



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIAMBU**  
**CRIMINAL APPEAL NO. 166 OF 2016**

**JOSEPH WAWERU KARUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Thika Chief Magistrate's Court Criminal Case No. 2923 of 2009 by A. Lorot H.R. S P M on 12/05/16)*

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

1. **Joseph Waweru Karuma**, the Appellant, was charged with the offence of **Obtaining Money by False Pretenses** contrary to **Section 313** of the **Penal Code**. Particulars of the offence were that on the **6<sup>th</sup>** day of **January, 2009** at **Ruiru Township** in **Thika District** of the **Central Province** jointly with others not before court with intent to defraud, obtained cash **Kshs. 750,000/=** from **Jacinta Nyambura Mwangi** by falsely pretending that they were in a position to sell her a quarter acre of land plot number **849** at **Githunguri Constituency Ranching Company Limited**, a fact they knew to be false.

2. He was tried convicted and sentenced to **three (3) years imprisonment**.

3. Aggrieved by the conviction and sentence, the Appellant now appeals on the following grounds:

The learned trial Magistrate failed to appreciate the fact that the Appellant was also the owner of the title of **Land Parcel No. Ruiru/Ruiru 1/7849**.

The trial Magistrate wrote judgment in a case heard by other two Magistrates without invoking any relevant provisions of law under which he was so authorized therefore resorting to a miscarriage of justice.

Crucial witnesses were not called to testify.

4. Facts of the case were that PW1 **Jecinta Nyambura Mwangi** who intended to buy a parcel of land was introduced to the Appellant by PW2 **Peter Maina Kariuki**. The Appellant took her to the **Githunguri Constituency Ranching Company Limited Offices** where it was confirmed that he had a Share Certificate and **Ballot Card No. R/W 047**. He proceeded to show her the land on the ground. She paid her **Kshs. 750,000/= for the parcel of land**. Their agreement was reduced into writing. Two (2) days later she went to fence the plot only to find a man who claimed title to the land. The other person showed him a title in the name of **Simon Mbaabu Kimani**. PW3 **Samuel Mbaabu Kimani** the owner of **Ruiru/Ruiru East Block 1/T 849**. The Complainant having reported the matter to the police continued looking for the Appellant. She traced him at **Lithuli Avenue, Nairobi** and alerted the police. PW5 went and arrested him.

5. When put on his defence the Appellant who gave sworn evidence stated that he is a property agent. He testified that the Complainant was well known to him. They met and proceeded to the offices of **Githunguri Constituency Ranching Company Limited** where he bought **Plot No. 848** and was given a **Ballot No. 047** in **1990**. He was shown the plot on the ground and he took possession of the same. In the year **2009** he sold the plot to the Complainant after verification at the **Githunguri Constituency Ranching Company Limited Office**. They entered into an agreement that was commissioned by an Advocate. Later, the Complainant went to his home and alleged that the plot was not genuine. He denied having intended to defraud the Complainant.

6. The Appeal was canvassed by way of oral submissions, that have duly considered.

7. **Mr. Kinyanjui** learned Counsel for the Appellant stated that there was a deliberate failure by the Prosecution to call witnesses who were deemed to be adverse to the Prosecution's case. The Appellant having admitted that he sold what belonged to him, **Section 144** of the **Criminal Procedure Code** should have been invoked and witnesses from the Land Registry called to verify the authenticity of the two (2) properties. Officials of the land company should also have been called. The Advocate who attested the sale agreement was not availed by the State.

8. Further he argued that the judgment was written by a Magistrate who was bereft of the knowledge of witnesses availed. As a result the Appellant was prejudiced.

9. In response the State through **Ms. Mutheu** opposed the Appeal arguing that the case was proved to the required standard. She stated that according to **Section 143** of the **Evidence Act** no specific number of witnesses is required to prove a case. Elements of obtaining were proved. The Appellant sold land that was not his therefore had no capacity to sell. An official search carried out established that the property belonged to PW3. The search certificate was an official document. They established the case and the Appellant who came up with allegations of ownership should have adduced evidence to that effect.

10. On the second ground she stated that the trial Magistrate gave directions and the Appellant chose to have the matter proceed therefore there was no misdirection.

11. In a rejoinder, Counsel for the Appellant stated that the Magistrate who wrote the judgment complied with **Section 200(3)** of the **Criminal Procedure Code** instead of **Section 200(4)** of the **Criminal Procedure Code** hence the prejudice.

12. This being the first Appellate Court, I am duty bound to re-evaluate, re-assess and re-analyze evidence adduced before the trial Court bearing in mind I had no opportunity of seeing and hearing witnesses who testified at trial then come up with my own conclusions. **(See Okeno vs. Republic (1972) EA 32)**.

13. The judgment herein was written by **Hon. A. Lorot S P M** who took over the matter from **Hon. M. W. Mutuku Ag. S P M** after the Accused had adduced evidence in his defence. At the point of taking over it was intimated that the defence intended to call witnesses. The coram of the day read thus:

*“Before Hon. A. Lorot S P M*

*C/A: Samuel*

*Prosecutor: Present Nganga for Chris Maina for accused. The matter is for fixing a date for defence hearing. Matter also proceed from where last heard.*

*Court Defence hearing on 28.7.2018.”*

14. Subsequently, the matter came up on the **25<sup>th</sup> July, 2015** where the defence Counsel indicated that they were having challenges getting the official of **Githunguri Constituency Ranching Company Limited**. Witness summons were issued. On the **8<sup>th</sup> October, 2015** when the matter came up the defence closed the case having failed to secure the attendance of the secretary of **Githunguri**

**Constituency Ranching Company Limited.** In his judgment the learned trial Magistrate remarked that he did write the judgment based on evidence recorded by other two (2) Magistrates.

Conviction on evidence partly recorded by one Magistrate and partly by another is provided for in **Section 200(1)(b)** of the **Criminal Procedure Code** which stipulates thus:

*“(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—*

*(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.”*

Consequences of the action taken are stated in **Section 200(4)** of the **Criminal Procedure Code** that provides thus:

*“(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”*

It is argued that the Appellant was prejudiced. The reason given is that the Magistrate did not hear witnesses who testified. The Appellant holds himself out as the genuine owner of the land in issue. Further he argued that had the matter been heard *denovo*, the Magistrate would have understood the need to call additional witnesses.

16. It is important to note that a Magistrate who takes over the matter from a former Magistrate has the discretion to act on evidence recorded by his predecessor. In this case when **Lorot S P M** took over the matter, the defence clearly indicated their intention to proceed from where the matter had reached. Subsequently the defence was given the opportunity of availing their witnesses. After failing to present the witnesses they closed their case.

17. The prosecution is not obligated to call numerous witnesses.

**Section 143** of the **Evidence Act** provides thus:

*“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”*

In the case of **Keter vs. Republic (2007) 1EA 135** the Court of Appeal held *inter alia* thus:

*“The prosecution is not obligated to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond reasonable doubt.”*

18. This was a case that was filed in Court on the **19<sup>th</sup> June, 2009** and was not concluded until the **12<sup>th</sup> May, 2016**. It was in Court for a duration of six (6) years yet it was just a misdemeanour. In the interest of justice, the learned Magistrate exercised his discretion wisely by continuing with the matter instead of hearing it *denovo* as implied/stated.

19. It was not a requirement for the learned Magistrate to call witnesses alleged. At the point of writing the Judgment, the learned Magistrate started off by setting out: the history of the matter, how many Magistrates had heard the matter previously and how he was writing and delivering the judgment based on evidence on record. Although he did not specifically state that he was acting pursuant to the provisions of **Section 200(1)(b)** of the **Criminal Procedure Code** that was the case. In the circumstances, the Appellant was not prejudiced.

20. This being a case of obtaining money by false pretences the Prosecution was required to prove:

(i) That the Appellant obtained something capable of being stolen.

(ii) That he did it with false pretence.

(iii) That he had an intent to defraud.

21. It is not in dispute that the Appellant obtained **Kshs. 750,000/=** cash money that was something capable of being stolen. **Section 312** of the **Penal Code** defines false pretence 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.”***

The Appellant met the Complainant on the **6<sup>th</sup>** day of **January, 2009** and represented to her the fact that he owned a parcel of land. He went and showed her the parcel of land in question. They entered into an agreement dated **6<sup>th</sup> January, 2009** which was commissioned by **Wakahu Mbugua & Co. Advocates** where he represented in writing that he owned **Plot No. 849** at **Githunguri Constituency Ranching Company Limited** pursuant to **Ballot Card No. R/W 0047**. The representation which was in the present is not in dispute.

22. The question to be addressed is whether the representation was false. The Appellant took the Complainant to the **Githunguri Constituency Ranching Company Limited Offices** to confirm he had **Ballot Card No. 047**. A clerk at the office checked the Ballot Number and Share Certificate that the Appellant had and confirmed that the plot belonged to the Appellant. She was given a Share Certificate and a clearance letter that would enable her get a title deed. The Appellant proceeded to show her the actual land that he disposed off. However when she went to take actual possession it turned out that the land belonged to another. The Appellant claims ownership of land following an allotment by the **Githunguri Constituency Ranching Company Limited**. The Prosecution adduced in evidence a Certificate of Official Search for **Title No. Ruiru/Ruiru East Block 1/T849**. As at **23<sup>rd</sup> June, 2009** the title was in the name of **Samuel Babu Kimani** and charged to **Kenya Commercial Bank** as a collateral for a loan of **Kshs. 350,000/=**. A letter from the Bank confirming being in possession of the title deed as security for a sum advanced was adduced in evidence.

23. In the case of **Republic –vs- Nyambura and Others (2001) KLR 355**, it was held that:

***“It is our cardinal principal of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of the accused person and the standard of proof is proof beyond reasonable doubt.”***

**Section 107(1)(2)** of the **Evidence Act** provides thus:

***“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person.”***

This is a case where the Complainant paid the Appellant a consideration for sale of parcel of land after she was assured by the **Githunguri Constituency Ranching Company Limited** that the parcel of land in question belonged to the Appellant. On cross-examination the Complainant was categorical that the search they carried out at **Githunguri Constituency Ranching Company Limited** confirmed that the Appellant was the owner of the parcel of land. He surrendered his **Ballot Card No. 0047**

24. The **Githunguri Constituency Ranching Company Limited** issued a receipt dated **6/11/2009** for a sum of **KSh 10,800/=** in the name of the complainant and another being payment of Transfer of **Ballot R/W 0047** and parcel number **849**. On **13/1/2009** the same Company issued the complainant with another

Share Certificate No. B. 080. She was a Registered Proprietor of 1/4 acre plot. The Clearance Certificate for 1/8 acre residential addressed to the District Land Registrar Thika dated 13/1/2009 by **Githunguri Constituency Ranching Company Limited** – Ruiru certified that Jesinta Nyambura Mwangi (Complainant) and another were the owners of 1/8 of an acre of Residential Block No. Ruiru East Block/Githunguri/849. The document was signed by the chairman. The parcel of land owned by PW3 Samuel Babu Kimani is Ruiru/Ruiru East Block 1/T.849

25. The prosecution were duty bound to establish whether or not there is a company incorporated in the name of **Githunguri Constituency Ranching Company Limited**. The alleged company proved that the Appellant was a shareholder and transferred his share to the Complainant. A person the Complainant referred to as an official of the company confirmed that the land belonged to the accused. Without evidence from the **Githunguri Constituency Ranching Company Limited** to suggest that the Appellant was not a shareholder at their company it cannot be stated with certainty that he made the representation knowing it to be false.

26. The Title No. given on the document issued to the Complainant by the Ranching Company as seen is different from the one on the certificate of search and the title deed in possession of the PW3.

27. The prosecution had a duty of establishing whether or not it was the same parcel of land that the Appellant disposed of. This could have been proved by the Land Registrar who was not called as a witness.

28. In the premises, the prosecution failed to prove that the Appellant acted with the intention to defraud the Complainant.

29. The conduct of the Appellant has been brought into question. The offence was alleged to have been committed on the 16/1/2009 and the accused was not arrested until 22/6/2009. The Appellant was introduced to the complainant by PW2. It was alleged without proof that they made several phone calls to the Appellant but he wasn't responding. The prosecution failed to establish the allegation of any phone-call having been made to the Appellant by the Complainant or PW2.

30. From the foregoing, it is apparent that investigations carried out by the investigation officers were shoddy. It is however not in doubt that the Complainant paid the Appellant KSh. 750,000/= for a parcel of land, KSh. 10,800/= for transfer of land and KSh. 12,000/= to the advocate who commissioned the sale agreement. To date the Appellant has not put her in actual possession of the land, she could institute a civil suit against him in that regard.

31. Otherwise having re-evaluated evidence adduced, it is apparent that the case against the Appellant was not proved to the required standard of proof beyond reasonable doubt. Consequently the appeal is meritorious. Therefore, the conviction is quashed and the sentence imposed is set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

32. It is so ordered.

**Dated, Signed and Delivered at Kiambu this 15<sup>th</sup> day of June, 2017.**

**L. N. MUTENDE**

**JUDGE**