Nyutu v Republic (Criminal Appeal E130 of 2022) [2023] KEHC 909 (KLR) (Crim) (17 February 2023) (Judgment)

Neutral citation: [2023] KEHC 909 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E130 OF 2022

K KIMONDO, J

FEBRUARY 17, 2023

BETWEEN

ALEX MUITA NYUTU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The appellant was convicted for obtaining money by false pretences contrary to section 312 as read with 313 of the Penal Code.He was imprisoned for 4 years.
2. The particulars were that on 30th April 2014 at Thika Road Mall in Nairobi with intent to defraud jointly with another not before the court he obtained from Peris Wangari Karanja a sum of Kshs 1,000,000 by falsely pretending that he was in a position to refund her the money, a fact he knew to be false.
3. The appellant lodged an appeal on 27th July 2022 raising 14 grounds but which can be condensed into five: Firstly, that all the elements of the offence were not proved; secondly, that the learned magistrate misapprehended the provisions of sections 312 and 313 of the Code; thirdly, that the trial court failed to appreciate that the matter was a civil debt; fourthly, that the appellant's defence was disregarded; and, fifthly, that a draconian sentence was handed down without affording the appellant an opportunity to mitigate.
4. The appeal is contested by the Republic.
5. Learned counsel for the appellant lodged submissions dated 23rd November 2022 together with a list of authorities. The Republic replied through submissions dated 2nd December 2022.

6. On 9th December 2022, I heard further arguments from both learned counsel for the appellant and the Republic.

7. Learned counsel for the appellant submitted that this was a civil debt recoverable by execution under clause 8 of the loan agreement. Further, the lending was to a limited liability company which was a separate legal entity from the appellant. He contended that the criminal justice system was being abused to enforce payment.

8. Learned Prosecution Counsel on the other hand submitted that on the totality of the evidence of the four witnesses who took to the stand, all the essential elements of the offence were proved beyond any reasonable doubt. I was implored to dismiss the appeal.

9. This is a first appeal to the High Court. I have examined the record; re-evaluated the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. Njoroge v Republic [1987] KLR 19, Okeno v Republic [1972] E. A. 32.

10. Four witnesses testified for the Republic. The material testimony was from Peris Karanja (PW1). She and the appellant were not strangers. They were related; and, the appellant had even lived with her family when he was a teenager. She met the appellant and his partner named William in their offices of Samalex Partners at Chaka Place. The two claimed that they had a lucrative contract with the British Army for hire of a Prado Car. They asked the complainant to give the Kshs 1,000,000 towards its purchase.

11. The deal was enticing: she would get interest of Kshs 40,000 every month. The principal was to be repaid in one year. On 30th April 2014, they executed a loan agreement at the law offices of Wangai Nyuthe (exhibit 1). The parties to the agreement were the complainant and Samalex Partners. It was attested to by Anthony Wachira (PW2), an advocate at the law firm. PW2 testified that he knew the appellant and the complainant.

12. On the same date, she and the appellant went to Co-operative Bank at Thika Road Mall. She withdrew the money and handed it to the appellant who issued her with a written acknowledgement and a payment receipt both bearing the note paper of Samalex.

13. She received the Kshs 40,000 per month for 11 months. Then the appellant disappeared and switched off his phone. She discovered that the trading offices at Chaka Place were closed eight months earlier. Before the appellant was arrested, he had made some empty promises to pay or feigned excuses that his business had hit a rough patch.

14. The complainant made a report to Corporal Muturi (PW4) at Kilimani Police station. The appellant was arrested in June 2016. PW4 prepared the Exhibit Memo Form forwarding the exhibit marked "A" (a copy of the receipt) and specimen handwritings "B1 – 4" to the Director of Criminal investigations for analysis. He said that upon questioning the appellant, he freely admitted that he had received the monies from the complainant.

15. PW3 was Chief Inspector Susan Wambugu. She is a forensic document examiner. She testified on behalf of her colleague, Inspector Victoria Owako. The latter in her report dated 24th May 2017 (exhibit 2 (a)) confirmed that the handwritings on exhibit "A" and the specimens "B1 – 4" were authored by the same person.

16. When he was placed on his defence, the appellant admitted that the monies were received on behalf of Samalex Partners Limited where he was a director. He testified that the complainant was his cousin. He also said that in compliance with the terms of the loan agreement, the company had paid the

complainant the interest of Kshs 440,000. In cross examination, he sought an opportunity to settle the debt by transferring a piece of land to the complainant. It was however not registered in his name, but he claimed that his lawyer had the transfer instruments.

17. The basic ingredients of the offence facing the appellant required prove of the following facts: the act of obtaining something capable of being stolen; obtaining the thing by false pretence; and, obtaining the thing with intent to defraud.

18. 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 misdemeanour and is liable to imprisonment for three years.

19. The appellant and complainant were related and knew each other well. The lawyer (PW2) who attested to the loan agreement also knew them. There is thus no question of identification. This was evidence of recognition. Wamunga v Republic [1989] KLR 424.

20. From the evidence of the lawyer and the document examiner (PW3), there was no doubt that the appellant was one of the persons who signed the agreement and wrote the payment receipt for Ksh 1,000,000. Furthermore, in his sworn evidence, the appellant freely admitted those facts.

21. To be fair to the appellant, the amounts were received on behalf of Samalex Partners. Although learned counsel for the appellant submitted it was a limited company, no evidence of incorporation was tabled. The legal status of Samalex thus remained doubtful. What is material however is that the appellant admitted he was a director or principal of the business. He was thus in control of the enterprise. It is he through that business that lured the complainant into the deal. It is also true, that he or the business paid the complainant the premium of Kshs 40,000 per month for 11 months.

22. The complainant was an easy bait. The deal was too good with a handsome return of Kshs 480,000 a year on for an investment of Kshs 1,000,000. The complainant has herself to blame. True, she insisted on execution of the formal loan agreement before a lawyer. It gave the transaction the aura of a fool-proof business transaction.

23. Learned counsel submitted that the offence was not made out because it referred to a future event. I am alive that to constitute a false pretence, the false statement must be of an existing fact. See R v Dent [1975] 2 All E.R. 806 at page 807-

> … 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.

24. But from the evidence, I find that the appellant had no intention, from the very beginning, to repay the principal sum. The intention to defraud can be discerned from the following set of facts: Firstly, the alleged car hire agreement with the British Army was a ruse or hoax. Secondly, he never repaid the principal, went underground and shut down his offices. He was only arrested many months later on 29th June 2016. True, the premium or interest of Kshs 40,000 was paid for 11 months but on a true analysis, it was only part of the principal sum. The painful truth is that the principal sum was lost. Lastly, and as I said earlier, the appellant admitted he was a director or principal of Samalex.

25. Fundamentally, it was the appellant and the person known as William who received the Kshs 1,000,000 in cash from the complainant at the Thika Road Mall. I find the belated offer to settle the debt by

transfer of a piece of land (which was not even in his name and whose details were not provided) to be a red herring.

26. In a synopsis, the appellant had no defence to the charge. I agree with learned counsel for the appellant that under clause 8 of the loan agreement, it was open to the complainant to pursue it as a civil debt. But the mere existence of that right did not preclude criminal proceedings. It is not even a proper defence to the charge. It is thus not true that his evidence was disregarded. Rather, it was a bogus defence. Like the learned trial magistrate, I have concluded that the entire defence was a sham.

27. In the instant case, the appellant received the cash payment of Kshs 1,000,000. Money is capable of being stolen. From my earlier analysis of the evidence, he obtained the money by a false pretence and with a clear intention to defraud the complainant. His conduct thus falls squarely within the definition of a false pretence expounded in section 312 of the Penal Code.

28. It is a truism that the legal and evidential burden rested squarely on the Republic. Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332. I am unable, on the totality of the evidence to say that the burden was shifted to the appellant.

29. On a full re-appraisal of the prosecution's evidence and the counterfeit defence set up by the appellant, I readily find that all the necessary elements of the offence were present and proved beyond reasonable doubt. It follows that the conviction was safe. The appeal on conviction is hereby dismissed.

30. I will turn briefly to the sentence. Section 354 (3) of Criminal Procedure Code empowers the court to alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence. The parameters were well set out in Macharia v Republic [2003] 2 E.A 559.

31. The appellant was not remorseful. When he was granted an opportunity to mitigate, he stated "nothing to say". I have to go by that record. I note however that he is a first offender. The law provided for a sentence of up to three years. The sentence handed down was thus unlawful and is hereby set aside. I substitute it with a sentence of 2 (two) years imprisonment. The sentence shall run from 20th July 2022, the date of the original conviction. The time spent in remand custody from the date of his arrest on 29th June 2016 to the time when he was released on bail shall be deducted from this sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2023.

KANYI KIMONDO

....

JUDGE

Icertify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment read virtually on Microsoft Teams in the presence of-

Mr. Muli for the appellant instructed by Kimathi Wanjohi Muli Advocates.

Ms. Kigira holding brief for Ms. Arunga for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.