



1. Criminal Law
2. Criminal Appeal

a. **Subject of offence**

- i. Obtaining money by false pretence contrary to **Section 313** Penal code.
- ii. **Particulars of offence.**

***On 31<sup>st</sup> December, 1998 at Kericho Township in Kericho District within Rift Valley Province jointly with others not before Court with intent to defraud obtained from John Kiplangat Bunei a sum of Kshs. 130,000/= by falsely pretending that he had a tractor registration number KLJ 674 Massey Fergusson to sell to the said John Kiplangat Bunei.***

- iii. Owner of tractor claimed to be one Bernard Kiprono Sanya.
- iv. The Buyer inspected tractor Massey Fergusson e.g. KLJ 674 with a plough
- v. Intermediary took buyer to advocate D.K. Akinyi.
- vi. Advocate prepared agreement between parties and shared cash 130,000/= out of agreed for 170,000/-.
- vii. Immediately handed Kshs. 130,000/= to seller (vendor) without “due diligence”.
- viii. Seller (vendor) disappears with moneys but no tractor
- ix. After investigations seller traced out to be Duncan Kiprono Kitur and not Bernard Kiprono Sanya.
- x. That the real Bernard Kiprono Sanya was a teacher.
- xi. Tractor never belonged to seller but PWVI owner of tractor.
- xii. Accused arrested, charged, convicted after trial to 30 months imprisonment. (22<sup>nd</sup> September, 1999)

3. **Appeal**

- i. Pleaded not guilty
- ii. No proof that he was maker of documents.
- iii. Case Law of

**Muiruri Njoroge & others V R**  
(1982) KAR 115

Court of Law document act on any certification unless proved

- iv. Signature on sale agreement not subjected to expert evidence.
- v. PW3- hostile witness

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Evidence of hostile witness not to be considered or heard.

- vi. His unsworn evidence not considered.

4. **State**

- i. Supports conviction and sentence
- ii. Sentence of 30 months imprisonment

5. **Held**

- i. Appeal filed out of time
- ii. If filed in time.

Appeal rejected.

**Note:** Appellant released on Presidential Amnesty on 12<sup>th</sup> October, 2000.

6. **Case Law** — Nil

7. **Advocates**

P. Kiprop state counsel instructed by the Attorney General for the Respondent – present

Appellant – absent released on Presidential Amnesty 12<sup>th</sup> December, 2000.

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERICHO**

**CRIMINAL APPEAL 9 OF 2010**

DUNCAN KIPRONO KITUR alias  
BENARD KIPRONO SANYA ..... APPELLANT  
VERSUS

REPUBLIC .....RESPONDENT

*(From the appeal of the Resident Magistrate, D. Odityo delivered on 22<sup>nd</sup> September, 1999 at Kericho)*

**JUDGMENT**

**Criminal Appeal**

**I: Background**

1. On the 5<sup>th</sup> February, 1999 the appellant Duncan Kiprono Kitur alias Bernard Kiprono Sanya had been charged with the offence of :-

***“Obtaining moneys by false pretences contrary to Section 313 of the Penal Code.***

The particulars of offence being:-

***“ On 31<sup>st</sup> December, 1998 at Kericho Township in Kericho District within Rift Valley Province, jointly with others not before court, with intent to defraud, obtained from John Kiplangat Bunei a sum of Kshs. 130,000/= by falsely pretending that he had a tractor registration number KLJ 674 Messey Fergusson to sell to the said John Kiplangat Bunei”***

2. The proposed purchaser and complainant herein was an Engineer attached to the Garissa, Ministry of Works whilst his brother was a police officer attached to the police station at Kericho.
3. His brother received information that there was a tractor for sale. The complainant travelled to Kericho and was put in contact with PW2 who after visited the OCS at Kericho and whom the complainant’s brother was able to introduce the complainant to.
4. It was alleged that the owner of the tractor was one Bernard Kiprono Sanya. The buyer did not meet him but was able to inspect the tractor registration number KLJ 674 with a plough.
5. The Intermediaries took the complainant to M/S D.K. Akinyi & Co. Advocates. What was surprising is the advocate at once prepared a Sale Agreement when the complainant (PW1) was at the bank withdrawing moneys. He then noted their Identity Card. When the complainant arrived he was handed Kshs. 130,000/= cash out of a sum of Kshs. 170,000/= agreed between the complainant and the purchaser. The purchaser introduced himself as one Benard Kiprono Sanya. He was paid Kshs. 130,000/= immediately by the advocate.
6. What was very clear here is the said advocate failed to conduct “*due diligence*” on the transaction. He required to hold Kshs. 130,000/= in trust of the parties and not to release the sum until the tractor was officially handed over to the complainant. He was required to do a search with the Registrar of motor vehicle to ascertain the exact owner as per the log book. He instead believed there was a debt of Kshs. 38,000/= due to a former carrier of the sum.
7. On receiving the payments the said Benard Kiprono Sanya disappeared. The tractor was not traced. The complainant’s brother being a police officer attempted to arrest the accomplices but they were released. Instead they were treated as witnesses and it is the appellants claim that PW3 was a hostile witness and should never have given evidence.
8. Investigations nonetheless revealed that one Bernard Kiprono Sanya held a different identification card from the one the advocate had used to prepare the Sales Agreement. The real Benard Kiprono Sanya in fact was a teacher he knew one Duncan Kiprono Kitur who lived near him and actually had been in school together with him.
9. The tractor was traced but found to have been earlier sold on 29<sup>th</sup> December, 1999 to PW6 who held its log book.

10. The appellant was arrested, charged with obtaining moneys by false pretence and convicted after trial to 30 months imprisonment.
11. Not being satisfied with his appeal, the appellant then filed this appeal on 19<sup>th</sup> November, 1999 against conviction and sentence passed on 22<sup>nd</sup> September, 1999.
12. The appeal was filed out of time and is accordingly dismissed.
13. The appeal was admitted to hearing on 24<sup>th</sup> July, 2000. If per chance the appeal had been filed on time or out of time with the leave of the court my findings would have been as follows.
14. The appellant grounds of appeal being in summary that :-
  - i) **He pleaded not guilty.**
  - ii) **There was no proof of the maker of the documents**
  - iii) The case law of  
**Muiruri Njoroge and other V R**  
(1982) KAR 115  
where a court of law does not admit on any certification unless proved.
  - iv) **The signature on the sales agreement was not subjected to expert evidence.**
  - v) **PW3- was a hostile witness**  
  
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Evidence of a hostile witness is not considered or heard.
  - vi) **His unsworn evidence was not considered.**

## **II: Opinion**

15. The appellant was treated very leniently by the investigative arm of the law. The first is that he personated another. No charge had been brought against him on this court.  
  
Secondly, he produced an identity card which most certainly was fake purporting it to belong to Bernard Sanya the one he impersonated. That is identity card 13110560 when the real Bernard Kiprono Sanya held identity card 10886179. The appellant should have been charged with uttering a false document to PW4 the advocate. In connection with the identity card, he should have been charged with making of a false document.  
  
Thirdly, there should have been a charge obtaining moneys by false pretences.
16. This brings a total of four counts that would have been preferred against him.
17. The issue of a document expert would not arise here as he signed the documents before PW4 an advocate of the High Court of Kenya. This having been witnessed did not render the charge against the appellant by way of evidence nugatory.
18. The advocate D.K. Akinyi most certainly failed in his duties by not ensuring that “*due diligence*” was done. Should he be sued for profession misconduct by the complainant?

19. Another sales agreement was entered into for refund of the moneys by the appellant's wife who cannot be called to court to give evidence.
20. I would have found that this appeal has no merits. It is dismissed. The appellant I understand was released on Presidential amnesty on 12<sup>th</sup> December, 2000.

**DATED** this 21<sup>st</sup> day of July, 2009 at **KERICHO**

**M.A. ANG'AWA**  
**JUDGE**

**READ** on the 6<sup>th</sup> day of October, 2009 at **KERICHO**

**M.A. ANG'AWA**  
**JUDGE**

**Advocates**

P. Kiprop state counsel instructed by the Attorney General for the Respondent – present  
Appellant – absent released on Presidential Amnesty 12<sup>th</sup> December, 2000.