

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. E044 OF 2024

SAMUEL GITAU MUIRURI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. Upon arraignment, Samuel Gitau Muiruri, the Appellant faced two (2) counts;

I. Making a document without authority contrary to Section 357(a) of the Penal Code.

Particulars of the offence being that on unknown date within the Republic of Kenya, jointly with others not before court, with intent to defraud, without lawful authority made a land title deed No. Marmanet/Oljabet Block 1/95(Limunga) purporting it to be a title deed issued by land registry Nanyuki.

II. Obtaining money by false pretences contrary to Section 313 of the Penal Code.

Particulars of the offence being that on the 9th and 10th April, 2018 in Nyahururu Township, within Laikipia County, jointly with others not before court, with intent to defraud obtained Kshs.400,000/- from Evans Kamau Nduta by falsely pretending that he was in a position to

sell one acre of land title No. Marmanet/Oljabet Block 1/95(Limunga) a fact he knew was false.

2. He was taken through full trial, found guilty and convicted on both counts thereby being sentenced as follows;

- Count I - fine of Kshs.300,000/- or three (3) years in default.
- Count II - fine of Kshs.200,000/- or two (2) years in default.

3. Aggrieved, the Appellant appeals on grounds as amended thus;

1) That the learned trial Magistrate erred in law and in fact in finding the Appellant guilty of the offence of obtaining money by false pretenses and making a document without authority against the Appellant against the weight of evidence adduced by the prosecution which was insufficient to prove the essential elements making the document and the element of false pretense and the intention to defraud.

2) That the learned trial Magistrate erred in law and in fact in relying on circumstantial evidence which did not irresistibly point to the guilt of the Appellant and failed to exclude other reasonable hypothesis consistent with the Appellant's innocence.

- 3) That the learned trial Magistrate erred in both law and in fact by failing to properly consider and evaluate the Appellant's defence. Which raised reasonable doubt as the Appellant's guilt.**
- 4) That the learned trial Magistrate erred in law and in fact in failing to consider the evidence adduced by the Appellant and the prosecution that the Appellant was the registered proprietor of the parcel of land title deed No. Marmanet/Oljabet Block 1/95 and the advancement of by the prosecution of making document without authority and false pretense was not demonstrated.**
- 5) That the sentence and alternative fine imposed on the Appellant by the trial Magistrate is manifestly excessive in the circumstances of the case and does not take into account the mitigating factors presented by the Appellant.**
- 6) That the learned trial Magistrate erred in law and fact by failing to appreciate that the issues raised during the trial did not support the charge and were purely civil and could not be raised in criminal proceedings.**

4. Briefly, facts of the case were that in March 2018, Evans Kamau Nduta, the Complainant, wished to buy land for

purposes of farming. He informed his friend Ndung'u about the intention who later told him that there was land for sale at Limunga Marmanet measuring 6 acres but only 3 acres were on sale. Since he only wanted one (1) acre, the owner agreed to sell the acre at Kshs.400,000/-.

5. On 9th April, 2018, they went to the office of PW4 Njuguna Kamanga Advocate where a sale agreement was prepared. Both of them signed the agreement and he paid cash Kshs.300,000/- then Kshs.100,000/- the following day which was acknowledged. Upon payment of the total sum, the original title deed, photos, copy of the identity card and KRA Pin of the vendor were passed to the buyer as well as the search certificate and the Vendor/Appellant signed the search certificate while in the advocate's office, documents that were certified by Mathea Gikunju Advocate.
6. That they engaged a surveyor and the Appellant asked him to pay survey fee for the other two (2) plots that he wanted to sell which he did in good faith. They applied for a consent of the Land Board to subdivide the land. Then he sent a friend PW3 David Muika to fence the land for purposes of cultivation. The person he sent to fence the land told him that the land had not been sold having been stopped by Gitau's son.
7. On the question of the spousal consent, the Appellant swore an affidavit stating that he had no spouse but on presentation of documents to PW5 Patrick Ndung'u, the Land

Registrar Rumuruti for subdivision of the land in issue, Marmanet/Oljabet Block 1/95 the title turned out to be fake. He was informed that the seal was not for the Land Registry and the signature of the Land Registrar was different. Therefore, the title was rejected. It was alleged that the title for 1991 had a yellowish paper and was brighter.

- 8.** In the result, the matter was reported to the police. PW6 No. 51981 Corporal Fredrick Walela of DCI Rumuruti investigated the case by listening to the tale given by the Complainant and since the Appellant did not refund the money obtained, he arrested and charged him.
- 9.** Upon being placed on his defence the Appellant who made an unsworn statement stated that he did not obtain money as alleged. That Evans Kamau (Complainant) was introduced to him by James Kiragu in 2017 and they threatened to chop off his head if he would not sell land to the Complainant. That Kiragu had sold another piece of land and he wanted to sell another piece. That he would go to his house at night to threaten him, however, he did not report the matter to the police because he was afraid but he informed the Chief and Village Elder. He denied having given Evans any document or copies of his Identity Card, KRA Pin or photo. That the District Officer instructed Evans Kamau to agree with his children but he refused. That the Complainant wanted to con him.

- 10.** The Appellant called witnesses. DW2 John Muiruri Gitau stated that he is the eldest son of the Appellant. That he was not aware of the transaction regarding sale of any land for he was not called to any meeting. That if indeed land was sold the person should avail documents. On cross - examination he denied being present when the agreement was drafted. He argued that the Accused (Appellant) ought to have been given the authority to sell the parcel of land.
- 11.** DW3 Charles Mwangi Gitau also a son of the Appellant stated that the Appellant was charged for selling land that he resides on. That when one Mukorino went to clear the land, they reported the matter to the District Officer who instructed the Chief to tell the person to leave. They also reported to the DCIO - Rumuruti. That the Appellant did not tell them that he was selling land and when the Complainants were summoned they did not turn up. Their mother who denied having sold land became ill and later died. Thereafter, the Appellant was arrested and charged.
- 12.** The appeal was disposed through written submissions that I have taken into consideration.
- 13.** This being a first appellate court it has the duty to reappraise evidence presented at trial and reach an independent finding based on the facts and law. And in doing so it must consider all relevant aspects of the case bearing in mind the fact of having neither seen nor heard witnesses who testified. This responsibility was clearly set out in **Okeno v**

Republic [1972] EA 32 where the Eastern Court of Appeal delivered itself thus;

“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 Republic [1957] EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R [1957] EA 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 finding and 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]EA 424.” This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174.”

14. On the charge of making a document without authority;

Section 357(a) of the Penal Code provides thus;

Making documents without authority Any person who, with intent to defraud or to deceive—

a) without lawful authority or excuse makes, signs or executes for or in the name or on

account of another person, whether by procurement or otherwise, any document or electronic record or writing.

- 15.** Ingredients of the offence are hence;
- a) Whether an act of making of document existed.
 - b) Whether it was made without authority/permission.
 - c) Whether it was with the intent to defraud.
- 16.** The particulars of the charge indicate that the document made was a title deed No. Marmanet/Oljabet Block 1/95(Limunga) (subject land). And it was purported to be a title issued by the land registry, Nanyuki.
- 17.** In **Woolmington v DPP (1935) UKHL 1** it was held that;

“..it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

18. PW1 stated that upon payment of the consideration which totaled to Kshs.400,000/- the Appellant gave him all documents including the original title deed. The sale agreement which was commissioned by PW4 M/s Njuguna Kamanga advocate was in respect of sale of the one acre to be excised out of the subject land measuring 2.088ha. PW4 stated that when the parties went to his office for drafting of the agreement the Appellant had a title deed. James Kiragu Gathiru was a witness to the transaction. PW4 identified the title deed adduced in evidence as the one he saw on the material date.

19. PW5 the Land Registrar Nanyuki, dismissed the title deed as being false. According to him the seal wasn't theirs and the signature was not for the Land Registrar. Evidence was not called of who was the Land Registrar as at 7th May, 1991 when the title was purported to have been issued. To prove that the document was made without authority the prosecution was required to take the sample handwriting of the suspect and that of the signatory. In the instant case it was imperative to also take sample signatures of the Land Registrar that would have been sent to the Forensic Document Examiner for analysis to determine if the document was genuine or not. The expert testimony and report were missing which was detrimental to the prosecution's case. It was not sufficient for PW5 to say that the title was not theirs.

20. Regarding the seal he stated thus;

“The seal was not ours. The one we normally use and the signature of the Land Registrar was different.”

21. This was not an expert witness. Needless to add that their seal was not availed for comparison. The seal from the land registry and the impression should have been availed for taking of the specimen for comparison purposes to confirm authenticity.

22. In a nutshell, shoddy investigations resulted into the charge being not proved to the required standard hence there was no proof of the Appellant having made a document with intent to defraud.

23. On the second count of obtaining by false pretences; **Section 313 of the Penal Code** defines the offence thus;

Any person who by any false pretense, 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.

24. The court was obligated to prove elements thus;

- (i) The Accused obtained a thing capable of being stolen.
- (ii) It was done by false pretense.

(iii) It was by intent to defraud.

25. Evidence of PW1 is that he paid the Appellant Kshs.400,000/- In his defence the Appellant denies having sold land and he also denies having received the money. He claims that Kiragu sold another parcel and wanted to sell another me. This ideally could mean that the culprit here was Kiragu. He witnessed the sale agreement but was not called as a prosecution witness. However, the Appellant did not allege that he took the money.

26. PW4 witnessed when the money was paid to the Appellant, his evidence confirms the fact of the Appellant having been the vendor of the land. It is not denied that the parcel of land belongs to him.

27. Section 312 of the Penal Code provides thus;

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 pretense.

28. Although the Appellant alleges that he was coerced to sell the parcel of land, he did not report the allegation to either the police or even tell his children DW1 and DW2. Therefore, by agreeing to sell the land and even stating in writing of the intent to sell buttressed by an averment that his spouse Lydia Njeri ID No. (number withheld) had granted the requisite

consent; the Appellant made a representation of fact in word which was in present which made him obtain the money.

29. The Appellant denied having sold the land which means that at the point of receiving the sum he was aware of the deception in the statement he made of being in a position to pass over the land in question. He did not believe what he was undertaking was true.

30. From the upshot the appeal succeeds partially since on the 1st Count, the trial court erred in law and fact in connecting the Appellant on a charge that was not proved beyond reasonable doubt. Therefore, I quash the conviction and set aside the sentence meted out.

31. On the 2nd Count, the charge against the Appellant was proved beyond reasonable doubt hence I affirm the conviction.

32. On sentence meted out, the same was a fine of Kshs.200,000/- and in default the offender was required to serve two (2) years imprisonment. The sentence provided for the offence is up to three (3) years imprisonment but this does not bar a court from exercising the discretion of imposing a fine. That having been the case, **Section 28 of the Penal Code** was applicable which provides thus;

(1)Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply—

(a)where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;

(b)in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;

(c)in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion—

(i)direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also

(ii)issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant:

Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2)In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Repealed) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

Sh. 15,000 but not exceeding Sh. 50,000	6 months
Sh. 50,000	12 months

(3)The imprisonment or detention which is imposed in default of payment of a fine shall

terminate whenever the fine is either paid or levied by process of law.

33. That having been the case, the trial court erred in imposing a default sentence of two (2) years imprisonment which I quash, set aside and substitute with a fine of Kshs.200,000/- and in default to serve one (1) year imprisonment with effect from the date of sentencing, 20th July, 2023.

34. It is so ordered.

Dated, signed and delivered virtually this 10th day of March, 2026.

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L.N. MUTENDE

JUDGE