



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: MADAN, POTTER JJA & CHESONI Ag JA)**

**CRIMINAL APPEAL NO 28 OF 1983**

**NICHOLAS WACHIRA ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Nicholas Wachira was convicted of obtaining money by false pretences, contrary to section 313 of the Penal Code (cap 63), by the resident magistrate, Nyahururu. On appeal to the High Court, Mead J, allowed the appeal against the conviction for obtaining. Acting under the provisions of section 189 of the Criminal Procedure Code (cap 75) the learned judge substituted a conviction for the offence of stealing, contrary to section 275 of the Penal Code.

Mr Johana Kariuki, the chairman of Kihinga Farmers Company (possibly the same as Kihinga Co-operative Society mentioned in the particulars of the offence), made a deal on behalf of his Society to purchase the farm of the appellant's father, the late Mr Ephantus Mahihu (also called Mr Gakuru), comprising 650 acres for Kshs 500,000. He paid Kshs 3,000 to Mr Mahihu on account of the purchase price. Mr Mahihu died soon thereafter. Mr Kariuki who was aware of Mr Mahihu's death continued to make periodic payments to the appellant who was Mr Mahihu's eldest son until the entire balance of the purchase price Kshs 497,000 was paid. The Society did not get the title to the farm because it was not transferred to it. The appellant had no authority to effect a transfer in favour of the Society. He was not a trustee or administrator of his late father's estate. Mr Kariuki instituted a civil suit against the appellant.

We do not know its outcome. We also do not have details of the claim or the names of the parties. Mr Kariuki also lodged a complaint with the authorities. The appellant and his two brothers were prosecuted for obtaining. The brothers were acquitted. The appellant was convicted, the conviction being altered to stealing by the High Court upon appeal to it as stated above. The appellant has appealed to us against his conviction for stealing. Mr Kariuki paid the money voluntarily, thus passing of his own free will not only possession, but the right of property therein, to the appellant. In stealing there is no theft in taking, however fraudulent may be the means by which delivery is obtained, if the dupe of his own free will passes not only possession, but the right of property. *Mwangi Nyongah v Republic* [1965] EA 526 at p 529. See also *Republic v Jones* [1976] Kenya LR 1 at p 4. Nor were any fraudulent means proved on the part of the appellant by which he obtained possession of the money from Mr Kariuki. He did not really obtain the money from Mr Kariuki, he was given it by the incredibly gullible Mr Kariuki. The appellant's conviction cannot be sustained. It is quashed and the sentence set aside. The appellant must be set at liberty.

Order accordingly.

Dated and Delivered at Nakuru this 22<sup>nd</sup> Day of March, 1983

**C.B. MADAN**

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**JUDGE OF APPEAL**

**K. D. POTTER**

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**JUDGE OF APPEAL**

**Z.R. CHESONI**

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**Ag JUDGE OF APPEAL**