



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL 171 OF 2011**

**MARK MATORI ONDIENGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from judgment of the SRM's court at Kilgoris,*

*Hon. A.K. Mkoross, dated and delivered on 19<sup>th</sup> August 2011)*

**JUDGMENT**

1. The appellant herein, Mark Matori Ondieng'a was found guilty and convicted of the offence of obtaining money by false pretences contrary to **section 313** of the **Penal Code, Cap 63** of the **Laws of Kenya**. The particulars of the offence are that on the 23<sup>rd</sup> day of March 2010 at Mapashi village in Transmara District within Rift Valley province, jointly with others not before court, with intent to defraud obtained from Thomas Nyangweso the sum of Kshs.280,000/= by falsely pretending that he would show him a pit in his father in-law farm containing mercury which was left by colonial missionaries which they would excavate and remove and sell the same at a very expensive rate. The appellant denied committing the offence.

2. The prosecution called 4 witnesses. PW1 was Thomas Arucho Nyangweso, the complainant herein. He testified that on 23<sup>rd</sup> March 2009, the appellant herein went to him and informed him that there was a mercury stone and an old padlock in one of the fields and that those items were highly precious things. Together with the complainant and the appellant were Paul Ole Tio, Stephen Ole Ndege, PW3. Since the complainant was interested in the precious items, it was agreed that he would pay to the appellant a sum of Kshs.280,000/= to facilitate the recovery of these precious metals from the pit. The pit in which the precious metals could be found was in the home of Paul Ole Tio, PW2, the complainant's father in-law. The complainant raised Kshs.100,000/=

Kshs.100,000/=, Stephen Ole Ndege another Kshs.100,000/= while Paul Ole Tio contributed Kshs.80,000/=. The appellant insisted on getting the whole sum of Kshs.280,000/= before he could proceed to excavate for the precious items from the pit. On the following day, the complainant sold one cow while Ole Tio sold a calf. The trio paid the whole amount to the appellant before the appellant could undertake the excavation for the precious items from the pit (cave).

3. In the evening of the same day, all the parties went to the pit at about 7.00 p.m. The appellant made a sacrifice by slaughtering a white goat. He put the blood in a white container, took the money from Paul Ole Tio and dipped it in the blood as he prayed. The appellant then gave back the money to the

complainant. The money was wrapped in a white cloth. As the appellant descended into the pit together with Ole Ndege, Stephen and the complainant remained outside with Paul and two other old men and two young men who had accompanied them. About three minutes later, Ole Ndege emerged from the pit carrying a red bottle which had a bit of cement on the side. Ole Ndege again went into the pit and when he emerged the second time, he had something which he said was a padlock from colonial times. The complainant gave the money to the appellant who then left.

4. On the 25<sup>th</sup> March 2010, the appellant went away and returned with a certain teacher whom he said was the buyer of the precious items. When the appellant first left, he gave instructions to the complainant to water those precious items for about 2 weeks. The items were wrapped in a white cloth. On that day and because of the requirement to water the items for about 2 weeks, the alleged buyer was told to return after 2 weeks when the items would have gone through the watering process.

In total obedience to what the appellant had commanded him to do, the complainant continued watering the wrapped up treasure for 2 weeks. After the 2 weeks, the appellant returned accompanied by an old man from Nairobi and together with the complainant and **“Mwalimu”** the treasure was laid out on the table. When the treasure was tested by the old man from Nairobi, it was found to be worthless as the alleged mercury was not mercury and the precious lamp was a normal lamp with a magnet in it. The appellant thereafter vanished and remained underground until his arrest. In the meantime a report was made to Nyamaiya police station.

5. During cross examination, the complainant stated that he knew the appellant well; that he also knew the appellant’s home and that it was the appellant who brought up the subject of the hidden treasure in the pit. The complainant also stated that the appellant told him that the treasure in the pit was hidden there by the Germans during the war.

6. PW2 was Malakwen Ole Tio, a farmer in Mapashi. Malakwen testified to the fact that the appellant was a herbalist and that he had treated his daughter on or about 20<sup>th</sup> March 2009. On that same day, Malakwen and the appellant met at Malakwen’s daughter’s home and that is when the appellant brought up, the issue of the hidden treasure. Malakwen supported the testimony by the complainant to the effect that it was agreed to pay the appellant the sum of Kshs.280,000/= to enable the appellant get the treasure from the pit. Malakwen sold 4 cows to raise part of his contribution. The other contributors also paid their share.

7. After the money was given to the appellant, the appellant took a he-goat to the pit, which was situated some 600 metres from Malakwen’s house and slaughtered it there, after which the appellant descended into the pit together with Ole Ndege while Malakwen and the complainant remained outside. All this time, Malakwen was holding the money. The appellant and Ole Ndege took some of the blood from the goat into the pit, later sprinkling some of it onto the money before going back into the pit. A little while later, the appellant came up from the pit carrying the following items:-

*A stone-like item wrapped in a white scarf and 3 magnetic rings – MF1-1 and MF1-2 a, b and c respectively;*

*3 pieces of metal – MF1-3 a, b and c;*

*The base of a hurricane lamp – MF1-4 and some pieces of concrete – MF1-5.*

Malakwen also identified some reddish liquid in a bottle which he said was brought up from the pit by the appellant, a substance which the appellant claimed was mercury. All these items were wrapped up in a white cloth and handed over to the complainant in exchange for the money.

8. The appellant promised to find a buyer for the treasure and one week later, the appellant brought a person he identified as a teacher but did not want the treasure shown to the teacher until he was certain of

the content of that treasure. The appellant still said he would look for a good buyer and asked the complainant, Ole Ndege and Malakwen to exercise some patience as the appellant continued looking for a good buyer. For one month, the appellant could not be reached on phone as he had switched it off. After a report was made to the police, the appellant was arrested in Keiyan.

9. During cross examination, Malakwen stated that he had never entered the pit though the pit was situated on his land. Malakwen denied a suggestion that he was a thief. He also stated that though he was a God-fearing person, he only got into the arrangement because he trusted the complainant who was his son-in-law. Malakwen denied that he and the complainant had brought the appellant to his home so as to drive out snakes from the cave. Malakwen also said that there was neither mercury nor any other precious metal among the items which the appellant brought out from the pit.

10. The complainant was recalled and cross examined at length. He confirmed that they paid the money to the appellant so that the appellant could remove treasure from the pit. He also testified that it was the appellant who brought a specialist to confirm whether the reddish liquid was mercury or not and that the said specialist had confirmed that the said liquid was not mercury. He also testified that it was the appellant who came up with the idea that there was mercury and other precious metals in the pit, and that the appellant was paid the sum of Kshs.280,000/= upon his coming out of the pit with the items. Further that the appellant was paid the money before the specialist confirmed whether the reddish liquid was mercury.

11. PW3 was Stephen Ole Mteeke (Stephen) from Enoosaen. He confirmed that he contributed to the Kshs.280,000/= which the appellant was eventually paid for the treasure that he (appellant) was to retrieve from the pit. Stephen also confirmed what the complainant and Malakwen said about what happened before the appellant vanished from the scene and never to be seen until the day of his arrest. He explained that the ritual involving the goat, was so that those who had participated in the recovery go with all the tools. Stephen also confirmed that when the specialist came, he confirmed that the reddish liquid was not mercury as alleged by the appellant but that it was tomato sauce. Stephen also stated that when the appellant was eventually arrested, he denied any knowledge of the complainant, Malakwen and Stephen, and that he (the appellant) said he had no knowledge of the money allegedly paid to him. Stephen also testified that the appellant had healed his (Stephen's) wife.

12. In cross examination, Stephen testified that the appellant prevented “**mwaliimu**” whom he himself had brought, from testing the reddish liquid for mercury and further that when the liquid was eventually tested and found not to be mercury, the appellant was not present. Stephen also confirmed that the appellant had told them to water the items for a period of 14 days before they could be unwrapped to see what was inside the white cloth.

13. PW4 was Number 70232 Police Constable Stanley Musimbi of Nyamaiya police station. He testified that he received a report from the complainant concerning this case against the appellant and that thereafter, he detained a motorbike belonging to the appellant as a bail to have him arrested. The motor bike was detained on 22<sup>nd</sup> July 2010. When the appellant went to the station on 24<sup>th</sup> July 2010 to claim the motor bike, he was arrested. Investigations into the complaint were thereafter carried out during which it was established that the appellant had defrauded the sum of Kshs.280,000= from the complainant, Malakwen and Stephen. The appellant was eventually handed over to Kilgoris police station before being arraigned in court with the present offence.

14. At the close of the prosecution's case which was closed without the benefit of the evidence of the investigating officer, the appellant was found to have a case to answer and was put on his defence. The appellant gave testimony on affirmation and told the court that he was a herbalist. He admitted knowing the complainant whose wife he had healed. He also said that the complainant approached him with a request to the appellant to remove some mercury from the cave with the promise to pay the appellant a sum of Kshs.300,000/= if the mercury was successfully removed. He admitted to going into the cave to remove some mercury but instead, he found some cement and some boxes which were removed. He was then paid Kshs.75,000/=, but the balance was to be paid later.

15. The appellant further stated that he found a buyer for the mercury but when he took the man to the complainant, the complainant refused to accept that man on grounds that the complainant had his own buyer. Later the appellant was informed that the mercury had been stolen by a herds boy from Malakwen's home. When the appellant sought to be paid his balance of Kshs.225,000/=, the complainant reported him to the police. He denied committing the offence.

16. During cross examination, the appellant told the court that apart from being a herbalist, he also chased away demons. He also said that when he entered the cave, he found many black snakes in there. He also said that he was to be paid Kshs.300,000/= because the items he was to remove from the pit were precious. He also said that he sacrificed a goat before entering the pit. He denied that he gave the complainant any conditions regarding the items that had been brought out of the pit. The appellant told the court that though he had never seen mercury in all his life, he had found mercury in the pit and brought it over to the complainant. The appellant did not call any witnesses.

17. After carefully considering all the evidence that was placed before him, the submissions made by both the prosecution and counsel for the respondent, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was accordingly found guilty as charged and convicted. The appellant was sentenced to suffer imprisonment for a period of 2 years.

18. Being aggrieved by both the conviction and the sentence, the appellant brought this appeal on the following 7 grounds:-

- 1) *The learned trial magistrate failed to consider the evidence adduced by the appellant in and his witness by merely, dismissing it without considering and giving it's due effect.*
- 2) *The learned trial magistrate misdirected himself when evaluating the evidence on record before occasioning a miscarriage of justice.*
- 3) *The learned trial magistrate erred in law and fact by finding the appellant guilty of the offence charged as the evidence on record never supported the charge.*
- 4) *The learned trial magistrate erred in law by not taking unto consideration that the appellant's right was violated as he stayed in custody in excess of the 24 hours as stipulated in Article 49 of the constitution.*
- 5) *The learned trial magistrate erred in law by considering mere facts of witnesses without proof as no exhibit was ever shown to court to proof the allegation.(sic)*
- 6) *The learned trial magistrate never considered evidence adduced as a whole to his judgment.*
- 7) *Any other ground that may be adduced at the hearing of the appeal.*

19. The appellant therefore prays that the appeal be allowed, the conviction quashed and the sentence set aside.

20. This is a first appeal. On this first appeal, I am under a duty to rehear the case against the appellant by reconsidering and evaluating the evidence afresh with a view to determining whether the conclusions reached by the learned trial magistrate can be supported. I am also under a duty to carefully consider and weigh the judgment of the learned trial magistrate, remembering always that I do not have the benefit of seeing and hearing the witnesses who gave evidence during the trial and that if any issue arises on credibility of a witness, only the trial court can comment. This onerous duty of a first trial court has been restated in cases such as **Pandya –vs- R.[1957] EA 336** and **Okeno –vs- Republic [1972] EA 32.**

21. I have now carefully reconsidered and evaluated the evidence afresh. I have also carefully considered and weighed the judgment of the trial court as is expected of me. The issue that arises for determination is

whether the prosecution indeed proved its case against the appellant beyond any reasonable doubt.

22. When this appeal came up for hearing before me on the 28<sup>th</sup> March 2012, I heard submissions from S.M. Sagwe, advocate appearing for the appellant and from Mr. Gitonga, learned State Counsel. During the arguments, Mr. Sagwe abandoned ground 7 of the appeal, merged grounds 1, 2 and 3 together and argued grounds 4, 5 and 6 separately. Counsel submitted that the appellant performed his part of the bargain of removing mercury and other items such as the lamp and gave the same to the complainant and was paid Kshs.75,000/=. Counsel also submitted that the complainant and his colleagues did not wait for the return of the appellant before testing the mercury. He also submitted that the bottle containing the mercury was never produced as an exhibit nor were the contents thereof taken for chemical analysis by experts. Counsel also submitted that the learned trial magistrate failed to consider the evidence of the appellant and by so doing ended up with wrong conclusions.

23. It was also submitted that the appellant's constitutional rights under **Article 49 (1) (f)** of the **Constitution of Kenya** were violated when he was kept in custody for 5 days instead of the statutory 24 hours before being taken to court following his arrest. Because of this violation, counsel submitted, the proceedings and the judgment of the trial court were a nullity. He urged the court to let the appellant free on this account.

24. It was also contended that the learned trial magistrate erred by failing to consider the evidence that was placed before him as a whole and that if he had done so, he would have reached the conclusion that the prosecution had failed to prove its case against the appellant beyond any reasonable doubt.

25. In response, counsel for the respondent submitted that the whole of the appellant's appeal lacks merit. He submitted that all the prosecution witnesses testified as to how on the 23<sup>rd</sup> March 2010, they were all at the complainant's home and the appellant told them about the possible find of mercury and other valuables in the pit that was located on Malakwen's land. The appellant asked for Kshs.300,000/=: but they eventually agreed on Kshs.280,000/= which was paid to the appellant after he came out of the pit with what he purported was mercury and other precious items. Counsel submitted that all the prosecution witnesses gave consistent and corroborative evidence against the appellant who after receiving the money went underground for about 1 month before he was eventually arrested.

26. On the prosecution's failure to call the Investigating Officer, counsel submitted that despite that omission, the prosecution's evidence was still so watertight that it was safe for the trial court to rely on the same in finding the appellant guilty as charged and convicting him of the offence. It was also submitted that mere delay in arraigning the appellant before court does not automatically mean that the appellant must be acquitted. Reliance was placed on the Court of Appeal decision in the case of **Mwangi Njuguna -vs- Republic [2010] e KLR**.

27. Counsel also submitted that prosecution's failure to produce the bottle with the alleged mercury was not fatal to the prosecution's case and further that the appellant's complaint that his evidence was not considered at all is not correct since the record clearly shows that all the evidence on record, including that of the appellant was taken into account by the learned trial magistrate. Counsel urged the court to dismiss the appeal for want of merit.

28. In reply, Mr. Sagwe submitted that the prosecution should have produced the bottle of mercury though it may have been imaginary and that it was crucial that the prosecution adduces the evidence of the Investigating Officer.

29. Considering all the grounds of appeal in light of the above submissions and the evidence on record, I am satisfied that the findings of the learned trial magistrate cannot be faulted. The ingredients which needed to be proved by the prosecution in this case were correctly stated by the learned trial magistrate as follows:-

(a) *That the accused person obtained the money from the complainant.*

(b) *That the accused obtained the money by making a false representation.*

30. **Section 312** of the **Penal Code** defines “**false pretence**” 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.”**

31. In the instant case, there is evidence by all the prosecution witnesses that the appellant told them that there was mercury and other precious items in the pit that was located in Malakwen’s farm and that he would get those things for them if they paid him Kshs.300,000/=. The appellant represented to the said witnesses that these items had been left behind and hidden in the pit by the Germans during the war. Considering the whole evidence, including the testimony of the appellant, I am satisfied that this representation was made and that the appellant knew that the same was false. As a result of the said representation, the appellant was paid a total sum of Kshs.280,000/=. What is instructive is that the appellant asked for the full amount before he could go to look for a buyer and after the money was paid to him, the appellant went underground. It is my finding that the conduct of the appellant of going underground and switching off his phone after he was paid the money went a long way to prove that what he had purported was mercury and other precious items from the pit were false items.

32. I have considered with considerable interest the appellant’s contention that when he entered the pit he found many black snakes and that after he poured some herbs, the snakes left the cave. It is my considered view that this story was coined by the appellant to support his theory that the complainant had hired him to drive away snakes and some other dangerous creatures which were in the pit. This story is, in my view, without merit and I reject the same.

33. I have also carefully considered the appellant’s contention that it was the complainant who approached him over the issue of mercury in the pit. I do not think that this was the true position considering the strong evidence offered by the complainant, Malakwen and Stephen that it was the appellant who brought up the subject and said that if he was paid Kshs.300,000/= he would remove the mercury and give it to the complainant, Malakwen and Stephen. It is also instructive that after the appellant removed what he alleged was mercury the lamp and other items, he wrapped them up after sprinkling them with blood from the goat and told the complainant not to open the same and to water the same for 14 days. When the appellant did not return as promised, and instead sent an old man from Nairobi to test the “**mercury**”, it dawned on the complainant that what was alleged to be mercury was not mercury. This is evidence on record that the purported mercury was infact tomato sauce.

34. All this evidence pieced together has convinced me that the case against the appellant was proved beyond any reasonable doubt even in the absence of the evidence of the investigating officer.

35. In the premises, I find that the appeal herein lacks merit. The same is accordingly dismissed in its entirety.

36. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9<sup>th</sup> July 2012.

**Dated and delivered at Kisii this 11<sup>th</sup> day of October, 2012**

**RUTH NEKOYE SITATI**

**JUDGE**

In the presence of:

Mr. Okenye for S.M. Sagwe (present) for Appellant

Mr. M. Mutuku (present) for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**