



REPUBLIC OF KENYA



KENYA LAW
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**Nguthuru v Republic (Criminal Appeal 53 of 2019)
[2023] KEHC 1769 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 53 OF 2019
J WAKIAGA, J
MARCH 15, 2023**

BETWEEN

MIRIAM WANGECHI NGUTHURU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against conviction and sentence of Hon. M. Wachira in
Muranga CMCC Criminal Case No 988 of 2015 delivered on 4th December 2019)*

JUDGMENT

1. The Appellant was charged with the offence of obtaining money by false pretence Contrary to Section 313 of the [Penal Code](#). The particulars of which were that on the April 18, 2015 at Gathoni Wairegi & Company Advocates, in Thika, with intent to defraud obtained Kshs 550,000 from Joseph Njogu by falsely pretending that she was in position to sell to him a parcel of land registration number Nginda / Samar/ 129 a fact he knew to be false or untrue.
2. She was, on Count two, charged with the offence of destroying evidence contrary to Section 116 as read with section 36 of the [Penal Code](#).
3. She pleaded not guilty and was tried, convicted on the first count and sentenced to an imprisonment term of two years and being aggrieved by the said conviction and sentence, filed this Appeal and raised the following summarized grounds of Appeal:
 - a) The Prosecution case was not proved beyond reasonable doubt.
 - b) The Court did not take into account the fact that there was a valid Sale Agreement and that the case was purely a case for breach of Sale Agreement whose remedy fell within the realm of civil litigation for specific performance or refund of the purchase price.
 - c) The trial Court shifted the burden of proof upon the Appellant.



- d) The sentence imposed was severe and harsh taking into account the fact that the Appellant was a first offender.

Submissions

4. Directions was given that the Appeal be heard by way of Written Submissions and on behalf of the Appellant, it was submitted that the ingredients of the offence were not proved since the sum paid to the Appellant was for the purchase of land which the complainant had identified and confirmed to have been registered in the name of the Appellant and no evidence was adduced at the trial to the contrary save that a caution had been lodged on the same by a licensee which did not affect the Appellants right of ownership.
5. It was submitted that since the Appellant was the registered owner of the subject property, there was nothing she was capable of stealing in support of which reliance was placed on the case of *Joseph Wanyonyi Wafukho v Republic* [2014] eKLR to the effect that the frustration by the relatives did not take away the Appellants authority to sell his land. It was submitted that there was no proof of fraud on the part of the Appellant and that the action by the prosecution was away of collecting debt on behalf of the complainant, in support of which the case of *Nyaga v Republic* [1975] 1 EA 118 was tendered to the effect that it is essential to establish that false pretence is as to existing facts.
6. It was submitted that the case was purely a breach of contract and that the charge was contrary to section 313 of the *Penal Code* as was purely of a Civil nature.
7. It was finally submitted that the Appellant had set out to sell her land willingly and that only after she had received the deposit did a licensee lodge caution and that the prosecution failed to conduct an in-depth investigations and vital prosecution witnesses were not produced to verify whether she had the land capable of being sold.
8. Ms Otieno for the prosecution conceded too the on the ground that the complainant did not explore the default clause in the Sale Agreement.

Determination

9. The Court is not supposed to allow the Appeal on the ground that the same has been conceded to by the Prosecution but the same is under a duty and obligation as a first Appellant Court to re-evaluate and analyse the evidence tendered before the trial Court and to come to its own determination thereon while giving allowance to the fact that unlike the trial Court, it did not have the advantage of seeing and hearing witnesses as was stated in the case of *Okeno v Republic* [1973] EA 32 .
10. In this cause the prosecution case was that PW1 Joseph Murigi Njogu on the April 18, 2015 entered into a Sale Agreement with the Appellant who was introduced to him through his cousin for which he paid a deposit of Kshs 550,000/= and it was agreed that the Appellant get consent of the Land Control Board, which consent he thought was suspect and when he searched the land he found that there was a caution thereon lodged by one Richard.
11. This evidence was corroborated by PW2 Mark Kibande Njogu and Pw3 Stephen Karanja who witnessed the Sale Agreement only to later learn that the Appellant had not obtained the Land Control Board consent. PW4 Edwin Chelyon Omondi received the complaint and investigated the same wherein it was established that the piece of land had a licensee interest which the Appellant was aware of and therefore was not in a position to pass title to the complaint and that she proceeded to receive money from the complainant.



12. The Appellant in her defence stated that the suit property was registered in her name on 15/4/2015 and that the caution was placed on 24/7/2017. She stated that she fell sick and was unable to go for the consent.
13. From the evidence tendered before the trial Court, it is not in dispute that the title was registered in the name of the Appellant as at the time of the transaction and that the caution was placed on the same thereafter. There is no evidence that the Appellant colluded with the licensee to place the caution thereon neither was there any evidence that she obtained the money through misrepresentation.
14. I would therefore agree with the submissions by the Appellant that the ingredients of the offence were not proved by the prosecution and that the fact that there was a caution placed on the subject land by a licensee was not proof of fraud on the part of the Appellant.
15. It therefore follows that her conviction was in error and unlawful. I hereby allow the Appeal set aside the conviction and quash the sentence herein. The appellant shall be set free forthwith unless otherwise lawfully held. And it is ordered.

DATED SIGNED AND DELIVERD AT MURANGA THIS 15TH DAY OF MARCH, 2023.

J WAKIAGA

JUDGE

In the presence of:

Ms Carol Mutahi – Court Assistant

