to the Said Joshua Ntoror four acres of land to plant sugar cane for four seasons.

The Appellant's Submissions

3. The appellant submitted that the prosecution did not disclose what was the plot number that the appellant had allegedly used to obtain the said manners form. The charge sheet only stated that he had allegedly defrauded them by pretending to lease land leases always have a plot number attached to them but in this case, it was only stated that the appellant had pretended that he was in a position to lease



land to the complainant which opened up to uncertainties. Further, when the facts were being read to him the prosecution did not also mention the plot number that the appointment had used to obtain the money from the company and thus it goes without saying that the charge itself and the way the police took place was ambiguous and by the time the plea was being read to the upper line it was not clear as to what he was going to plead to. All the material facts that ought to make the ingredients of the particulars of the charge sheet were not there. Therefore, he was not in a position to understand the charge before him and that it was an unfair and just boggled-up process. The appellant relied on Black's Law Dictionary on page 636, *Ombena vs Republic* 1981 eKLR, *Elijah Njibia Wakianda v Republic* 2016 eKLR, *Abdallah Mohammed versus the Republic* 2018 eKLR, and *Simon Gitau Kenene vs Republic* 2016 eKLR.

4. The appellant submitted that the trial court failed to note down the mitigation of the appellant before sentencing. Immediately after the Prosecution had stated that the appellant was a first offender the trial court went straight ahead to sentencing the trial court noted accused plea in mitigation was considered. Whatever that mitigation to which the appellant stated at that time no one but the trial court only knows since it has never been noted down. This appeal court has no advantage of seeing what the appellant said in his mitigation. He could have mitigated and explained to the court through some facts in mitigation that would have required the court to directly change the plea from that of a plea of guilty and enter a plea of not guilty under the circumstances but nothing like that is on record. Everything that the appellant said in mitigation ought to have been recorded in the proceedings by the trial court but it did not this is irregular and it has put the appeal at a disadvantageous position at this appeal stage. The offense of obtaining by false pretenses contrary to section 313 of the *Penal Code* is a very serious offer which upon the appellant pleading guilty the trial court ought to explain and caution the appellant and that the actual that he has just pleaded guilty to a very serious offense that carries a maximum sentence of three years without a fine does ask him and not it down on record whether they understood the charge and even have somehow translated to him in a language he understands that for the avoidance of doubt this never happened in this case. The appellant relied on the case of *Ombena vs Republic* [1981] eKLR, *Elijah Njibia Wakianda v Republic* 2016 eKLR, and *Simon Gitau Kenene vs Republic* 2016 eKLR.
5. The appellant submitted that he did not get a fair hearing. If he had only understood the charge he would have probably properly pleaded and that's a proper hearing would have taken place. This never happened because the plea-taking process itself was not understandable to him furthermore he was unrepresented.
6. The appellant submitted that the trial court took no heed of the sentiments of the appellant's mitigation, the court went ahead to sentence their appearance the maximum sentence prescribed under the *Penal Code* of the offence under section 313 is a misdemeanor, first of all there is no way that the appellant will have been sentenced to a maximum sentence whereas this is a misdemeanor.
7. The appellant submitted that the option of a fine and lenient sentence was available for the court to meet. The appellant relied on the case of *Joseph vs Republic* [2017] eKLR.

The Respondent's Submissions

8. The respondent submitted that the court record herein indicates that the charge and every element thereof were stated to the appellant in the language he understands, the court recorded the words of the accused person and hence met the stipulated threshold of *Adan's case*. The respondent relied on *Adan versus Republic* 1973 EA 443 at 446 and Section 207 of the *Criminal Procedure Code*.



9. The respondent submitted that the trial court recorded that the appellant's plea in mitigation was considered. The [Sentencing Guidelines 2016](#) provide a four-tier methodology for the determination of custodial sentences. That's the court-established custodial sentence under the applicable statute second consider any mitigation third consider any aggravating circumstances then weigh this to determine the appropriate sentence. The Respondents relied on the case of [Nelson Mwiti Gikunda & 2 Others versus Republic](#) 2018 eKLR and [Elizabeth Mwiya Thi Syengo v Republic](#) [2019] eKLR.
10. The Respondent Submitted that the penalties imposed upon the appellant were lawful. The trial court did not act on some wrong principle or overlooked some material factor therefore there is no reason whatsoever for this court to interfere with the sentence method out to the appellant by the trial court as the same was neither harsh nor overly excessive. The respondent relied on section 313 of the [Penal Code](#), the [Sentencing Guidelines 2016](#) *Ogalo s/o Owoura vs R* [1954] EACA 270, and [Bernard Kimani Gacheru versus Republic](#) [2002] eKLR.
11. Considering all this evidence on record adduced by the prosecution and in the circumstances of the case the sentence and conviction of the opponent by the trial court was therefore proper in the premises the respondent invited this court to dismiss the appellant's appeal.

Analysis and Determination

12. As this is first appeal; the court will re-evaluate the evidence afresh and arrive at its own independent conclusions. Except, being minded to give allowance to the fact that the court neither saw nor heard the witnesses firsthand ([Njoroge v Republic](#) (1987) KLR, 19 & [Okeno v Republic](#) (1972) E.A, 32.)

Issues

13. From the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions, the broad issues for determination are;
 - i. Whether the plea was unequivocal.
 - ii. Whether the sentence was manifestly harsh and excessive.

Whether Plea Unequivocal

14. Where a plea is unequivocal, no appeal shall be allowed on conviction from own plea of guilt, except on the extent or legality of the sentence. (See section 348 of the [Criminal Procedure Code](#) and [Olel v Republic](#) [1989] KLR 444)
15. For a plea to be unequivocal, it must be free from any coercion, threat, promise, or inducement, and be informed decision of the accused. Hence, the requirements of the law in section 207 of [CPC](#), and that plea must be taken in the manner set out in *Adan vs. Republic* (1973) EA 445 that: -
 - i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands
 - ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
 - iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
 - iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;



- v. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.
16. The requirements in section 207 of the *Criminal Procedure Code*, and the steps for taking a plea set out in *Adan vs. Republic*, are some of the staple protections in criminal law, and real safeguards of fair trial for an accused who pleads guilty to a charge.
17. Applying the test, the appellant was arraigned before the Senior Principal Magistrate's Court at Kilgoris on 17/05/2021 to answer charges of obtaining by false pretense contrary to section 313 of the Penal Code. The record shows that the substance of the charge(s) and every element thereof was stated by the court to the appellant in the language that he/she understood, in Kiswahili who being asked whether he/she admits or denies the truth of the charge(s) replies; 'True'.
18. Subsequently, the prosecutor then stated the facts thus:
- Facts are that on 6th February 2021 the complainant was instructed by her brother-in-law that the appellant was leasing out four acres of land for sugar cane planting for the complainant commended and they agreed to meet at Migori at an advocate office where the agreement lease was executed. The complainant paid Kenya 160,000 to the appellant for the lease being the total consideration of a price of Kshs.40,000/= per acre for the can harvesting cycle of 5 years later the complainant visited the land at Keiyan and found maize planted which was to mature after 120 days after three weeks the complainant went to prepare the land but found out that the land had been leased to another person. She couldn't trace the appellant the appellant was later traced and charged the prosecution produced a lease agreement Pexh1.
19. The appellant is then recorded as having stated "facts are true" after which the court convicted him on his own admission.
20. From the record it can be noted that the appellant was unrepresented. Judicial authorities and *the Constitution*, emphasize the need for the court to be cautious when accepting a plea of guilty, and the need is heightened, where the accused is unrepresented. Some posit that this is a new element added in plea-taking. Others say, it is a more serious matter of *the Constitution* and criminal law, as at that stage, the person may suffer prejudice unless he understands the purport or consequences of plea of guilt, and this group proposes, courts to adopt a standard pragmatic practice of impressing the caution on the record, instead of leaving it to the verbal communication by the court to the accused. See Prof. Ngugi, J (as he then was) in *Simon Gitau Kinene v Republic* [2016] eKLR when he stated that:
- '19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v R Kiambu* Crim. App. No. 8 of 2016 (unreported) this is what I said and I find it relevant here:
- In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence...To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.'



21. Whereas there is nothing to show that the trial court was cautious when accepting the plea of guilt by the accused who was not represented, the record shows that the charge and every element thereof had been stated by the court to the accused person in the language he understands-Kiswahili- and the appellant replied 'true'. The facts were also stated replete with details and he replied 'facts are true'. The land he purported to lease was already in use with a crop growing on it and which would mature in 120 days. The agreement was also produced as exhibit and indicated that the lease purportedly created in the agreement takes effect from the date of execution of the agreement.
22. Accordingly, the plea was un-equivocal and the appellant was properly convicted on his own plea of guilt.

Whether Sentence Harsh or Excessive

23. Nevertheless, the trial magistrate did not record the mitigation by the accused. It drew mitigation upon the submission by the state counsel. Mitigation serves an important purpose in sentencing. Therefore, this court gives the benefit to the appellant, and orders that the term he has served is sufficient sentence for the crime. He will therefore, be released from prison immediately unless otherwise lawfully held.
24. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 5TH DAY OF MARCH, 2024.**

HON. F. GIKONYO M.

JUDGE

In the presence of:

C/A – Mr. Leken

Appellant – Present

Mr. Letaya Ole Seriani for the Appellant - Present

Mr. Okeyo for DPP – Present

