

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO. E114 OF 2023**

**DAVID MACHARIA MUIRURI.....**  
**.....APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

*(Being an appeal against the conviction and sentence by Hon. J Irura, SPM, delivered on 18<sup>th</sup> October, 2023, in Kigumo Senior Principal Magistrate's court criminal case no. 867 of 2020)*

**JUDGEMENT**

1. The Appellant, David Macharia Muiruri, was tried and convicted of nine counts of the offence of Obtaining Money by False Pretences contrary to Section 313 of the Penal Code.
2. The particulars of Count I allege that on diverse dates between 1<sup>st</sup> April and 31<sup>st</sup> November, 2019, in Mutithi village, in Murang'a South sub-county, within Murang'a county, with intent to defraud, the appellant obtained Kshs. 100,000 from Jane Wanjiku Waweru, by falsely pretending that he was in a position of selling to her a parcel of land within land parcel Kakuzi/Kirimiri Block 8/1200, 1201, 1202, 1229, 1229, 1250 and 1216, a fact he knew to be false.
3. The particulars of Count II are that on 22<sup>nd</sup> July, 2019, at Mutithi village, in Murang'a South sub-county, within Murang'a County, with intent to defraud, the appellant obtained Kshs. 200,000 from Joseph Kioi Kamau, Kshs. 200,000, by falsely pretending that he was in a position to sell to him a parcel of land within land parcel Kakuzi/Kirimiri Block 8/1200, 1201, 1202, 1229, 1229, 1250 and 1216, a fact he knew to be false.

4. The particulars of Count III are that on diverse dates between 1<sup>st</sup> April and 31<sup>st</sup> November, 2019, at Mutithi Village, in Murang'a South sub-county, within Murang'a County, with intent to defraud, the appellant obtained Kshs.200,000, from Esther Njambi Guchu by falsely pretending that he was in a position to sell to her a parcel of land within land parcel Kakuzi/Kirimiri Block 8/1200, 1201, 1202, 1229, 1229, 1250 and 1216, a fact he knew to be false.
5. The particulars of Count IV allege that on diverse dates between 1<sup>st</sup> April and 31<sup>st</sup> November, 2019, at Mutithi Village, in Murang'a South sub-county, within Murang'a County, with intent to defraud, the appellant obtained Kshs.200,000, from Leah Mugure Mungai by falsely pretending that he was in a position to sell to her a parcel of land within land parcel Kakuzi/Kirimiri Block 8/1200, 1201, 1202, 1229, 1229, 1250 and 1216, a fact he knew to be false.
6. The particulars of Count V are that on diverse dates between 1<sup>st</sup> April and 31<sup>st</sup> November, 2019, at Mutithi Village, in Murang'a South sub-county, within Murang'a County, with intent to defraud, the appellant obtained Kshs.200,000, from Thomas Ndungu Mwangi, by falsely pretending that he was in a position to sell to him a parcel of land within land parcel Kakuzi/Kirimiri Block 8/1200, 1201, 1202, 1229, 1229, 1250 and 1216, a fact he knew to be false.
7. The particulars of Count VI are that on diverse dates between 1<sup>st</sup> April and 31<sup>st</sup> November, 2019, at Mutithi Village, in Murang'a South sub-county, within Murang'a County, with intent to defraud, the appellant obtained Kshs.750,000, from Joseph Mwangi Kimotho, by falsely pretending that he was in a position to sell to him a parcel of land within land parcel Kakuzi/Kirimiri Block 8/1200, 1201, 1202, 1229, 1229, 1250 and 1216, a fact he knew to be false.

8. The particulars of Count VII are that on 27<sup>th</sup> September, 2019, at Mutithi Village, in Murang'a South sub-county, within Murang'a County, with intent to defraud, the appellant obtained Kshs.200,000, from Francis Njoroge Kimotho, by falsely pretending that he was in a position to sell to him a parcel of land within land parcel Kakuzi/Kirimiri Block 8/1200, 1201, 1202, 1229, 1229, 1250 and 1216, a fact he knew to be false.
9. Upon conviction, the appellant was sentenced to pay a fine of Kshs. 250,000 on each count, in default to serve a term of two (2) years imprisonment per count. The court further ordered that the sentences were to run consecutively.
10. The appellant was aggrieved by his conviction and sentence, and he proffered an appeal to this court, vide a Petition of Appeal filed before this court on 1<sup>st</sup> November, 2023.
11. In the Petition of Appeal, the appellant faulted the learned trial magistrate for convicting him, despite the fact that the prosecution had failed to prove all the elements of obtaining Money by false pretences; for shifting the burden of proof to him; for failing to consider that the prosecution had failed to call crucial witnesses; for relying on unfounded evidence marred with contradictions and inconsistencies; and for relying on a case that violated his rights to fair trial under article 50 (2) of the Constitution.
12. The prosecution's case was that the appellant fraudulently obtained a total sum of Kshs. 2,280,000 from various complainants by falsely representing that he was in a position to sell parcels of land to them. PW1, Francis Njoroge Kimani, testified that PW2, Leah Mugure Mungai, informed him that the appellant was selling a plot in the Mutithi area, which he expressed interest in purchasing.

13. He subsequently met the appellant, who showed him a plot measuring 50 x 100 feet, allegedly belonging to Mutithi Farmers' Co-operative Society. However, the appellant did not disclose the specific plot number. They agreed on a purchase price of Kshs. 200,000, which PW1 paid in full into the appellant's account. In January 2020, PW1 instructed his mother to commence cultivation on the land, but she was chased away and informed that the land did not belong to him. PW1 then reported the matter to the chairman of the society and later to the Directorate of Criminal Investigations (DCI).
14. PW2, Leah Mugure Mungai, testified that one Muriithi informed her of plots being sold and requested Kshs. 500 to purchase airtime to contact the appellant. She and her co-wife were later introduced to the appellant, who informed them that the plots were being sold at Kshs. 200,000 and that the transactions were not known to other committee members.
15. He further stated that he would attend a Land Control Board meeting and thereafter issue them with a title deed. PW2 informed her husband, who withdrew the purchase money, and together with Jane, they paid the appellant. As acknowledgment, the appellant issued them with his business card. She later realized the transaction was fraudulent when she received a title deed from the society unrelated to the purported purchase. Upon inquiry, the chairman confirmed that the society was not selling any plots.
16. PW3, Esther Njambi Guchu, testified that PW2 informed her of the plots for sale and introduced her to the appellant, who provided his contact details. After discussing the matter with her husband, who secured a loan, she paid the appellant Kshs. 200,000. She also submitted her identification documents and passport photograph as requested. The appellant promised that title deeds would be processed after

attending the Land Control Board with the society's chairman. She stated that she had cultivated the land shown to her by the appellant for approximately one and a half years.

17. PW4, Bernard Mutua Nzau, testified that after a subdivision of neighbouring land blocked access to his home, he sought out the surveyor responsible and opted to purchase the affected parcel. Thereafter, the appellant contacted him claiming to have additional plots for sale at Kshs. 200,000. PW4 negotiated and paid Kshs. 185,000 for one plot. Subsequently, the appellant requested an additional Kshs. 60,000, initially under the pretext of a refundable amount, which PW4 later treated as a deposit for another plot. When he sought updates on the additional parcels, the appellant became evasive and eventually unreachable. Upon consulting the chairman, PW4 discovered that the appellant had been fraudulently selling plots.
18. PW5, Jane Wanjiku Waweru, testified that she learned from Muriithi that the appellant was selling plots. She obtained a loan of Kshs. 100,000 and paid the appellant. The appellant assured them of the legitimacy of the transaction and encouraged them to begin cultivating the land. When the title deeds were not forthcoming and the appellant stopped answering calls, they grew suspicious and reported the matter to DCI Makuyu.
19. PW6, Josphat Kioi Kamau, testified that he applied for a loan of Kshs. 100,000 and paid Kshs. 90,000 to the appellant, while his father contributed Kshs. 100,000. He cultivated the land for about one year. When he intended to begin construction, the appellant advised him to delay until all plots were sold. Later, upon learning that others had received title deeds, he inquired about his own, but the appellant gave evasive responses. Eventually, he and others were evicted from the land, prompting them to pursue a refund.

20. PW7, Charles Mbote, the chairman of the society, testified that in 2019 the society resolved to subdivide its 100-acre parcel of land and engaged the appellant as a surveyor for a fee of Kshs. 1,700,000. In July 2019, it was discovered that plots reserved for public utilities had been encroached upon. Investigations revealed discrepancies between the physical demarcations on the ground and the official subdivision map. Complaints emerged from individuals who had allegedly purchased plots from the appellant but had not received title deeds. The appellant had misrepresented to these individuals that the chairman was aware of the transactions. PW7 denied any such authorization and referred the complainants to the DCI.
21. PW8, PC Noah Opondo, testified that the matter was referred to their office by the District Officer, Makuyu. Investigations revealed that several individuals had paid the appellant a total of Kshs. 2,280,000 for plots he had no authority to sell. Upon inquiry with the society, it was confirmed that the appellant lacked any authorization to conduct such sales. PW8 obtained court orders to access the appellant's bank records, which confirmed receipt of funds from the complainants through cash deposits, bank transfers, and other means. The appellant was subsequently arrested.
22. On 12<sup>th</sup> March, 2024, this court directed that the appeal be canvassed by way of written submissions. The appellant's written submissions dated 10<sup>th</sup> June, 2024, were filed on his behalf by his learned counsel Charles Mbugua & Co. Advocates; while the respondent's written submissions dated 4<sup>th</sup> June, 2025, were filed on his behalf by his learned counsel Winfred Nzuki & Company Advocates.
23. This being a first appeal, this court as a first appellate court, is obligated to re-evaluate and analyse afresh all the evidence adduced before the trial court and to draw its own

independent conclusions on whether or not the findings of the trial court should stand, while bearing in mind that it neither saw nor heard the witnesses testify.

24. This position was reiterated by the court of appeal in **David Njuguna Wairimu versus Republic [2010] KECA 495 (KLR)** as follows:

***“In Okeno v R [1972] EA 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”***

25. That said, the appellant contended in his written submissions that the learned trial magistrate erred in convicting him on Counts V, VI and IX in the absence of evidence to support those convictions.
26. I have carefully perused the record of the trial court and note that there is indeed no indication that the complainants in Counts V, VI and IX, namely Thomas Ndungu Mwangi, Joseph Mwangi Kimotho and Lucy Wairimu Kamau, testified during the trial.
27. The reason for this omission is discernible from the ruling on sentence of the learned trial magistrate dated 15th November

2023, wherein she observed that some of the complainants had passed on while awaiting the conclusion of the case.

28. Notwithstanding the foregoing, the Investigating Officer, No. 94967 PC Noah Opondo, testified that on 26th October 2020, nine complainants who had allegedly been defrauded by the appellant in relation to the sale of plots belonging to Mutithi Farmers' Co-operative Society reported the matter. He stated that the complainant in Count V, Thomas Ndungu Mwangi, reported having paid the appellant Kshs. 200,000 in cash as consideration for a plot of land.
29. The Investigating Officer further testified that the complainant in Count VI, Joseph Mwangi Kimotho, had purchased three plots and paid Kshs. 620,000 in cash and an additional Kshs. 130,000 deposited into KCB Bank Account No. 1213180864 on 10th August 2019, allegedly belonging to the appellant. The officer produced, as Exhibit 2, a bank statement from the complainant's account confirming the deposit, as well as, as Exhibit 12, a statement from the appellant's bank account reflecting receipt of the said funds.
30. With respect to Count IX, the Investigating Officer testified that he obtained M-Pesa statements for the complainant, Lucy Wairimu Kamau, which were produced in evidence. These showed that she transferred Kshs. 90,000 to the appellant via M-Pesa number 0711241702, registered in the appellant's name. He further testified that she reported having paid an additional Kshs. 90,000 in cash.
31. In my considered view, the evidence of the Investigating Officer, who interacted directly with the complainants in Counts V, VI and IX, is cogent and compelling. Moreover, the documentary evidence produced, including bank and M-Pesa statements, corroborates the fact that monies were indeed transmitted to the appellant's accounts by Joseph Mwangi Kimotho and Lucy Wairimu Kamau.

32. Although the complainants in the said counts did not testify, there is sufficient and credible evidence on record demonstrating that the appellant engaged with them and fraudulently induced them to part with money under the false pretext of purchasing plots which he had no authority to sell. Accordingly, I find that this ground of appeal is devoid of merit and is hereby dismissed.
33. Other than the foregoing ground challenging his conviction, the appellant, who was represented by counsel, in his written submissions, did not pursue the remaining grounds on conviction and instead confined his arguments to the issue of sentence. I therefore deem the said grounds on conviction as abandoned.
34. On sentence, the appellant, in his written submissions, contended that the sentence of a fine of Kshs. 250,000 in each count, in default to serve two (2) years' imprisonment, was excessive. He further argued that once the learned trial magistrate exercised discretion to impose a fine exceeding Kshs. 50,000, the default custodial sentence ought not to have exceeded twelve (12) months.
35. In this regard, I note that the offence of obtaining money by false pretences under section 313 of the Penal Code attracts a maximum penalty of three (3) years' imprisonment. The said provision does not provide for payment of a fine as a form of punishment.
36. Having nonetheless elected to impose a fine, the learned trial magistrate was bound to comply with the provisions of section 28 of the Penal Code, which governs fines and the corresponding default sentences. **Section 28(2) of the Penal Code** provides that where a fine exceeds Kshs. 50,000, the term of imprisonment in default shall not exceed twelve (12) months.

37. In the present case, the appellant was sentenced to pay a fine of Kshs. 250,000 in each count, in default to serve two (2) years' imprisonment per count. This default sentence clearly contravened the mandatory provisions of section 28(2) of the Penal Code and was therefore unlawful. The maximum permissible default sentence in the circumstances was twelve (12) months' imprisonment.
38. **Consequently, having found that the default sentence imposed was illegal, I hereby set it aside and substitute it instead with a default sentence of twelve (12) months' imprisonment in each count. The sentence of a fine of Kshs. 250,000 per count is upheld, in default of payment of which the appellant shall serve twelve (12) months' imprisonment per count.**
39. The appellant also faulted the learned trial magistrate for ordering the sentences to run consecutively rather than concurrently. Upon perusal of the record, it is evident that the offences in the respective counts were committed on different dates and arose from distinct and separate transactions. **In the circumstances, the trial court cannot be faulted for directing that the sentences run consecutively.**
40. Furthermore, *paragraph 2.3.28* of the Sentencing Policy Guidelines, 2023, provides that a sentence of imprisonment in default of payment of a fine cannot run concurrently with a previous sentence.
41. The said paragraph states: ***"In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence."***
42. **In the premises, this ground of appeal also fails.**

43. The appellant had also faulted the learned trial magistrate for failing to consider the period of 1 year and 6 months that he had spent in custody, prior to his sentencing.

44. *Section 333 (2)* of the Criminal Procedure Code states as follows:

***“Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”***

45. The Court of Appeal, in **Kazungu versus Republic, (2024) KECA 635 (KLR)** expressed itself as follows regarding the provision of *section 333 (2)* of the Criminal Procedure Code:

***“The foregoing provision makes it clear that the period during which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. Unless the trial court, in sentencing the accused states and sets out the effect of that period on the sentences meted, the legal implication of the proviso to section 333(2) of the Criminal Procedure Code is that the period spent in custody forms part of the eventual sentence.”***

46. Upon perusal of the record of the trial court, I noted that when the appellant was first presented before the court on 17th March 2021 for plea taking, he was admitted to cash bail of Kshs. 1,000,000. He was subsequently released on 29th March 2021. However, the record further reveals that the

appellant failed to comply with the terms of his bond, leading the trial court, on 3rd February 2022, to suspend the same. He remained in custody until 16<sup>th</sup> February 2022, when his bond was reinstated.

47. The matter came up again for hearing on 6th June 2022, but the appellant failed to attend court, prompting the issuance of warrants of arrest. He was presented before the court on 7th June 2022, at which point his bond was cancelled. The appellant thereafter remained in custody until 15th November 2023, when he was sentenced. In total, he spent a period of one (1) year and five (5) months in custody prior to sentencing.
48. There is no indication on the record that the learned trial magistrate took this period into account when imposing sentence.
49. **I therefore find that the appeal partially succeeds and hereby grant orders as follows:**

***i. The sentence is hereby varied such that the appellant shall pay a fine of Kshs. 250,000 in each count, in default to serve one (1) year imprisonment per count. The sentences shall run consecutively.***

***ii. The period of one (1) year and five (5) months spent in custody shall be taken into account.***

**Dated, Signed and Delivered Virtually on this 14<sup>th</sup> day of May 2026.**

**HON. T. W. OUYA, OGW  
JUDGE**

**In the presence of:**

Mbugua for the Accused  
Appellant present at Kamiti Maximum Prison  
Hamza/Kevin - Court Assistants

ORIGINAL