

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. E096 OF 2023

PRICILLAH NDUTA GITHUMA.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an appeal from the conviction and sentence by Hon. J Irura (SPM), delivered on 31st July, 2023, at the Kigumo Senior Principal Magistrate's court in criminal case no.1006 of 2019)

JUDGEMENT

- 1.The appellant, *Pricillah Nduta Githuma*, was tried and convicted before the lower court, in Count I, with the offence of obtaining money by false pretences **contrary to section 313 of the Penal Code.**
- 2.The particulars of the offence allege that on diverse dates between 1st May, 2019, and 10th May, 2019, in Murang'a south sub-county, within Murang'a county, the accused, jointly with others not before court, and with intent to defraud, obtained from *Rose Wairimu Waiganjo*, a total sum of Kshs. 1,600,000, by falsely pretending that she was in a position of selling land parcel no. Makuyu/Makuyu/Block I/552 to *Rose Wairimu Waiganjo*, a fact she knew to be false.
- 3.In Count II, with the offence of **forgery, contrary to section 345 as read wit section 349 of the Penal code.** It is alleged that on unknown dates at an unknown place, within the republic of Kenya, the accused, jointly with

others no before court and with intent to defraud, forged certain documents, namely a title deed number Makuyu/Makuyu/Block I/552, purporting it to be a genuine title deed issued by the Land registrar of Murang'a lands office.

4. In count III, with the offence of **Making a document without authority, contrary to section 357 (a) of the Penal Code**. It is alleged that on unknown dates, at an unknown place, within the republic of Kenya, the accused jointly with others not before court, and with intent to defraud without lawful authority or excuse, made title deed no. Makuyu/Makuyu/Block I/552, purporting it to be a genuine title deed issued by the land registrar of Murang'a Lands Office.
5. In count IV, with the offence of **uttering a false document with intent to defraud, contrary to section 357(b) of the Penal Code**. The particulars of the offence allege that on an unknown date, at View park towers, within Nairobi county, the accused, jointly with others not before court, and with intent to defraud knowingly uttered a document, namely title deed no. Makuyu/Makuyu/Block I/552, to an advocate, namely Samuel Mwaniki, purporting it to be a genuine and valid title deed issued by the Land Registrar of Murang'a Land's office.
6. Upon conviction, the appellant was sentenced to pay a fine of Kshs. 400,000 per count, in default to serve a term of three (3) years imprisonment for each count. There is no mention however as to whether the sentences were to run concurrently or consecutively.

7. She was aggrieved with her conviction and sentence; hence she proffered an appeal to this court vide a petition of appeal filed on 11th August, 2023. In her petition of appeal, the appellant faulted the learned trial magistrate for failing to find that multiple counts in the charge sheet related to the same criminal conduct, thereby resulting in overcharging and prejudice; for failing to find that the appellant was not correctly identified as the perpetrator of the offences charged; and for failing to find that no evidence connected her with the offences charged.
8. The appellant also faulted the learned trial magistrate for sentencing her to a term of 12 years imprisonment, which sentence she termed as harsh and inappropriate in the circumstances. On the above grounds, the appellant urged this court to quash her conviction and set aside the sentence by the trial court.
9. The appeal was canvassed by way of written submissions. The appellant's submissions dated 29th May, 2024, were filed on her behalf by her learned counsel S.N Thuku & Company Advocates, while those by the respondent dated 23rd May 2024 were filed Ms. Winfred Nzuki, learned prosecution counsel.
10. In her submissions, the appellant contended that the identification process conducted at the police station was inadequate and fundamentally flawed, thereby subjecting her to a wrongful conviction in violation of her constitutional right to a fair trial as guaranteed under **Article 50(2)(a) of the Constitution of Kenya**. She argued that the irregular identification procedure compromised the presumption of innocence and rendered the prosecution's case unreliable, particularly as her

conviction was founded on what she described as doubtful identification evidence.

11. The appellant further submitted that the prosecution failed to call crucial witnesses whose testimony was material to the just determination of the case, namely Samuel Mwaniki (Advocate), the Land Registrar, and Nancy Wairimu Gathogo. She maintained that the omission to summon these witnesses weakened the prosecution's case and gave rise to an adverse inference against the State.
12. Additionally, the appellant argued that the prosecution did not establish the essential ingredients of the offences with which she had been charged. She contended that no cogent or credible evidence was adduced to prove the charges beyond reasonable doubt, and that the learned trial magistrate erred in convicting her on the basis of mere allegations and suspicion.
13. On sentence, the appellant submitted that the term of three (3) years' imprisonment imposed on each count was excessive and disproportionate in the circumstances. She argued that, given the alleged evidentiary gaps and the absence of any aggravating factors, the sentence was harsh and unwarranted.
14. The respondent on the other hand submitted that the particulars of the offences with which the appellant had been charged, together with the evidence tendered before the trial court, clearly demonstrated that each count related to a distinct and separate transaction. The learned prosecution counsel argued that the circumstances giving rise to each offence were different and independent, and

therefore there was neither duplicity nor any overlap in the charges.

15. The respondent further submitted that the complainant met the appellant on two separate occasions at View Park Towers, during which they interacted at length in the course of the transactions. It was contended that the complainant was able to positively identify the appellant both from photographs displayed at the offices of the Directorate of Criminal Investigations (DCI) and subsequently at a properly conducted identification parade. In the respondent's view, the identification was free from error and sufficiently placed the appellant at the scene as the perpetrator of the offences.
16. The respondent maintained that the prosecution discharged its burden of proof and established all the essential elements of the offences beyond reasonable doubt. Consequently, it was submitted that the conviction entered by the learned trial magistrate was sound and ought to be upheld.
17. On sentence, the respondent submitted that the sentences imposed for each count were lawful and commensurate with the gravity of the offences committed. It was further argued that the trial court properly exercised its discretion, noting the need for a deterrent sentence in the circumstances of the case.
18. This being a first appellate court, it is the duty of this court to reconsider and re-evaluate the evidence that was tendered before the trial court and to arrive at its own independent conclusion as to whether the findings of the learned trial magistrate should be upheld. In doing so,

however, the court must bear in mind that, unlike the trial court, it neither saw nor heard the witnesses testify, and must therefore make due allowance in that respect.

19. This duty was reiterated in the Court of Appeal case of **Okeno v Republic (1972) EA 3**, where the court expressed itself as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

20. Guided by the principle in the aforementioned case, I have duly considered the grounds of appeal, the evidence on record, as well as the rival written submissions by both parties and all the authorities cited therein. I have also considered the entire proceedings recorded by the trial court and read and understood the impugned judgement. Having done so, I find that the main issue for determination is whether the present appeal is merited.

21. The appellant in this case, has challenged her conviction by the trial court on all the four counts that she had been charged with, on grounds that the prosecution did not adduce sufficient evidence to convict her for the said offences.

22. In count I, the appellant had been convicted of the offence of obtaining money by false pretences. **section 313 of the Penal Code**, defines the offence of obtaining money by false pretences 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.”

23. The phrase false pretence, has been defined under section 312 of the Penal Code, 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.”

24. The court in **Joseph Wanyonyi Wafukho v Republic BGM HCCRA No. 200 of 2012 [2014] eKLR**; provided for the ingredients which the prosecution must prove before an accused can be convicted for the said offence. The court in that case stated as follows:

“...the essential elements of the offence of obtaining through false pretenses are that the person:

- a. Obtained something capable of being stolen;**
- b. Obtained it through a false pretense; and**
- c. With the intention to defraud.”**

25. In this case, the learned trial magistrate found the appellant guilty of the offence of obtaining money by false pretences on the basis that, by allegedly presenting herself as a shylock who had advanced a loan to the purported owner/seller of the land, the appellant induced the complainant to pay a total of Kshs. 1,600,000 to the alleged seller and an advocate by the name Samuel Mwaniki, on her behalf.

26. Upon re-evaluating the evidence on record, I find that the conviction by the trial court was grounded solely on the identification evidence of a single witness, namely PW1, Rose Wairimu Waiganjo. I say so because, from the totality of the evidence adduced before the trial court, PW1, out of all the four prosecution witnesses who testified before the trial court, was the only one who purported to link the appellant to the alleged offence and to the events at View Park Towers.

27. PW1 testified before the trial court, that when she first met the purported seller of the parcel of land, the said seller informed her that she did not have possession of the title deed because it had been deposited with a shylock as security for a loan. She was further told that one Advocate Samuel Mwaniki was holding the title deed on behalf of the said shylock, who had deposited it in his office.

28. PW1 further stated that she and the seller proceeded to View Park Towers, where they met both the advocate and the alleged shylock. According to her testimony, the

shylock declined to release the title deed until the outstanding loan was fully repaid and indicated that upon payment, she would instruct the advocate to release the title deed. PW1 testified that after conducting a search on the property, she withdrew Kshs. 1,600,000 from Equity Bank and transmitted the money to the alleged seller and the shylock through the advocate, Samuel Mwaniki.

29. Notably, the complainant did not hand the Kshs. 1,600,000 directly to the appellant. By her own evidence, the money was given to the advocate, who was allegedly to transmit it to the shylock, as the said shylock had travelled to take her children back to school. I have however noted, that the said advocate was not called as a prosecution witness.

30. Whereas *Section 143* of the Evidence Act permits the prosecution to call such number of witnesses as it considers sufficient to prove its case, the evidence of the advocate in this matter was, in my view, an important and crucial witness. He was the person who allegedly received the money on behalf of the appellant and was present at the meeting where the appellant is said to have represented herself as the shylock. His testimony would have been critical in establishing whether the appellant indeed held herself out as the shylock and whether the funds withdrawn by PW1 were received by him and held on her behalf.

31. In the absence of the advocate's evidence, there was no independent testimony corroborating PW1's account of the events at View Park Towers or linking the appellant to the receipt of the Kshs. 1,600,000. It follows therefore that the conviction of the appellant by the trial court rested entirely on the uncorroborated identification evidence of a single witness.

32. The court of appeal in **Wamunga v Republic [1989] KECA 47 (KLR)**, stated thus:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

33. Similarly, the Court of Appeal for Eastern Africa in the case of **Abdallah Bin Wendo v R 20 EACA 166 at page 168**, stated as follows:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

34. In this case, given that there was no circumstantial or any other direct evidence linking the appellant to the crimes she had been charged with, the next step would have been to test with great care, the single evidence of the complainant.

35. That said, as per the evidence of PW1, she met the appellant as the alleged shylock twice, at the Advocate Samuel Mwaniki's office. The prosecution in their submissions stated that the complainant interacted at length with the appellant, as such she was able to positively identify her as one of the perpetrators; not only in the photographs that she was shown while at the DCI offices, but also at the identification parade that was carried out at the police station, as well as at the dock, while in court. However, there was no mention of the surrounding circumstances under which they met.

36. Mativo, J (as he then was) in **Watuku v Republic (Criminal Appeal 08 of 2020) [2022] KEHC 4**, stated as follows:

“The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. While testing identification evidence of a single witness, great care and caution should be taken to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. Authorities are in agreement that these include light, time spent with the assailant,

clothes or any item that the witness may positively identify and whether the complainant knew the accused. Such evidence may be reinforced by sufficient collaboration. In absence of collaboration, the court needs to treat it with caution. In evaluating the accuracy of identification testimony, the court should also consider such factors as: -

- a) What were the lighting conditions under which the witness made his/her observation?**
- b) What was the distance between the witness and the perpetrator?**
- c) Did the witness have an unobstructed view of the perpetrator?**
- d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?**
- e) For what period of time did the witness actually observe the perpetrator?**
- f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?**
- g) Did the witness have a particular reason to look at and remember the perpetrator?**
- h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?**
- i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?**
- j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?**

k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

The trial court in assessing the demeanour of a witness is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his or her boldness or firmness.”

37. In this case, there was no evidence regarding the surrounding circumstances under which the complainant and the alleged seller met the appellant at the advocate’s office. The complainant did not testify as to whether they met in the morning, afternoon or even in the evening. Considering also that they met inside the advocate’s office, there was no mention of whether the advocate’s office was well lit or whether it was dark. There was no evidence of whether the light in the said office was sufficient enough to enable the complainant properly identify the parties in the room.

38. Furthermore, other than the complainant stating that the appellant was wearing an *Akorino* attire at the time, complete with a turban, the complainant did not describe the appellant, her features or her complexion. In my view, this lapse by the prosecution casted doubt on whether the complainant was able to properly identify the appellant.

39. The court of appeal in **Maitanyi versus Republic [1986] KECA 39 (KLR)**, stated as follows:

“.....many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the

suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the “greatest care” the evidence of a single witness? There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant’s aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.”

40. The prosecution had stated that an identification parade was carried out at the police station, where the complainant was able to positively identify the appellant as one of her perpetrators. I have however noted from the evidence on record, that the said identification parade was carried out after the complainant had been shown photos of the appellant at the police station.

41. Furthermore, the appellant had in her defence before the trial court, indicated to the court that the identification parade was flawed, in that the other ladies that were presented at the parade were older than her and that there was only one lady in the parade that had her complexion.

42. The procedures regarding identification parades were discussed in depth by the court in **Watuku versus Republic (Criminal Appeal 08 of 2020) [2022] KEHC 4**, as follows: ***“The procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the National Police Service Act. These procedures were explained in R v Mwango s/o Manaa and Ssentale v Uganda. The rules include: -***

a) The accused has the right to have an advocate or friend present at the parade;

b) The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

c) Witnesses should be shown the parade separately and should not discuss the parade among themselves;

d) The number of suspects in the parade should be eight (or 10 in the case of two suspects);

e) All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

f) Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

g) As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting. The evidence must be such that threshold set by the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified. If the police force standing orders in respect of conduct of identification parades are flouted, the value of the evidence of identification depreciates considerably. In Ajode v Republic the Court of Appeal held that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

43. In this case, it is clear from the evidence on record, that the identification parade carried out at the police station, in which the complainant identified the appellant as her perpetrator was completely flawed, as the correct procedure for conducting the same were not carried out. The identification parade was, in my view, carried out in a manner that did not guarantee fairness to the accused.

44. I say so because, it is evident that the police in the said parade, brought in women that were of different complexion and age from the appellant. Furthermore, there is evidence by the complainant and PW4, the investigating officer that the complainant was shown photographs of the appellant at the police station before the said identification

parade was carried out. I am of the view that this may have influenced the complainant to pick out the appellant as her preparator, out of all the other women that were in the identification parade.

45. Based on the above, I am of the view that in the absence of any other evidence linking the appellant to the offences she has been charged with, other than the identification evidence of the complainant; the charges against the appellant cannot be allowed to stand.
46. It is clear that the learned trial magistrate did not properly interrogate the surrounding circumstances in which the complainant and the appellant allegedly met. The learned trial magistrate did not also scrutinise the conditions under which the identification parade in which the complainant identified the appellant were carried out. Had he scrutinised the same, he would, in my view have come to a different conclusion regarding the appellant's guilt.
47. Flowing from the foregoing analysis, I am not satisfied that the surrounding circumstances at the time of the alleged offence were conducive to a positive and error free identification of the appellant. In my view, there is doubt as to whether the complainant was able to properly and safely identify the appellant as one of the perpetrators.
48. Considering that all the four counts preferred against the appellant rested entirely on the complainant's identification, and there being no other independent evidence linking the appellant to the offences, the conviction cannot be said to be free from the possibility of error.

49. In the premises, I find that the convictions entered by the learned trial magistrate in all the four counts were unsafe and cannot be allowed to stand.

50. ***Accordingly, the appeal is hereby allowed. The convictions entered against the appellant on all four counts are quashed, and the sentences imposed thereon are set aside. The appellant shall be set at liberty forthwith, unless otherwise lawfully held.***

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF FEBRUARY, 2026.

**HON. T. W. Ouya
JUDGE.**

For Appellant.....Pricillah Nduta Githuma (Present from Lang'ata Women Prison)

For Appellant....Kirubi

For State.....Mwangi

COURT ASSISTANT.....Brian