



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 100 OF 2019**

**ALEX KIPTOO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence delivered on 3<sup>rd</sup> June, 2019 in Criminal Case No.207 of 2019 in Iten Law Courts Before Hon H.M.Nyaberi – Senior Principal Magistrate)*

**CORAM: Hon. Justice S.Githinji**

**Mr Kogali for the state**

**Mr Chemwok for the Appellant**

**J U D G M E N T**

**EMMANUEL KIPROP KEMBOI and ALEX KIPTOO** were charged in the lower court with two counts; the first one is of conspiracy to defraud, contrary to section 317 of the Penal Code.

The particulars of this offence being that on the 28<sup>th</sup> day of January, 2019 at about 12.30Hrs at Iten Township in Keiyo North Sub-County within Elgeyo Marakwet County, accused persons jointly conspired with intent to defraud by making land sale agreement falsely pretending that they were then carrying on a genuine business, by selling parcel of land No.Irong/Iten 777 to Joan Jeptoo, which belongs to another person namely Francis Kipkoech Cheptoo.

The second count is of obtaining money by false pretence, contrary to section 313 of the penal code.

The particulars of this offence are that on the 28<sup>th</sup> day of January, 2019 at about 12.30Hours at Iten Township in Keiyo North Sub-County within Elgeyo Marakwet County the accused persons jointly with intent to defraud obtained from Joan Jeptoo the sum of Kshs.160,000/- (One hundred and Sixty Thousands) by falsely pretending that they were going to sell to her a piece of land measuring 0.2acres, parcel No.Irong/Iten/777.

From the original lower court proceedings, it's vivid that the charges were stated to the accused persons in Swahili, a language of which they well understands. On each Count, each responded that, **"it is true"**. The Court entered a plea of guilty for each.

The prosecutor read the facts as follows; -

On 28<sup>th</sup> January, 2019 at about 12.30Pm at Iten Township in Elgeyo Marakwet County, the complainant Joan Jeptoo made a call to his brother namely Matthew Kiprotich to look for her a piece of land for sale. After 2 days, she received a call from her brother Mathew Kiprotich, informing her that he had met a brother namely Alex Kiptoo Kandie and that he had a person who had a land for sale at Sergoit Trading Centre and she should arrange to see the piece of land. On the same day, the complainant made arrangement to see the piece of land. On the same day, the complainant made arrangement with her brother Matthew to see the land together with Alex Kiptoo Kandie. They met at Iten and the 2<sup>nd</sup> accused, Alex Kiptoo took them to the home of Emmanuel Kiprok Kemboi, the 1<sup>st</sup> accused, by his motor vehicle. The 1<sup>st</sup> accused showed them a piece of land measuring 0.2acres. When the complainant saw the land, she was pleased and opted to buy it. They all went to Iten town and proceeded to the office of the 2<sup>nd</sup> accused but before reaching the office, the complainant went to pick the money. After picking the money, she picked her sister Eunice Kipyego to witness the transaction. At the 2<sup>nd</sup> accused's office, he made an agreement and the purchase price was agreed at Kshs.170,000/=. On the same day of the sale agreement, the complainant paid Kshs.140,000/- and an agreement was drawn by the 2<sup>nd</sup> accused and was witnessed by Eunice Kipyego and Mathew Kiplimo on behalf of the buyer. On the part of the seller, it was witnessed by Alex Kiptoo the 2<sup>nd</sup> accused person and Edwin Kipkemboi. The sale agreement had a stamp of Talel Gaa

Investment Limited. I wish to produce the sale agreement dated 28<sup>th</sup> January, 2019 as Pexhibit 1 – produced. On 4<sup>th</sup> February, 2019, another sale agreement was entered clearing the balance of KShs.40,000/- which I produce as P-exhibit 2. Both sale agreements were entered between the complainant and the 1<sup>st</sup> accused.

In March 2019, the complainant visited the piece of land with a view to fence off the land. The 1<sup>st</sup> accused denied her access stating he had not sold the land. She reported to the chief and later to Iten Police Station. Investigations were commenced and it was established that the parcel of land Irong/Iten/777 was registered in the name of Francis Kipkoech Cheptoo and Title Deed had been issued on 14<sup>th</sup> November, 2005. I wish to produce a certificate of search as Pexhibit 3. Upon interrogations of the 1<sup>st</sup> and 2<sup>nd</sup> accused, they claimed that there was a typographical error on the sale agreement and the plot they were selling is Irong/Sergoit/777. The investigating officer did a search on the alleged plot and he established that there were no records for the plot they were allegedly selling. I wish to produce the 2<sup>nd</sup> Certificate of search as P Exhibit 4.

Upon conclusion of investigations, the accused were charged with the two counts before Court. Up to date, the complainant has not been refunded her money. The two accused have been charged jointly in Count 1 because they conspired in selling non-existent land to the complainant. In Count II, they have been charged jointly as they may have shared the money.

When the accused were called upon to plead to the said facts they each stated; -

***“All facts are correct”.***

The Court then convicted each on his own plea of guilty. They mitigated and were sentenced to serve two years in prison.

Alex Kiptoo, the appellant herein, dissatisfied with the said conviction and sentence preferred an appeal to this Court on the grounds that;-

- 1. The Court used English language of which the appellant did not understand.**
- 2. The appellant did not understand consequences of a consolidated charge.**
- 3. Appellant was not asked the language he understands.**
- 4. Language was not indicated by the Court.**
- 5. Appellant was not warned of consequences of the plea of guilty.**
- 6. Appellant was coerced and misled by the investigating officer to plead guilty to a charge he did not understand.**
- 7. The appellant only drafted the agreement at a fee of 10,000/= and was not a party to the alleged fraud.**
- 8. The title and farm exists, unlike what the Court held.**

Having gone through the proceedings and the submissions, I do find that the only issue for determination is whether the plea of guilty by the appellant was unequivocal.

The proceedings of the lower court show the language of the Court was Swahili. The participation by the appellant in the plea taking process, as is captured in the proceedings, shows that he well understands Swahili language. The read facts disclosed the offences the appellant was facing. He voluntarily pleaded guilty to the offences. The guidelines of plea taking as was stated in the case of ***Adan-vs-Republic [1973] EA 445*** were properly adhered to. The only minor errors noted are that the conviction was not clearly stated to be on both counts and the sentence of 2 years imprisonment though on each count was not indicated whether to run concurrently or consecutively. The said defects are curable. The only thing this Court can do is to make it vivid that sentences are to run concurrently, otherwise the appeal is unmerited and is dismissed.

**JUDGEMENT/RULING FOR ELDORET DELIVERED VIRTUALLY AT MALINDI ON THIS 14TH DAY OF OCTOBER, 2021.**

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**S. M. GITHINJI**

**JUDGE**

**In the presence of:**

1. Mr Chemmok for the Appellant
2. Appellant himself and Ms. Limo for the State