



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT MACHAKOS**

**HCCCA NO. 102 OF 2013**

**DAVID MWANZA KYULE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence in Machakos CM's Court Cr. Case No. 236 of 2010 delivered on the 16<sup>th</sup> day of May, 2013 by P. N. Gesora [SRM]**

### **JUDGMENT**

#### **Introduction**

1. The appellant was convicted of two counts of obtaining by false pretences contrary to section 313 of the Penal Code with Particulars thereof set out in the Charge Sheet as follows:

***“Count I – Obtaining money by false pretence contrary to section 313 of the Penal Code.***

***Particulars: David Mwanzia Kyule Alias Kasanga on diverse dates between 8<sup>th</sup> of April, 2009 and 29<sup>th</sup> March, 2010 at Sabaki Estate of Athi River District within Eastern Province with intent to defraud obtaining Ksh.700,000/= from Moses Kiplagat Toroitich in pretence that you were in position to sell him a plot in Sabaki area a fact you knew to be false.***

***Count II- Obtaining money by false pretence contrary to section 313 of the Penal Code.***

***Particulars: David Mwanzia Kyule Alia Kasanga on diverse dates between 8<sup>th</sup> of April, 2009 and 29<sup>th</sup> March, 2010 at Sabaki Estate of Athi River District within Eastern Province with intent to defraud obtained Ksh.700,000/= (seven hundred thousand) from James Koech Kipkenda in pretence that you were in position to sell him a plot in Sabaki area a fact you knew to be false.”***

2. The trial court imposed a sentence of a fine of Ksh.200,000/= and imprisonment for 12 months on each count.

#### **The Appeal**

3. The appellant appealed against conviction and sentence on the following grounds of appeal:

1. That the learned Magistrate erred in law and in fact when he convicted the accused person on counts that were not proved beyond reasonable doubt.
2. That the learned trial magistrate erred in law and in fact when he failed to appreciate that the dispute involved in the proceedings was a civil dispute which had not been resolved.
3. That the learned magistrate erred in law and in fact when he failed to decide whether the accused person received the entire sum of Ksh.1,400,000/= as particularised in the two counts.
4. That the learned magistrate erred in law and in fact when against the weight of evidence adduced, failed to appreciate that the matter could only be determined in a civil court not in criminal proceedings.
5. That the learned magistrate erred in law and in fact when he failed to consider the authorities availed by the defence.

6. That the learned magistrate erred in law and in fact when against the weight of the evidence adduced, found the accused person not willing to refund the purchase price.

7. That the learned magistrate erred in law and in fact when he held that the sentence imposed should run consecutively.

#### Submissions by the appellant

4. The appellant's counsel M/S Mulwa, Isika & Mutia Advocates filed written submissions and urged as follows:

It is our submission that the offence of obtaining does not relate to future events. The appellant relied on *Edgington v. Fitzmaurice* where **Bowen, L. J** stated "*there must be a misstatement of an existing fact*".

The fact of the future act unfortunately does not also constitute an element of representation defining "false pretence" under section 312 of the Penal Code; held in the case of *Oware v. Republic* [1989] KLR 287 where the court held that "*a representation as to future event cannot support a charge of obtaining money by false pretence*". The court cited the case of *R v. Dent* [1975] 2 ALL ER, 806 p. 807 where it was held that:

*"A statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law"*

Similar observation by Gikonyo, J. citing *R v. Dent* in the case of *Joseph Wanyonyi Wafukho v. Republic* [2004] eKLR that the fact of obtaining by false pretence does not relate to future events.

#### **Whether the appellant took the complainant's money.**

It is important to note that the appellant had been frank and honest with the complainants about the circumstances surrounding the sale of the said plots. The appellant had revealed the fact that the land in question had been sold to him by a third party Jayant Kumar Dave, in whose names the land was still registered. He had copies of the sale agreement which the complainant and their advocates perused. The appellant had no intention to defraud the complainant.

There is no evidence that shows that the land parcel had not been sold to the accused person as he indeed indicated. The title holder for land reference number 20604/237 and 20604/238 Jayant Kumar Dave as appears in the title deed was not called as witness to how he had not sold the said plots to the appellant.

The complainants to come together and took account with the appellant made it impossible for the transaction to be completed by the attempt to use the CID officers at Athi River to force the Appellant to facilitate transfer.

There was nothing false or untrue about the sale agreement for the sale of the land or the land itself. It cannot be stated that the appellant made a false representation of the fact about the land.

#### Whether the matter before hand was civil or criminal

We submit that the complaints by PW1, PW2 and PW3 flow from an agreement that the parties breached. The Law Societies' Condition of Sale (1989) Edition, clause 4, make it clear that where a completion date is incorporated into a contract of sale, then a completion notice ought to be issued. The complainants did not issue any completion notice to the appellant; hence there was to breach of the said agreement.

The high court in *John Oduor Ojera v. Republic* [2009] eKLR page 119 rendered itself that interpretation of agreements should be left to civil court and not criminal court. The same position obtains in the case of *Koi Anthony Kahindi v. Republic* [2005] eKLR, this matter clearly falls under the civil court to determine whether the sale agreement was breached or not.

In *Joseph Wanyonyi Wafukho v. Republic* [2014] eKLR the court held that;

*"...that criminal process is never a substitute to criminal remedy or to be used to settle a civil claim or to avail a party in a commercial transaction undue or collateral advantage over the other. That kind of practice is fraudulent, demented and an abuse of the court process; should always be avoided by the parties, resisted and forcefully suppressed by courts of law whenever it manifests itself before court."*

#### On sentence

Sentence must be commensurate/in proportion to the moral blameworthiness of the offender, as held in *Omuse v. Republic* [2009] KLR, 214. The appellant was sentenced to 12 months imprisonment for each count and payment fine of Ksh.200,000/= on each count. Hefty fines were imposed the court should substitute them with lesser ones as was held by G. W. Ngenye J., in *Francis Mwangi & Anor v. Republic* [2015] eKLR.

#### Whether the judgment conformed to section 169 of the Criminal Procedure Code

The trial magistrate clearly disregarded submissions by the defence which pointed out in no terms that the matter in issue was civil in nature. The judgment fell short of compliance with section 169 of the CPC, it did not inter alia, contain the points of determination; evaluation of the defence; the decision arrived at; and reasons for that decision.

We submit that the charge of obtaining money by false pretence was not proved at all.

### **Respondent's Submission**

5. In response to the Appellant's submissions, Mrs. Tabitha Saoli, Prosecution Counsel filed written submissions and urged principally as follows:

It is our submission that the prosecution discharged their duty by calling five witnesses who were able to prove the prosecution's case beyond reasonable doubt.

The charge as framed was proper as required by the law and all the elements were proven.

PW1 states the complainant, stated that he entered into an agreement with the appellant to purchase a plot at Sabaki area. He paid all the dues to the appellant but unfortunately the appellant did not meet his end of the bargain thus the charge. PW2 the complainant in count 2 stated that he too entered into an agreement with the appellant and after paying the money needed for the purchase of the plot the appellant disappeared. PW1 and PW2 jointly entered into another agreement to buy a plot together from the appellant but the transfer never took the place. Exhibits were produced in court to prove that the complainants sent money to the appellant in respect of the plots. It was thus proven that the Appellant fraudulently obtained money from the complainants.

The matter as much as its concurrent to a civil matter section 193 A of CPC gives room for criminal matter to be concluded regardless of the proceedings in civil.

### **Prosecution's Case**

6. The Prosecution's evidence before the court was as follows:

1. **PW1** Moses Kiplagat Toroitich

*"I come from Elgeyo Marakwet, I am employed by Kenya Duty Free Ltd. as sales person. At the beginning of April, 2009 I was looking for a plot at Sabaki. I got an unoccupied plot which was being sold by David Mwanza the accused. I was linked to the accused by an agent called Lazarus a Kisii man. I inspected the plot and called the accused; we agreed to meet at National Petrol Station along Outering Road Embakasi. I agreed to buy the plot at Ksh.450,000/= No. 20604/239 at Sabaki area. I was shown the certificate by the accused.*

*I was buying two plots, other was 20604/23; I have its share certificate copy (MFI 1). I called my lawyer John Walubengo to conduct a search. There was sale agreement between the accused and Jayat Kumar Dave who was still the registered; the certificate was still on the latter's name.*

*I saw the sale agreement; the accused promised to give me a copy but the next day he told me that he has replaced it. I paid accused Ksh.150,000/= before my lawyer on 8/9 2009. I have the sale agreement (MFI-2). We agreed I pay Ksh.250,000/= first instalment and balance to be distributed 31/8/2009 was to be the completion date.*

*We deposited the Ksh.250,000 in the account of the accused. Ksh.150,000/= was paid at Buruburu Barclays Bank Branch account No 070-2551854 Kasanga Agencies which the Ksh.100,000/= was paid to the same account K.K.I.A branch on the same date 8/9/2009. We agreed that the accused would sign the agreement after getting Ksh.250,000/=, he did that.*

*I paid the balance. On 21/5/2009 I paid the same account Ksh.100,000/=. I also paid Ksh.50,000/= on 17/8/2009 at Barclays J.K.I.A branch; this was plot 237. accused had plot adjacent to 20604/239 which he agreed to sell to me at Ksh.500,000. I bought it jointly with James Kipkoech Kipkenda; he had bought plot No. 238 from the accused. We agreed to pay Ksh.250,000/= each and share the plot. I paid my share as follows:*

- On 4/11/2009 – Ksh.50,000/= plot registered in the names of Travedi Anjani Kumar. There was a sale agreement on sale between him and the accused. (slip – MFI 9)*
- On 8/11/2009 – Ksh.50,000/= (slip prestige Centre – MF1 10)*
- On 15/11/2009 – Ksh.100,000/= Equity Account 0650192421516, Eldoret account of the accused.*
- On 8/2/2010 – Ksh.50,000/= to Kasanga Agencies Account at J.K.I.A Barclays (MFI - 12)*
- Paid Ksh.70,000/= to the accused for the two plots.*

*On 8/4/2009 we agreed the accused was to transfer the plot to me on completion of payment. He did not claiming I had not paid all*

instalments. His lawyer wrote a letter dated 29/9/2009 to challenge the sale price, that it was supposed to be Ksh.500,000/= (MF1-13).

J.M. Okachi Advocate wrote letter referring plot 237 claiming we had tempered with beacons and fenced plot contrary to the agreement; also that we had used abusive language to the accused. When I met the accused he told me to ignore the letter, that it was the advocate who wrote the letter under instruction of the agent and not himself.

Accused failed to keep appointments.

I reported them matter at Athi River Police Station. The police investigated the matter and he was arrested.”

#### **Cross-examined by Mutia**

“On 8/4/2009 we entered an agreement with the accused. Agreement acknowledged payment of Ksh.250,000/=. There are deposit slips of 8/4/2009 confirming the payment clause No. 3 of the agreement. I have nothing from the accused acknowledging the receipts. The original slips are with me, I gave accused the copies. The title of the land was not in his names. The accused said he could transfer the title to me that notwithstanding the first plot was registered in the name of David Kumar according to the search. Clause 5 says the seller had given vacant possession when we signed the agreement.

Later accused agreed to sell me plot No. 20604/239, I have an undertaking from him. Accused declined to sign the sale agreement which we had written. We did not proceed to make payments, in his account taking advantage of the knowing it was without a sale agreement. I attempted to fence the plot but was repulsed by the agent. When I was repulsed I assaulted Lazarus.

I have the original receipts of the payments for the second plot. I went with the surveyor to the ground and was shown the beacons; I did not fence the plot.

#### **Re-examination**

“I have the sale agreement for the second pot. I fence the plot I did not assault Lazarus as alleged. He told me to stop developing the plot.”

#### **2. PW2 James Koech Kipkenda**

“I come from Keiyo District and work for Kenya Airways Company as Revenue Manager. On April, 2009 I was interested in buying a plot; I had identified Sabaki Area, accused got one plot for me, David Mwanzia Kyule was selling. I met him on 8/4/2009 we agreed to draft the sale agreement for plot No. 20604/238 (MFI – 14) at Ksh.450,000/=. I was to pay a down payment for Ksh.250,000/= before signing of agreement. I paid the money at Jomo Kenyatta Bank 0702551854 at Kasanga Agencies.

The balance of Ksh.200,000/= was to be paid by 31/8/2009. I paid it in instalments:

- On 5/6/2009 - I paid Ksh.40,000/= (MFI- 16)
- On 17/7/2009 - I paid Ksh,90,000/= (MFI- 16)
- On 26/8/2009 I deposited Ksh.50,000/= (MFI- 19)

We conducted search and confirmed what accused stated that he had bought the plot from Jayamt Kumar Dave. Lands Officer confirmed Dave was the registered owner of the plot (MFI- 20). He agreed to sell plot no 239 which I bought jointly with Moses Kiplagat who had bought 237. We agreed to raise Ksh.250,000/= each, (agreement –MFI-21). We paid Ksh.100,000/= jointly.

On 7/11/2009 I raise Ksh.50,000/= vide deposit slip MFI-22. We agreed 31/3/2010 was the clearance date.

On 8/12/2009 I paid Ksh.50,000/=in the same account, Slip MFI1-24

On 25/2/2010 I deposited Ksh.30,000/= slip MFI-25

On 29/3/2010 I deposited final Ksh.30,000/- slip MFI-26

Totalling to Ksh.250,000/=

Our advocate was to make a formal agreement the accused was to sign it but he become evasive (agreement MFI-27), undated as it was never signed. I reported accused to Athi River Police Station, and recorded statements. I fenced the plot, the agent of accused Lazarus stopped me.”

#### **Cross-examination by Mutia**

*“Clause 3 of the (MFI-14 Sale Agreement dated 8<sup>th</sup> April, 2009) acknowledges accused received Ksh.250,000/=. Clause 5 confirms accused had given vacant possession. The further payments in the bank were not acknowledged by the accused, we never wrote to him telling him we had deposited the money. I have the original receipts; I informed Alfred through cell phone when I made the deposits, he told me he got the money.*

*On 17/7/2009 I paid vide slip MFI-17, payment slip 5/6/2009, 28/8/2009, are unsigned. MFI-19 of 31/8/2009 was paid by Viola Ruto on my behalf and signed.*

*We did not have a formal agreement for the second plot signed by the accused; the accused evaded the signing and my advocate wrote him about the same. In early April, 2010 we sat with accused and took accounts of the payments as he was disputing whether I had made full payments.*

*I did a search of the land, and the title of the plot was not in the name of the accused. He had to effect the transfer to himself before he transferred to me. I was to pay the transfer fees for consent, registration and stamp duty. To date the monies have not been paid. The agreement applies the Law Society Conditions of Sale 1989. I reported case to the Police Station on 21/8/2010, 31/3/2010 was the completion date of the 2<sup>nd</sup> plot.”*

### **Re-examination**

*“I did write to the accused about the deposits. The unsigned slips are in consequential as the stamp of the bank confirms the deposit. I satisfied the accused that I had made full payment.*

### **3. PW3 Viola Cheronno Ruto**

*“I come from Marakwet District. I work with National Security Intelligence Service based at Jomo Kenyatta International Airport. Before 8/4/2009 my husband Morris Kiplagat and I decided to buy a plot at Sabaki. Lazarus Ogolla showed us a plot he was selling on behalf of David Mwanzia the accused. We called him and we agreed to meet at National Petrol Station Embakasi. He gave us a copy of certificate of title of the plot (MFI-1)*

*We conducted a search at Ministry of Lands. We then drew an agreement for the sale of the plot MFI-2 the agreed price was Ksh.450,000/=, the agreement said if we paid Ksh.200,000 accused would sign the agreement. We paid him on 8/4/2009 slip MFI-3. We also paid Ksh.100,000/= slip MFI-3. We also paid Ksh.100,000/= Slip MFI-4. Accused signed the agreement. We agreed to pay balance before August.*

*On 16/8/2009 we fully paid the balance*

*On 2/5/2009 we paid Ksh.100,000/= to accused MFI-5.*

*On 8/7/2009 we paid Ksh.50,000/= MFI-6*

*On 16/8/2009 we paid Ksh.50,000/= completing payment MFI-7*

*We added plot No. 20604/239 from the accused incorporating James K. Kipkenda. The agreed price was Ksh. 500,000/=. Our advocate wrote an agreement but the accused refused to sign. My husband paid Ksh. 150,000/= on 4/11/2009 MFI-9. Paid Ksh.50,000/= on 8/12/1009 MFI-10. Paid Ksh.100,000/= to account of the accused on 15/1/2010 MFI-11. Paid Ksh. 50,000/= on 8/2/2010 MFI-12*

*Accused did not transfer the plot to us, our lawyer, Walubengo wrote him severally. He failed to acknowledge the payment. We reported him to Athi River Police Station. We came to know the accused during the transactions.”*

### **Cross-examination by Mutia**

*“The first plot the accused availed a certificate in the name of Jayant Kumar Dave. There was a sale agreement between him and Kumar Dave there was no transfer. We paid deposit of Ksh.250,000/= then, there is a bank slip signed. We saw the plot before recording the agreement, it stated accused had given*

*We agreed to purchase a second plot, the accused wrote a handwritten agreement stating price was to be agreed upon. We drafted a new agreement, the accused did not sign. There is no agreement signed on the second plot which accused signed setting price at Ksh.500,000/= deposited in the account of the accused. The price for the second plot was agreed upon verbally. After paying for the plot the advocate issued a completion notice.*

*I was not present when the accused got arrested; my husband took the police to him. He was arrested twice.”*

### **Re-examination**

*“He refused to sign the agreement which our advocate drafted.”*

#### 4. PW4 John Walubengo Waningilo

*"I come from Nairobi and I am an advocate practising in Nairobi. I did act as the advocate of the parties in the case; Moses Toroitich Cheronu, Viola Cheronu and David Kyule. The first two were purchasing one plot as a couple. James Kipkenda and David Kyule purchasing another plot at Syokimau area. I reduced the agreement into writing, terms were negotiated between the parties. The parcels of land being sold were not in the names of seller David Kyule. Kyule had said he bought the parcel from a registered owner that upon completion of payment he would transfer the parcel to the buyers directly. I prepared transfer papers in the names of the registered owners which Kyule was to give to the owners; Kyule became unavailable and said the registered owner was out of the country. October 2009 my clients told me accused was selling them another plot, I noted it was not registered to his name. It was agreed he would facilitate the transfer after payment of agreed price. He made me write to Barclays bank claiming they were holding one of the titles for safe keeping. I heard last from him when I handed him a letter to take to the Bank to facilitate the transfer. **Advocate of the accused wrote to me that the accused was terminating the transaction. We replied stating the accused was under contractual obligation.** Accused came and stated the advocate had no instructions from him; it came out the accused was unable to facilitate the transfer, with no capacity and was perpetuating a fraud.*

*I was called to make a statement on 28/3/2011.*

*Letter dated 3/8/2010 addressed to accused (PMFI-28) enclosing bank slips. Letter dated 4/11/2010 addressed to accused's advocate replying to a letter written to DCIO Athi River. A responded letter 15/10/2010 PMFI-30.*

*Agreement dated 8/4/2010 between James K. Kipkenda in respect of plot L.R 20604/238 (PMFI-22)*

*I prepared undated agreement marked MFI-27 between Jayat Kumar Dave and Moses K. Kiplagat and Viola Cheronu Ruto over plot L.R 20604/239. The accused had offered the couple to buy on understanding that he was to take agreement and transfer to the registered owner to execute to evidence the sale but the accused avoided to take agreement from me.*

*One time he told me he was admitted at Nairobi Hospital, I took the agreement to him but he had switched his phone.*

*There was another agreement of 8/4/2009 between the accused and Moses Kiplagat and Viola over plot 20604/237 (MFI-14)."*

#### **Cross-examination by Mutia**

*"When I prepared MFI-2 AND MFI-14, I was acting for the purchasers and witnessed the sale for both parties. The search was not available when I prepared the agreement. I was shown a copy of the title. It was not in the names of the accused. MFI-2 of Moses Kiplagat and Viola paragraph one states that vendor is the registered lessee. Paragraph 7 states that completion date was 31/8/2009 meaning accused should have been paid and given us transfer date. Clause 8 states there was no extension. The agreement was subject to Law Society's Conditions of Sale. After 31/8/2009 I did not issue a completion notice to the Law Society's Condition of Sale.*

*On 3/8/2009 I wrote to the accused; he was disputing figures of the accused."*

#### **Re-examination**

*"Accused said that he did not know there was money paid in his account."*

#### 5. PW5 NO. 64269 CPC Daniel Njuki

*"I am attached to CID Office Athi River. On October, 2010 I had reported to Athi River from Machakos. Accused had taken money Ksh. 1.4 million purporting to be selling 3 plots at Sabaki. Moses and his wife and Kiplagat were the complainants. I got the documents (deposit slips, sales agreement, letter from Walubengo Advocates letters from Mbaluka, letter from Magara Advocates and certificate of title) regarding the land from the complainants. We have two copies of title deeds of plots No. 237 and 238. When I got the documents I called accused to my office. I was able to get a statement from the bank which indicates that a deposit of Ksh,100,000/= was made on 15/1/2010 (MFI-31). A statement from Barclays Bank indicating that on 18/1/2010 Ksh.50,000/= was deposited into Kasanga and Agencies Account. On 28/2/2010 a further Ksh.50,000/= was deposited. On 25/2/2010 Ksh. 30,000/= was deposited in the account, on the same date further deposit of Ksh. 30,000/= was made (MFI-32).*

*I obtained the account opening documents (MFI-33) that confirmed the accused was operating the account.*

*I charged the accused with the offence herein. There was an offer to settle the matter out of court but it did not go through."*

#### **Cross-examination by Mr Mutia**

*"I arrested the accused on two occasions in regard to the matter on 19/10/2010 alongside Sgt Kahumboho. He initially was arrested by Police officers from Buruburu Police Station and brought to us. I and my colleague went to Donholm Police Post and got officers to assist arrest the accused where he resides; we were unable to because of interference for some civil matter. We agreed verbally he attends court but would pass by at the police station that is why we did not produce the police file in court.*

I charged accused with obtaining Ksh.1.4 million. Accused acknowledged of having received Ksh.250,000/= as deposit. There are two agreements for the complainants herein as they have clause for receipts of deposit. Other amounts were deposited in accused's account.

Complainants brought me the original bank slips totalling to 1.4 million and did not see any acknowledgments from accused about the deposits. James Kipkenda's name does not appear neither does Moses Kiplagat's name, same applies to the statement from Barclays Bank. The agreement was executed on 8/4/2009 and the completion date was 31/8/2009. There was a change in the agreement from the sale of the third plot which changed the completion date, there was no written document. The plots were not there and they were never issued to them, accused presented himself as the owner of the plot.

It was not specified how the other amounts were deposited. There was a complaint from the accused advocate that the complainants were harassing him. Letter dated 8/11/2010 this was after he came to know the police wanted to arrest him."

#### **Re-examination done by prosecutor**

"Accused received money from the complainants deposited into his account. Payments were for three plots in Sabaki which were never issued to them or money refunded to them."

#### **DEFENCE CASE**

#### **7. When put on his defence, he appellant gave sworn evidence as follows:**

**DW1** David M. Kyule

"I am a business man in Nairobi T/A Kasanga Agencies, I do investigation, real estate and debt collect. One complainant herein was one time buying a piece of land in Sabaki area he come to me at outer ring road jam rescue; I cannot recall the date, I gave him a copy of the title did to go conduct a search for plot number 20604/237. I was a third party in the transaction. Later we met at National Petrol Station, they were interested, we agreed on Ksh.450,000/=. I advised them to engage an advocate who would draft an agreement, I would then sign. Two weeks later they called to Jam Rescue Car wash, their lawyer, Walubengo brought for my particular and I was clear that I was the third party. An agreement was drawn between me and Kiplagat and his wife, I signed together with Kiplagat Viola did not sign. They paid Ksh.250,000/= the completion date was 31/8/2009. As at that date I had not been paid my balance neither any communication from the complainants.

PW1 indicated that he deposited money in my account, we had agreed they issue me with the original deposit slip and they take a copy, I saw them in court.

James Kipkoech Kipkenda whom I met through PW1 wanted to jointly buy plot No 20604/237 and 20604/238. We extended the agreement on the same price as the other agreement Ksh.450,000/=. they were to pay Ksh.250,000/= but I did not see any report. On completion date they had neither communicated to me they had completed the payment and no evidence was given to me.

I heard about a third plot in court and we never negotiated anything. I was arrested and taken to Donholm Police Station where I stayed till evening, I was released at 9.30 pm.

A week later I was arrested and kept in the cell till evening, I was later transferred to Athi River Police Station where I stayed till Sunday, I was forced to sign some papers but I declined. I called CPI Njue for bond, I was taken to DCIO who demanded I pay Ksh.50,000/= cash bail. I called my lawyer on Monday but they declined to give me bond or take me to court. At 10.00 am CPI Njue came and asked what amount I had paid, I had Ksh.30,000/= he insisted on Ksh.50,000/= I had to give him my ATM and pin to go and withdraw the money.

Following day I was called to meet the DCIO and complainants, they threatened me to find them their bond or else I would not be released. I demanded to be taken to court, they agreed on Ksh.10,000/-= bond then I appeared in court. The complainants have not paid me Ksh. 1.4 million as alleged. PEX 31 is my bank statement and it does not show the name of the depositor. PEX 32 is my Company's Bank statement and it does not show the names of the depositors.

The land I was selling is there, and they confirmed the same. I was ready to transfer the plots and I had paid the rates as I have the lengths (DEX-1 bundle of receipts for rates clearance cost)"

#### **Cross-examined by prosecutor**

"It is a busy account and I come to see the statements in court. To now I cannot tell whether the money is in the account."

#### **Cross-examined by Mr. Mutia**

"The police were involved in the transaction. The complainant wanted me to comply."

#### **Judgment of the trial court**

8. The substance of the Judgment dated 16<sup>th</sup> May, 2013 delivered by P. N. Gesora (SRM) is as follows:

*“I have carefully considered the evidence, the exhibits produced and the submissions filed herein. There is no doubt in my mind that accused herein did enter into an agreement with the complainants for the sale of land in Sabaki area of Athi River. On the first transaction accused received Ksh.250,000/= from PW1 and the balance was to be paid later. This in essence set the ball rolling in terms of crystallizing the transaction and the accused too has certain obligations to carry out. This is because the land was registered in the names of Jayant Dave Kumar and he had to sort out that issue so as to have good title that he would pass on to the complainants.*

*As regards completion of payment of the purchase price by the complainants although accused stated that the complainants never furnished him with the original deposit slips, nothing would have been easier than checking with his banking balances or even call a meeting through his advocate to reconcile the accounts. It is surprising that as he was not aware of any payments having been made. The conduct of accused herein goes to show that he was not willing to settle this matter and that is where the criminal intent crept in. If he was genuine in his transaction he would have called off the matter if he felt that the complainant were not honouring [their] part of the bargain. Why hold on to the initial deposit of Ksh.250,000/= for each complainant without finalizing the agreement. The authenticity of the bank slips is an issue and that they honoured their part of the contract. Accused cannot escape culpability and I hold that he pretends that he could sell the plot, a fact he knew false.”*

#### **Issue for determination**

9. The only question for determination in this appeal is whether the prosecution has proved that the appellant knew it to be false the representation, in his agreements for the sale of the suit properties, that he could sell the plots subject of the sale agreements with the complainants or whether it was a genuine case of civil liability for breach of contract.

10. There was no dispute that the appellant had received deposit of purchase money from the complainants. The only question is whether the receipt was fraudulent with the knowledge that he had no title to pass in the property subject of the sale agreements.

11. The law is clear that the possibility or pendency of a civil suit is no bar to criminal prosecution, by virtue of section 193A of the Criminal Procedure Code which provides as follows:

#### **“193A. Concurrent criminal and civil proceedings**

*Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.*

*[Act No. 5 of 2003, s. 79.]”*

12. What matters, therefore, is the proof of the ingredients of the criminal offence, in this case of obtaining by false pretence contrary to section 313 of the Penal Code.

#### **Determination**

13. Section 313 of the Penal Code provides for the offence of obtaining money by false pretences as follows:

#### **“313. Obtaining by false pretences**

*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.*

*[Act No. 3 of 1969, s. 4, Act No. 22 of 1987, Sch., Act No. 11 of 1993, Sch., Act No. 5 of 2003, s. 56.]”*

14. Section 312 of the Penal Code defines **false pretence** as follows:

#### **“312. Definition of false pretence**

*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.”*

15. The representation by the appellant in this case is best captured in the testimony of the advocate PW4 as follows:

***“The parcels of land being sold were not in the names of seller David Kyule. Kyule had said he bought the parcel from a registered owner that upon completion of payment he would transfer the parcel to the buyers directly. I prepared transfer papers in the names of the registered owners which Kyule was to give to the owners; Kyule became unavailable and said the registered owner was out of the country. October 2009 my clients told me accused was selling them another plot, I noted it was not***

**registered to his name. It was agreed he would facilitate the transfer after payment of agreed price. He made me write to Barclays bank claiming they were holding one of the titles for safe keeping. I heard last from him when I handed him a letter to take to the Bank to facilitate the transfer. Advocate of the accused wrote to me that the accused was terminating the transaction. We replied stating the accused was under contractual obligation. Accused came and stated the advocate had no instructions from him; it came out the accused was unable to facilitate the transfer, with no capacity and was perpetuating a fraud.**”

16. I respectfully agree that for the offence of obtaining by false pretences to be established, the false representation must relate to an existing and not a future event. See **Oware v. R** (1989) KLR 287. At the time of the sale agreement between the complainants and the appellant, the parcels of land were to the knowledge of the complainants registered in the names of third parties, and in respect of the sale to the first complainant, the appellant had shown him a certificate of title in the name of the registered proprietor and an agreement of sale between the appellant and the said registered proprietor. All it would have required as testified to by their common lawyer (PW4) was for the appellant to secure from the registered proprietor a transfer directly into the names of the complainant purchaser. Although the promise to transfer the suit property was a future event upon the completion of the agreement for sale between the parties, I would find that in entering into the agreements for sale, the appellant represented that he was in a position to get the registered proprietors to transfer to the complainant directly the title to the suit parcels of land. It was upon this representation that the complainants acted to pay the deposit and subsequent instalments on the purchase price. This was a representation of an existing fact, and the question is whether the said representation was false.

17. The falsity of the representation could only have been established by proof that the agreements for sale of the parcels of land by the registered proprietor to the appellant were invalid for being forgeries or otherwise, or by calling the said registered owners of the suit property to dispute any arrangements for the sale of the parcels of land to the appellant or his authority to sell the property. The said registered proprietors were not called as witnesses and no evidence of invalidity of the agreements for sale to the appellant by the registered proprietor was led.

18. As regards the question whether the complainants had paid to the appellants, in addition to the evidence of deposit of the money into the appellant’s bank accounts, proof of withdrawal or other use by the appellant by production of bank statements should have been provided by the Prosecution.

19. In absence of crucial evidence of the registered proprietors disowning any agreements with the appellant and therefore his right to deal with the property by sale to other parties, and of the receipt and use of the monies allegedly deposited into his bank accounts, the court must in accordance with authority presume that such evidence would have been adverse to the Prosecution’s case. See **Bukenya & Ors v. Uganda** [1972] E.A. 549.

20. It would appear that the trial court convicted the appellant for his failure to perform his contractual duties under the agreement of sale to the complainant, when it ruled as follows:

**“On the first transaction accused received Ksh.250,000/= from PW1 and the balance was to be paid later. This in essence set the ball rolling in terms of crystallizing the transaction and the accused too has certain obligations to carry out. This is because the land was registered in the names of Jayant Dave Kumar and he had to sort out that issue so as to have good title that he would pass on to the complainants.”**

21. The trial court clearly used the criminal process to punish the appellant for his unwillingness to settle the civil dispute, as follows:

**“The conduct of accused herein goes to show that he was not willing to settle this matter and that is where the criminal intent crept in. If he was genuine in his transaction he would have called off the matter if he felt that the complainants were not honouring [their] part of the bargain.”**

That, with respect is an improper use of the criminal jurisdiction of the court to resolve, or to pressure parties into resolving, civil disagreements.

22. Moreover, the **intent to defraud**, which is an ingredient of the offence of obtaining by false pretences must be proved by more than a mere surmise thereof because the appellant did not “call off the matter if he felt that the complainant’s were not honouring their part of the bargain”. I did not find cogent evidence of intent to defraud, considering that the complainants were allegedly depositing the monies without notifying the appellant. It was the Prosecution’s own witness PW4 who testified that the appellant’s lawyer had written to him to cancel the transaction, as follows:

**“Advocate of the accused wrote to me that the accused was terminating the transaction. We replied stating the accused was under contractual obligation.”**

23. It may have been a genuine transaction for sale of the parcels of land, in which the appellant had beneficial interest as a holder of agreements for sale from the registered proprietor. It may also be that the appellant was defrauding the complainants and there was no valid agreement for sale from the registered proprietor. The benefit of the doubt must be given to the accused appellant.

## **Orders**

24. Accordingly, for the reasons set out above, the court finds that the appellant’s appeal has merit and the convictions on the two counts of obtaining by false pretences contrary to section 313 of the Penal Code are quashed and the sentences set aside.

25. Needless to state, by virtue of section 193A of the Criminal Procedure Code, the outcome of this appeal in no way bars or affects the recovery, under the civil process of the court, of monies paid by the complainants to the appellant under the alleged written agreement of sale

and monies *had and received* by the appellant pursuant to alleged oral agreement for sale between the parties in a civil suit filed in that behalf, as they may have been advised by their Counsel.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF JULY 2018.**

**ODUNGA J.**

**JUDGE**

**Appearances:**

M/S Mulwa, Isika & Mutia Advocates for the Appellant.

Mrs. Tabitha Saoli, Prosecution Counsel for the DPP.