



REPUBLIC OF KENYA



**Kandie v Republic (Criminal Appeal E002 of 2025)  
[2025] KEHC 18611 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18611 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL APPEAL E002 OF 2025  
JRA WANANDA, J  
DECEMBER 17, 2025**

**BETWEEN**

**SHABAN KIGEN KANDIE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 9th June 2025 by Hon. C. Njagi (PM) at Kibera Chief Magistrate's Court, Sexual Offences Case No. E074 of 2023 Republic vs John Onyango)*

**JUDGMENT**

1. The Appellant was charged in the said criminal case with the offence of obtaining by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence were that between the 20/04/2021 and 21/08/2021 at Chepsirei village of Keiyo South Sub County within Elgeyo Marakwet County with intent to defraud, obtained from Rose Jepnetich Micah Kshs 1,432,750/- by falsely pretending that he was in a position to sell 8 ½ acres of land L.R. No. Elgeyo Marakwet/Koimur/98, a fact he knew to be false or untrue
2. The Appellant pleaded not guilty to the charge and the case then proceeded to full trial in which the Prosecution called 5 witnesses. At the close of the Prosecution case, the Court found the Appellant as having a case to answer and put him on his defence. The Appellant then gave a sworn statement, in his defence, and also called one other witness. By the Judgment delivered on 22/01/2025, he was convicted and sentenced to pay a fine of Kshs 1,000,000/-, in default to serve 3 years imprisonment.
3. Dissatisfied with the decision, the Appellant, through Messrs. Bundotich Korir & Co. Advocates, filed this Appeal by way of the Petition of Appeal dated 23/01/2025. The grounds of Appeal preferred are as follows, reproduced verbatim;



- i. That the learned Magistrate misdirected herself in fact and law by convicting the appellants when the evidence and facts could not sustain a conviction for the offence of obtaining money by false pretences.
- ii. That the learned Magistrate misdirected herself in fact and law by not appreciating all the issues raised during trial and submissions.
- iii. That the learned Magistrate erred in law and that in failing to take into consideration matters that she ought to have taken into consideration and taking into consideration irrelevant matters which she ought not to have taken into consideration and thus arrived at a wrong finding.
  - a. Whether there was a representation by the accused which was false.
  - b. Whether the transaction that gave rise to the charges and conviction that involved land parcel No. Elgeyo Marakwet/Koimur/98 which transaction involved land between the Appellant and the complainant which involved transactions to be undertaken in the future which include subdivision be undertaken in the future which include subdivision and consent of land control Board.
  - c. That it is trite law that transactions which involve future transactions would not amount to obtaining by false pretence.
  - d. That it was a fact and was proven that the title to the land is issue both existed on the ground and the title was available where the registered owner, appellant's father participated in the sale.
  - e. That the learned Magistrate erred in law and fact in convicting the appellant yet the prosecution did not prove a crucial ingredient of the charge to wit that the appellant knew the representation to be false.
  - f. That the learned Magistrate erred in law in failing to consider principles set in the celebrated case of *J.R Vs. Dent (1955) 2 QB* and the case of *Wafukho Vs Republic (Criminal appeal No. 200 OF 2012)* where it is settled that;
 

“That a statement of intention about future conduct whether or not it be a statement of existing fact is not such a statement as will amount to false pretence.

That the law applicable to transaction involving land such as the one before the court the legal framework which governs the transaction in controversy makes the transaction a purely civil action thus removing it from the realm of criminal law and thus the transaction would not constitute a false pretence or intention to defraud for the purposes of the offence of obtaining through false pretence under section 313 of the penal code.”
- iv. That the learned Magistrate misdirected herself in failing to appreciate the law in the sense that the legal framework which governs the transaction in controversy made the transaction a purely civil action thus removing it from the realm of criminal law and thus the transaction would not constitute a false pretence.
- v. That the learned magistrate misdirected herself in fact and law by passing sentencing that was excessive.



4. I will now recite the testimonies and/or evidence given by the respective witnesses.
5. PW1 was Rose Chepnetich Micah, the complainant. She testified that in early 2017, the Appellant approached her and her husband and told them that he had 4 acres of land to sell to them, he took them to the land and showed them the title deed for L.R. Elgeyo Marakwet Koimur 96 which was registered in his fathers' name, and he agreed to sell to them 6 acres thereof at Kshs 150,000/- per acre. She stated that on 20/04/2017, they went to the Lawyer's office and executed a Sale Agreement, the Appellant signed on behalf of his father, and he also brought witnesses. She then produced the Sale Agreement dated 20/04/2017 and stated that she paid Kshs 600,000/- for 4 acres, and that the Appellant later agreed to sell to her 2 additional acres at Kshs 180,000/-, each for which she paid Kshs. 300,000/- and thus remained with a balance of Kshs. 60,000/-. She also produced this second Sale Agreement. She testified further that she was to clear the balance in 3 months but the Appellant again approached them offering to sell to them the remaining 4 acres at Kshs 200,000/- per acre. She stated that there were 10 other purchasers for different portions, and the Appellant was to book for attendance the Land Board and he paid for the survey and title deed processing. She testified further that the Appellant's father was present when the survey was conducted, and he confirmed that he had given the land to the Appellant. She stated that the purchase price for the entire 10 acres was Kshs 1,760,000/- and she paid Kshs 1,648,850/-, both by Mpesa and cash, and she produced a breakdown thereof. She testified that in December 2022, a neighbour phoned and asked her whether she had sold the land as there were Surveyors thereon, upon which she phoned the Appellant to inquire and the Appellant confirmed to her that he had indeed sold the land. She stated that she tried to meet the Appellant but he kept on hiding. She produced the title deed and testified that she had another case against the buyer, and that the Appellant has never given her possession of the land and has also not refunded her the money. In cross-examination, she agreed that the purchaser of the land named in the Sale Agreement was Keiyo Investments, her name was not in the Agreement, and that she is only listed as a witness thereon. She also agreed that she had not produced documents to show that she is a director of Keiyo Investments. She further agreed that the Appellant's father who was the registered owner of the land was listed as a vendor, and that the Appellant's father had never complained that the land was sold without his authority. She also agreed that while she claims to have purchased 8 ½ acres of the land, the Agreements only refer to 6 acres. She also agreed that they never went to the Land Control Board and stated she was not aware of a 6-months limitation to obtain the Board's consent to the transaction. She also conceded that for some of the alleged cash payments, there is no written acknowledgment of receipt by the Appellant. In re-examination, she stated that she signed the Sale Agreements as a director, on behalf of Keiyo Investments, and also as a witness. She also stated that her husband's name is Micah Kemboi Kigen.
6. PW2 was Simon Kipnetich. He confirmed that the Appellant had sold the same land he had initially sold to PW1 to someone else. He also stated that he was present when the land was subdivided in 2018. In cross-examination, he stated that PW1 purchased 6 acres and also stated his awareness that the Appellant's father had given the land to the Appellant although it still remained registered in the name of the father.
7. PW3 was Festus Kipkurui. He, too, stated that his brother, Luka Kiprono, purchased a portion of the land from the Appellant and asked PW3 to go and view it on his behalf. He stated that there were several other purchasers and that sub-division thereof commenced, and they put beacons. He also confirmed that PW1 had purchased 10 acres, but that PW1 later informed him that her said portion had been sold to another person. In cross-examination, he agreed that the purchaser was Kerio Investments, while the vendor in one of the Agreements was listed as Joseph Kandie Sawe who was present during the survey exercise, together with the Appellant.



8. PW4 was Corporal Susan Chebet, the Investigating Officer. She testified that she interviewed PW1, a director of Keiyo Investments. She then narrated the information given to her by PW1, which was in the same terms as PW1's testimony already recounted above. She testified that the entire amount paid was Kshs 1,432,750/-, that in April 2023, PW1 learnt that someone was making constructions on the land and when she confronted that person, she learnt that the Appellant had sold the same land to this other person, one Isaac Kiptoo, upon which PW1 reported the matter to the police. She then produced the Sale Agreements, invoice, extracts of Mpesa transactions, Certificate of Incorporation, and Search. She further stated that the Appellant has not refunded the money. In cross-examination, she agreed that in the Sale Agreements, the purchaser is indicated as Keiyo Investments but stated that the company's documents indicate the names of the directors. She also agreed that PW1 is indicated as a witness in the Agreements, not a purchaser. She also agreed that Keiyo Investments is not mentioned in the charge sheet. She also agreed that the documents show one Joseph Kandie as the registered owner and seller and also agreed that she did not have evidence in Court that Joseph Kandie or the Appellant had sold the same land to Isaac Kiptoo, although she had it elsewhere. She also agreed that some of the payments were made by one Micah Kipkemboi, who was not party to the Agreements, and was also not a complainant. She also agreed that she did not have the original title, and that no Land Control Board consent had been obtained. She said that the entire parcel of land was 30 acres, and the Sale Agreements were for an aggregate of 6 acres, although the charge sheet refers to 8 ½ acres. She however insisted that the Appellant was paid for the additional 2 ½ acres. She further agreed that the Mpesa transactions were made by various people including one Faith and Micah but she did not have evidence that the money was being paid on behalf of PW1. She also agreed that the Advocate before whom the Agreements was executed was not a witness in the case.
9. PW5 was Felix Metetaia, a Senior Records Officer at the Business Registration Service. He stated that he received a letter from the Directorate of Criminal Investigations (DCI) Keiyo South requesting details for Keiyo Investments Limited. He then produced a letter from the Business Registration Service listing PW1 and her said husband, Micah Kipkemboi Kigen as the directors thereof.
10. In his defence, the Appellant, who testified as DW1, stated that his father is the registered owner of the subject land which he had however given to the Appellant, and he produced the written authority. He testified that he sold 4 acres of the land to Keiyo Investments, that PW1 was a witness in the Sale Agreements, that PW1 later demanded for more acreage for which they signed the second Sale Agreement and added more money but never completed the transaction as she failed to pay a balance of Kshs 60,000/-. He stated that they never signed any Agreement for sale of an additional 2 ½ acres, and that he was charged herein simply because he refused to give more acreage to PW1. He also stated that they never attended before the Land Control Board. He stated further that the total land is 25 acres out of which he has sold different portions to different purchasers, that they had a sitting with elders to discuss the dispute but PW1 refused to be refunded her money, that the elders resolved that she takes 5 acres, and that the person who purchased PW1's portion was to refund PW1 the entire amount. He also stated that he is ready and willing to refund the money and also that PW1 has filed a case, namely, E004/2024, seeking specific performance and, in the alternative, a refund. He also insisted that the land exists on the ground. In cross-examination, he stated that the land is currently occupied by another person and agreed that he has not refunded PW1. He also agreed that he had not produced the minutes from the elder's' meetings. In re-examination, he stated that PW1 demanded 10 acres.
11. DW2 was Joseph Kandie, the Appellant's father. He confirmed that he is the registered owner of the subject land and that he gave authority to the Appellant to deal with the land. He thus stated that the Appellant dealt with the land illegally. In cross-examination, he stated that he was not aware that the Appellant had received money from PW1.



12. After the trial, as aforesaid, the Court convicted the Appellant and sentenced him to pay a fine of Kshs 1,000,000/-, and in default, to serve 3 years' imprisonment.
13. In canvassing the Appeal, the parties filed written Submissions. The Appellant's Submissions is dated 6/05/2025. However, by the time that I concluded writing this Judgment, I had not come across any Submissions filed by the State in the online Judiciary Case Tracking System (CTS) portal or in the physical file.

### **Appellant's Submissions**

14. Counsel for the Appellant submitted that from the evidence, at the time that the Appellant was alleged to have sold the land to PW1, the same was in existence both in terms of the title deed and also on the ground. He pointed out that the Appellant's father confirmed that he was the registered owner of the land and that he had given the Appellant, his son, authority to sell the same. He also pointed out the Appellant's testimony that he had decided to sell the land as PW1 had breached the agreement by not completing the purchase price, and that he was willing to refund PW1 the purchase price she had paid but who declined, insisting on the land. Counsel faulted the trial Court for failing to consider that the transaction involved or called for further events to be undertaken such as sub-division and securing of Land Control Board consents, and that it also involved further payments of consideration which he accuses PW1 of failing to complete to justify the claim of 10 acres. He further urged that the Sale Agreements relied on by the Prosecution were for an aggregate of 6 acres, and that no evidence was tendered to show that PW1 purchased 8.5 acres as charged, and thus the evidence could not sustain the charges as framed. He cited the case of *JR v Dent* 1955 2 QB, and also the case of *Oware v Republic* (1984) KLR 2001.
15. He urged further that the Agreements indicated the purchaser as Keiyo Investment Limited, and not PW1, that the charge sheet as drafted and presented is defective considering that for an accused to be able to defend himself, the charge sheet was not in tandem with the evidence presented. He maintained that the charge sheet ought to have been in the name of Keiyo Investment Limited. On the submission that the facts and evidence cannot sustain a conviction as the transaction of sale involved future events to be undertaken, he submitted that there are several authorities holding that contracts relating to future transactions do not amount to obtaining by false pretences. He cited the case of *Wafukho v Republic* (Criminal Appeal No. 200 of 2012) [2014] KEHC 7538 KLR, and also urged that this case was purely contractual and PW1 ought to have pursued her remedy in a civil Court through specific performance or seek a refund.

### **Determination**

16. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of witnesses (see *Okeno vs. Republic* [1972] E.A 32).
17. The issues that arise for determination in this Appeal are evidently the following:
  - i. Whether the charge sheet was defective.
  - ii. Whether the Prosecution proved the case of obtaining by false pretences against the Appellant to the required standard.
18. I note that the Appellant raised the issue of the alleged defective charge sheet in the Submissions, and not as a ground of appeal. This notwithstanding, I shall give it consideration.



19. In the charge sheet, the size of the parcel of land alleged to have been falsely sold is stated to have been 8 ½ acres. The Appellant’s Counsel, in his Submissions, contends that the Sale Agreements produced only revealed a size of 6 acres. According to him therefore, the variance in acreage was a defect that could not sustain the charge.
20. In this case, the Appellant was charged with the of obtaining by false pretences contrary to Section 313 of the Penal Code which is premised 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 to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”
21. On what components/ingredients a charge sheet should constitute, Section 134 of the Criminal Procedure Code provides as follows:
- “ Every charge sheet of information shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”
22. In determining whether a charge sheet is defective, the Court of Appeal in the case of Sigilani versus Republic (2004) eKLR 480, held as follows;
- “ The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clean and unambiguous manner so that the accused maybe be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”
23. Section 382 of the Criminal Procedure Code also gives guidance on the factors to be considered in determining whether, even with a defect, justice could still be met, and whether such defect is curable. The Section provides that:
- “ subject to the provision’s hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revered or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge proclamations, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings.”
24. As aforesaid, in the charge sheet in this case, it is stated that the size of land falsely sold by the Appellant to PW1 was 8 ½ acres. However, the two Sale Agreements produced in evidence reveal an aggregate of only 6 acres. The Appellant’s Counsel, in his Submissions, contends that the variance in the acreage was a defect that could not sustain the charge. I disagree. First, the Prosecution’s case was that the additional 2 ½ acres was sold subsequently and that is the reason why no further Sale Agreement was executed for it. The same was thus a contested fact and could not render the charge sheet defective before the trial could be concluded. Secondly, the main issue before the trial Court was the obtaining of money by false pretence, the acreage not thus being a central issue. Even assuming that there was a variance on the issue of acreage, the same cannot have therefore rendered the charge sheet fatal. Further,



as guided above, the Court, in determining whether a defect in a charge sheet caused injustice, ought to consider whether the objection could have been raised at an earlier stage in the proceedings. In this case, I note that the Appellant, when taking plea, was asked whether he understood the charges, and he confirmed to the Court, in the presence of his Counsel, that he did. The charge sheet could not therefore have been defective as the Appellant was able to understand the offence he was charged with and put up a defence.

25. On whether the Prosecution proved its case beyond reasonable doubt, as aforesaid, Section 313 of the Penal Code defines the offence of obtaining by false pretence 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 to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

26. In the case *Gerald Ndoho Munjuga v R HC Criminal Appeal No. 213 of 2011 (Nyeri)*, Mativo J (as he then was) quoted the High Court of Botswana in the case of *Lesholo & Another v. The State* as follows:

“ i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intent to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.

ii. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not false pretence if it is made in relation to the future even if it is made fraudulently. Where however the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false [8]

iii. .... The representation must be made with the specific purpose of getting money from the complainant which he/she would not have given had the true facts been revealed to him.”

27. As stated above therefore, there are 3 essential elements of the offence of obtaining by false pretences as follows:

- i. Obtaining something capable of being stolen;
- ii. Obtaining through false pretences; and
- iii. Obtaining with intent to defraud.

28. The first element that the Prosecution needed to prove is that the Appellant obtained something capable of being stolen. The parties are in agreement that the Appellant obtained money from PW1 and/or her family or family company, Keiyo Investments Ltd in which she is a director, as purchase price for the portions of land in issue. There is therefore no doubt that the Appellant obtained money, and money is definitely something capable of being stolen. The fact that the charge sheet names PW1 as the complainant, and not Keiyo Investments Ltd, did not, in my view, in any way prejudice the Appellant’s ability to understand the charge or to put up a defence.



29. The finding that the Appellant obtained something capable of being stolen is however not by itself sufficient to sustain a conviction since the mere taking of the money did not per se constitute the offence. The Prosecution had to therefore also prove that the money was obtained through false pretences and with the intention to defraud.

30. Section 312 of the Penal Code defines “false pretence” as follows:

“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.”

31. From the above definition, a “representation” therefore encompasses the following:

- (1) A representation by words, writing or conduct.
- (2) A representation of a matter of fact either past or present.
- (3) A representation that is false.
- (4) A representation made knowing it to be false or believed not to be true.

32. The above definition connotes that the offence of obtaining by false pretences does not relate to future events. On this point, I cite the Court of Appeal decision in *Carolyn Nabwire Wawire v Republic* [2018] eKLR in which the Court stated as follows:

“To constitute a false representation under section 313 of the Penal Code, the representation in question must be of a matter of fact, either past or present. It has been held consistently that a representation about future events cannot form the basis of a charge of obtaining money by false pretences. (See for example *Abdallah v. Republic* [1970] EA 657) and *Oware v. Republic* [1984] KLR 2001). The dicta of Devlin J. (as he then was), in *R. v. Dent* [1955] 2. Q.B. 594, where he stated that:

“a long course of authorities in criminal cases has laid down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law”,

has been cited with approval in this jurisdiction and we agree with the same.

For the above reasons, we find that this appeal has considerable merit and hereby allow the same. This was really a purely civil dispute in which the criminal process should never have been invoked. Accordingly, we quash the appellant’s conviction and set aside the sentence. It is so ordered.”

33. In this case, the Appellant admits receiving installment payments as purchase price for the portions of land. The amount received is said to have been an aggregate sum of Kshs 1,432,850/-. The Appellant also confirms that notwithstanding receipt of the amount, he nonetheless subsequently sold the same portion of land to a third party. Although therefore the promise or undertaking to transfer was initially dependent on a future event - payment of the full purchase price - the amount having been received, it ceased being a future event as the condition precedent for implementing the promise - payment - had crystalized. The Appellant’s allegation that PW1 demanded 10 acres but defaulted in payment of a balance of Kshs 60,000/- cannot change the facts. The Appellant sold the same portion of land to a third party knowing very well that he had already received a hefty amount from PW1 or her associates. If he were genuine, why did not refund the amount he had received? Although he alleges that he offered



to refund the amount but PW1 declined, he did not submit any evidence to that effect and further, he did not demonstrate that he was ready with the money.

34. In this case, the particulars of the charge were that the Appellant obtained money by “pretending” that he could sell the said parcel of land to PW1, “a fact he knew to be false”. “Pretending” connotes that the Appellant did not have the capacity to sell the land at the time of entering into the agreement. It may be debatable whether this ingredient of the charge was correct in this case since the Appellant’s father, who was the registered owner thereof, confirmed that he had given the land to the Appellant and that therefore, the Appellant had his authority to sell the land to PW1 as he did. However, the receipt of the money by the Appellant from PW1, his subsequent sale of the same portion to a third party, and his failure to refund the amount received to date indicates an unwillingness on the part of the Appellant, from the onset, to complete the sale, and thus “pretence”.
35. Having established the above, I am satisfied that intent to defraud on the part of the Appellant was established. The only conclusion that can be drawn from the Appellants’ conduct is that he was fully aware of his actions and his intention was to defraud.

### **Final Order**

36. The upshot of the foregoing is that this Appeal is dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 17<sup>TH</sup> DAY OF DECEMBER 2025**

.....

**WANANDA JOHN R. ANURO**

**JUDGE**

Delivered in the presence of:

Ms. Bundotich Korir for the Appellant

Ms. Mwangi for the State

Court Assistant: Brian Kimathi

