



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 159 OF 2015

DICKSON MURIITHI MURAGE APPELLANT

Versus

REPUBLICRESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 4 OF 2016

FRANCIS MURIUKI GITHIRE APPELLANT

Versus

REPUBLIC RESPONDENT

*(Being an appeals from the original conviction and sentence by Hon. THRIPSISA WANJIKU
CHERERE – CHIEF MAGISTRATE dated 9th April, 2015 in Nanyuki Chief Magistrate’s Court
Criminal Case No. 943 of 2012)*

JUDGMENT

- 1. DICKSON MUREITHI MURAGE (Dickson) and FRANCIS MURIUKI GITHIRE (Francis)** were charged before the Nanyuki Chief Magistrate’s Court with the **offence of obtaining money by false pretences contrary to section 313 of the Penal Code**. The particulars of that offence were to the effect that they together with another person who was acquitted on 23rd August 2012 at Nanyuki town in Laikipia County with the intent to defraud jointly obtained from George Mwangi **Kshs.1,250,000** by falsely pretending that they were in a position to sell to him land reference number **NANYUKI/MARURA/BLOCK 8/419 (NTURUKUMA) (the Property)** a fact they knew was not true.
2. After trial the court convicted them and sentenced them to serve **24 months** in prison. Dickson has appealed against both conviction and sentence whereas Francis has only appealed against the sentence.
3. This court as the first appellant court is required to analyse and re-evaluate the trial court’s evidence and come to its own conclusion on that evidence without overlooking the fact that it neither saw or heard the witnesses testify. See **OKENO VS REPUBLIC (1972) EA 32**.
4. **John Muiruri Mwai PW1** was the chairman of a self-help group called **Muungano**. That group was started in 1998. The objects of that group was to buy land and either subdivide the land amongst its members or resell the whole land. It is in that regard that Francis contacted PW 1 and informed him that

the property was for sale. PW 1 together with the treasurer **George Waiganjo Wahome (PW2)** of that self-help group went to view the land with Francis and two other people. PW 1 and PW 2 liked the land. They did a search at the land office and thereafter went to the office of Kiget and Company Advocates. By then they had been joined by another person who identified himself as **Edwin Otieno Olweny**. Edwin informed them that the land was co-owned by him and his wife. He said his wife's name was Molly Njeri Mutura. Edwin therefore requested PW 1 and PW 2 to advance him out of the purchase price Kshs. 105,000 a commitment fee. He informed PW 1 and 2 that he did not have a bank account and therefore required to be paid that money in cash. The advocate drew an acknowledgement of receipt of Kshs.105,000 which was signed by PW 1 and 2 and Edwin. It is important at this point to state that Edwin was later to be identified as Dickson the first appellant. Edwin after signing the acknowledgement receipt agreed to bring his wife to the advocate's office. On 24th August 2012 Edwin and his purported wife signed the sale agreement at the advocate's office and both of them were taken to a photographer where their passport photographs were taken and affixed by the advocate to the transfer form. On Edwin and his purported wife signing the transfer form PW 1 and 2 paid Kshs. 1,145,500 in cash to them.

5. It was later that the advocate informed PW 1 and 2 that the title document to the land was a forgery.

6. Advocate Kiget in his evidence before the trial court confirmed that the officials of Muungano self-help group approached him and requested for a sale agreement to be prepared by him over the land. In that regard he said he was handed the original title of the land, identity cards and pin certificates of Moreen and Edwin. He confirmed that he drew the acknowledgment note for kshs.105,000 which he confirmed was paid to Edwin. He also confirmed that that payment was made by Muungano officials to Edwin in his presence. He prepared the sale agreement and he confirmed that the balance of the purchase price was paid to Edwin on execution of the transfer. The advocate stated that the first appellant Dickson identified himself to him as Edwin. He also confirmed that the second appellant Francis was present when the transaction was done but he stated that he did not know the role that Francis played.

7. Evidence was submitted by **PW 4** a document examiner who confirmed that the signature and the seal in the title to the land were forgeries.

8. **PW 8** was an officer from Kenya Revenue Authority who stated that the pin certificate presented to advocate Kiget as belonging to Edwin and his purported wife did not according to the KRA records belong to them.

9. **PW 9** was an officer from the National Registration Bureau who confirmed that the identity cards handed to the advocate Kiget by Edwin and his purported wife belonged to other persons other than Edwin and his purported wife. That although the photographs were those of Dickson alias Edwin and his purported wife the other information on the identity card did not belong to them.

10. **PW 5** was a police inspector who conducted an identity parade where PW 1 and 2 pointed out Dickson and in each occasion Dickson signed the parade forms signifying his satisfaction with the process.

11. In his defence Dickson, the first appellant denied receiving the money, denied signing the acknowledgement of Kshs.105,000 and signing the sale agreement. He also denied knowing or being the person referred to as Edwin. Jechoniah Oraro learned counsel for Dickson submitted that the trial court erred to have relied on the oral evidence of PW 1 and 2. In this regard he relied on **Section 97** of the **Evidence Act Cap 80**. That section prohibits the proof of the written contract by oral evidence when a contract is one of disposition of property which has been reduced into writing. That section is in the following terms:-

“When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the

provisions of this Act.”

The learned counsel argued that the trial court erred to have accepted the evidence of PW 1 and 2 and that of Kiget Advocate which he said was to the effect that Dickson presented himself as the owner of the subject land. This he argued in view of the provision of Section 97 Cap 80.

12. Learned Senior Principal Prosecution Counsel Mr. Tanui in opposing Dickson’s appeal stated that there is no law that forbids oral evidence. He further stated that Section 97 of Cap 80 only forbids contradictory evidence which contradicts the written document. He reminded the court that the appellants were charged of purporting to sell land which was not theirs. In that regard he submitted that the evidence was black and white that Dickson represented himself as a person called Denis who was the owner of the land.

13. In my view Dickson’s advocate fell in err in relying on Section 97 Cap 80 in this case. Section 97 as I understand it forbids the reliance of oral evidence to prove the terms of the written agreement and which oral evidence contradicts the written agreement. In this case the complainants were not proving the terms of the agreement of sale by adducing oral evidence. They were by their oral evidence supporting the charge that the appellants faced by showing that the appellants purported to sell land that did not belong to them. The submission by the learned counsel on the relevance of Section 97 is rejected.

14. Learned Counsel Mr. Oraro submitted that elements of **Section 313** of the Penal Code were not proved. That section provides as follows:-

“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 any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

15. In my view the ingredients in that section were fully met by the prosecution. The prosecution by its evidence proved that Dickson falsely pretended to be the owner of the subject land with the intent to defraud Muungano self-help group. Dickson represented himself as Edwin Otieno and as the registered owner of the land. Dickson was identified by PW 1 and 2 at the identification parade as the person who passed as Edwin Otieno and who received the purchase money of the land. He was also identified by Mr. Kiget. That ground of appeal is rejected.

16. The learned counsel Mr. Oraro also argued that the Law of Contract Act **Section 3(3)** required that any suit on contract or disposition of land has to be in writing. That section provides:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) the contract upon which the suit is found –

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it effect the creation of a resulting, implied or constructive trust.”

The action referred in Section 3.3 of the Law of Contract Act clearly refers to civil suits and not criminal action.

17. My quick response is that the Contract Act refers to civil suits. A reference to the definition of suits in Black's Law dictionary confirms this. It is defined as:-

“any proceedings; by a party or parties against another in a court of law.”

18. The case against the appellant was brought by the state and not by the individual. If there is any doubt in the above definition, I shall refer to the oxford reference dictionary of law which defined the suit as:-

“A court claim. The term is commonly used for any court proceedings although originally it denoted a suit in equity as opposed to an action at law.”

19. I have considered all the submissions of Oraro Advocate and the Learned Senior Principal Prosecuting Counsel and I am of the view that the grounds raised by the appellant do not displace the very cogent evidence adduced by the prosecution witnesses. Those witnesses proved the case against the appellant beyond reasonable doubt. There is no basis for interfering with the trial court's conviction of the appellants.

20. The sentence provided under Section 313 of Cap 63 is 3 years. The appellants were sentenced to serve 24 months imprisonment. This in my view was commensurate to the offence that the appellants committed. The self-help group lost Kshs. 1,250,000 to the appellants which they did not recover. Accordingly the appellant's appeal against sentence is dismissed. In regard to Dickson's appeal against conviction for the reason given above the same is dismissed. **The trial courts conviction of both appellant's is confirmed and their sentence is upheld.**

DATED AND DELIVERED THIS 7TH DAY OF FEBRUARY 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

1st Appellant: Dickson Muriithi Murage

2nd Appellant: Francis Muriuki Githire

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE