



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYANDARUA

CRIMINAL APPEAL NO. 42 OF 2023

AMOS WANG'OMBE WANYIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original judgment in Criminal case No. 2904 of 2015 of the Chief Magistrate's Court at Nyahururu by Hon Charles Obulutsa. – Chief Magistrate)

JUDGMENT

1. Amos Wang'ombe Wanyiri, the appellant herein, was convicted in two counts of the offence of obtaining money by false pretences contrary to section 313 of the Penal Code.
2. The particulars of the offence in count one were that on diverse days between 26th day of September 2013 and the 17th day of December 2013 at Nakuru town within Nakuru County, jointly with others, conspired to obtain Kshs.645, 000.00 from Daniel Macharia Kinuthia by falsely pretending that land parcel number Nyandarua/Ndaragwa /scheme 522 was for sale to the said Daniel Macharia Kinuthia, a fact he knew to be false.
3. In count two, the particulars were as follows:
That on diverse dates between the month of November 2013 and the 17th day of December 2013 at Nakuru town within Nakuru County, jointly with others conspired to obtain Kshs.315, 000.00 from Enoch Kihagi Ndigirigi by falsely pretending that land parcel number Nyandarua/Ndaragwa /scheme 522 was for sale to the said Enoch Kihagi Ndigirigi, a fact he knew to be false.
4. The appellant was sentenced to serve eighteen (18) months imprisonment in count one and twelve (12) months imprisonment in count two. The sentences were ordered to run

concurrently. He was dissatisfied and filed this appeal through Waichungo Martin & Company Advocates and presented the following grounds of appeal:

- a) The learned trial magistrate erred in law and in fact in finding that the evidence on record was sufficient to find that the appellant posed as Damiano Muriithi, owner of the eland sold to the complainants.
 - b) The learned trial magistrate erred in law and in fact in finding that the complainants and their witnesses had dealt severally with appellant and thus could not have mistaken him, which was contrary to the evidence on record.
 - c) The learned trial magistrate erred in law and in fact in finding that failure to hold, and an identification parade, and to subject the sale agreements produced as exhibits for a forensic examination on the signature therein for comparison with that of the appellant was not fatal.
 - d) The learned trial magistrate erred in law and in fact in disregarding the evidence of PW 9, one Kanyi Ngure, Advocate, on the identity of the person who posed as Damiano Muriithi during the sale.
 - e) The learned trial magistrate erred in law and in fact in finding that the appellant conspired with other persons to defraud the complainants, whereas no evidence was adduced to that effect to prove that others had been charged and convicted.
 - f) The learned trial magistrate erred in law and in fact in dwelling on extraneous matters not presented in evidence in his judgment.
 - g) The learned trial magistrate erred in law and in fact in failing to comply with clear provisions of section 169 of the Criminal Procedure Code in writing his judgment.
 - h) The learned trial magistrate erred in law and in fact in dismissing the appellant's defence and in believing the prosecution's evidence, which was full of glaring contradictions in all material aspects.
5. The respondent conceded the appeal through Ms. Odero L.A. Vena, learned counsel. The respondent contended that the prosecution's case was riddled with inconsistencies and contradictions.
 6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

7. The ingredients of the offence of obtaining by false pretences contrary to section 313 of the Penal Code were enumerated in the case of **Amugo vs. Republic High Court (Kisumu) Criminal Appeal No. 320 of 1980** (unreported) as follows:

The offence of obtaining by false pretences has seven possible ingredients which have to be proved beyond doubt before an accused person is convicted. They are as follows:

- a) a false representation;*
- b) which is made;*
- c) by words or writing or conduct;*
- d) of a matter of fact;*
- e) either past or present;*
- f) with knowledge of the falsehood or without belief that the presentation is true; and*
- g) the representation causing the giver to part with the thing obtained.*

The court further stated that for a conviction, all eight elements must be proven beyond a reasonable doubt.

8. It is well-established law that for an act to constitute a false pretence, it must involve past or present facts, not future ones. Lord Devlin, in the case of **J. R. vs Dent [1955] 2 Q.B. 594**, stated:

...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.

9. In this case, all eight ingredients meet the required standards. The only issue is identifying the perpetrator.
10. The prosecution presented two accounts of the identity of the person who claimed to be the owner and seller of land parcel number Nyandarua/Ndaragwa/Scheme 522. The complainants stated that the appellant identified himself as Damiano Mureithi, the owner of the said parcel of land. The evidence of Kanyi Ngure (PW9), the advocate in whose office the transaction was conducted, indicated that the person who presented himself as the seller was not the appellant.
11. During the transaction, the appellant acknowledged that the first complainant interacted with the seller three times, while the second complainant met him twice. Before this, the complainants had no prior knowledge of the seller. The appellant was arrested two years after the alleged offence. An identification parade would have been required to ensure that the issue of identity was addressed.

12. Rahab Wangui Macharia (PW3) identified the accused as the person who entered into a sale agreement with her husband (PW1). However, during cross-examination, she stated that during the identification at the police station, she described the person as short, stout, and walking with a limp. She further stated that the appellant had lost weight since the time of the agreement and that, at the time of the transaction, he pretended to walk with a limp.
13. The purported identification was flawed. It was not an identification parade.
14. Michael Kanyi Ngure (PW9), the advocate, participated in land transactions between the complainants and Damiano Mureithi. He testified that the appellant was not the seller, provided a different description of the actual seller, and noted that one leg was shorter.
15. There were many material contradictions regarding the identity of the perpetrator of the two offences. It was unsafe for the learned trial magistrate to convict on the evidence on record.
16. Consequently, the conviction is quashed and the sentence set aside.

Delivered and signed at Nyandarua, this 25th day of February 2026

KIARIE WAWERU KIARIE
JUDGE