



REPUBLIC OF KENYA



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**Gitari v Republic (Criminal Appeal E020 of 2023)
[2025] KEHC 18971 (KLR) (22 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E020 OF 2023
EM MURIITHI, J
DECEMBER 22, 2025**

BETWEEN

CAROLYNE WANJIKU GITARI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appellant from original conviction and sentence of the
Kerugoya Chief Magistrate's Court Criminal Case No. 199 of 2019
delivered on 30th March, 2023 by Hon. Cheruto C. Kipkorir (PM))*

JUDGMENT

1. The appellant was together with another convicted on two counts, respectively, for the offences of obtaining by false pretences contrary to section 313 of the Penal Code and conspiracy to defraud contrary to section 317 of the penal Code, the offence relating to purported sale of 5 acres of parcel of land LR Mwea/Miuu/LR 13963/4511, and sentenced to imprisonment for two (2) years in each count running consecutively from the date of the sentence on 30/3/2023.
2. The appellant raises several grounds of appeal that:
 1. The learned trial Magistrate misdirected herself in both facts and the law by disregarding the defence of the Appellant.
 2. The learned trial Magistrate misdirected herself by proceeding with sentencing the Appellant before considering and or calling for a presentence report.
 3. The learned trial Magistrate misdirected herself by sentencing the Appellant to a term of imprisonment without an option of a fine or other sentence; which is excessive in the circumstances.



4. The learned trial magistrate erred in ordering the sentences to run consecutively instead of concurrently since the charges arose from the same transaction.
5. The judgement of the learned trial Magistrate was against the weight of the evidence adduced.

Brief Facts

3. The appellant was charged with two others with the following offences:

Count 1

Obtaining money by false pretense contrary to section 313 of the Penal Code.

Caroline Wanjiku Murage, Rose Wangeci Muriu and Nahashon Murage Muriithi on 22nd June, 2018 in Kerugoya town within Kirinyaga County jointly with intent to defraud obtained Kshs.1,800,000 from Fridah Wambui Kiura and Deany Wanjiku Kinyua by falsely pretending that you were in a position to sell to them 5 acres from a parcel of land No. Mwea/MIUU/LR. 13963/4511 a fact you knew to be false.

Count 2

Conspiracy to defraud contrary to Section 317 of the Penal Code.

Caroline Wanjiku Murage, Rose Wangeci Muriu and Nahashon Murage Muriithi on unknown dated in the month of June, 2018 in Kerugoya town within Kirinyaga County jointly with intent to defraud obtained Kshs.1,800,000 from Fridah Wambui Kiura and Deany Wanjiku Kinyua by falsely pretending that you were in a position to sell to them 5 acres from a parcel of land No. Mwea/MIUU/LR. 13963/4511 a fact you knew to be false.

4. The trial court found the appellant guilty as charged of the two offences and on 30th March, 2023 sentenced her to 2 years for Count 1 and 2 years for count 2.

Prosecution case

5. PW1- Fridah Wambui Kiura testified that together with her sister, Deany (Pw2 herein) wanted to buy land in 2018. She stated that she had asked her brother and her husband to look for a land for them. She was called by a person, who she later knew was Caroline Wanjiku, the first accused herein. This was in June 2018. She told her she had a land in South Ngariama, which her husband and brother went to see. It was Mwea/ Miuu/L.R 13963/4511. On 21/6/2018 she went to see the land accompanied by her husband, Grace Wamarwa (accused 2) and Caroline Wanjiku (accused 1), Christopher Mbundi and a surveyor called Kamutu. She was to buy 5 acres at Kshs 450, 000 each for a total of kshs 2.3 million.
6. On 23rd June, 2021 she let her husband go to Kutus to verify the title they did execute the agreement which was prepared by the firm of P.M Muchira & Co. Advocates. She was with her husband, accuse 1 & 2, Deany Wanjiku and Christopher Bundi. She deposited kshs 1.8 million. Kshs 500,000 was to be paid once survey was done. She sent the transfer money to Caroline. She gave her a deposit slip of ksh 1.8 million. Her sister did a deposit of kshs 485,110 deposited by Deany Wanjiku. She was to get 2 acres out the 5 acres they bought.
7. Later, her husband was called by Grace Wamarwa and was told that he was trespassing on her land. That is when she made a report at the DCI. They realized that the second accused person did not own the land they bought; they never received their money back either. She did not know the 3rd accused, Nahashon Murage.



8. On re-examination, she stated that the 2nd accused availed her ID and she said she was called Grace Wamarwa. She did sign the agreement in her presence and she signed her name and her too. She only deposited money to Caroline as she was unwell.
9. PW2- Deany Wanjiku sister of PW1 confirmed her evidence. She was to buy 2 acres at Kshs 460,000 an acre. The seller was Grace Wamarwa and was Caroline's mother. She she did not go to see the land with Pw1 and her husband on 21st June, 2018. She was to Kutus on 22/6/2018 when the search for the land was done. She met the first and second accused herein, as well as Christopher Mbundi. They went to the office of the County Government, the second accused, who introduced herself as Grace. Grace Wamarwa, gave out ownership documents. George looked at them in the County Government office, said they were genuine. She explained that he told them to have the land surveyed to confirm the acreage. She confirmed how the agreement was written, how the money was paid as per the evidence of PW1. Grace Wamarwa said that Caroline was her caregiver and money was to be paid to her. Jackson called the real Grace Wamarwa who told them not to till the land. She knew 1st and 2nd Accused but did not know 3rd accused.
10. PW3-Jackson Kiura Lukenya the husband of Pw1 and brother in law of Pw2. He reiterated evidence of Pw1 was well as that of Pw2. He added that he was called by Charles Murimi (Pw4) a sibling to Pw1 and Pw2. He told him about a land in South Ngariama being sold; together they went to see it. They met with the first accused, Caroline, who introduced herself and the daughter of the owner, who was indicated as Grace Wamarwa. They negotiated the purchase price at Kshs 460,000 an acre. Caroline told them she had to consult with her mother before confirming the amount. She later called indicating she affirmed. On 21/6/2018, he went to the land surveyor with Pw1 and Pw2 as well as the first and second accused persons and Christopher Bundi. The surveyor was called Kamotho, who was also mentioned by Pw1. He surveyed the land, but he did not confirm if it was indeed five acres. George confirmed the documents were genuine They made their sale agreement at P.M. Muchira Advocates. Grace told them to deposit the money to Caroline. He also confirmed that he was called by the real Grace Wamarwa on 30/6/2018 and informed that they were trespassing her land and that they were duped on the land purchase. He did not know the third accused person. He did not get the land and money.
11. PW4- Charles Murimi Kinyua the brother to Pw1 and Pw2 are his sisters, Pw3 is his brother in law. He confirmed that the two wanted to buy land. Pw1 was unwell and did not want to deal with land brokers. He informed Pw1, Pw2 and Pw3. On 17/6/2018, together with Pw3, they went to see the land. Grace had told him he will send her daughter. He was with Jackson. They met with the daughter who was the first accused herein. They agreed on the purchase price as kshs 460,000 an acre. On 21st June, 2018 they went to the land to survey. The 1st and 2nd accused were present. He did not know details of the sale agreement. That was the extent of his involvement. He did not know the third accused.

PW 5 Julius Mwai

12. He is an agent of Advocate Mutoya Muthuri and not a surveyor. He testified that on 20th June, 2018, while he was at home, a person called Bernard came to his home. He asked him if he knew a surveyor, he had been sent by the first accused herein. He met the two, Bernard and Caroline, (first accused herein) the next day, he took them to the surveyor and accompanied them to the shamba to be surveyed. He met two women and two men. The land was surveyed into five and two acres. He added that Caroline paid for the service Kes. 15,000. He was later called by the buyer who informed him Caroline could not be reached when called. He called her as well, the number was switched off. He was arrested by DCI when the report was made, he is the one who looked for the accused persons.



13. PW6 - Superintendent of Police Michira Ndege a document examiner and based in Mandera. He adduced in evidence the report he prepared upon the request by the investigating officer on the following documents:
 - a. A7- 2 sale agreement
 - b. B- Letter dated 22/6/2018
 - c. C of – C4 the specimen signature of Rose Wangeci Muriu & Grace Wamarwa Mwangi.
14. He was to confirm if the signature in A1- and B marked in red if it had been made by the same writing as compared to specimen availed on X C1 – C4. He looked at the said signature and documents as marked and compared it with the specimen signatures marked as C1 – C4. He concluded that it was made by the same author.
15. On re-examination, he stated that the signature belonged to Grace Wamarwa.
16. PW7-Corporal Dorisilla Ochami works as DCI Kirinyaga Central and is the investigating officer. On 1/7/2028 she got a report from the police for PW1 & PW2. It was with Jackson Kiura. They said that money was taken on 22nd June, 2018. They were buying land from Grace Wamarwa Mwangi and Caroline Wanjiku Gitari. It was land No. Mwea/MIUU/LR. 13963/4511.
17. On 22nd June, 2018 they went to the advocate and a sale agreement was written. Then kshs.1.8 million was paid via equity Bank. Caroline account being 0040175469739. The complainant said that the real Grace called them and told them they did not sell the land.
18. She searched Caroline account after getting a court order. It shows Caroline's ID Number and her phone number. Her next of kin is her husband, Nahashon Murage. She was given statement of account for Caroline – exhibit 16. Account statement shows kshs 1.8 million was deposited on 22nd June, 2018 and kshs 822,000 was withdrawn and Nahashon Murage was sent kshs 800,000.
19. The report of the documents examiner showed specimen signature was similar with the signature in the sale agreement and letter of transfer. It was signed by Rose, Caroline, Rose and Nahashon did get arrested.
20. She produced in evidence the following documents
 - a. Sale agreement dated 22/6/20218.
 - b. Deposit slip dated 21/6/2018 for Kes. 485,110
 - c. Deposit slip dated 22/6/2018 for Kes. 1,800,000
 - d. Application for funds transfer at Equity bank for Kes. 1,800,000
 - e. Letter dated 22/6/2018 from the 2nd accused to the county government, giving her consent to transfer the land to Pw1 and Pw2.
 - f. The ballot for the land Mwea/Miuu/L.R 13963/4511 - no 4511
 - g. Receipt dated 27/4/2009for Kes. 7,000
 - h. Receipt dated 27/1/2009 for Kes. 2,500
 - i. Copy of Identify card for Caroline Wanjiku Gitari ID 23199102
 - j. Copy of identity card for Grace Wamarwa Mwangi ID 74550027



- k. KRA PIN for Grace Wamarwa PIN number A001349197V
 - 1. Document examiners report and the sample signature for the 24 accused.
 - l. Order dated 17/1/2019 and application dated 17/1/2019
 - m. Account opening forms for Caroline Wanjiku Gitari for account number 00401754669739
21. On re-examination, she stated that she arrested the appellant at her home where Nahashon lives. She had hidden in a wardrobe. Nahashon did not talk at all. She did not hit accused 3.

Defence case

- DW1 - Nahashon Murage Murithii testified that he lived in Kibingo. He is a farmer and a businessman. On 14th March 2019, he was arrested at about 3pm and taken to Kerugoya police station. They said that he was not to be charged. Further, he was told that there was money that he was given by his wife. He told them that when she did deposit the money, they had separated.
22. He called Caroline and told her to come. She did and she said there is money a lady had given her money and her account was locked. This was on 22/6/2018. Caroline told him to meet at Kerugoya, she said she can't withdraw the money it was deposited by Grace Wamalwa. She wanted to withdraw it and give it to Grace and she found it locked. She was told at the bank to find someone to transfer it to someone else who is not Grace. She did transfer it to him. He withdrew it was Kes. 800,000 and gave it to Caroline and Grace and her son who also present. He was arrested. He did not know about the sale of the land.

DW2- Caroline Wanjiku

23. She lives in Kagumo and is a business woman. On 22/6/2018 she was called by Benard Karimi. She knew him as he bought eggs from her. He said he had a shamba he was selling in South Ngariama. He owned it with his sister and brother. He said we go see it the next day. They went to view it. They were three, Benard, Grace Wamalwa and Eliud. A lady called and said that land was being sold, she asked that they direct the intended buyers and they did so. The persons who she took to the shamba, are called Jackson, Wambui and Charles. They saw it and they said we go to Kutus to go do a search, and they did so. A person called George told them the land was fine. They said they go to the advocate's office; he is called Muchira. Jackson and Wambui did say they will write the agreement. It was said she will be a witness, and she gave out the ID. The owner of the land also executed the agreement. The search showed that the land was in the name of Grace Wamalwa. Both Grace and Benard said their accounts have loans and it was said it be deposited in her account. The advocate said he will not sign the agreement until he sees the money. She withdrew Kshs. 820,000.
24. They went back to the advocate he saw the money and they all signed the agreement. She gave Grace the 800,000. She could not withdraw all the money. She knew Bernard Karimi from a while back. They agreed to withdraw the money the next day. When we went to the bank, they found that Grace did write a letter saying that she should not withdraw the money. On 25/6/2018, at her branch in Karatina, she sent Kshs 800,00 to the account of her husband Nahashon Murage. Nahashon withdrew the money and he gave it to Benard Karimi. Nahashon did ask why I gave Benard the money and how long I knew him. They quarreled and he was later arrested. The deal was not genuine. Grace Wamalwa is Rose Wangeci as she called herself then.



DW3- Rose Wangeci

25. She lives in Itumbi and is a farmer. She was called by Benard Karimi in 2018. He said he had land in Ngariama he owned it with his sister and brother. They were selling it. They went with the surveyor called Kamutu and Caroline Wanjiku, to show them the land. There is a person called Eliud, he knew those people had money to buy the land. They went on their own. She was not at the shamba. She went to Kutus to do the search. She was with Karimi, Caroline and Eliud. Caroline said that the land belonged to the mother who passed on. She said that she pretended to be her mother at the time. She did. She came to the advocate Muchira, he wrote an agreement. Caroline was given the money it was deposited in her account. The other money she transferred to her husband. She also said there were people in South Ngariama she would take to them Kes. 400,000. She took the remaining money with her husband. She did not know this case. The ID she used her husband gave her as he was in Kutus he was with Eliud and Benard. He is called Nahsahon Murithi Murage. She was arrested as she had someone else's money. She does pray to be forgiven.

Appellant submissions

26. From the evidence tendered, PW1 stated that the land belonged to Grace Wamarwa (2 accused in the lower court) — page 19 line 4 - 8 of the record of appeal. Pw1 stated as follows;

“On 214 June, 2021, I did go and we saw the land I was with my husband, Grace Wamarwa and Caroline Wanjiku. Christopher Bundi was also present and as surveyor called Kamutu. I was expectant at the time and I was on bed rest”

27. Having done due diligence, PW1 must have confirmed that the land belonged to the 2nd accused and it is on the basis of this that payment was made upon execution of the agreement. PW2 further stated that Grace Wamarwa did remove documents to show ownership and that George did look at them and said they were genuine. They then agreed to do the agreement and the money was paid into the appellants account under the instruction of the 2nd accused. PW4 (Charles Murimi) testified that he was called by the 2nd accused who informed him that she was selling land and that he informed PW1 and PW2 of the land. The appellant submits that she only participated to an extent expressly sanctioned by the 2nd accused and that all the parties were in agreement and an advocate witnessed the transaction. Lastly, the appellant bore no interest in the money as she withdrew it and handed it over to the 2nd accused in the presence of the advocate.

Respondent submissions

Did the Prosecution prove the ingredients of Obtaining by false pretences?

28. Section 313 of the Penal Code states ‘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 misdemeanor and is liable to imprisonment for three years.
29. The case of Gerald Ndoho Munjuga v Republic [2016] KEHC 6508 (KLR) (Mativo, J. as he then was) cited the case of High Court of Botswana in Lesholo & Anather vs The State where in dealing with an offence of this nature held that:

“To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intend 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.

A false pretence has been held to be 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 a 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.

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."

30. PW1 proved the Appellant working in concert with the 2nd Accused passed themselves as legitimate owners of the land being sold. The Appellant met PW1 who was said to have been the representative of 2nd Accused, the mother who is unwell to actively transact. She introduced the land, negotiated the price with PW1 and PW2. She even took instructions from 2nd Accused before agreeing to the terms of sale. The Appellant received Kshs. 1,800,000.00 via bank transfer, executed the agreement as a witness and availed her identity card. She thereafter was handed in cash Kshs. 800,000.00 by the 3rd accused, funds that she had sent to his account that were part of the Kshs. 1,800,000.00 received from PW1 as purchase price of the land.
31. The Appellant was neither the registered owner of the land in question nor have authority to transact on behalf of the legitimate owner. This did not stop her from procuring the services of PW5 to secure a Surveyor to demarcate the land. She was present when the surveyor was working on the land and paid for these services.

“Did the Prosecution prove the ingredients of the charge of Conspiracy to defraud?”

32. The offence of Conspiracy is set out in section 393 of the Penal Code as:

“Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”

33. The Court of Appeal in *Kisorio alias George Jack Tobias v Republic (Criminal Appeal 109 of 2020) [2023] KECA 335 (KLR)* was of the view that “The dominant aspect of the offence of conspiracy is that there must be a common agreement and or, a meeting of the mind. Was it proved that there was a meeting of the mind of the appellant and his co-accused.”
34. The Appellant and 2nd Accused first made contact with PW3 and PW4 offering their land for sale. They followed up with meeting with PW1, PW2 and negotiated the purchase price, terms of sale. In this, the Appellant stated she is the daughter and adheres to the instructions of the mother, 2nd accused. She would become a witness in the sale agreement, facilitate surveying of the land and receive purchase funds on behalf of the ailing mother. The periodic appearance of 2nd Accused during the negotiating period, she narration of her ill health, the stepping aside to seek authorization painted a legitimate mother-daughter narrative. The Appellant and 2nd Accused are joined at the hip. Lastly, both mobile



numbers of the Appellant and 2nd Accused were offline when challenges arose when the real proprietor warned PW1 of the fraud.

The Appellant's Defence was disregarded in total

35. The Appellant offered a simple denial. She acknowledged receiving funds from PW1 but stated the same was withdrawn in batches, Kshs. 800,000.00 in cash and handed over to Grace. Another Kshs. 800,000.00 sent to 3rd Accused account which was withdrawn and handed over to her and in turn handed over to Bernard. It was a strange explanation, she had a balance of Kshs. 200,000.00 which remains unaccounted for. The explanation that Grace and Bernard had loans and could not receive the funds was not proved.
36. On sentencing, the respondent submits that the appellant was not remorseful for the offence and delayed the trial for 4 years. The aggravating circumstances outweighed the mitigation.

Issues

37. Whether the prosecution proved the ingredients of obtaining by false pretenses.
38. Whether the prosecution prove the ingredients of the charge of Conspiracy to defraud.
39. Whether the trial magistrate erred in ordering the sentences to run consecutively instead of concurrently since the charges arose from the same transaction.

Analysis

40. The appellate court is guided by the principles set out in *Okeno v Republic* [1972] EA 32, where the Court of Appeal held that:

“The first appellate court must reconsider the evidence, evaluate it itself, and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
41. Under Section 354(3)(a) of the Criminal Procedure Code, this Court may reverse the finding and sentence of the lower court if it appears that there has been a miscarriage of justice, or the decision is against the weight of the evidence.

Whether the prosecution proved the ingredients of obtaining by false pretenses

42. Section 313 of the Penal Code provides that:

“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 misdemeanor and is liable to imprisonment for three years.”
43. As observed in *Gerald Ndoho Munjuga v Republic*, *supra*, the Prosecution must prove the following elements beyond reasonable doubt:
 1. A false representation of a present or past fact;
 2. Knowledge by the accused that the representation was false;
 3. An intention to defraud; and



4. That the accused obtained something capable of being stolen as a result of the false pretence.
44. The evidence on record shows that the Appellant actively participated in the land transaction from inception. She introduced the land for sale to PW1 and PW3, negotiated the purchase price, facilitated the survey process, accompanied the complainants to conduct a search, executed the sale agreement as a witness, and crucially, received Kshs. 1,800,000/= into her personal bank account.
45. The appellant submitted that having done due diligence, PW1 must have confirmed that the land belonged to the 2nd accused and it is on the basis of this that payment was made upon execution of the agreement.
46. Although the Appellant claimed she was merely assisting the second accused, the evidence demonstrates that she represented to the complainants that the land was available for sale and that the sellers had authority to sell it, a fact which later turned out to be false. The real owner of the land disowned the transaction and the complainants neither received the land title nor a refund of their money.
47. The appellant submits that she only participated to an extent expressly sanctioned by the 2nd accused and that all the parties were in agreement and an advocate witnessed the transaction.
48. The Appellant's receipt and partial redistribution of the funds, including transfer of Kshs. 800,000/= to the third accused, reinforces the finding that she was not an innocent party but an active participant in the fraudulent scheme.
49. This Court therefore finds that the prosecution proved beyond reasonable doubt all the ingredients of the offence of obtaining by false pretences.

Whether the prosecution proved the ingredients of conspiracy to defraud

50. The offence of Conspiracy is set out in section 393 of the Penal Code as:

“ Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.
51. In *Kisorio alias George Jack Tobias v Republic* [2023] KECA 335 (KLR), the Court of Appeal reiterated that conspiracy is rarely proved by direct evidence and may be inferred from conduct showing a common design.
52. The Appellant and 2nd Accused first made contact with PW3 and PW4 offering their land for sale. They followed up with meeting with PW1, PW2 and negotiated the purchase price, terms of sale. In this, the Appellant stated she is the daughter and adheres to the instructions of the mother, 2nd accused.
53. From the evidence, the Appellant acted in concert with the co-accused persons. There was a clear sequence of coordinated actions: joint introduction of the land to buyers, presentation of ownership documents, execution of agreements, receipt and redistribution of purchase money, and subsequent disappearance when the fraud was uncovered.
54. The Appellant's explanation that she was acting on instructions of others was inconsistent and failed to account for her central role in receiving and disbursing the funds. The financial trail produced by



PW7, including bank statements and transfers, corroborated the prosecution case and established a chain of connection between the Appellant and her co-accused.

55. In her defense, the appellant did not deny that she received the land transaction money on behalf of the 2nd accused. She transferred part of the money to the 3rd accused. The 2nd accused had agreed to pose as the owner of the land. Hence, they were all aware of the conspiracy to defraud the complainant.
56. This Court is satisfied that the totality of the evidence established a common intention to defraud, and that the charge of conspiracy to defraud was proved to the required standard.

Whether the trial magistrate erred in ordering the sentences to run consecutively

57. Section 14(1) of the Criminal Procedure Code gives a trial court discretion to order sentences to run consecutively or concurrently. However, judicial precedent has consistently held that where offences arise from the same transaction, sentences should ordinarily run concurrently.
58. In *Peter Mbugua Kabui v Republic* [2016] eKLR and *Sawedi Mukasa s/o Abdulla Aligwaisa v R* [1946] 13 EACA 97, the courts held that consecutive sentences are inappropriate where offences are committed in the course of a single transaction.
59. In the present case, both counts arose from the same land transaction, involved the same complainants, the same sum of money, and were committed within the same period. The conspiracy was merely the mechanism through which the offence of obtaining by false pretences was executed. The trial magistrate therefore erred in principle by ordering the sentences to run consecutively.
60. In addition, the Court failed to consider that the accused were first offenders as no records were availed by the Prosecution and the principle in *Josephine Arissol v. Republic* [1957] EA 447 that a maximum sentence should not be imposed on a first offender is relevant. Although the sentence for the offences of obtaining by false pretences and conspiracy to defraud is imprisonment for three years, the failure to consider the alternative of a fine for the first offenders was harsh.
61. The record of the trial court proceedings shows that the Court was perhaps unduly moved by the prevalence of the offence and the loss on the complainant as follows:

“ 30. 3.2023

Before: Hon.C. Cheruto K -PM

Prosecutor/State Counsel: Riziki

Court Assistant: Job

Accused: All 3 (three) present.

Court: Judgement delivered as per the hard copy.

Kariuki: holding brief for Hayo for the accused 2 (two).

Pros: I do not have any previous records.

Kariuki: I do pray you render justice with mercy. I do seek a non- custodial sentence: she is extremely remorseful.

Rose Wangechi: I am sorry I did get involved by Caroline. I have never committed the offence.

Court:



Noted.

- i. I have considered the circumstances of this case. The prevalence of the offence under circumstances which is the bulk of the court work. I have also considered the loss in complainant underwent.
- ii. They are each sentenced to serve an imprisonment of 2 years each in each count. It will be consecutively. Right of Appeal 14 days.
- iii. Cash bail/security deposited be returned to the depositor.

HON. C. C. Kipkorir

PM”

62. As first offenders, the accused were entitled to benefit to the lesser sentence available by way of a fine which is permitted under section 26 (3) of the Penal Code as follows:

“

“26. Imprisonment

- (1) A sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable.
- (2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.
- (3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:

Provided that—

- (i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;
- (ii) deleted by Act No. 5 of 2003, s. 4.”

63. This Court considers a sentence of a fine of three hundred Thousand shillings (Ksh.300,000/-) and in default an imprisonment term of one (1) year for each count to a total of two years for the two counts, to be appropriate sentence in this case. The default sentence shall run consecutively in terms of section 37 of the Penal Code, which provides as follows:

“37. Sentences when cumulative

Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently



with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.”

Orders

64. Accordingly, for the reasons set out above, the Court finds no merit in the appeal from conviction, except sentence and makes the following orders:

1. The appeal against conviction on both counts fails and is dismissed.
2. The appeal against sentence succeeds to the extent that there is substituted for the sentence of imprisonment for two years, a sentence of a fine of Ksh.300,000/- and in default an imprisonment term for one (1) year for each count.

65. In accordance with section 37 of the Penal Code, the default sentences shall run consecutively.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF DECEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba and Mr. Charles Mwangi for the DPP.

Ms. Kiragu for the Appellant.

