



**Ragui v Republic (Criminal Appeal E036 of 2024)
[2024] KEHC 14707 (KLR) (Crim) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E036 OF 2024
DR KAVEDZA, J
NOVEMBER 26, 2024**

BETWEEN

NEWTON KIGERA RAGUI APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal against the original conviction and sentence delivered by
Hon. Murage (PM) on 3rd June 2024 at Kibera Chief Magistrate's
Court criminal case no. 366 of 2019 Republic vs Newton Kigera Ragui))*

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. He was sentenced to serve three (3) years imprisonment.
2. Being dissatisfied, he filed an appeal challenging his conviction and sentence. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He argued that the trial shifted the burden of proof to him. In addition, the charge sheet was defective. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court, and 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. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The complainant, PW1, Dr. Ruth Wanjiru Wanjohi, testified that in December 2017, she intended to purchase a car and sought the assistance of the appellant, whom she referred to as her husband,



- to facilitate the importation process. The appellant sent her pictures of the car via WhatsApp and informed her that the process would require Kshs. 2 million. In February 2018, he claimed the car had arrived in Mombasa and requested a sum of Kshs. 300,000. She sent him Kshs. 200,000 and awaited further communication regarding the car's arrival.
5. She however observed that the appellant began avoiding her calls and later refunded only Kshs. 70,000 with no explanations given. In September 2018, she sent him an additional Kshs. 870,000 as the balance due to complete the transaction. Despite paying a total of Kshs. 1,370,000, she neither received the car nor any further refund. PW1 maintained communication with the appellant throughout the transaction via emails and WhatsApp messages but eventually lost contact with him.
 6. PW2, David Sikuku Wafula, a friend of the complainant, testified that on 20th September 2018, PW1 informed him of her intention to purchase a car with the appellant's assistance. She also mentioned an outstanding balance of Kshs. 1.5 million. The next day, she requested a loan of Kshs. 870,000, which PW2 delivered to her house, where he met the appellant. Later, when PW2 inquired about the car's delivery, PW1 informed him she could no longer reach the appellant. PW2 subsequently recorded a statement at Kabete Police Station regarding the matter.
 7. PW3, Police Constable Edward Onyango, testified that he became involved in the case after taking it over from PC James Wanjoi, who had concluded the investigative phase. PW3 stated that he arrested the appellant on 19th March 2019 and subsequently prepared the charge sheet.
 8. In court, PW3 produced several documents as evidence, including records of RTGS money transfers, details of a car purchase involving a Volkswagen Touareg, the loan agreement executed between PW1 and PW2, photographs of WhatsApp messages exchanged between the appellant and PW1, a photograph of the car purportedly purchased, and proof of the refund of Kshs. 70,000 by the appellant. When he inquired from the appellant whether he would settle the business transaction, he said that he was working on it at the time.
 9. In his defence, the appellant stated that PW1 was employed by his wife and had approached him for assistance in purchasing a car. The agreement between them was not formalised in writing. He asserted that the car's cost was Kshs. 2 million, and he was to receive a commission from the total sum. The appellant further claimed that PW1 did not pay the full amount upfront, and that, upon receiving payments from her, he refunded Kshs. 70,000. In total, PW1 transferred Kshs. 1,370,000 to the appellant, and subsequently requested that he return her money, deducting Kshs. 150,000, which represented the outstanding balance for the car. The appellant concluded by stating his willingness to repay the amount owed to PW1.
 10. This court has re-evaluated the facts of this case. It has also re-evaluated the rival submissions made by parties to this appeal. Section 313 of the *Penal Code* (Cap 63) Laws of Kenya provides that;

“ 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.”
 11. The prosecution is required to establish that the appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud.
 12. The first element of the subject offence that needed to be proved was whether the appellant obtained something capable of being stolen. From the record, there is witness evidence that the appellant obtained money. It was PW1's evidence that the appellant received Kshs, 1,370,000 from her. The



appellant did not dispute that he received the amount. It is therefore clear from the evidence that the appellant obtained money from the complainant, and money is something capable of being stolen.

13. However, the taking of the money did not solely constitute the offence and it was for the prosecution to prove that the same was obtained through false pretences and with the intention to defraud. Secondly, did the appellant obtain the money by false pretense or with the intention to defraud the complainant? 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.

14. The second ingredient for determination was whether the money was obtained by false pretences and with the intention to defraud. From the record, the prosecution evidence was that the appellant falsely presented that he was in a position to import a motor vehicle on behalf of the complainant. The evidence that the appellant received money from the complainant is corroborated by the evidence of PW2 who advanced money to the complainant for purposes of importation of the motor vehicle. The documentary evidence of the other transactions is documented in the records of RTGS money transfers, details of a car purchase involving a Volkswagen Touareg, the loan agreement executed between PW1 and PW2, photographs of WhatsApp messages exchanged between the appellant and PW1, a photograph of the car purportedly purchased, and proof of the refund of Kshs. 70,000 by the appellant.
15. On the intention of the funds, the appellant did not dispute that the funds were meant to import the motor vehicle. He indeed admitted that he was willing to repay the complainant but insisted that the complainant did not pay the full purchase price but asked for a refund of her money.
16. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not a false pretence if it is made in relation to the future even if it is made fraudulently. Where, however, the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false. Perhaps the most explicit exposition of the ingredients of the offence of obtaining by false pretences is to be found in the decision rendered by the Nigerian Supreme Court on Friday April 2006 in the case of *Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria* SC 41/2003 where the court stated as follows: -

“In order to succeed in a charge of obtaining by false pretences, the prosecution must prove: -

that there is a pretence;

that the pretence emanated from the accused person;

that it was false;

that the accused person knew of its falsity or did not believe in its truth;

that there was an intention to defraud;

that the thing is capable of being stolen;

that the accused person induced the owner to transfer his whole interest in the property.”

17. The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest belief in the truth of the statement on the part of the accused



which later turns out to be false, cannot found a conviction on false pretence. The above adequately presents the law as in the Penal Code.”

18. The key question is, does the defence offered by the appellant in the lower court raise doubts as to his guilt? Does it rebut the above ingredients? Is it reasonable in the circumstances? In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt.
19. In my assessment, the appellant’s explanation lacked reasonableness and failed to counter the compelling evidence presented by the prosecution. Even according to his own admission, no motor vehicle was ever imported. Considering the evidence presented, I find the appellant’s defence to be highly improbable and challenging to accept.
20. After weighing the explanation offered by the appellant and the prosecution evidence, I find that the prosecution evidence is truthful, credible, and probable as opposed to the highly improbable defence offered by the appellant. The appellant’s defence did not raise any reasonable doubts on the prosecution case. The conviction by the trial court is therefore affirmed.
21. Further, the appellant stated that the sentence was excessive in view of the offence. Section 313 of the Penal Code provides for a three-year sentence for persons convicted of the offence of obtaining by false pretence.
22. In the sentencing proceedings, the trial court considered that the appellant was not a first offender, the presentencing report and the appellant’s mitigation before imposing the maximum sentence.
23. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed.
24. I take note that the appellant conceded to owing the complainant money and he was ready to pay her. Additionally, the probation officer indicated in the pre-sentence report that the appellant was suitable for a non-custodial sentence. It is therefore my view, and guided by the pre-sentence report, that a rehabilitative approach would be more beneficial in this case as it would allow the appellant to serve a non-custodial sentence and pay the complainant her money.
25. For the foregoing reasons, I hereby:
 - i. Substitute the sentence of three (3) years imposed by the trial court with an order of probation for three (3) years under the supervision of the Kibera Probation Office.
 - ii. The appellant is directed to reimburse the complainant Dr. Ruth Wanjiru Wanjohi Kshs. 1,370,000 in instalments to be negotiated before the probation officer.
 - iii. In the event the appellant commits a related offence or fails to repay the complainant, he shall be re-arrested and required to complete the original sentence imposed by the trial court.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF NOVEMBER 2024

D. KAVEDZA

JUDGE



In the presence of:

Bosire for the Appellant

Mburugu for the Respondent

Achode Court Assistant

