



REPUBLIC OF KENYA



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**Kariuki v Republic (Criminal Appeal 6 of 2017)
[2023] KEHC 1453 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 6 OF 2017
FR OLEL, J
FEBRUARY 16, 2023**

BETWEEN

ROSE GATURI KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No.82 Of 2015 in the Principal Magistrate Court at Wanguru By (Rm) Hon. Nyoike Sure in the Judgement Delivered On 27th January 2017)

JUDGMENT

Issues Identification:

Lack of proper evidence mode of arrest, failure to consider appellant's defence and harsh to excessive sentence.

Back ground

1.

- (a). The appellant herein was charged with the offence of obtaining money by false pretence contrary to section 313 of the [Penal code](#). The particulars were that on diverse dates between September 9, 2014 and September 16, 2014, at Equity bank of Kerugoya trading centre within Kirinyaga county with intent to defraud jointly obtain cash Ksh 3 million from Samuel Gitaru Muriuki by falsely pretending that you was in a position to sell him land no Ngariama/ settlement scheme/688 a fact you knew to be false.
- (b). On count II the appellant was jointly charged with Peter Gichobi Gitaru with the offence of making a false documents contrary to section 347(a) of the [penal code](#). The particulars are that on unknown date within the month of September 2014 at unknown places within



Kirinyaga County with intent to defraud jointly made a false documents namely a title deed no Ngariama/Settlement scheme/668 purporting it to be genuine title deed issued by Land Registrar Kirinyaga.

- (c) On count III the appellant was jointly charged together with Peter Gichubi Gitaru with the offense of making a false documents contrary to section 347(c) of the *penal code*. The particulars were that on unknown dates within the month of September 2014, at unknown place within Kirinyaga County with intent to defraud jointly made a false document namely a certificate of official search no 348/2014 purporting it to be a genuine certificate of official search issued by Land Registrar Kerugoya.
 - (d) On count IV, the appellant was charged with making a false document contrary to 347 of the *penal code*. The particulars of the offense were that on unknown date within the month of September 2014 at unknown place within Kirinyaga County jointly with others not before court with intent to defraud, made a false document namely National Identity Card no 9876430 serial no 213174816 purporting it to be a genuine National Identity Card issued to Felister Wanjira Kingori by the Registrar of persons.
 - (e) On count V, the appellant was charged with the offence of personation contrary to section 382 of the Penal Code. The particulars were that on September 10, 2014 at Ngurubani trading centre within Kirinyaga County with intent to defraud represented yourself as Felister Wanjira Kingori a fact you know to be false.
2. The appellant denied having committed the offense levelled against her hence full trial was conducted after which she was found guilty of the offence of obtaining by false pretence, making false documents, uttering a false document and personation and were accordingly conviction under section 215 of the *Criminal Procedure Code*. The trial court proceeded to sentence the appellant and his co-accused as follows;

Count both accused sentence to serve 2 years in jail

I:
Count Both accused sentence to serve 2 years in jail

II:
Count Both accused sentence to serve 2 years in jail.

III:
Count 1st Accused sentence to 2 years in jail.

IV:
Count 2nd accused to sentence to 2 years in jail

V:
Count 1st accused to sentence to 2 years in jail

VI:
Count 1st accused in sentence to 2 years in jail

VII:
Count 1st accused in sentence to 5 years in jail

VIII:
Count 2nd accused in sentence to 5 years in jail.

IX:

Sentence to run consecutively and 14 days right of appeal was explained to them. Accumulatively the appellant who was the 2nd accused person at the trial was sentenced to serve 13 years as the sentence was to run consecutively.

Ground of Appeal

3. The appellant file her ground of appeal dated February 10, 2017 and filed in court on the said date and undated amended grounds of appeal. The main issues brought out in the three documents are that;



- a. The learned Trial Magistrate erred both in law and in fact by convicting the appellant in all the nine (9) counts without justification and/or evidence on each individual count to satisfy a conviction.
- b. The learned trial magistrate erred in law and fact by convicting the accused based on contradicting evidence and extraneous issues not presented as evidence on record.
- c. The learned Trial Magistrate erred in both law of fact by failing to determine that any doubt created should have tilt to the favour of the accused.
- d. That the learned trial Magistrate erred in both law and fact by handing the appellant an excessive sentence in the circumstance
- e. That the trial magistrate erred in law and fact by failing to find that the appellant was not properly identified to be the person who committed that alleged offence.
- f. That the trial magistrate erred in matters of law and fact by not giving regard to the appellant defence.

Facts at Trial

4. The prosecution called 13 witnesses in support of their case. PW1 was Jane Wakuthii Samuel. She narrated that she was married to one Samuel Gitari Muriuki and her three children. They had land in Lukenya village, Kabare location and moved because it was acquired by the government for which they were paid Ksh 5,700,000/-. They decided to buy land and were told there was land at Difathas which was a 6 acres farm and contained a permanent house. They met one Francis Gachoki Kamau who told them that the land belonged to his deceased brother and it was left for his widow Felister Wanjiru King'ori who was selling it at Ksh 3.3million.
5. PW1 identified Francis Gachoki Kamau as (the 1st accused). After one week the parties agreed to buy the parcel of land at Ksh 3million. They were given the title number and the parcel of land was no Ngariama/settlement scheme/688. Upon placing a search it revealed it belonged to one Felister Wanjiru Kingori. On September 9, 2014, they met accused 1, other persons including Felister (whom the witness pointed out in court as accused 2 - Rose Gatari Kariuki). They went to the D.O officer and signed Land Board consent forms and both accused persons did give copies of their National Identity Cards after which they went to an advocate officer and executed an agreement for Ksh 3,000,000
6. On September 9, 2014 they did not finish the said transaction and agreed to meet the following day so that they could pay the deposit of the purchase price and the balance was to be paid upon transfer being affected.
7. The parties thereafter met at Equity bank in Kerugoya and both accused persons were given Ksh 2.5 million. On September 16, 2014. The parties against met at Keruguya where PW1 and her husband withdrew a further Ksh 500,000/- which was given to the appellant and her colleague after giving the complainant the transferred title deed registered in their names and a current land search.
8. The complainant went and took possession of parcel Ngariama/settlements scheme/688 and while they were cleaning the house, four men confronted them and told them the said parcel had not been sold. Upon visiting the land registrar they discovered that the parcel of land still belonged to Felister Wanjiru and that the title deed they held was fake. They reported this incident at Wang'uru police station and the appellant was later arrested and charged.



9. In cross examination PW1 stated their previous parcel of land Kutiri/Kabara/304 had been taken over by the government for construction of a dam. The appellant initially (on September 9, 2014) took possession of the land board consent forms as she had not been paid but the following day on September 10, 2014 she was paid Ksh 2.5 million. The other parties present were Samuel Gitari, Alice Wacera Gachoki, Francis Kimani, Felister Wanjiru and Hussein Muthee. There was no acknowledge signed. She further stated that it was the appellant who gave her the land search and title deed and she paid the balance of the purchase price Ksh 500,000/-. Finally she stated that she had not conspired with Alice to fix the appellant.
10. PW2 Francis Gachoki kamau stated that he was called by the Deputy DCIO at Wang'uru police station to confirm if he witnessed a sale agreement. He confirmed that this name and identity card number matched but it is not him who signed the said agreement. Further he knew Bwononga and Co. Advocates in another issue but had never gone to her office in preparation or signing the agreement in question. He also stated the signature on the sale agreement differed from her signature.
11. PW2 also stated that he does not know anybody by the name Felister Wanjiru neither does he have a relative by that name. The appellant and co-accused were unknown to him. In cross examination, he reaffirmed that he did not know the appellant and her co-accused and did not sign any sale agreement involving them.
12. PW3 Francis Njeru Karimi, was a clerical officer at DC Mwea East doing general office duties and was also the secretary to the Land board. Part of his duties included receiving applications forms for land board, fill consent forms and presenting them to the board for approval. If the board had no issue, approval would be granted and they would retain a copy of the application and attach ID, Photos, KRA pin and land search.
13. On 12/1/2015 he was called and asked if they had records at GSS 688. He checked the record and found the same. The seller was Felister Wanjiru and buyer was Samuel Gitari Muriuki and Jane Wakuthii. He presented the documents to the DCIO. On cross examination, he said that he did not have the official receipt for the consent application and payment of the same was made at Kerugoya. The minutes indicated that the approval was obtained vide minutes 392/08-08 in the month of August 2014. Finally he stated that he was not aware of any consent being issued on September 9, 2014 or that Ksh 15,000/ was paid from special land board consent.
14. PW4 Samuel Gitari Muriuki was the husband to PW1 Alice Wakuthii. He confirmed that the government acquired the parcel of land (which belonged to his grandfather – Gatonye Kababi) and paid them 5.7million. He asked his friends to help him look for land and was told by their neighbour Alice that there was a parcel of land on sale at Difathas. They went and met Francis Kamau who told them the land belonged to his sister-in-law Felister King'ori who lived in Nairobi and was asking for 3.5 million as the purchase price. He identified Francis Kamau as (1st accused).
15. Francis Kamau told them that they would meet Felsiter Wanjiru King'ori on September 9, 2014 and indeed they met at Merica within neighbouring town. They went to the DO's office and applied to land board consent and were asked to pay Ksh 15,000/-. Thereafter they went to the office of Bwonwange Advocate and executed an agreement to pay the parcel of land at Ksh 3,000,000/-. They paid Ksh 2,500,000/- on September 10, 2014 and it was agreed that the balance would be paid on processing the title deed.
16. On September 16, 2014, Francis Gachoki called them and informed them to meet the next day to finalize the transaction. On 17/9/2014, PW1, PW2, PW3 and Alice Gichingi went to Kerugoya and met the appellant and Francis Gachoki at Topraw Hotel. The appellant showed them the title deed



- registered in their name. They went to Equity Bank and withdrew one million shillings. They gave the appellant and Francis Gachoke Ksh 500,000/-.The appellant then handed over the title deed to them plus land search showing the land had been transferred to them.
17. Later when they went to take possession they met the caretaker of the land who told them that the land belonged to a different person. They placed a new land search and it showed Felsiter Wanjira King'ori still owned the sold parcel of land. They further gave the land registrar their title deed and was told it was fake title. He thereof reported the matter to the police for investigations.
 18. In cross examination, he stated that the whole transaction took one month and the agreement was done by Bwonwonga Advocates. He also confirmed that he paid the two accused person Ksh 2.5 million and later added the balance of Ksh 500,000/-. He stated that the time he met the appellant was on September 9, 2014 at Merica which he had also met Francis at Gichungu. It was Francis (the appellants co accused) who introduced them to the appellant.
 19. PW4 further stated that the 2.5 million was paid at Advocate Bwonwonga's office. He gave the money and she inturn gave the appellant co- accused in the primary suit before the parties shared the money is his presence.
 20. PW5 Alice Gichugu Njugi testified that she met PW4 who told her he wanted to buy land and later when he was in funds involved her in looking for a suitable parcel of land. They found a suitable parcel of land at Difathas which was about six (6) acres and were told to wait for the owner to come from Nairobi. They were told the owner wanted to sell it at Ksh 3.5million but it was negotiated down to 3million. The negotiation was between PW1, PW4 and Francis Gachoki (the appellant co-accused).
 21. On September 16, 2014, PW4 called her and requested her to accompany them to Kerugoya where they were going to pay balance of the purchase price. They met at a restaurant and she saw PW4 remove the money and gave it to the appellant herein. She couldn't tell how much it was as it was not counted but also heard the parties say that the full purchase price had now been paid. In cross examination, she confirmed that when the initial amount was paid she was not there, but was present when the last instalment was paid to the appellant in her presence.
 22. PW6 Felister Wagera King'ori testified that she was a lecture at Strathmore University. She said she owned land in Gichugu settlement scheme no 688, Difathas measuring 6 acres and stated that she never sold her parcel of land. She did not know the purported sellers or purchasers.
 23. PW7 Hussein Mutheu stated that PW4 was his neighbour in Lukenya. He met him and his wife PW1 at Difathas and they told him that they had identified a parcel of land they liked. They indeed went and saw the parcel of land and were shown around by Francis Gachoki. They thereafter asked for the title number and placed a land search at Kerugoya land offices and found out that it was indeed in the name of the owner as advised. On September 10, 2014, they again met at Equity bank Kerugoya where the appellant was introduced as the owner of the land and given Ksh 2.5 million. The parties thereafter left for the Advocate office to sign an agreement. On cross examination, he stated that he did not sign the agreement nor was he present at the land board but was present when the appellant was being given the money at Equity bank, Kerugoya.
 24. PW8 Stephen Gachoki Muthee stated that he knew PW4 as his father in-law. PW4 had asked him and told him he wanted to buy land and had gotten one at Difathas. On September 9, 2014, they went to DO's office at Wang'uru while accompanied by PW4, Francis Gichoki and 2 others to book special board. On September 10, 2014 they came back and went to the bank to withdraw money. He met both accused persons on the said date and PW4 withdrew 2.5 million which was given to advocate Bwonwonga then gave it to Francis Gichoki and then in turn gave it to the appellant herein. A few days



- later PW4 called him and informed him that the title deed was fake. In cross examination he confirmed that he was at Equity bank when money changed hands, though he did not sign anywhere as a witness.
25. PW9 Chief Inspection Geoffery Chainia was a forensic documents examiner. The sale agreement dated September 9, 2014, specimen hand written signatures of Rose Gatari Kariuki alias Felister Wanjera Kingori and exhibit memo form were forwarded to him by inspector Mary Makau of CIO Kirinyaga South. After examination he formed the opinion that the hand written signature was made by the same author Rose Gatari Kariuki. He produced the reported dated 17/4/2015 as P-exhibit 11(a) and exhibit memo form P-exhibit 11(b).
 26. The same witness also had the second report dated 9/11/2014 prepared by Chief Inspection Michira Ndege his colleague of 8 years who examined the title deed, affidavit search and specimen signature and stamp of land registration C.W Njagi and accompanied exhibit memo form. There were two requests one to ascertain whether the signatures were made by the same author and whether the stamp impression was made by the same instrument. On both accounts they returned a negative verdict on both signature and stamp. They did not match. He produced the report dated 9/11/2014 and p-exhibit 13(a) and police exhibit memo form as p-exhibit 13(b).
 27. PW10 Catherine Nyagi stated that she was the lands registrar Kiringanga Lands Office and had been a land registrar for over 20 years in various land registrars. On 22/1/2015 she was presented with a title deed for verification by a CID officer from Wang'uru police station and confirmed that it did not emanate from their offices. The title deed was made by electronic typewriter while in their registry there was manual typewriter. Secondly she stated that they don't have a registration section called Ngariama settlement scheme but Gichugu settlement scheme and that the parcel Gichugu settlement scheme 688 belonged to one Felister Wanjira Kingori. The said 2 signatures in the title deed shown to her were not hers and the title deed and search did not originate from their office. On cross examination she stated that the title deed in the name of PW1 and PW4 did not emanate from their office and she did not sign it.
 28. PW11 Gladys Kenneth Magare stated she is an advocate of the High Court of Kenya and worked at Bwonwanga & Co. Advocate. On September 9, 2012 some client came and requested her to draw an agreement and after getting relevant documents she did draft the sale agreement. On 10.9.2014 they went to Equity bank and confirmed that Ksh 2.5 million was paid in her office. She identified the appellant as 'Felista' as being present and was the 2nd accused person before the trial court. In cross examination she confirmed that Ksh 2.5 million was paid to the appellant and her co accused in her office.
 29. PW12 Eunice Wairimu Wachira testified that she worked at registration of person's office Mwea East and had worked in the said department for 22 years. On 3/6/2015 they received 2 copies thumb prints and ID copies from Francis Gachoki Kamua ID no 7918020 and Felista Wanjiru Kingori ID no 9876430. The finger prints were from Peter Gichori Gitari ID no 9872835 and Rose Gatari Kariuki Kingori ID no 2923984.
 30. On searching their date base they discovered that the 1st ID belonged to Francis Gachoki Kamau but the image differed with the computer printout. The identity card thus fake The 2nd ID belonged to Kansa Kazungu Karumu. It was also fake as Kansa was a man while Felister is a woman. Other details also differed. The ID for Felister there was a serial no 213174816 which belonged to Milka Mugo Weru of ID no 1195989 thus Felister Wanjiru had a fake serial number and ID number.
 31. Finally they compared the 2nd set of thumb prints for Rose Gatari kariuki alias Felister Wanjiru Kingori ID no 2923984 and upon searching their data it showed that ID belonged to Rose Gatari Kariuki. Her report was produced at P-exhibit 16 – 23. On cross examination, she stated that she compared



- documents photocopies of IDs availed to them with records in their system. They checked ID number and serial numbers and finger prints examination was generated from the data base.
32. PW13 Inspector Mercy Makau was the last witness to testify for the prosecutor. She rehashed all the facts as stated by the previous prosecution witness of what transpired and that PW1 and PW4 were conned of Ksh 3,000,000/- by the appellant and her co-accused as the land sold did not belong to the purported sellers. That they discovered when they went to take possession.
 33. On 6/10/2014, the complainants alerted her that they had spotted (Francis Gachoki Kamau) within Wang'uru law and she organised for him to be arrested and later charged. Later through intelligence they got information that appellant was in Mbeere on 2/2/2015. She went and arrested her. They searched her house and recovered an original identity card which showed the appellant was known as Rose Gaturi.
 34. She further stated that she took all relevant specimen signatures and thumb impressions and sent them for analysis and got reports proving the fraudulent documents and activities. She produced all the documents as exhibits.
 35. In cross examination, the witness stated that only 4 people signed the sale agreement and that the appellant co-accused person was the only witness. The agreement was signed on September 9, 2014 while money exchanged hands on September 10, 2014. On being questioned by the appellant the witness confirmed that the purchase price was given to her and she recovered the original Identity card from her house. No other item was recovered from her.
 36. The appellant and her co-accused were placed on their defence and the appellant opted to give sworn statement. She stated that she was called Rose Gaturi Kariuki and lived in Mbeere. She was arrested in February 2014 and charged in court. It is in court where she saw the 1st accused for the first time and did not know him. She stated that she had never transacted with him before and the exhibit relied on were unfamiliar to her.
 37. On cross examination she said she does not understand how her photograph was used in p-exhibit 5(a) and did not know Felister Wanjiru Kingori. She can't remember selling Felister Wanjira Kingori parcel of land.
 38. The court found the appellant guilty of the offences against which she was charged with and sentenced her to accumulative 13 years imprisonment as the sentence was to run consecutively.
 39. Being dissatisfied with the said judgment, conviction and sentence the appellant filed this appeal and entered written submission in support of her prayers therein.

Submissions

40. The appellant stated that she was not properly identified and legal authorities stated that there must be positive identification. She alleged that PW1 did not describe her positively to the police and the identification at trial was not safe on ground two and three of her submissions she stated that she was convicted based on extraneous issues and her arrest was unlawful as no evidence of recovery of Ksh 3,000,000 was made when they arrested her.
41. The appellant also stated that the trial court did not consider her defence and that the sentence imposed was harsh and excessive. Finally she also stated that it was wrong for the court to sentence her to consecutive sentences as this breaches provision of 7(1) and 14 of the *Criminal Procedure Code*. She relied on *Ogolla Owade v Republic* (1954) EACA 270 and *Peter Mbogua Kabui v Republic* (2006)



eKLR, *Republic v Said Nsabugas Juma and another* (1941) EACK, *Anah Nathan v Republic* (1965) EA 777.

42. This appeal was opposed by the state (DPP) who filed their written submission on 23/8/2022 and contended that the conviction and sentence was lawful and safe.

Analysis and determination

43. I have carefully considered all the evidence on record, the ground of appeal, amended ground of appeal, the appellant submissions and the submissions filed by the state (DPP) and find that the following should flow for determination ;

- i. whether the prosecution proved its case beyond reasonable doubt
- ii. Whether the appellant was positively identified
- iii. As to whether there is a no agreement or document to show that money exchanged hands
- iv. Whether the trial magistrate ignored the appellant defence
- v. Whether the sentence melted out was excessive.

44. This being the first appeal this court will reassess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion while taking into account that it neither heard nor saw the witnesses testify whether the prosecution has proved its case beyond reasonable doubt.

45. On the first count the appellant was charge with the offence of obtaining money by false pretence contrary to section 313 of the penal code. False pretence is defined Section 312 of the [penal code](#) as follows;

“Any representation made by words, writing or conduct as 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”

46. The operative word under section 312 is ‘representation’ which is applicable in the following circumstances

- a. A representation by words, writing or conduct
- b. A representation in either past or present
- c. A representation that is false
- d. A presentation made knowing it to be false or believe not to be true.

47. The High Court of Botswana in *Le sholo and Another v the State* held that;

- i. ‘To prove the offence of obtaining by false pretence, the accused must by false pretence, with intent to defraud obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the persons’
- ii. A false pretence has been held to be a representation by accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it related to a profound part or past fact or facts. It is not false pretence if it is made in relations to the future event if it is made fraudulently where however the representation speak both of a future promise and



complies it with a false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false.

48. On count two, three and five in the charge sheet the appellant was charged with making a false documents contrary to section 347 (c) of the *penal code*. The Black's law dictionary 9th edition defines 'forgery' as the act of fraudulently making a false documents or altering a real one to be used as genuine.
49. The High Court of India in the case of *Sukanti Choudhury v State of Orisa* held that the following ingredients were necessary for the offence to the proved.
 - a. The document must be forged
 - b. The accused had the document as genuine
 - c. Accused knew or had reason to believe that it was a forged document; and
 - d. Accused used it fraudulently or dishonestly knowing or having reason to believe that it was a forged document
50. This forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud.
51. In the Nigerian case of *Alake v the State*, the court listed the following ingredients of the offence of forgery;
 - a. That there is a document or writing
 - b. That the document or writing is forged
 - c. That the forgery is by the accused person
 - d. That the accused person knows that the document or writing is false
 - e. That he intends the forged document to be acted upon to the prejudice of the victim in the belief that it is genuine.
52. On the first count of obtaining by false pretence PW1 (Jane Wakuthii Samuel) and PW4 (Samuel Gitari Muriuki) did testify that the Government of Kenya took their land and were compensated Ksh 5.7 million and as a family decided to buy another parcel of land. 1st accused in the trial (Francis Gachuki Kamau alias Peter Gichoki Gitari) told them that the land they were interested in buying belonged to his widowed sister in law Felister Wanjira Kingori who turned out to be Rose Gaturi the appellant herein.
53. On September 9, 2014, both parties met and the appellant herein informed PW4 that she had already booked for land Board consent, a special board and the parties did sign an agreement before Bwonwonga Advocate, where the agreed purchase price was Ksh 3,000,000/-. It should be noted that PW1, PW4 and PW11 all identified the appellant as the person who presented herself as Felister Wanjira Kingori.
54. On September 10, 2014, the parties went to the bank and Ksh 2,500,000/- was withdrawn and received by the appellant. Further on September 16, 2014, again the appellant presented to PW4 an original title deed and search certificate confirming change of ownership of the property sold. The appellant did receive Ksh 500,0000/- on the said date. It's when the complainant went to task physical possession of their land they were chased away and discovered that they had been conned.



55. Having gone through the entire proceedings, this court is satisfied that on count one, the prosecution did prove beyond any reasonable doubt that the appellant obtained money by false pretence. She pretended to own land parcel no Ngariama/Settlement scheme/688 yet she knew within her knowledge that was not true. She impersonated and held herself out as 'Felister Wanjira Kingori' who owned the said parcel of land yet she knew this was false and due to her deception the complainant did believe in her and faithfully paid her the purchase price of Ksh 3,000,000/.
56. I find and hold that there was deliberate intention to defraud the complainants and the land parcel no Ngariama/settlement scheme/688 was a thing/property capable of being stolen.
57. On the other three count's of making false presentation contrary to section 347(c) of the penal code, evidence by PW10 Catherine Nyagi the Lands Registrar Kerugoya confirms that indeed the title deed and official land search presented to the PW1 and PW4 were not genuine and did not emanate from their office. MFI -7 the title deed was typed using an electronic typewriter, while at their office they had a manual type writer. The said parcel as per their records was still in the name of Felister Wanjira Kingori and not PW1 and PW4 as shown in the official search (MFI-8). The signature was also forged in both documents. Finally she also stated that they did not have a Registration section called Ngariama settlement but they had Gichuga settlement scheme.
58. PW12 Eunice Wairimu Wachira who worked at the registrar of persons confirmed that the ID card used by the appellant belonged to one Kansa Kazungu Karume and it was fake since Karume was a man while Felister was a woman. Other details, also differed. The serial number 213174816 belonged to Milka Mugi of ID no 1195989 and thus she had the national card presented as that of Felister Wanjira was fake.
59. The final count of personation contrary to section 382 of the penal code is tied to the other grounds above and evidence of PW1, PW2, PW4 and others indeed shows that the accused held herself and presented documents (national identity card, KRA pin and title deed) as Felister Wanjira Kingori which she knew was false and she was Rose Gaturi Kariuki. PW12 Eunice Wairimu Wachira confirmed the same using data from the registration for persons (see P-exhibit (6-25) this proved beyond doubt that she personated Felister Wanjira Kingori and was doing with the intent to defraud the complainants.
60. The key question is did the prosecution prove the five counts the appellant was charged with the required standard. Did the defence offered by the appellant in the lower court raise any doubt on the prosecution case? Does it rebut in any manner the case put forth by the prosecution? Reviewed and analysed the defence offered by the appellant clearly shows that it does not in any way create doubt on the strength of the prosecution's case. In my view the defence did not rebut the serious allegations made in the evidence nor did it create doubts in the prosecution case.
61. After evaluating the evidence adduced the law and authorities, I am satisfied that the prosecution proved the offences committed and that the necessary ingredients of the offence as enumerated above were proved beyond doubt and the appellants convictions was safe and base on the strength of the prosecution case and not weakness of his defence (See Sekitoleko v Uganda).

Whether the appellant was positively identified.

62. From the evidence on record, it is clear that the appellant was positively identified by PW1 (Jane Wakuthi Samuel) PW4 (Samuel Gitari Muriuki), PW5 (Alice Gichigu Njagi) PW7 (Hussein Muthee), PW8 (Stephen Gachoki Muthee) and PW11 (Gladys Kenneth Magara). All this witnesses identified the appellant on September 9, 2014 when they went to the DO office and Bwonwongo advocate office.



Again on September 10, 2014 when they went to Equity bank Kerugoya to withdraw Ksh 2,500,000/- and finally on September 16, 2014 when she handed over the fake title deed and land search in exchange of the final portion of the purchase price Ksh 500,000/-

63. The above witnesses were eye witnessed to this transaction which happened over a period of ten days or so. They met the appellant several times. Their testimony directly linked the accused to the commission of the offence. The transaction I repeat happened over a period of ten days or so. The parties met at day time and spent considerable time in each other's company and that's their evidence of positive identification cannot be implicated.

Whether there was an agreement or document to show that money exchanged hands

64. PW1 (Jane Wakuthi Samuel) and PW4 (Samuel Gitaru) were clear that there was an agreement drawn and signed by the parties (P-exhibit 6). The appellant presented herself as Felister Wangira Kingori and signed the same. This is confirmed by PW4 (Samuel Gitai), PW11 Advocate Gladys Kenneth Magera confirmed that the parties appeared before her on September 9, 2014 and she drafted a sale agreement on their behalf. The investigation Officer inspector Mary Makau produced the agreement as P-exhibit 6). This ground of appeal is thus dismissed for having no basis in law and that;

Whether the trial Magistrate ignored the appellant defence

65. The appellant was placed on her defence and elected to give sworn testimony where she denied any involvement in this matter. She stated that she saw the accused (co-accused) for the first time in court and had nothing to do with the transactions.
66. In her considered judgement prayer 19 – 20 the learned Magistrate capture the appellant defence and on prayer 32 she stated that;

1st and 2nd accused at merciless predators chose to gamble on PW1, and PW4 gullibility by incorporating lawful pretence into dubious transaction. I strongly believe based on the above in some of these offices the 1st and 2nd accused worked in cahoots with scrupulous official to further fool blind PW1 and PW4.

With the above analysis and findings, I find no merit in 1st and 2nd accused defence. When weighed against the presented case, I find they have positively been identified as the persons selling land to PW1 and PW4.

67. This without doubt shows that their defence was considered and found to be without merit. This court has no basis of interfering with the same.

Whether the sentence meted out was harsh and excessive

68. The appellant was sentenced to;
- a. 2 year in count one – obtaining money by false pretence contrary to section 313 of the [penal code](#)
 - b. 2 years in count two – making a false document contrary to section 347(a) of the [penal code](#)
 - c. 2 years in count two – making a false document contrary to section 347(a) of the [penal code](#)
 - d. 2 years in count two – making a false document contrary to section 347(a) of the penal code
 - e. 5 years in count nine – personation contrary to section 382 of the penal code.



- The sentence was to run consecutively from January 27, 2017 when convicted and sentence
69. The appellant submitted that the trial court erred in sentencing her to serve consecutive sentence while section 7(i) of the criminal procedural code prohibited the trial court from so doing since the offense were committed under the same transaction.
70. It is an establishment fact that sentencing is essentially and exercise of the trial court and the appellant court should not interfere unless it is shown the in person the sentence that cannot take into account an irrelevant fiction or that a wrong principle was applied or short of this the sentence was so harsh and excessive then an error in principle must be informed.
71. From the submissions filed, two issues emerge. Whether the trial magistrate erred in imposing consecutive sentence and whether the sentences imposed were harsh and excessive.
72. Section 313 of the [penal code](#) provides for three years imprisonment for the offence of obtaining money by false pretence, section 249 of the [penal code](#) provides for three years imprisonment for the offence of forgery and finally section 382 of the [penal code](#) provides for seven years imprisonment for the offence of personation. The sentence meted out were not harsh or excessive and were within the merit of what is provided for under the penal code and there is not irrelevant fiction or wrong principle considered pointed out to warrant interference by this court of the same.
73. Further are general principle, the practice is that if an accused person commits a series of offence by the same single act or transaction, a concurrent sentence should be imposed. However, if the accused commits separate and distinct offences in different criminal jurisdiction, even though he charges are that in one trial, it is not illegal to mete out a consecutive term of imprisonment. (see [BMN v Republic](#) NYA CA Criminal Appeal no 97 of 2013 (2014 eKLR. This was also emphasized in paragraph 7.13 and 7.14 to the [sentencing policy guideline 2016](#) which provides that;
- 7.13 Where the offence emanate from a single transaction, the sentence should concurrently. When the offences are committed in the course for multiple transactions and where there are multiple victims, the sentence should run consecutively.
- 7.14 The discretion to impose concurrent or consecutive sentence lies with the trial court.
74. In *Nathan v Republic* (1965) EA 777, the phrase 'same transaction rule' was discussed and the court states as follows;
- 'If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purposes or by relation of cause and effect as to constitute on transaction, then the offences constituted by these series of acts are committed in the course of the sum transaction'.
75. From the charges outlined above, it is clear that count 1 and 7 were committed on the same day while count 2, 3 and 5 were committed on different dates though were part of the same transaction the appellant was charged with.
76. There was therefore an error of law for the trial magistrate to sentence the appellant to consecutive imprisonment with regard to all the counts she was charged with.
77. I therefore allow the appeal on sentence and quash the consecutive term imposed and substitute them with the following sentences;



- a. On count 1 and 7 the sentence will run consecutively
- b. On count 2,3 and 5 the sentence will run concurrently

The total complete term of imprisonment shall therefore be 9 years imprisonment. The sentences shall run from the date of sentence in the subordinate court.

78. For avoidance of doubt the appeal as against conviction fails and is dismissed.

79. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON 16TH THIS DAY OF FEBRUARY 2023

FRANCIS RAYOLA

JUDGE

In the presence of;

