



REPUBLIC OF KENYA



KENYA LAW
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**Guyo v Republic (Criminal Appeal E014 of 2022)
[2023] KEHC 1651 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 1651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E014 OF 2022
JN NJAGI, J
JANUARY 18, 2023**

BETWEEN

OLLA GOLLO GUYO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Simon Arome, SRM, in Marsabit Principal Magistrate's Court Criminal Case No. E431 of 2021 delivered on 31/5/22)

JUDGMENT

1. The appellant was convicted of two counts of the offence of obtaining goods by false pretence contrary to section 313 of the *Penal Code* and was sentenced to a composite fine of Ksh 300,000/= in default to serve two years imprisonment. The particulars of the offence in count 1 were that on the May 14, 2021 at Baldesa in North Horr sub-county within Marsabit county with intent to defraud obtained from Yattani Katelo Orge 90 goats at a price of Ksh 3,300/= all valued at Ksh 297,000/= by falsely pretending that he was in a position to pay for them, a fact he knew to be false.
2. The particulars of the offence in count 2 were that on the May 14, 2021 at Baldesa in North Horr sub-county within Marsabit county with intent to defraud obtained from Giro Dub Mamo 80 goats all valued at Ksh 264,000/= by falsely pretending that he was in a position to pay for them, a fact he knew to be false.
3. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. He only raised one ground of appeal which is that the trial magistrate did not consider the period spent in custody while sentencing him of the offences which was a violation of his constitutional rights.
4. The case for the prosecution was that the two complainants are livestock traders. That on the material day the 1st complainant, PW1, was at a place called Baldesa. He sold 90 goats to the appellant at a total



cost of Ksh 297,000/=. They agreed that the appellant would pay the money later. Similarly, the 2nd complainant was on the material day at the stated place. He sold 80 goats to the appellant at a price of Ksh 264,000/=. He agreed with the appellant that he would pay the money later. The appellant loaded the goats of the two complainants in a vehicle. He instructed one Boru Katelo Elema PW3 to escort the animals to Karatina. PW3 did as instructed. The appellant did not pay the complainants their money. He instead went into hiding. The complainants reported to the police Sgt Komote PW 5 investigated the case and charged the appellant with the offences.

5. The appellant in his defence stated that he was not at Baldesa on the material day. He denied that he bought goats from the complainants and neither did he hire anybody to transport the animals.
6. The appeal proceeded by way of oral submissions of the appellant and those of the respondent through the Senior Prosecution Counsel, Mr W. Ochieng. The appellant submitted that he did not cross-examine one of the witnesses as he did not understand the proceedings of the court. Further that the trial magistrate when sentencing him did not consider the time spent in custody while awaiting trial.
7. The state submitted that the prosecution had proved the charges against the appellant beyond reasonable doubt. That the evidence of the complainants that the appellant bought livestock from them promising to pay later but instead went underground was cogent. That the appellant did not cross-examine the two witnesses and therefore their evidence remains largely unchallenged. That their evidence was corroborated by the evidence of PW3 who transported the livestock to Karatina on instructions of the appellant. That the evidence of the said witness is similarly not challenged. That the ingredients of the offence of obtaining by false pretence was proved.
8. It was further submitted that the defence mounted by the appellant was a mere denial which did not attempt to answer the allegations made against him. The state submitted that the sentence meted on the appellant was fair.

Analysis and Determination:-

9. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced before the trial court and draw its own independent conclusions. In the case of *Okeno v Republic* [1972] EA 32, East Africa Court of Appeal put this duty as follows:

“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 R* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*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 findings and conclusions; it must make its own findings and draw its own 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.”

10. In the case of *David Njuguna Wairimu v Republic* (2010) eKLR the Court of Appeal stated that;
“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.”

11. In his judgment the trial magistrate held as follows:

The quality of the prosecution evidence was direct and consistent. The accused’s defence is a mere denial. I find the accused person was at Baldesa on May 14, 2021 and received 170 herd of goats worth Kshs 561,000 from the PW1 and 2. The prosecution has proved its case beyond reasonable doubt. The accused person is convicted under section 215 of the [CPC](#).

12. The appellant did not cross-examine any of the witnesses who testified in the case. The evidence of the two complainants, the evidence of PW3 who transported the animals to Karatina on the instruction of the appellant and the evidence of the investigating officer PW4, were thus uncontroverted. The trial court was therefore correct in reaching a finding that the appellant bought the animals from the two complaints promising to pay for them on a later date, which he did not do. The question that was before the trial court was whether the promise to pay on a later date amounted to obtaining goods by false pretence. The magistrate did not address the issue in his judgment.

13. The charges were under section 313 of the [Penal Code](#) which provides as follows:

“ Any person who by 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.”

14. Section 313 [Penal Code](#) brings out three essential elements of the offence of obtaining by false pretences which are:-

- (a) Obtaining something capable of being stolen.
- (b) Obtaining it through a false pretence.
- (c) Obtaining it with intention to defraud.

15. The [Penal Code](#) defines “false pretence” under section 312 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.”

16. The operative word under section 312 is representation which is applicable in the following circumstances: -

- 1) A representation by words, writing or conduct.
- 2) A representation in either past or present.
- 3) A representation that is false.
- 4) A representation made knowing it to be false or believed not to be true.



17. It is settled law that a future representation does not amount to obtaining by false pretence. In the case of *Stephen Ndungwa v Republic* (2020) eKLR, Ong'udi J. cited the English case of *Republic v Dent* (1955) 2 ALL ER. 806 where it was held that;

“....., we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence, in criminal law.”

See also the decision in the case of *Joseph Wanyonyi Wafukho v Republic* (2014) eKLR cited in the same judgment where the court held that a false pretence can only apply to a past and present fact and not a future fact.

18. In the instant case, the appellant was accused of obtaining goats from the complainants by false pretence in that he promised to pay for them on a later date which he failed to do. For all intents and purposes, the promise by the appellant to pay on a later date was a future representation which did not amount to obtaining goods by false pretence. A false representation can only apply to a past or present fact and not to a future fact. In the premises there was no evidence that the appellant obtained the goats by false pretence. The trial magistrate erred in failing to address the issue whether the obtaining in the circumstances of the case amounted to false pretence.
19. Though the appellant did not appeal against conviction, it is the duty of this court to ensure that any conviction entered against an accused person complied with the law. The appellant was not represented during the appeal and therefore the court cannot wave away any transgression by the trial court. The prosecution counsel in his submissions submitted that the conviction was proper and was supported by evidence. The state will therefore not be prejudiced if this court is of the contrary view.
20. In view of what I have stated above, it is my finding that the charges against the appellant were not proved. The appellant was wrongly convicted of the offences. I therefore quash the conviction and set aside the sentence imposed on the appellant. The appellant is to be set at liberty forthwith unless lawfully held.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JANUARY 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Respondent

Appellant – Present virtually at Marsabit Law Courts

Court Assistant -Abdow

14 days R/A.

