



REPUBLIC OF KENYA



**Musee v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 12522 (KLR) (Crim) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12522 (KLR)

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

**CRIMINAL
CRIMINAL APPEAL E001 OF 2023**

**LN MUTENDE, J
OCTOBER 17, 2024**

BETWEEN

WYCLIFFE KITONGA MUSEE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the original conviction and sentence in Criminal
Case No. 713 of 2019 at the Chief Magistrate's Court Milimani)*

JUDGMENT

1. Wycliff Kitonga Musee, the appellant, was indicted for committing fraudulent acts. He faced the offence of conspiracy to defraud, where it was alleged that he conspired with other people who were not charged to defraud one Euphraith Muthoni Njue Ksh. 2,350,000/- following deceit that he was in a position to sell her a parcel of land (Donyo Sabuk/Komarock Block 1/30267) measuring 0.357 Hectares knowing it was not true.
2. To perpetuate the false pretence, that he made a document namely, a Title Deed for the Stated title which he uttered to the stated complainant.
3. In the result he obtained money from the same complainant with intent to defraud, by falsely pretending that they were in a position to sell the parcel of land (Donyo Sabuk/Komarock Block 1/30267) (Subject land) a fact he knew was false. On the 30th December, 2017, at Unaitas Bank, Temple Road he obtained from the complainant Kshs 500,000/-; On the same day, the 30th December, 2017, at Equity Bank Kenyatta Avenue Branch, he obtained from her Ksh. 500,000/-; On 9th January, 2018 at Syokimau Gateway Mall Branch, along Mombasa Road, he obtained Ksh. 500,000/-; On 8th February,



- 2018 at Unaitas Bank Temple Road Branch, he obtained Kshs 300,000/- from the complainant; On the 15th March, 2018; at Family Bank City Hall Branch, he obtained Ksh. 400,000/- from the complainant.
4. On the 7th April, 2018 at Family Bank Towers Branch he obtained Ksh. 150,000/- from the complainant being the final payment for purchase of the subject of land.
 5. Having been taken through full trial the appellant was acquitted of the charges of Conspiracy to defraud; Making a document without authority and Uttering document with intent to defraud. But, he was convicted on all counts of Obtaining money by false pretence contrary to Section 313 of the Penal Code and sentenced to pay a fine of Ksh. 150,000/- and in default to serve one (1) year imprisonment, sentences that were to run consecutively.
 6. Aggrieved, the appellant proffered this appeal on grounds that may be condensed thus: The case was not proved beyond reasonable doubt. The court failed to reconcile the doubts in the prosecution's case. Crucial witnesses were not called. The defence was disregarded. The sentence imposed was excessive.
 7. Facts of the case were that PW1 Eupharaith Muthoni Njue, desirous to purchase a parcel of land, jointly with her husband went to Malaa Town and while there encountered a lady called Jane whose contact she got from OLX. They did not like the land she showed them hence she introduced them to another broker, Patrick, who in turn introduced them to, yet, another broker, Joseph, who showed them a parcel of land that they liked. Joseph called the alleged owner, Irene Muikali. Joseph showed them a copy of a Title deed for the land. Having established through their advocate that the Title was good they moved to meet the owner. They negotiated and agreed at Ksh. 2,350,000/- then agreed to meet the Seller's advocate of Steve-Isintu Advocates at Hazina Towers. A deposit was required hence the complainant transferred Ksh. 500,000/- from her Unaitas Account held at Family Bank and a further Ksh. 500,000/- from her Equity Account, transactions that were made on the same day. They agreed to have the outstanding balance paid in 3 months' time. In the result a sale agreement was executed.
 8. Two weeks later, Alex, Irene's husband called asking for the balance as they needed to clear some cargo. On 9th January, 2018 she deposited Ksh. 300,000/- from her account to the advocate's account. Having been asked to clear the balance, on 15th March, 2018 she transferred Ksh. 400,000/- to the advocate's account
 9. Alex, assured her that the process of the Land Control Board was ongoing and promised that the Title Deed would be ready for transfer once the balance is paid. When she called the advocate to inquire on the progress, he said he needed to talk to Alex to confirm whether the Board had sat. Subsequently both Alex and the advocate were not picking her calls. Despite having not reached Alex or the Advocate she paid Ksh. 150,000/- through bank transfer to the advocate. Thereafter she was advised that the advocate was problematic hence she asked her advocate to follow up with the sellers advocate. Ultimately when they found the seller's advocate, they could not get the sellers themselves. Her advocate sought to be given the Title Deed, and, they reported the matter to the Police. The person who was identified as Alex, the appellant herein, was arrested. It was established that the Title Deed was not genuine as purported. The alleged Irene was not the genuine owner and she was not the wife of the appellant.
 10. PW2 Irene Mwikali Komu, the owner of the land in issue and Title holder denied having sold her land. She denied being the signatory of the sale agreement.
 11. PW3 David Gichuki Maina of Family Bank Security Investigation Department confirmed that Wycliff Kitonga Musee is the holder of the account at the Family Bank.



12. PW4 Fredrick Kibet, the Land Registrar, Machakos, stated that Title Deed Number Donyo Sabuk/ Komarok Block 1/ 30267 adduced in court was not genuine and did not originate from their office. It did not have the official seal impression of Machakos County Land Registry. The purported Title Deed did not reflect the endorsement made on part C (Encumbrance) and, the signature of the Land Registrar was not in its original form. That the green card indicated that on 27th March, 2015 the registered owner was Irene Mwikali Komu ID No. 22237185 and was issued with a Title Deed Entry No. 4 on 10th April, 2015. Serial Number 1138941. There was also a charge created/Registered in favour of Equity Bank for a loan of Ksh. 1.5 Million.
13. PW5 Steve Isinto Nyaribo practicing in the name of Isintu & Company Advocates, alluded to having prepared a sale agreement signed between the complainant and the appellant with one Irene Mwikali Komu. Among them he was familiar with Kitonga the appellant. He stated that parties had already agreed on the mode of payment. A total of Ksh.2,350,000/- was paid which was forwarded as received in instalments through Mobile Banking. And after S. M. Muhia Advocates was instructed to represent the purchaser, he forwarded the Title Deed to him which was acknowledged. That his instructions were limited.
14. PW6 No. 63010 Sergeant Alex Chokera investigated the case, arrested the appellant and charged him. On cross examination he stated that the appellant did not sign the agreement but the total sum was deposited on his account.
15. Upon being placed on his defence the appellant denied knowing Jose and that he was not involved from the beginning. That after the search was conducted according to the complainant it was established that the land belonged to Irene Mwikali Komu and not him. That Jose arranged for a meeting with PW1 and the seller (Mwikali) and the buyer and seller went to the advocate. He denied having been a participant and argued that the money was paid through an advocate. Admitting that he had worked with the advocate for a long time he denied knowing Alex and denied being the alleged Alex.
16. The trial court considered evidence adduced, acquitted the appellant on counts 1,2 & 3 which were not proved to the required standard. But, convicted him for the offence of Obtaining money by false pretence on Counts 4,5, 6,7,8 & 9.
17. The appeal was canvassed through written submissions that I have taken into consideration.
18. This being a first appellate court, it is obligated to reassess and re-analyze the evidence and come up with independent conclusions bearing in mind that the court did not see or hear witnesses for which it must give an allowance. This was stated in the case of *Okeno v Republic* [1972] EA 32 where the court stated as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R* [1957] E A 336) and to the appellate courts 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] EA 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 courts’ 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 - See *Peters v. Sunday Post* [1958] EA 424”.



19. The appellant was stated to have contravened the law, in particular Section 313 of the Penal Code which provides 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.

20. The prosecution was hence required to prove elements of the offence thus:

- a. The fact of obtaining.
- b. The presence of false pretense
- (b) The intent defraud.
- (d) That the thing was capable of being stolen.

21. In *Dr. Edwin v Onwudiuse v Federal Republic of Nigeria* Suit No. 412/2003,

“On Ingredients of Offence of Obtaining by False Pretences – In order to succeed in a charge of obtaining by false pretences, the prosecution must prove: (a) that there is a pretence; (b) that the pretence emanated from the accused person; (c) that it was false; (d) that the accused person knew of its falsity or did not believe in its truth; (e) that there was an intention to defraud; (f) that the thing is capable of being stolen; (g) that the accused person induced the owner to transfer his whole interest in the property. The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest belief in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence. The above adequately presents the law as in Section 419 of the Criminal Code.”

22. It was established that the complainant/victim transferred/paid money for purchase of land parcel No. Donyo Sabuk/Komarok Block1/30267. A sum of Ksh. 2,350,000/- was paid through PW5, the seller’s advocate, money that was ultimately sent to the appellant through the mobile phone. It was proved that the same phone number belonged to the appellant was used to open an account No. 014000 held at the Family Bank. The source of money was from the victim’s accounts. This was evidence that the money was obtained.

23. It has been stated that the appellant gave a misleading tale about the ownership of the land, a narrative and falsehood that persuaded the victim to part with the money. Section 312 of the Penal Code defines false pretence as:

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.

24. This is a case where it was represented in words and writing of the fact of existence of land for sale which was identified at Malaa and viewed by the victim. A lady who personated PW2 purported to be the wife of the appellant and the Title holder. The representation that was in respect of a present fact persuaded the victim to enter into a sale agreement which was duly executed. The payment of the consideration was under the belief that Title would pass from the owner/seller to the victim. The representation was in respect of a present fact which was false. When the appellant and his accomplice



made the representation he knew it was not true as they did not own the land in issue hence did have the stated belief.

25. This therefore brings in the issue whether an intent to defraud existed? An intent to defraud is established if the victim is prejudiced in any way as a result of fraud. The culprit having participated in the act with full knowledge that it is deceptive in nature aimed at achieving a criminal act, the intent was a present fact.
26. By virtue of the appellant having falsely posed as the husband and the Title holder hence being a beneficiary and having fully participated in the transaction and ultimately received the money paid as consideration as proved through the evidence of PW5 it was established that he had the intent to defraud.
27. The appellant has faulted the court for basing its decision on evidence that had no probative value. He pointed out a discrepancy on the actual sum deposited to be Ksh. 1,760,000/-, and yet the sum stated to have been obtained from the complainant was Ksh.2,350,000/-.
28. The law on the question of discrepancies is clear, if such inconsistencies exist, they must be forming a necessary base of importance so as to go to the root of the case.
29. PW5 was a legal representative of the accused. Both were in agreement that they had worked together in a client-advocate relationship for a long time hence it would not be imagined that PW5 would lie. It was his evidence that the total sum of Ksh. 2,350,000/- paid by the complainant passed through him to the appellant. This was proof of the sum in question having been received by the appellant. The allegation that he received the money as a commission which I find being an afterthought put up at the defence stage on cross examination was rightly disregarded.
30. On Sentence, the penalty provided for the offence is three (3) years imprisonment. The appellant's contention is that it was erroneous for the court to direct the sentences to be served consecutively. Section 14 of the Criminal Procedure Code provides thus:
 1. Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
 2. In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.
 3. Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences— (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or
(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.



(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

31. A consecutive sentence starts to run after expiry of the prior one. Courts have broad discretion in deciding how the sentence is to run. The consideration would be the factors and circumstances in which the offences were committed or whether the crimes were independent of each other. The aggregate of years in issue were not more than fourteen years hence the court did not err in making the order for the sentences to run consecutively.

32. The upshot is that the appeal lacks merit. In the result, it is dismissed in its entirety.

33. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 17TH DAY OF OCTOBER, 2024.**

L. N. MUTENDE

JUDGE

