



REPUBLIC OF KENYA



KENYA LAW
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**Kiruthi & 7 others v Republic (Criminal Appeal 224 of 2022)
[2023] KEHC 22572 (KLR) (Crim) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22572 (KLR)

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

CRIMINAL

CRIMINAL APPEAL 224 OF 2022

DR KAVEDZA, J

SEPTEMBER 22, 2023

BETWEEN

FREDRICK KINYANJUI KIRUTHI 1ST APPELLANT
NGAI NJERU 2ND APPELLANT
IRENE WANGUI WAWERU 3RD APPELLANT
CHARITY MUMBU NJUE 4TH APPELLANT
GERALD MAINA GACHAU 5TH APPELLANT
ANNE WAMBUI WAWERU 6TH APPELLANT
REGINAH NJERI KINYANJUI 7TH APPELLANT
JOYCE WAMBUI WAWERU 8TH APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence delivered by Hon. M. Mutuku on 8th July 2022 at Milimani Chief Magistrate's Court criminal case no. 873 of 2011 in Republic vs Fredrick Kinyanjui Kiruthi & 7 others)

JUDGMENT

1. The 1st, 2nd, and 3rd appellants were charged and convicted in counts I and II for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code (Cap 63) Laws of Kenya. They were also jointly charged and convicted with the counts III and IV for the offences of obtaining registration by false pretences contrary to section 320 of the Penal Code. The 4th to 8th appellants were charged with



various counts for the offence of acquisition of property from the proceeds of crime contrary to section 4 (a) as read with 16 (1) (a) of the *proceeds of crime and Anti-Money Laundering Act* No. 9 of 2009. After a full trial, they were convicted on the various counts charged.

2. Being dissatisfied with their conviction and sentence, they filed an appeal challenging the same.
3. The appellant raised ten (10) grounds of appeal which have been coalized as follows: in grounds 1, 2, 3, 4, 6 and 7 the appellant challenged the totality of the prosecution's evidence against which they were convicted. In grounds 5 and 8 they complained that the trial court failed to consider their respective defences. In grounds 9 and 10 they argued that the trial court meted at an excessive sentence.
4. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs Republic* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
5. The prosecution called 21 witnesses in support of their case. Pragna Voya (Pw 1) testified that he works as a branch manager at Prime Bank. On 17th April, 2011, while on duty the 1st, 2nd, and 3rd appellants opened a joint account. A banker's cheque of Kshs. 9 million by Thorn Hill Holdings which was drawn to the new account. They also withdrew Kshs. 2 million. On 11th April 2011 Kshs. 81 million was deposited vide a cheque drawn by Thorn Hills Holdings Ltd. Bank statements produced reflected the said transactions.
6. George Gacheru Mungai (Pw 2) an estate developer and director of Thorn Hills Holdings Limited told the court that he was introduced to the 1st, 2nd, and 3rd appellants who were selling a parcel of land L.R NO. Kajiado/Kaputei/North/1420 which they jointly owned. He was shown the parcel by the 1st appellant and agreed on a purchase price of Kshs. 90 million for the 100 acres. He was issued with a certificate of search and paid a deposit of Kshs 9 million through a banker's cheque. A sale agreement was drafted by Michael Kiruti & Co. advocates and applied for a consent from the Land Control Board. A transfer was executed between the parties and lodged at the Kajiado Land Registry. He was issued with a title deed and paid the balance of the purchase price. He started the process of subdivision and was informed someone else was claiming ownership over the parcel.
7. Michael Kiruti (Pw 3) an advocate of the High Court of Kenya told the court that he drafted the sale agreement for the property in issue. He identified the 1st, 2nd and 3rd appellants as the vendors while the PW 2 was the purchaser through his company.
8. Penwel Nyangweso Nyamweya (PW 4) the land registrar based in Ngong told the court that a land transfer was lodged on 28th March 2011 by the 1st, 2nd and 3rd appellant to Thorn Hill Holding. All the relevant documents presented were proper and a title deed prepared and issued. Later on, Mr. Bedan Mbugua claimed ownership of the parcel and was summoned together with other interested parties. From his record, the land was first owned by Karei Ole Dogome who transferred to Bedan Gikebe and later to Le John. It was his evidence that the green card he acted upon to issue title deed to the 1st, 2nd, and 3rd appellants, did not reflect these transactions and was likely fraudulent.
9. Kipkorir Ole Rissan Munii (PW 5) a land buying and selling agent told the court that he was introduced to the 1st, 2nd, and 3rd appellant by a 3rd party. They were interested in getting prospective buyers for the land which was about 100 acres. He met them and contacted prospective buyers. He approached PW 2 who was interested and proceeded to complete the transaction. He was paid his agency fee. He later came to learn that the land did not belong to the vendors.



10. Bedan Gikebe Mbugua (PW 6) testified that he approached one Ole Dogome who was selling his parcel of land in 1990. He followed the laid down procedure and purchased the 100 acres for Kshs. 620,000. He was issued with a mutation to confirm. He later sold the land to Le John and produced the transfer. Even after the sale, he continued managing the land for Le John. In 2011, he discovered beacons suggesting the land was being sub-divided. He reported the incident and recorded a statement.
11. Kennedy Musitya Luvisya (PW 7) a car salesman testified that he was visited by two men who wanted a motor vehicle. They were interested in a Toyota Mark II Blitz Wagon KBM 978U. They negotiated the price with the owner for Kshs. 1,100,000. An agreement was signed on 15/04/201. The 2nd appellant indicated that he was buying the car for his wife the 4th appellant. The motor vehicle was delivered to him and a delivery note was produced.
12. Mukta Guyo Kotile (PW 8) an officer in charge of Postal Corporation of Kenya Isiolo told the court that he received a request for particulars from DCI dated 06/09//2011. The request was for P.O box 66 Isiolo. From the record, the box had been allocated to the Department of Defence Battalion.
13. Ronsly Sifa Kepher (Pw 9) the acting branch manager of African Banking Corporation Bank Lamu, told the court that on 10/2/2012 received warrants to investigate several bank accounts.
14. Alex Rebiro Ngugi (Pw 10) a businessman told the court that in February 2011, he was sourcing for purchasers for a parcel of land owned by James Ngara. He was approached by the 1st appellant who was interested in the 1.14 acres in Ruiru – Kamakis area. The purchase price was agreed at Kshs. 15 million. He paid Kshs. 13 million which money was later refunded due to a court dispute. He did not know the source of the funds.
15. Charles Wainwa Ngechu (PW 11) the land registrar Kajiado between 1989 to 1990 elaborated the transfer process of land. He reiterated the evidence of PW 4, on the current entries in the land register. He maintained that the signature of one Mr. Makau (now deceased) appended on documents signed in 1990 who was his predecessor was not his. He confirmed that the signature on the title issued to Le John during the period was his.
16. Tariq Abdullah Ibrahim (PW 12) a car dealer told the court that he was approached by the 3rd appellant who was interested in the purchase of a motor vehicle. They agreed on the sale of KBP 082T Isuzu CXZ for Kshs. 4,500,000. He told the court for he did not know the source of the funds used to purchase the same.
17. Hellen Wanjiku Kinewe (Pw 13) told the court that she sold her parcel of land Ruiru/Ruiru East Block 3/1362 to the 1st appellant Kshs. 1,800,000. The 1st appellant told her that he was buying the land for his wife the 7th appellant. She produced the sale agreements.
18. Peter Makusa Muhoya (Pw 14) testified that he sold his truck FVR Isuzu for Kshs. 7,200,000 to the 2nd appellant on 07/06/20211. The vehicle was transferred to the 5th appellant on the instructions of the 2nd appellant.
19. Churchill Mugo (Pw 15) a former salesperson testified that the 6th appellant approached him with the intention of purchasing a motor vehicle registration no. KBP 101C Toyota Harrier. The purchase price was Kshs. 2,500,000. The amount was paid by the 3rd appellant and sale agreements were executed. The said motor vehicle was registered to the 6th appellant.
20. Daniel Kasirimo Ole Moyaa (Pw 16) testified that he was former chair of Polka Control Board from 1988 to 2002. On 13/07/1989 Ole Dogome approached the board intending to sell his parcel to PW 6. They agreed to the sale of 100 acres. He later learnt that other people had claimed ownership of



- the same parcel sold. He maintained he knew the physical location of the parcel but not the reference number.
21. No. 231840 Mr. Mwangi Njiru Gitau (PW 17) while working at the DCI Crimes Scene Investigation Services received a request for documents under investigation. They were documents relating to parcels of land and motor vehicles. He took photographs and filed his report which was produced.
 22. No. 231671 Alex Mwangera (PW 18) a document examined at the DCI headquarters told the court that on 16/7/2015, his office received documents for examination. Upon examination, he filed a report dated 18/11/2015 which was produced. It was to establish whether Mr. Charles Waihwai Ngechu and Mr. Makau signed entries on the Green card in favour of the 1st, 2nd and 3rd appellants.
 23. No. 54427 CPL Andrew Odera (PW 19) the investigating officer told the court that he took over the case from IP Magiri (now deceased) and later Mr. Kyalo (PW 21). He reiterated the prosecution's evidence and told the court the steps he took to get the identities of the parcels of land and the registrations of the motor vehicles purchased by the appellants.
 24. No. 23092 Felix Nyamai (PW 20) who was previously stationed at DCI Headquarters told the court that he recorded statements from the appellants under inquiry. He told the court that he specifically took statements from the 6th appellant who was the daughter of the 3rd appellant, and the 5th appellant. He testified that he was a Chief Inspector of Police at the time. CPL Kyalo took the statement of the 6th appellant.
 25. Peter Kyalo (PW 21) previously a DCI Officer who was investigating the case reiterated the evidence of PW 19. On cross-examination, he told the court that he did not see the sale agreements between Ole Dogome and the 1st, 2nd, and 3rd appellants. In addition, there was no evidence that PW 6 Represented Le John Enterprises in the sale.
 26. After the close of the prosecution's case, the appellants were all found to have a case to answer and were put on their respective defences. They each gave sworn testimony. Fredrick Kinyanjui (DW 1) told the court that the 7th appellant is his wife. Ole Dogome sold him the parcel of land after an interaction in 1989. He produced the sale agreement between himself, the 2nd and 3rd appellant, and the vendor's agent dated 16/4/1990. He maintained that he did not participate in the transfer of the property. In addition, he did not know about the sale from Ole Dogome to PW 6.
 27. Njeru Ngai (DW 2) gave a sworn statement and testified that during the purchase, no one else claimed ownership until 2011. That the 4th appellant is his wife, while the 5th appellant is his nephew.
 28. Irene Wangui Waweru (DW 3) reiterated the evidence of DW 1 and DW 2 on how they acquired ownership over the parcel of land for Kshs. 700,000. She also told the court that the 5th and 8th appellants are her daughters. She denied the charges before the court maintaining that the purchase was lawful.
 29. Charity Mumbe Njue (DW 4) testified that the 2nd appellant is her husband. She maintained that she was not involved in any transaction for the sale of a piece of land. She purchased a motor vehicle which was paid for by him. She denied the charges.
 30. Annah Wambui (DW 5) that DW 3 is her mother who paid for the Toyota Harrier which had been registered in her name. She also confirmed that she co-owned motor vehicle registration no. KBP 082T with the 8th appellant. The same was purchased by DW 3 for Kshs. 4,500,000.



31. Joyce Wambui (DW 6) told the court that her mother DW 3 bought her a gift which was lorry. The same is jointly owned by her sister. She denied the charges maintaining that it is not illegal to accept gifts from parents.
32. Gerald Maina Gacheu (DW 7) told the court that the 2nd appellant was his uncle. He purchased a motor vehicle on his behalf but did not know the source of the funds.
33. Kaye Ndogome (DW 8) a brother to Ole Dogome told the court that his deceased brother sold the land to DW 1, DW2 and DW 3. Although he had already previously sold the same land to PW 6, he intended to refund him the money since the sale was not complete. He maintained that the 3 purchasers had good title as the vendor fell out with PW 6.
34. Robert Mugendi (DW 9) a land registrar told the court that there does not exist a property identified as Ruiru/Ruiru East Block 24/819.
35. Mathew Karei (DW 10) a son of the deceased Ole Dogome. He told the court that he was a minor in 1990 and all he heard and knew about the transactions of the land was from his father.

Analysis and determination.

36. In their appeal, the appellants challenged the totality of the prosecution's evidence against which they were convicted. They argued that the trial magistrate failed to consider the law governing land registration in Kenya specifically section 26 of the *Land Registration Act*. They challenged the evidence of PW 4 Penwel Nyangweso the former registrar of lands. They contended that he failed to confirm the identity of Le John and yet a title deed had been issued in the said name. In addition, the evidence of PW 6 was not concrete as he indicated that he sold the property to Le John and yet no title deed or transfer documents were presented to that effect. The appellants submitted that PW 6 also claimed to be a caretaker for Le John but such documentation was also not presented.
37. The appellants maintained that the investigations were shoddy as relevant witnesses were not called to give evidence. that the only inference that can be deduced is that this was a material irregularity. They argued that the only title known to be in existence was one issued to the appellants 1,2 and 3 and later procedurally transferred to a third party. In totality, the appellants submitted that the prosecution failed to prove the ingredients of the offence of obtaining money by false pretense.
38. This court has re-evaluated the facts of this case. It has also re-evaluated the rival submissions made by parties to this appeal. Section 313 of the Penal Code (Cap 63) Laws of Kenya 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.”
39. The prosecution is required to establish that the appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud. In the present appeal, it was the prosecution's case that the 1st, 2nd and 3rd appellants opened a joint bank account. It is not refuted by evidence that Kshs. 9 million and later on Kshs. 81 million was deposited in the said account being the purchase price of L.R NO. Kajiado/Kaputei/North/1420. It is therefore not in dispute that the three received the funds totalling Kshs. 90 million from George Gacheru Mungai of Thorn Hills Holding Limited. The money received was therefore something capable of being stolen. All in all, the 1st, 2nd,



and 3rd appellants maintained that there was no fraud involved and held a good title capable of being passed to the purchaser.

40. The second ingredient for determination was whether the money was obtained by false pretenses and with the intention to defraud. From the record, the prosecution evidence was that the land in dispute originally belonged to Ole Dogome who sold it to PW 6, Bedan Mbugua. Mr. Mbugua developed the land and even built a borehole as documented by evidence. His evidence is corroborated by the evidence of that the land belonged to a person named John and was sold to Mr. Bedan Mbugua, who developed it by drilling a borehole, supported by documentary evidence. Mr. Mbugua's claim is corroborated by PW 16, Mr. Ole Moyaa, a member of the Land Control Board, who knew the seller Ole Dogome personally. The same parcel of land was later sold to Le John.
41. On how this land was registered, the 1st, 2nd and 3rd appellants were in possession of a title deed issued by PW 4 who was the land registrar at the time. When the said title was disputed, and interrogated further, it was discovered that the appropriate documents were not presented during registration. In addition, the entries allegedly made by PW 11, Ngechu, and Mr. Makau were found to be forgeries after forensic analysis by PW 18 a forensic examiner. He concluded that it was issued on the strength of a forged green card. It was consequently expunged from the record.
42. PW 4 further gave evidence that the land was registered in favour of the 2nd appellant and an entry made in 2011. The same was found to be fraudulent. The evidence of PW 6 was consistent with other prosecution witnesses that he purchased the property from the now-deceased seller in 1989 and later transferred it to Le John.
43. The defence of the 1st, 2nd and 3rd appellants did not dent the otherwise strong culpatory evidence adduced by the prosecution witnesses. It went to corroborate the prosecution's evidence that PW 6 had purchased the property from Ole Dogome. In addition, they failed to shed light on how they purchased the property from the deceased seller. The same was properly dismissed. Their guilt on the offence of obtaining money by false pretenses was established to the required standard of proof beyond any reasonable doubt. The subject green card which relayed the title to the three was false and the title obtained emanating thereto as due process was not followed.
44. On counts 3 and 4, the 1st, 2nd and 3rd appellants were charged with obtaining registration by false pretenses contrary to section 320 of the Penal Code. On whether or not the prosecution proved its case to the required standard, I have carefully considered the prosecution and defence evidence, the relevant law and authorities. Section 320 of the Penal Code provides that:-

Any person who willfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.

Section 312 defines the offence thus:

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.

45. From this definition, the ingredients of the offence are that; there must be a representation on matters of fact about the past or present; that representation must be false and it must have been made with the intent of defrauding someone of his property. It must have been acted upon to the disadvantage of the complainant. The prosecution must therefore prove these ingredients in order to succeed in the case of obtaining registration by false pretences.



46. The prosecution's case was that the 1st, 2nd and 3rd appellants procured the registration of LR. No. Kajiado/Kaputei-North/1420 under false pretenses. This being that the title issued to them was not procedurally issued and that they did not purchase the property from the late Ole Dogome. The Court of Appeal stated the following in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR regarding the obligation of a registered proprietor of land whose title is challenged on the ground of fraud or other illegalities:

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal....”

47. Having already analysed the issues of obtaining money by false pretenses, I need not reiterate the alluded facts. In addition, they did not deny the assertion that they transferred the title to themselves. It is my finding that the title in issue and the subsequent transfer of that title to a third party was tainted with illegality. The prosecution therefore proved the elements in counts III and IV against the 1st, 2nd, and 3rd appellants beyond reasonable doubt.

48. In counts V, VI, VII, VIII, IX, X, and X1, the 4th to 8th appellants were separately charged with the offence of acquisition of property from the proceeds of crime contrary to section 4 (a) as read with 16 (1) (a) of the *proceeds of crime and Anti-Money Laundering Act* No. 9 of 2009. The prosecution's case was that they had purchased various properties from proceeds of crime.

49. Section 4 of Proceeds of Crime and Anti- money laundering Act provides that:

A person who—

- (a) acquires;
- (b) uses; or
- (c) has possession of,

property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.

50. In count V, the prosecution led evidence to the effect that the 4th appellant who is the wife of the 2nd appellant purchased motor vehicle registration number KBM 979Y on his behalf. In count VI, the prosecution led evidence to the effect that Gerald Maina Gacheru, the 5th appellant, a nephew of the 2nd appellant purchased a lorry registration number KBP 288Q on behalf of 2nd appellant. The motor vehicle was however registered to the 5th appellant on the 2nd appellant's instructions. In count VII, the prosecution led irrefutable evidence that Anne Wambui Waweru, the 6th appellant who is a daughter of the 3rd appellant purchased a motor vehicle that was registered in her name but paid for by the 2nd appellant on instructions from the 3rd appellant.

51. In count VIII, the 6th appellant was acquitted for lack of sufficient evidence as to the source of funds for the purchase of the property.

52. In count IX, Anne Wambui Waweru and Joyce Wambui, who are the 6th and 8th appellants respectively acquired motor vehicle registration number KBP 082T which they jointly owned. The prosecution led evidence that the purchase price of Kshs. 4,500,000 was paid from the joint account of the 1st, 2nd



and 3rd appellants on the authority of the 3rd appellant. Count X relates to the acquisition of Ruiru/Ruiru East Block 3/1362 which was purchased by the 1st appellant for Kshs. 1,800,000. The same was proved vide a sale agreement dated 06/06/2011.

53. The 7th appellant was acquitted on count XI which related to the acquisition of Ruiru/Ruiru East Block 24/819. From the evidence of Robert Mugendi, the DW 7, the land in issue did not exist. The appellant was therefore acquitted on that counts.
54. That being said there was no evidence 4th, 5th, 6th, 7th and 8th appellants participated in the offences in counts I, II, III and IV, there is evidence that the purchase of the property was from proceeds of crime. The same was done by the 1st, 2nd and 3rd appellants in an attempt to conceal the source of funds. In their submissions, the appellants claimed that in criminal forfeiture, a crime must first be determined before one proceeds to the question of forfeiture. However, as stated by the trial magistrate, it is not enough to state that you do not know the source of funds.
55. In addition, their very close family relationship and the proximity in time when the assets were acquired point to an attempt to conceal. It is my finding that the trial court did not err in finding the 5th, 6th, 7th and 8th appellants culpable beyond reasonable doubt for the offence of guilty on the offence acquisition of property from the proceeds of crime.
56. The appellants also challenged the charge sheet as being defective. They contended that there was a multiplicity of charges since counts II and III referred to the same offence. I have read through the charge sheet herein and find that there is no duplicity therein. The charge and particulars are specific and only refer to two separate offences whose elements are unique in their own way. I find that the trial court did not err in convicting the appellants.
57. On sentence, the 1st, 2nd, and 3rd appellants were each sentenced to serve a term of one (1) year imprisonment for counts I, III and IV and a term of two (2) years imprisonment in count II. The sentences in counts III and IV were to run concurrently. In counts V, VI, VII, and X, the 4th, 5th, 6th, and 7th appellants respectively were each sentenced to pay a fine of Kshs. 200,000 in default to serve one-year imprisonment. In count IX, the 6th and 8th appellants additionally were sentenced to pay a fine of Kshs. 200,000 in default serve one-year imprisonment.
58. The 1st, 2nd, and 3rd appellants were sentenced to serve a cumulative sentence of two years on 12th July 2022. Since their incarceration, they have already served a period of one year and two months. Considering the nature of the offences committed, the subject matter and the mitigating factors, I set aside the custodial sentence of two (2) years imposed against the 1st, 2nd and 3rd appellants substituting it with an order that the 1st, 2nd, and 3rd appellants have a served sufficient sentence. I order that they be and are hereby forthwith set free unless otherwise lawfully held.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER 2023

.....

D. KAVEDZA

JUDGE

In the presence of:

