



**Kanyamu v Director of Public Prosecutions (Criminal Appeal
E136 of 2023) [2024] KEHC 6252 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E136 OF 2023
TW CHERERE, J
MAY 23, 2024**

BETWEEN

PATRICK MUTUMA KANYAMU APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(An appeal from the conviction and sentence in Meru Criminal Case No.
1276 of 2018 by Hon. M.A. Odhiambo (SRM) on 01st November, 2023)*

JUDGMENT

1. Patrick Mutuma Kanyamu (Appellants) charged with obtaining Kes. 300,000/- by false pretences contrary to section 312 as read with Section 313 of the [Penal Code](#) Cap 63 Laws of Kenya (the Act).

Prosecution Case

2. The prosecution called 4 witnesses in support of the case Silas Njeru Kiura, the complainant stated that he was introduced to the Appellant by one Muchangi who informed him that his brother Mutuma was selling land. That the said Muchangi also showed him some land between Gikumene and Ng'onyi markets which he said was on sale. Subsequently, he met Appellant who gave him title deed for land parcel Ntima/Ntakira/2952 in the name of Fredrick Mutuma. They executed a sale agreement dated 11th May, 2018 before Kiogora Mugambi Advocate and he paid Appellant a sum of Kes. 300,000/- and agreed to pay the balance of Kes. 400,000/- upon transfer of the land. He later realized that the land he had been shown was not the one he had bought and reported the matter to police.
3. Michael Ireri stated that he was present when complainant was shown the land that was allegedly for sale and at the time of the execution of the sale agreement and payment of Kes. 300,000/- to the Appellant.



4. Kiogora Mugambi advocate identified Appellant as the person that appeared before him and introduced himself as Fredrick Mutuma and owner of land parcel Ntima/Ntakira/2952. He stated he drew and witnessed a sale agreement and payment of Kes. 300,000/- to the Appellant by the complainant.
5. In the course of investigations, Cpl Galgalo received a letter dated 10th September, 2019 confirming that the title deed Appellant had presented to the complainant was not genuine. Appellant was subsequently arrested and charged.

Defence Case

6. In their sworn defences, Appellant denied having been involved in any land transaction with the complainant.

Conviction and Sentence

7. By a judgment dated 06th January, 2022, Appellant was convicted and sentenced as follows;
 - a. Fined Kes. 70,000/- in default 4 years imprisonment
 - b. In addition, Appellant was directed to pay back to the complainant Kes. 300,000/- and in default serve an additional 4 years imprisonment.
 - c. Sentences to run consecutively

The Appeal

8. The conviction and sentences provoked this appeal in which Appellant mainly contends that the prosecution case was not proved, essential witnesses were not called, the prosecution case was riddled with contradictions and finally that the defence was not considered.

Analysis and Determination

9. On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit. (See *Kariuki Karanja vs Republic* [1986] KLR 190).
10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions filed by the Appellant and oral submissions by Ms. Rotich for the DPP.
11. Appellant was identified by complainant, Michael Ileri and Kiogora Mugambi Advocate as the one that identified himself as Fredrick Mutuma and also received Kes. 300,000/- on the pretext that he owned land parcel Ntima/Ntakira/2952 using a title deed which the land registrar confirmed was not genuine.
12. The evidence by the three prosecution witnesses was well corroborated and I did not see any discrepancies as alleged by the Appellant.
13. Concerning the Appellant's contention that Prosecution failed to call crucial witnesses, Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides:

“ 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”



14. In *Donald Majiwa Achilwa and 2 other v R* (2009) eKLR the Court stated:

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See *Bukenya & Others v. Uganda* [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference.”

15. In *Keter v Republic* [2007] 1 EA 135 the court held inter alia:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

16. In the instant case, the prosecution called three witnesses whose evidence was corroborated and they had no obligation to call any other.

17. The degree of proof in criminal cases was properly established in the classicus English case of *Woolmington vs. DPP* 1935 AC 462. Similarly, in *Bakare vs. State* 1985 2 NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.

18. From the totality of the evidence tendered against the Appellant, I find that his defence did not raise any reasonable doubt and was rightly rejected by the trial court.

Sentences

19. Although Appellant challenged the sentences, it did not come out clearly what his grounds were. The foregoing notwithstanding, this court would fail in its duty if it fails to correct an illegality that is apparent on the face of the record concerning the sentences.

20. Section 313 of the *Penal Code* under which Appellant was charged provides that:

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.

21. From the foregoing, Appellant was liable to a maximum sentence of 3 years if the circumstances allowed and the 4-year sentence imposed in default of fine is therefore an illegal sentence.



22. Further to the foregoing, I have examined section 28 of the *Penal Code* which guides courts on imposition of fines in default sentences and subsection (2) states as follows:

“(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-

Amount	Maximum period
Not exceeding Sh. 500	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500	1 month
Exceeding Sh. 2,500 but not exceeding Sh. 15,000	3 months
Exceeding Sh. 15,000 but not exceeding Sh.50,000	6 months
Exceeding Sh. 50,000	12 months

(3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.”

23. Appellant having been fined an amount of Kes. 70,000/- the legal maximum default sentence is 12 months and that demonstrates further that trial magistrate erred in imposing the 4-year default sentence.

24. Concerning orders of compensation in criminal cases, Section 31 of the *Penal Code* expressly allows courts to order compensation in addition to or in substitution of any other sentence. For the avoidance of doubt, Section 31 of the *Penal Code* provides that:

“Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.”

25. In the case of *Francis Gachugu Njuguna v Republic*, [2021] eKLR, the court explained that Section 31 of the *Penal Code* must be read together with Section 175 (2) (b) of the *Criminal Procedure Code* which also provides for circumstances in which compensation can be ordered in criminal proceedings. The provision states as follows:

“(2) A court which—
a)
b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the “injured party”),



may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.”

26. From the foregoing, I find that the trial court rightly exercised its discretion in awarding compensation since the complainant had demonstrated the injury suffered by he suffered as a result of the act constituting the offence the subject matter of the conviction in question.
27. A reading of Section 175 (6) of the *Criminal Procedure Code* reveals that amounts awarded as compensation are only recoverable as civil debts. The provision states thus:
- “An order under this section that has taken effect is enforceable in the same manner as a judgement in civil proceedings for the amount awarded”.
28. From the above provision, it is apparent that the court has no power to order a convicted person to serve a prison term for failure to pay compensation to the complainant. The learned trial magistrate therefore erred in sentencing the Appellant to serve 4 years in default of the compensation.
29. In the end, the appeal succeeds on sentence and it is hereby ordered:
1. The default imprisonment term of 4 years is substituted with 12 months’ imprisonment term
 2. The order of compensation in the sum Kes. 300,000/- is upheld but the four-year imprisonment term in default of payment of compensation is quashed and set aside

DELIVERED AT MERU THIS 23rd DAY OF May 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances;

Court Assistants - Kinoti/Munene

Appellant - Present in person

For DPP - Ms. Rotich (PC-1)

