



**Njiru & another v Republic (Criminal Appeal 36 of 2019)
[2023] KEHC 85 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 85 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 36 OF 2019
RM MWONGO, J
JANUARY 19, 2023**

BETWEEN

KENNEDY NJIRU ALIAS MBOGO 1ST APPELLANT

SARAH WANGARI NJIRU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of Hon. L.W.Kabaria SRM delivered
on 27th May, 2019 in Gichugu Criminal Case Number 720 of 2014)*

JUDGMENT

Brief Background

1. The appellants were charged with obtaining money by false pretences contrary to section 313 of the [Penal Code](#). The particulars of the offence were that the appellants, on diverse dates between June 25, 2014 and July 2, 2014 at Kianyaga Town, Kirinyaga East District within Kirinyaga County, jointly with others not before court, with intent to defraud obtained from Rose Muriko Njeru, the complainant, a sum of Kshs 810,000/- by falsely pretending that they were selling to her a fertilizer product for business.
2. Following a hearing in which five (5) prosecution witnesses and the accused testified, the appellants were convicted on May 24, 2019 and sentenced to 2 years imprisonment on May 27, 2019.
3. Aggrieved by the judgment and sentence against them they appealed to the High Court against the said judgment and sentence on the following grounds:
 - i. That the trial magistrate erred in law and in fact by convicting the appellants on contradictory uncorroborated and evidence that is hanging not proven beyond reasonable doubt.



- ii. That the Trial Magistrate erred in law and in fact in convicting the Appellants on a charge of obtaining money by false pretences contrary to section 313 of the *Penal Code* and sentencing them 2 years' imprisonment when the prosecution did not prove and establish the ingredients of the said charge as required by the law.
 - iii. That the trial magistrate erred in law and facts in holding that the prosecution discharged the very heavy burden of proof beyond all reasonable doubt yet the Prosecution did not prove that the Appellants used false pretences to lure the Complainant into the transaction.
 - iv. That the Learned Trial Magistrate erred in both law and fact and failed to take into consideration that the Appellants are first offenders hence deserved an alternative sentence.
4. The appeal was disposed of by written submissions.

Issues

5. From the appeal, the issues that arise are as follows:
- a. Whether the trial court relied on contradictory and uncorroborated evidence that would have disentitled the court to find guilt;
 - b. Whether the charge of obtaining by false pretenses was proved;
 - c. Whether the sentence meted was disproportionate for the offence.

Analysis of Facts and Law

6. It is trite that this being a first appeal, this court is obliged to take a fresh look at the evidence adduced at the trial and to re-analyze and re-consider it so as to arrive at its own conclusions. In so doing the court must be careful to note that it did not itself hear and see the witnesses, and should not ignore the conclusions of the trial court. These guiding principles are reiterated in *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated;

“The duty of the first appellate court 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.”

7. At the trial, the complainant, PW1, testified that she was a business woman and sold clothes. On June 25, 2014 a customer came to her boutique, selected a jacket and paid a deposit of Kshs 500/-. They agreed he would pay the balance in instalments. They exchanged telephone numbers. His was 0703xxxxxx and he said he was called Dennis. Her number is not indicated in her evidence. On June 27, 2014, Dennis called her and told her that someone would drop his luggage at her shop for collection by him as he collected his jacket.
8. Later, someone called her saying he had been sent by Dennis to drop his luggage. He came to the shop, and said he was Charles. He also said he had some liquid fertilizer in bottles costing 7,000/- each. After he left a lady called her and said she had been sent by Dennis to collect his luggage. She introduced herself as Frida, and picked the luggage which was three bottles. Frida then called Dennis on the phone



- and complained that there were only 3 litres and not 36 litres of fertilizer. She paid for the 3 litres. PW1 told her if she found some fertilizer, she could supply it to Frida who then left.
9. Later, PW 1 called Charles and asked him to supply her with 30 litres of fertilizer. She paid him a total of Kshs 210,000/- made up of Kshs 100,120/- in cash and Kshs 109,880/- by mpesa on number 0725xxxxxx. When he made the supply she called Frida for it. She said she was in a meeting, but later called back to say the manager was not willing to collect only 30 litres. he advised her to get 200 litres.
 10. As she didn't have the money, she called Charles who suggested she call the supplier. She called the supplier, a lady, who said she could deliver on condition she paid at least half the order. On 30/6/2016 Charles brought 170 litres. She was told she needed to pay for a fertilizer permit, called a PG permit. She got 100,000/- and paid to the same number she had paid to earlier. She then took a loan and made further payments as follows: On 1/7/2016 Kshs 320,000/-; on 2/7/2017 Kshs 120,000/- to Charles Macharia; again on 2/7/2017 Kshs 150,000/- to number 0721xxxxxx, an account of one Emilio Ileri.
 11. After paying Kshs 810,000/- she called the manager, who never showed up to collect the fertilizer. PW1 therefore reported to the Police. She was told she had been conned and was later called to an identification parade where she identified Dennis. In court she identified the fertilizer, labelled Lidhan, and Mpesa Agent's statement for Agent No 52xxx which she had used.
 12. On being recalled for further cross examination by Accused 1, PW1 reconfirmed that she sent money to him through mpesa; that Accused 1 told her to keep the fertilizer for him and that he would come for it; that he introduced her to that business; that she paid him 810,000/- through mpesa and some in cash; that she could not prove the cash payment but that the money in the charge sheet is what was paid by mpesa. On further cross examination by the 2nd accused she stated that she did not know the financial arrangements between both accused, but that there was a transaction between the two accused persons which made Accused 2 a suspect.
 13. PW2, Phyllis Mukangu, a casual laborer, stated that she knew neither the complainant nor the accused persons. She was told by the police she had stolen money and was shown a paper with her fingerprints and picture. She confirmed that photograph was hers, but that she had lost her ID in February 2014, and had reported the fact. She showed the police the abstract and was informed that some persons had used her ID to steal money. She said her telephone number was 0702xxxxxx.
 14. Dennis Njuka testified as PW3. He stated that he was an accountant and knew nonether the accused or complainant. He said he was told the police wanted him concerning theft of money and was shown mpesa statements for Nos 0705xxxxxx and 0705xxxxxx registered I his name vide ID No 27xxxxxx. He informed the police that he had lost his ID on 2/3/2012 and had taken another ID. His number was 0726xxxxxx.
 15. PW4 Susan Mugo testified that police officers came to her house at night and asked for her ID card, phone and husband's phone. She said that in 2012 she had lost her wallet, ID Card No 28xxxxxx, phone and ATM Card. She had reported the loss at Kianyaga Police Station, but was sent to Embu to get an abstract as that was where her ID got lost. In 2013, she got another ID. The police told her that her ID had been used to register a telephone line which had been used to steal money namely telephone numbers 0716xxxxxx and 0720xxxxxx.
 16. PW 5 PC Martin Mwalavu was the Investigating officer assigned the case. He said the complainant complained about one Dennis who she was selling a jacket to and had introduced her to fertilizer business. A bottle was fetching Shs 7,300 and she had purchased 200 bottles. Dennis had failed to collect them despite her having sent him money through mpesa and in 100,000/- in cash. She gave him the telephone numbers through which she communicated to Dennis and his contacts. They



were seven; namely Numbers 0714xxxxxx; 0703xxxxxx; 0705xxxxxx; 0723xxxxxx; 0716xxxxxx and 0711xxxxxx.

17. On getting the numbers, PW5 applied in court in Gichugu Misc Case No 33 of 2014 for authority to investigate the numbers. He detailed the names registered to each number and obtained the respective Mpesa statements as follows: For No 0723xxxxxx registered in the name of Charles Macharia, it received Kshs 589,880/- from an Agent called Rasai Investment owned by the complainant. No 0711xxxxxx registered in the name of Emilio Ileri, had received 200,000/- from Rasasi Investment.

When the moneys were received, they were immediately disbursed as follows: to No 0701xxxxxx registered in the name of Sarah Njiru 2nd Accused; to No 0705xxxxxx registered in the name of Dennis Njuka PW3; and to 0725xxxxxx registered in the name of Kennedy Joshua the 1st Accused.

18. Further, the money received in the latter line, 0725xxxxxx, was immediately transferred as follows: To No 0705xxxxxx in name of Dennis Njuka To 0705xxxxxx in name of Dennis Namu

PW5 established that the ID number that registered these two telephone numbers is the same, that is Dennis Namu Njoka PW3.

19. PW5 traced and found PW3 and used his ID to obtain his particulars from the Registrar of persons. This was obtained through a request (PMFI 5). and a report He also got a report from the Registrar for fifteen other IDs (PMFI 6). He traced Susan Wanjiru PW4 whose ID No 28089461 and telephone number 0716862198 were found in the mpesa transactions (PMFI 7). He arrested Susan Wanjiru in Embu and brought her to Kianyaga Police station. on interrogating her, he was satisfied that she had lost her ID and she showed her duplicate ID.

20. PW5 also traced Dennis Namu Njoka who was a student at the University of Nairobi and on interrogating him, PW5 was satisfied that his ID had also been lost/stolen. Similarly, he traced Micere Mukanga Mwaniki of ID No 03xxxxxx whom he established from the registration printout (PMFI 9) which led to a request for ID registration particulars for ID numbers 32xxxxxx & 32xxxxxx (PMFI 11 & 12). He got the ID Numbers from Safaricom (PMFI 1, 11 & 12) and found they were registered in the names of Kennedy Njiru Joshua and Sarah Wangari Njiru, the 1st and 2nd Accused persons.

21. The Investigating Officer checked the trend of the money transactions and noted that they were among people who received cash immediately the same was received in the account from the complainant. Thus, PW5 sought to trace the accused persons, and found that they were husband and wife and lived in Thika.

22. With his colleague PC Victor Odhiambo, they went to the accused's house and found the wife in. They searched the house and found three mobile phones and two sim cards and made an inventory (PMFI 13). The wife called the husband but he could not be reached so she gave them his vehicle registration number KBH 584 a white Nissan Sunny. They went to Thika town and found the car parked outside a bar. Accused 1 was inside and they arrested him, and drove to Thika police station. They concluded the search and made an inventory of the items in the car and on accused 1 (PMFI 14 (a) & 14(b)).

23. The items in the inventory included a flash disk, wife's names, labels/stickers for Founzone and Lidhan. These were the same stickers/ labels that were on the PMF 15(a & (b)); Mobile phone Nokia IMEI No 355 904 053 455 394-PMF 16 with Safaricom SIM card. It was Mobile No 0705xxxxxx registered in the name of Dennis Namu per PMF 17); He found 12 Safaricom SIM plates from 1st Accused's wallet in his pocket (PMF 19(a)-(h)). These SIM plates contained all the numbers in PMFI 19, namely:

- a. 0705xxxxxx registered under Dennis Njoka (PMFI 19(a))



- b. sim card plate number 0711xxxxxx registered in the name of Emilio Ileri ID No 22xxxxxx (PMFI 19(b));
 - c. 0716xxxxxx registered under Susan Wanjiku ID No 28089461 (PMFI 19(c))
 - d. 0725xxxxxx registered under Kennedy Njiru Joshua ID No 32xxxxxx(PMFI 19(d))
 - e. Sim replacement for No 0705xxxxxx (PMFI 16).
24. In addition the PW5 recovered a black Itel mobile phone (PMFI 20) which was using sim card number 0701xxxxxx by Sarah Njiru, 2nd accused, by which money was transferred to her through Emilio Ileri's number; an Itel blue phone (PMFI 21) with sim card number 0703xxxxxx registered under Janet Aduyo Odera which was receiving money from the suspected numbers; Nokia 1280 black phone (PMFI 22) registered in name of Dennis Namu; Nokia 105 Black phone (PMFI 23) with sim card for number 0711xxxxxx belonging to Emilio Ileri; Samsung GT white phone (PMFI 24) using sim card number 0725xxxxxx registered in the name of Kennedy Njiru Njoka; Itel S120 blue phone which the IO was not able to pair to any number. PW5 further obtained the ID and passports of Dennis Namu Njoka (PMFI 26) and police abstract of Micere Mukanya Wanjiku (PMFI 27b).
25. The Investigating Officer produced all the marked items as Exhibits numbered PExb 1-27. The exhibits are contained in the lower court file which was availed to this court together with the proceedings.
26. In cross examination, PW 5 stated that the complainant told her they had been in a business deal; that the goods were supplied; that the complainant sent cash through her Mpesa Agency business to several numbers; that no cash was sent to numbers registered in the names of the accused persons; that the 1st accused is the one who was dealing with the complainant directly; that the 2nd accused obtained money indirectly; that proof had been produced to show that the accused persons received money from the sale proceeds; that the goods supplied were not what was intended; and that she was able to trace the accused persons through the telephone contacts they used.
27. The Accused persons gave their brief evidence through sworn statements. Accused 1 (DW 1) stated that he resides in Thika; that he has never supplied fertilizer; that he had only one phone , not several phones; that Emilio Ileri sent him money for sale of macadamia; and that he is a stranger to all the other information.
28. In cross examination he: denied knowing the complainant; denied ever having called her or been to her shop; denied supplying her anything; asserted that he had been framed for a reason he never knew.
29. DW2 the 2nd Accused stated she resided in Thika; that she didn't know why she was arrested, detained and charged; that the complainant does not know her; and that the IO told her she was arrested because her husband had sent her money. in cross examination she stated that only her husband sent her money; that the police did not recover anything from her house; and that she was framed.

Contradictory and Uncorroborated Evidence

30. In their submissions the appellants complain that PW1 testified that the total amount allegedly obtained from her is Kshs 1,100,000/- made up as follows: 210,000 + 100,000 + 200,000 + 320,000 + 120,000.150,000/-. That this is a clear contradiction from what is stated in the charge sheet as Kshs 810,000.
31. In addition, they submit that the mpesa Agent Number used by the complainant (PW1) to send money to the accused persons is uncorroborated as PW1 stated that she used her Agent No xxx86 to send money to the accused persons, whereas the Investigating Officer (PW5) indicated that the Agent No



- used by the complainant is xxx56. The trial court, on its part, indicated an entirely different Agent Number 62xxxxxx in the judgment.
32. Further, PW1 testified that she was supplied with 200 Litres of Liquid Fertilizer. However, PW5 testified that the substance or product was neither a pesticide nor fertilizer without a corroborating report from the Government Chemist to confirm the nature of the liquid.
33. As regards contradictory evidence as to amounts in the charge sheet and in the testimony, the evidence is as follows. The complainant stated that she paid for the alleged fertilizer by a first tranche of 210,000/-. It was made up of Kshs 100,120/- cash and Kshs 109,880/- by mpesa.
34. In the second tranche paid between 30/6/2016 and 2/7/2016 she paid by mpesa Shs 100,000/- + 200,000/- + 320,000/- +120,000/- +150,000 = 890,000/-. The total payment she made in the two tranches was therefore 890,000/- + 210,000/- all amounting to Shs1,000,000/=. I agree with the appellants that there is a discrepancy in the amount stated in the testimony and the Shs 810,000/- stated in the charge sheet.
35. The law concerning particularization in charge sheets is stated in section 134 of the Criminal Procedure Code which provides that:
- “ Every charge... shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.
36. In Sigilani v Republic, [2004] 2 KLR, 480 it was held that:
- “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”
37. The law concerning discrepancies is in many authorities but was well put in Twehangane Alfred v Uganda Crim App No 139 of 2001, [2003] UGCA,6 where it was held that :
- “With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”
38. I do not think that the difference in the amounts is a fundamental difference that goes to the root of the offence or the main substance of the case as to whether there was anything obtained by false pretences.
39. With regard to the complainant’s Mpesa Agent Number, the trial magistrate recorded it as 52986 in setting out the evidence of the complainant. However, later in the analysis in her judgment at page 35 of the ROA she used the information in the Exhibit 2 which shows the Account Number as 62296603-8. The agent or account name is for Rasasi Investment Ltd which company and agent account number was not referred to by the complainant at any stage.
40. I note that the evidence of PW5 was detailed and compelling. The story stitched together the movement of monies from person to person. the evidence put together by PW5 outlines clearly what



appears to have been happening in this alleged scam. The only misgiving I have, and it is a fundamental one, is who is Rasasi Investments Ltd and how is it connected to the complainant?

41. Although PW5 testified (ROA pg 17) that the agent called Rasasi Investment Kianyaga is owned by the complainant, there is nothing in the evidence availed connecting the complainant or her Agent No 52986 with Rasasi Investment Ltd, and no explanation has been given for receiving the exhibit of that company's mpesa statement in evidence. I think it was critical for the prosecution to make out a connection between the Exb 2 and the complainant, especially since the complainant had indicated that her agency Number was xxx86.
42. I have carefully perused the Rasasi Investments mpesa Statement (Exb 2) and have not seen anything in it that connects the complainant to Rasasi Investments Ltd or to her Agent Number xx86. In addition, there is no other exhibit, such as a corroborating Companies search report, availed indicating the ownership of Rasasi Ltd. In light of this gap in the evidence, doubt is created as to the ownership of the agency and the veracity of transactions in it relative to the complainant.
43. The learned trial magistrate in her judgment at page 32 of the ROA clearly noted the evidence of the complainant as follows:

“The complainant testified that she used her Mpesa Agent No xxx86 to send the cash..”

44. The trial court also set out various amounts said to have been sent. At page 33-34 ROA the learned magistrate set out the evidence of PW5. Thereafter, she analysed the evidence and stated:

“According to the Mpesa statements produced in court, the complainant's Mpesa number 62296603 indeed deposited money to Mobile Nos 0711xxxxxxx...”

She concluded by finding that the prosecution had proved its case and convicted the two accused. She did not comment on how the complainant's Mpesa Number changed or whether it was shown through evidence to whom the new number belonged.

45. In the absence of proof of a connection between the complainant and the Rasasi Agency which sent the moneys alleged to have been sent to the two accused through their various telephone numbers, the trial court was not entitled to place the heavy reliance on the statement that she did for proof of the movement of money. This was fundamental in the prosecution's case.
46. In the absence of such proof as to the connection between the Rasasi company and the complainant, the prosecution's case built upon the statement, the case collapses in its entirety. I so find.

Whether the prosecution established the ingredients of the offence

47. The appellants submitted that the complainant (PW1) alleged she entered a business deal with Frida and Charles. Frida being the customer and Charles being the supplier of the fertilizer. PW1 was indeed supplied with the fertilizer, 200 Litres (30 Litres plus 170 Litres) to be precise as demonstrated at page 12 of the record (page 18 of the typed proceedings), The appellants herein were nowhere in the picture when the complainant (PW1) agreed to engage in the fertilizer business. Therefore if at all there was any false pretence, which we humbly submit there isn't, then the same did not emanate from the appellants herein. The prosecution as such did not prove beyond reasonable doubt that the false pretence emanated from the appellants. Further, the prosecution needed to prove and establish that what was actually supplied was not fertilizer but water and food colour.
48. They further submitted that the prosecution miserably failed to place the appellants as having committed the offence of obtaining money through false pretences. The 1st appellant was merely



identified by the complainant for having come to her shop to buy a jacket. On the other hand the 2nd appellant was not identified at all by the complainant as having being part of the persons who committed the offence herein.

49. Section 313 of the Penal code states as follows;

“ 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 misdemeanor and is liable to imprisonment for three years.”

The essential elements of the offence under section 312 as read with section 313 of the Penal Code are:

- a. Obtaining something capable of being stolen.
- b. Obtaining it through a false pretence.
- c. With the intention to defraud.

50. The Penal Code defines “false pretence” under section 312 of the Penal Code to be:-

“ 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.”

51. The prosecution’s submissions also note that most of the allegedly fraudulently acquired money was received via Rasasi Investment. No effort was however, made to show the ownership of Rasasi by the complainant or to show that Agent No xxx86 was in fact Rasasi.

52. Further, in my view, although the complainant stated that she met the accused and that she gave him cash and sent the other amounts for the alleged fertilizer, and that she was able to identify him, there has been no proof that money left her phone – which number was not availed- nor was sent through her confirmed Agent No xxx86. Monies sent by Rasasi Investments Ltd cannot be attributed to her, as no connection was made between her and Rasasi investment company..

53. Accordingly, I find and hold that there is no basis for making a finding as to the connection between the accused and the allegedly that the fraudulent transactions. Thus, the basis for the convictions falls. Similarly there can be no basis for the sentences imposed.

54. Accordingly, the appeal succeeds for the reasons given and the convictions and sentences of both appellants are hereby set aside.

55. The appellants are set at liberty forthwith unless otherwise lawfully held.

56. Orders accordingly.

DATED AT KERUGOYA THIS 19TH DAY OF JANUARY, 2023.

R MWONGO

JUDGE

