



Republic v Mbutha alias Teresia Wanjiku Gitau & 3 others (Criminal Case 364 of 2018) [2024] KEMC 176 (KLR) (7 August 2024) (Judgment)

Neutral citation: [2024] KEMC 176 (KLR)

**REPUBLIC OF KENYA
IN THE NGONG LAW COURTS
CRIMINAL CASE 364 OF 2018
P ACHIENG, CM
AUGUST 7, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

**TERESIA WANJIKU MBUTHA ALIAS TERESIA WANJIKU
GITAU 1ST ACCUSED
TABITHA NGENDO GITARI ALIAS BETH NYAMBURA
NJOROGE 2ND ACCUSED
BENSON NDUNGU ALIAS BEN 3RD ACCUSED
JAMES MIRITI IMAANA ALIAS MWENDA BAITE 4TH ACCUSED**

JUDGMENT

1. The accused persons are jointly charged under count 1 with the offence of conspiracy to defraud contrary to Section 317 of the [Penal Code](#).
2. Particulars of the offence are that on diverse dates between 1st March 2018 and 17th March 2018 at Ongata Rongai township within Kajiado County, jointly with others not before court, with intent to defraud obtained money 1.8 million from Jotham Milimo Wasike by falsely pretending that they were in a position to sell to him plot number Ngong/Ngong/58516 a fact they knew to be false.
3. Count 2 which is against the 2nd accused person is personation contrary to Section 382 of the [Penal Code](#).
4. Particulars of the offence are that on 10th March 2018 at Ongata Rongai township within Kajiado County with intent to defraud, falsely represented herself to be Beth Nyambura Njoroge.



5. Count 3 which is against the 1st accused is obtaining money by false pretence contrary to Section 313 of the [Penal Code](#).
6. Particulars of the offence are that on diverse dates between 10th March 2018 and 17th March 2018 at Ongata Rongai township within Kajiado County, jointly with others before court and others not before court with intent to defraud, obtained money Ksh. 1.8 Million from Jotham Wasike Milimo by falsely pretending that she was in a position to sell to him plot number Ngong/Ngong/58516 a fact she knew to be false.
7. The accused persons denied the charges, and the case proceeded for hearing, with the prosecution calling 9 witnesses. I will now proceed to give a summary of the prosecution's case. The complainant Jotham Wasike stated that he resides at Ongata Rongai and he is a Lecturer at Kirinyaga University. He testified that in early March 2018, he and his family wanted to purchase a piece of land. They were introduced to the 3rd accused by their friend Gathua who said that the 3rd accused was a land broker and he would assist them to find the land. They contacted the 3rd accused who took them to land at Thayu Gardens at Rimpa area. The complainant and his wife Florence (PW2) liked the place, and the 3rd accused said that he was going to connect them with the owner Teresia Wanjiku Gitau who lived in Thika. In the month of March 2018, PW2 told PW1 that the 3rd accused had gone to her place of work at Nairobi Academy with the said owner. PW1 was told that Teresia was the owner thought the land was registered in the name of her sister Beth Nyambura. PW2 told PW1 that they had agreed on a purchase price of Ksh. 1.8 Million. It was agreed that a search be done, and the transfer be done by Beth Nyambura who had to be present on the date of the transaction.
8. The search was conducted and it indicated that the land was registered in the name of Beth Nyambura Njoroge. The parties agreed to meet on the land for the transaction to proceed. PW1, PW2 and the 3rd accused met on the land at Thayu Gardens. The 3rd accused was in touch with the owner of the land Teresia who kept saying that she was on the way. Some minutes after midday, the 3rd accused told PW1 and PW2 that they could proceed to make the payment since the bank was about to close, and they would return to the land later on. They were also unable to locate some beacons and the 3rd accused called some surveyors to do the demarcation.
9. PW1 stated that having known the 3rd accused as a friend and a neighbour, he proceeded with the transaction. They went to KCB Ongata Rongai on Saturday 10th March 2018 where they met Teresia who the 3rd accused introduced. He said that he knew her very well. Teresia introduced her sister Beth Nyambura. PW1 proceeded to do the transaction with Beth Nyambura who was the registered owner of the land. They prepared a sale agreement at Cyber close to the bank with the seller being Beth Nyambura Njoroge and the buyer Florence Cherotich Kipkemboi. Teresia witnessed the agreement for Beth while PW1 witnessed for PW2. They proceeded to the bank where the 3rd accused was with the 4th accused, who he introduced as a land broker, and that he was the one who had taken the 3rd accused to the land.
10. While in the bank, Teresia activated her account and PW1 transferred the sum of Ksh. 1.7 Million. Teresia withdrew some money soon after the transaction and said that she wanted to sort out the brokers Ben and James, the 3rd and 4th accused persons herein. PW1 said that he saw her handing over some money to them. Teresia gave PW1 a copy of title deed to the land in the name of Beth Nyambura Njoroge and an Affidavit of consent sworn by Beth, which indicated that she was not married. They decided not to go back to the land but to follow up on the transfer. PW1 was called after 7 days and he was informed that the title deed in the name of PW2 was ready. He transferred the balance of Ksh.



100,000/= to Teresia through M-Pesa. PW1 and PW2 received the title deed and they planned to develop the land.

11. On 1st May 2018, PW1 went to the land and found the place fenced. He asked neighbours that is Pastor Ndoria and Kinyua, and they told him that they knew the owner of the plot. When they presented their title deed to Kinyua to check, he said that the plot they had been shown was not the correct one. They got a mutation which showed that the correct plot was a few metres away from where the 3rd accused had showed them. Kinyua also said that he knew the owner of the plot Beth Njoroge. PW1 got in touch with the 3rd accused but he could not explain what was happening. PW1 also tried to get in touch with Teresia but her phone was off. They were able to get the rightful owner of the land who was not the same person they had dealt with. The matter was reported at Ongata Rongai Police station. A search was conducted at the land registry and it established that the land was registered in the name of PW2. The rightful owner Beth Njoroge proceeded to have the said title revoked. PW1 identified the 1st accused as Teresia who said that she was the owner of the land and the 2nd accused is the one who introduced herself as Beth, the registered owner of the land and the sister to the 1st accused. The 3rd accused was the broker and the 4th accused is the person they met in the bank.
12. PW4 Beth Nyambura Njoroge is the rightful owner of land parcel No. Ngong/Ngong/58516, having purchased it from one William Chira in 2017. She denied having sold the land and sated that she did not know the accused persons herein. She denied having signed the documents relating to the sale of the land to the complainants.
13. In defence, the accused persons elected to testify on oath and they did not call any witness. The 1st accused stated that the 2nd accused is her younger sister. She said that she does not know the 3rd accused well since she saw him once, but she knows the 4th accused since 2018 who was her regular customer while she was doing the business of supplying timber. In March 2018, the 2nd accused who does the work of selling land told the 1st accused that there was land in Ongata Rongai for sale. She asked the 1st accused to assist in getting a buyer. The 1st accused called several people and also went to the 4th accused to inform him about the land. He told her that if he gets a customer he will inform her. The following day, he called the 1st accused and told her that there was a broker who was going to call her. The 1st accused said that she did not know who the customer was, but she later on came to learn that it was Florence (PW2), who she met on the day she was going to make payment at the bank. The 1st accused said that she did not take PW2 to the land and she did not know where the land was located, further that she did not see the title deed to the land.
14. The 4th accused called the 1st accused later on and informed her that PW2 wanted to meet the seller. The 1st accused informed the 2nd accused and they agreed to meet that Saturday. The 1st accused gave them a lift to Ongata Rongai that Saturday, and PW2 called her and told her that they were at KCB. Since the 1st accused could not park there, she dropped the 2nd accused who was with one Beth. The 1st accused said that she did not know the said Beth. After about 1½ hours, the 2nd accused called the 1st accused and told her to meet them where she had dropped them. The 1st accused did so, and the 2nd accused told her that the purchaser had agreed to purchase the land. The 1st accused was also told that the purchaser had gone to withdraw the money but the bank declined since the amount of Ksh. 1.7 Million was a lot. The land owner Beth said that the money could not be paid to her account which was a Co-operative bank account, and that it would take 2 days for it to reflect. The 2nd accused requested the 1st accused to have the money deposited in her KCB account. They went to the bank to see whether that was possible. The bank agreed and the 1st accused person's dormant account was reactivated before Ksh. 1.7 Million was deposited. The 1st accused said that she acted in good faith and she had no intention to defraud.



15. The 2nd accused stated that she is a business woman selling wholesale goods, and that the 1st accused is her sister. She said that she did not know the 3rd and 4th accused persons. She said that she received a phone call from Nyambura who told her that she was selling land. The 2nd accused said that she was a land broker. She asked the 1st accused to assist her locate a broker from Ongata Rongai since she was at Juja. The 1st accused later on informed the 2nd accused that she had got a broker, and the 2nd accused should plan with Beth to meet the broker. The 1st accused, the 2nd accused and Beth Nyambura went to Ongata Rongai, where the 2nd accused connected Beth to the buyer PW2. The 1st accused was the one in touch with PW2. PW2 said that she did not want a broker there and the 2nd accused moved aside. The 2nd accused was later told that Florence wanted to pay the money since she did not want to stay with it. Beth Nyambura said that her account had a loan and the money could not be paid there. The 2nd accused's account also had a loan. The 1st accused said that she had a KCB account which was dormant, and the money was paid in that account.
16. The 3rd accused on the other hand stated that he resides at Rimpa and he does transport business. He stated that on 3rd March 2018 in the morning, he was with his brother George Kivui and a friend David Mgugua at a hotel in Ongata Rongai. Peter Njenga went and found them there. A neighbour of the 3rd accused Mathew Gathua who had requested him to find a plot for sale for a friend called the 3rd accused to enquire on the progress. The 3rd accused asked the people he was with about a plot available for sale, and Peter Njenga (PW5) said that there was a plot at Rimpa. He took the 3rd accused to the plot and the 3rd accused saw it. The 3rd accused informed Mathew of the land, and Mathew told him that he will give out his number and he will be contacted.
17. The 3rd accused was called by a lady who said that they were to meet with Gathua. They met and the 3rd accused found that she was Florence (PW2) who was a person he knew since they had done business before. She was with her husband PW1 and one Wasike. The 3rd accused took them to two plots and they told him that they will let him know. That evening Florence called the 3rd accused and told him that they will take the Rimpa plot. The 3rd accused informed PW5, and also told him that the customer wanted to meet the seller. PW5 later on called the 3rd accused and told him that they should meet at Nkoroi. The 3rd accused went there and met PW5 together with James Imana (4th accused) at his timber yard and one Kinyua. The 1st accused was also there and another young man who the 1st accused introduced as her cousin. The 3rd accused was told that the 1st accused was the owner of the land. PW5 said that they should go to the land, and the 1st accused took them there. From the land, they went to Nairobi Academy where PW2 works. The 3rd accused introduced PW2 to the 1st accused and they bedun to discuss. After 3 days, PW2 called the 3rd accused and informed him that she had done a search and it was okay. On Saturday, PW2 called the 3rd accused and told him that she was on the land. The 3rd accused went to meet her there with Peter Njenga, and Kinyua joined them. PW2 was with her husband PW1, who wanted to know where the beacons were. Kinyua called a surveyor who went there to measure. The 1st accused was not there and PW2 was in touch with her.
18. PW1 said that it was a Saturday and the bank will close, and they agreed to go to the bank where they were to meet the 1st accused. They went to KCB Ongata Rongai where they met the 4th accused, the 1st accused and the 2nd accused. The 1st accused introduced the 2nd accused as the sister. The 3rd accused said that he sat on the bench in the bank as they did the transaction. The brokers were to be paid Ksh. 400,000/= and the 1st accused paid the 4th accused Ksh. 300,000/=. The 3rd accused denied having been involved in fraud and said that he only acted as an agent.



19. The 4th accused on his part stated that he resides at Nkoroi and he is a businessman. He denied the allegations against him and said that he did not know PW1. He said that he only came to see PW1 in Court.
20. I have considered the evidence adduced by the prosecution witnesses and the respective defences by the accused persons. I have also considered the written submissions filed. In regard to count 1, Section 317 of the *Penal Code* provides as follows;
- “Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.”
21. The Black’s Law Dictionary 9th Edition at page 351 defines conspiracy as:
- “An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement’s motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose.”
22. In Archibold’s Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell), at pages 3025 and 3026, it is observed as follows:
- “The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement...
- The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it....Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”
23. In the case of Rebecca Mwikali Nabutola & 2 others v Republic [2016] eKLR, the Court stated that in order to prove an offence of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud the public. The court further stated that;
- “The first issue to consider is whether or not there was an agreement to execute an unlawful act. An agreement may either be express or implied from the circumstances of the case. As expressed in the Halsbury’s Laws of England Vol. 25 Criminal Law at para. 73:
- ‘It is not enough that two or more persons pursued the same unlawful object at the same place or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other.’
24. In Archibold’s Criminal Pleadings, Evidence and Practice (supra) it is stated that an agreement in a charge of conspiracy ‘may be proved in the usual way or by proving circumstances from which the jury may presume it’ and that ‘proof of the existence of a conspiracy is generally a matter of inference



deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.’

This requires that a common purpose between or among the subject parties is proved. Common intention is set out in section 21 of the penal Code as follows:

‘When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.’

25. In the instant case, from the evidence of PW1 and PW2, it was the 3rd accused person who showed them the parcel of land Ngong/Ngong/58516 located at Rimpa which they got interested in to purchase. The 3rd accused told PW1 and PW2 that the land belonged to the 1st accused who had bought it from the 2nd accused. PW2 also stated that they wanted an assurance from the 3rd accused that he knew the owner of the land well and he said that he knew her well. The 3rd accused took the 1st accused to PW2’s place of work at Nairobi Academy and introduced her as the owner of the land. Indeed, during the meeting, the 1st accused admitted that she was the owner of the land and stated that the land was still registered in the name of her sister Beth Nyambura Njoroge. PW1 and PW2 met the said Beth Nyambura Njoroge who is the 2nd accused herein on the day they prepared the sale agreement with her, and paid the sum of Ksh. 1.7 Million to a bank account held by the 1st accused, since it was alleged that she was the owner of the land. The sale agreement executed on 10th March 2018 between Beth Nyambura Njoroge as the seller and Florence Jerotich Kipkemboi as the buyer in respect to land parcel No. Ngong/Ngong/58516 was produced as P.Exb 2. There is also a KCB bank slip (P.Exh 3) proving that indeed a sum of Ksh. 1.7 Million was transferred from account No. 1224281899 in the name of Jotham Milimo Wasike to account No. 1124705007 in the name of Teresia Wanjiku Gitau, and the payment details indicate that it was for land purchase at Rimpa.
26. It however turned out after the land transaction had concluded and the land transferred in the name of PW2 that the land did not belong to the 1st accused, and the 2nd accused had masqueraded as being the registered owner Beth Nyambura Njoroge, since the real owner Beth Nyambura Njoroge who testified as PW4 surfaced and claimed ownership. The conduct of the 3rd accused who confirmed to PW1 and PW2 that he knew the owner of the land and took the 1st accused to PW2 as the owner of the land implies that they had a common intention. The 1st accused on the other hand introduced the 2nd accused as being the registered owner, a fact that turned out to be false, with the sole aim of defrauding the complainants of their money. A copy of the transfer of land document produced bears a passport size photo of the 2nd accused as the seller of the land and the ID card number indicated is 26080789. According to the results of investigation, the rightful owner of the land was PW4. It was the evidence of PW9 the investigating officer that upon confirming whether the 2nd accused was the holder of the national ID card No. 26080789 from the National Registration Bureau, the information he received was that she was not the holder of the same. The results of the investigations revealed that the 1st accused’s real name is Teresia Wanjiku Mbutia of ID No. 22707854 while that of the 2nd accused is Tabitha Ngendo Gitari of ID No. 23975272.
27. In regard to the involvement of the 4th accused in the matter, it was the evidence of PW5 that he was told by the 4th accused upon inquiry that the owner of the land in question was Shiku, the 1st accused herein. After about two hours, the said Shiku who is the 1st accused met PW5 and she introduced herself as being the owner of the land, but stated that the land was registered in the name of her sister Beth.



28. The evidence adduced by the prosecution witnesses point without a doubt to the fact that the accused persons impliedly acted with a common intention and there was a meeting of minds, thus they conspired to defraud the complainants. They were all present in the bank when PW1 transferred Ksh. 1.7 Million to the 1st accused's account. The 1st accused withdrew some of the money and gave it to the 3rd and 4th accused persons. At no point in the course of the transaction did the 3rd and 4th accused persons express reservations with the identity of the 1st and 2nd accused persons as being the owners of the land, but instead the 3rd accused build the confidence of the complainants to proceed with the transaction on the strength that he knew the owner well.
29. I have considered the respective defences by the accused persons and upon weighing it against the evidence of the prosecution, I find the same not believable. Though the 1st accused denied having posed as the owner of the land, there is overwhelming evidence against her proving that she in fact did so. The same applies to the 2nd accused who posed as being the registered owner of the land. Their defence that there was another person known as Beth Nyambura does not hold any water since there is no evidence to prove that there was another person save for the 4 accused persons and the complainants when they went to the bank.
30. In regard to count 2, there is proof as already stated above that the 2nd accused committed the offence of personating Beth Nyambura Njoroge. In regard to count 3, there is also proof as already stated above that the 1st accused received the sum of Ksh. 1.7Million from PW1.
31. Having considered the evidence on record in totality, I find that the prosecution has proved its case against all the 4 accused persons under count 1 beyond reasonable doubt. They are found guilty under the said count and are accordingly convicted.
32. Count 2 has been proved against the 2nd accused beyond reasonable doubt. She is found guilty of the same and is accordingly convicted.
33. Count 3 has been proved against the 1st accused beyond reasonable doubt. She is found guilty of the same and is accordingly convicted.

DATED DELIVERED AND SIGNED AT NGONG THIS 7TH DAY OF AUGUST 2024 IN THE PRESENCE OF THE ACCUSED PERSONS

In the Presence of:

Chris For The State

Mr. Waweru Nyambura For 2Nd Accused

Mr. Charles Githuka For 3Rd Accused

Mr. Wamari For 4Th Accused

Court Assistant - Dan

HON. P. ACHIENG

CHIEF MAGISTRATE

