Otieno v Republic (Criminal Appeal 38 of 2020)
[2023] KEHC 24122 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 38 OF 2020

AC MRIMA, J

OCTOBER 26, 2023

BETWEEN

SAMSON OMONDI OTIENO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

Intoduction and Background

1. Samson Omondi Otieno, the Appellant herein, was charged with the offence of obtaining money by false pretence. The particulars of the offence were as follows: -

    On the 10th day of October, 2018 at Kitale Township within Trans Nzoia County with intent to defraud falsely obtained from Eunice Nyongo Kshs. 415,000/= by false pretending you will register her company (nadira Hair And Beauty College something you knew to be false or untrue.

2. The Appellant denied the charge and he was tried. He was subsequently found guilty, convicted as charged and sentenced to a fine of Kshs. 200,000/= or in default to serve a prison term of three years. That was on 27th August, 2020.

3. The Appellant paid the fine and was released. He, however, opted to pursue an appeal since he was dissatisfied with the decision.

4. The Appellant was represented by Counsel.

The Appeal:

5. In a Petition of Appeal dated and filed on 8th September, 2020, the Appellant preferred eleven grounds of appeal. Needless to say, most of the grounds were in a repetitive manner.

6. The grounds of appeal were as follows: -

   1. That the learned trial magistrate erred both in law and fact in failing to appreciate that the prosecution had failed to establish their case and elements under section 313 of the Penal Code Laws of Kenya to the required standards that is beyond reasonable doubts.

   2. That the learned trial magistrate erred both in law and fact in failing to acknowledge and appreciate the glaring contradictions and gaps on the prosecution case which definitely created reasonable doubts in the prosecution case.

   3. That the learned trial magistrate made reference to, relied upon and took into account exterior matters to buttress an otherwise prosecution case.

   4. That learned trial magistrate erred both in law and fact in not only shifting the burden of proof, but also the instance of proof as well as lowering the standard of proof to the prejudice of the appellant.

   5. That the learned trial magistrate failed to take into account, appreciate and raise issues with the prosecution's failure to call material, competent, credible and compellable witnesses without ascribing any reason or explanation to the same.

   6. That the learned trial magistrate erred in both law and fact making conclusion decisions and drawing reference which are not based on evidence on record using exterior matters to do so.

   7. That the learned trial magistrate misapplied the provisions of section 313 of the penal code.

   8. That the learned trial magistrate erred in law and fact by failing to consider all the evidence on record, sworn defence and submissions by the appellant.

   9. That the learned trial magistrate erred in law and fact by failing to appreciate that the issues raised during trial did not support the charge and were purely civil and could not be raised in criminal proceedings.

   10. That the learned trial magistrate erred in law and fact by convicting the appellant on a defective charge which was contradictory and was not supported by evidence.

   11. That the learned trial magistrate erred in law and fact by giving the appellant a harsh sentence in the circumstances in total disregard to the appellant's mitigation.

7. By the directions of this Court, the appeal was heard by way of written submissions. Both parties duly complied. Parties referred to several decisions in support of their rival positions.

Analysis:

8. This being the Appellant's first appeal, the role of this Court, as the first appellate Court, has been discussed in various decisions. In Okemo vs. R (1977) EALR 32 and in Mark Oiruri Mose vs. R (2013)eKLR, the Court of Appeal restated the role of this Court as being duty-bound as to revisit the evidence tendered before the trial Court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and that this Court ought to give allowance for that.

9. To enable this Court, discharge the said duty, a brief look at the evidence becomes eminent.

10. The prosecution called three witnesses in a bid to prove its case. The complainant testified as PW1. She was one Eunice Nyongo. She was a business lady in the beauty arena who ran the Nadira Hair and Beauty Parlor. PW1 intended to put up a beauty training college in Kitale township in that very name. PW2 was the manager of the business. She was Margaret Nyakio and had worked for PW1 since 2006. She described PW1 as a very busy person. PW3 was the Investigating Officer one No. 71807 PC Eliud Ali Ajuma. He was stationed at the Kitale Police Station.

11. It was PW1's testimony that the Appellant was introduced to her by her daughter sometimes in August 2008 when she wanted to register her business. They discussed and agreed that the registration would cost Kshs. 250,000/=. They also agreed that the Appellant would set up the college since PW1 had already secured some space at TES Plaza. A total of Kshs. 510,000/= was variously paid by PW1 to the Appellant out of which Kshs. 10,000/= was on account of travel expenses for two workmen who would travel from Nairobi to Kitale.

12. The construction began, but it stalled midway when differences emerged between the Appellant and PW1. It transpired that the Appellant did not pay his workmen as and when need arose thereby compromising the works and he also demanded that PW1 entered into a formal with him. Further, one year lapsed without undertaking the registration of the business. However, PW1 successfully pursued the registration of the business through other means.

13. PW1 decided to report the matter to the police since the Appellant had disappeared from Kitale town into Nairobi.

14. PW2 affirmed the discussions between the Appellant and PW1. She confirmed that indeed the Appellant was to register the PW1's business and to also construct the college. PW2 further confirmed that the Appellant brought in two workmen who dealt with the portioning and electrical works. She also attested to the fact that the workmen were not properly paid by the Appellant and later left since the Appellant had disappeared.

15. PW3 investigated the case. He ascertained that PW1 paid the Appellant a total of Kshs. 510,000/= for purposes of undertaking construction works for a college as well as registration of a business. He also confirmed that Kshs. 10,000/= was on account of travel expenses for two workmen who would travel from Nairobi to Kitale.

16. In the course of the investigations, PW3 found out that the construction works to be undertaken was by way of partitioning the space which PW1 had acquired at the TES Plaza. He also established that the registration of the business was to be undertaken by the Appellant.

17. Since the Appellant was not in Kitale, PW3 liaised with his colleagues in Nairobi and the Appellant was apprehended. He was escorted to Kitale Police Station where he was processed and later arraigned before Court.

18. At the close of the prosecution's case, the trial Court found the Appellant had a case top answer and he was placed on his defence. He gave a sworn defence without any witnesses.

19. The Appellant explained that he was a Beauty Technician and also sold beauty products. He was based in Nairobi and had incorporated his own company in the name of Sahabeau Company Limited. He produced the registration documents as exhibits. He further stated that he had been involved in setting up beauty salons and parlors for a period of over 20 years.

20. He testified that he was contracted by PW1 to set up a beauty college in Kitale through PW1's daughter whom he had known her for long. That, they verbally agreed on the terms of the contract and the works began.

21. The Appellant stated that he prepared the design of the college and PW1 agreed to it. The first phase of the project was portioning of the available space. He began the works by availing two qualified workmen from Nairobi. Work proceeded on well. He also severally travelled to Nairobi to purchase some items that were used in the construction.

22. The Appellant then came up with the quotation for the entire works. He later prepared a formal contract for execution, but PW1 refused to sign it. PW1 then began accusing him of changing goal posts and threatened him of dire consequences. The Appellant then stopped the works since he was not able to sustain the workmen. He later returned to Nairobi as he waited for PW1 to give him the way forward since he realized that he had spent a lot of money than what PW1 had given him. He produced an invoice for the works done and the cost thereof which he had prepared and produced it as an exhibit.

23. According to the Appellant, the arrangement he had with PW1 did not include the aspect of registration of any business since business registration was by then legally undertaken through the person's e-citizen portal.

24. At the close of the defence, parties filed written submissions and the trial Court rendered itself vide a judgment wherein the Appellant was found guilty and convicted.

25. It is the above body of evidence that the Appellant mounted the appeal against.

26. Section 313 of the Penal Code creates the offence of obtaining by false pretences. The provision 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.

27. It is Section 312 of the Penal Code that defines false pretence as under: -

> 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.

28. The key word in the above definition of false pretence is "representation". The word seems to be applicable in the following instances: -

    i. A representation by words, writing or conduct.

    ii. A representation in either past or present.

    iii. A representation that is false.

    iv. A representation made knowing it to be false or believed not to be true.

29. Courts have also dealt with the interpretation of the law regarding the instant offence. The Court of Appeal in Nyambane v Republic [1986] eKLR dealt with the ingredients of the offence of obtaining by false pretences at length. This is how the Court rendered itself in a case where the Appellant had obtained some money on the representation that he had a friend in Nairobi who would sell a car at a cheaper price:

> There were, equally, concurrent findings of fact, which we are equally loath of disturb, that the money was paid over against a representation that the appellant had a friend who was

selling a Peugeot 504 car cheaply at Kshs 105,000. Mr Etyang, for the Republic, submitted that there was in fact “no friend and no car”. Again, there was ample evidence to support the concurrent findings of fact by both lower courts that their representation was false.

This brings us back to ground 1, namely the point as to whether the representation was one of an existing fact, or was merely a promise or statement of intention de futuro. True it is that almost every representation of fact involves a statement of intention, though the converse is not necessarily so. In R v Dent (1955) 2 AER 806, a case decided on section 32 of The Larceny Act 1916, which was before the law was altered in England to create the new offence of obtaining by deception by the Theft Act 1968, (so that the statutory provision there being considered was similar to section 313 of the Penal Code) theCourt of Criminal Appeal had this to say; at page 807:

Dishonesty is not per se a criminal offence: and the point that has been argued before us and which is the subject of the deputy chairman’s certificate is that a statement of intention, whether expressed or implied, is not a statement which can amount to a false pretence for the purpose of the criminal law.

And at page 808:

> Every promise by a person as to his future conduct implies a statement of intention about it, though not every statement of intention amounts to a promise; but it would manifestly be absurd to hold that when such a statement of intention does amount to a promise, the accused has committed no offence and that when it does not amount to a promise, he has. No distinction can be drawn for this purpose between “I will do it” and “I intend to do it”.
>
> There are two qualifications to be noted. The first is that a promise as to future conduct may be coupled with a false statement of existing fact, and that the words in the statutory definition are “A promise .... is not by itself a false pretence.”
>
> Finally, the court said, (with reference to the older R V Bates & Pugh (1848) 3 Cox’s Criminal Cases 201), at page 809 of the report:
>
> The words “ready willing to pay” indicate the second qualification. Readiness and willingness to pay may suggest a statement about future conduct. It is clear from the authorities that the law does not seek to divide the future meticulously from the present. If a man says: if you give me the goods now, I will hand over $10, while as a matter of chronology payment follows after delivery as a matter of business it is all one transaction. It has so far not been necessary to determine just where the dividing line between present and future is to be drawn. The reason for this is, we think, that there can in the nature of things be few promises intended to be performed immediately which do not import some statement about the promissor’s readiness to perform, that is he has an existing fact the power and means to perform his promises.
>
> That in our view fits the present situation. By telling the complainant that he had a friend who was selling a Peugeot 504 car very cheap and promising, in effect, to bring its owner and arrange the sale of it to the complainants, the appellant was representing that he had the power and the means to obtain the car for the complainants at the stated price, or, as it is stated in the particulars of the charge set out at the beginning of this judgment, that the appellant was in a position to buy (the complainant) a motor vehicle at a cheaper price in Nairobi. Though the

events occurred over several days, they were clearly all one transaction: see R v Dent (supra).

Further support for this view is to be found in the court's decision of Joseph Mwatha Gitonga v Republic, Criminal Appeal 14 of 1984, which considered a false pretence that the appellant had a farm to sell, coupled with a statement that there would be collections of money for the intending shareholders. It may also be that the evidence alternatively established the offence of theft by agent, in that the money could be deemed under section 271 of the Penal Code to have been the property of the complainant, but the point was not argued before us.

However, as we have said, there was ample justification for the concurrent findings of fact, by both the lower courts, that the representation was made and it was false. There was thus in our view a false pretence as to an existing fact which the appellant made to the complainant in order to obtain the Kshs 105,000.

30. In Lesholo & Another vs The State, the High Court of Botswana in dealing with the offence of obtaining by false pretences rendered itself thus: -

i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intend to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.

ii. 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.

iii. ....The representation must be made with the specific purpose of getting money from the complainant which he/she would not have given had the true facts been revealed to him.

31. In Gerald Ndoho Munjuga v Republic [2016] eKLR, the High Court had the following to say: -

The offence of obtaining by false pretence means knowingly obtaining another person's property by means of a misrepresentation of fact with intent to defraud. For the offence of obtaining by false pretences to be committed, the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen. An inducement on the part of an accused to make his victim part with a thing capable of being stolen or to make his victim deliver a thing capable of being stolen will expose the accused to imprisonment for the offence.

32. In dealing with the offence, the Supreme Court of Nigeria in Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria stated as follows: -

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

a. that there is a pretence;

b. that the pretence emanated from the accused person;

c. that it was false;

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

e. that there was an intention to defraud;

f. that the thing is capable of being stolen;

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

The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest believe 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.

33. The Black's Law Dictionary, 9th Edition defines "false pretense" at page 678 as follows: -

> The crime of knowingly obtaining title to another's personal property by misrepresenting a fact with the intent to defraud.

34. The above discussion expounds the main ingredients of the offence of obtaining by false pretence. Of striking importance is the fact that even 'where a representation speaks of a future promise, but it is coupled with false statements of existing or past facts, then that representation will amount to a false pretence if the alleged existing facts are false.'

35. In this case, it is alleged that the Appellant obtained Kshs. 250,000/= from PW1 on the understanding that he will register a business for PW1. The particulars of the charge state as much. PW1 and PW2 attested to the position. Even PW3 found that the Appellant was also to register the business.

36. In his defence, and in answer to the charge, the Appellant stated as follows: -

> .... The registration did not form part of the agreement. It was not part of the contract. Nowadays there is e-citizen platform. I was stopped immediately I took the contract to her....

37. The Appellant denied the aspect of registration of the business. The cumulative evidence of PW1, PW2 and PW3 affirms the otherwise position. It was apparent that PW1 wanted to register her business in order to run a lawful enterprise. That is where her daughter led PW1 to the Appellant who had been in the beauty business for such a long time.

38. The Appellant was, therefore, well aware as at the time he engaged PW1 that it was instead PW1 herself who would readily register her business through her e-citizen platform. The Appellant, hence, knew that he was not going to register the business. The representation of registration, although it referred to a future promise, was coupled with an untruthful statement of fact at the time the Appellant made the representation. Clearly, the Appellant obtained the sum of Kshs. 250,000/= towards the registration of the business in full glare of the fact that he was untruthful to PW1. The Appellant, therefore, purposed to defraud PW1 and that it is why the Appellant did nothing towards the registration for over one year.

39. Having found as much, there are other grounds raised by the Appellant which are worth consideration. One of them related to the alleged defectivity of the charge which contained the particulars, but did not contain the section of the law.

40. This Court will briefly render on this issue. Article 50(2)(b) and (n) of *the Constitution* provides as follows: -

(2) Every accused person has the right to a fair trial, which includes the right-

(b) to be presumed innocent until the contrary is proved;

(n) not to be tried convicted for an act or omission that at the time it was committed or omitted was not –

i) an offence in Kenya; or

ii) a crime under international law.

41. Section 134 of the Criminal Procedure Code (hereinafter referred to as 'the CPC') provides as follows: -

> Every charge or information 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.

42. Courts, in considering what constitutes a defective charge, have variously emphasized on the need to ensure that the accused is not prejudiced.

43. The then East Africa Court of Appeal in Yosefu and Another -vs- Uganda (1960) E.A. 236 held as follows: -

> The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act.

44. In Nyamai Musyoka v. Republic (2014) eKLR, the Court of Appeal expressed itself as follows: -

> The test for whether a charge sheet is fatally defective is a substantive one.......If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect... (emphasis added).

45. And, in Sigilani -vs- R (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.

46. The Black's Law Dictionary defines 'defective' as follows: -

> Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of......

47. As rightfully settled by the Court of Appeal, the test in determining whether a charge is defective is a substantive approach as opposed to being formalistic.

48. Therefore, if on examination of a charge, a Court is satisfied that the offence is stated and the particulars rendered such that the accused can understand what he/she is facing before Court and in a manner that enables him/her to adequately prepare for a defence, then such a charge cannot be faulted on defectivity. That position will not change even if a wrong section of the law has been cited on the charge.

49. Applying the above to this case, the Appellant was charged with the offence of obtaining money by false pretense. The particulars were given. The Appellant was represented by Counsel throughout the trial. He took part in the examination of witnesses. He even defended himself in stating that he did not undertake to register any business for PW1.

50. The trial Court dealt with the issue in the judgment. It found that the error did not occasion any miscarriage of justice as the Appellant was well aware of what he faced before Court and fully participated in the trial. The Court further applied Section 382 of the CPC in curing the error.

51. Going by the above discussion, this Court finds that application of Section 382 of the CPC was in order and it took care of the error, which error, in essence, did not occasion any injustice to the Appellant. This Court further finds that the application of Section 382 of the CPC in this matter does not in any way confront the protections of the right to a fair trial in Article 50(2) of *the Constitution*.

52. Having said as much, the Appellant's contention that the charge was defective does not have any legal leg to stand on. It is hereby dismissed.

53. There was also the issue of contradictions in the evidence. This Court has carefully perused the record. As this Court has repeatedly stated, contradictions in evidence cannot be totally ruled out when parties testify. The reason being that people perceive and narrate same events differently. Therefore, unless the contradictions go to the root of the matter and prejudices the accused, such are reconcilable and not fatal to the case.

54. The alleged contradictions did not, however, go to the root of the case. They were easily reconcilable and did not prejudice the Appellant or at all.

55. The Appellant also raised the issue of shifting the burden of proof. To this Court, this issue does not seem to be a serious one. The Appellant argued that the trial Court shifted the burden of proof when it allowed the charge and yet it was not proved in law.

56. This Court does not think so. The trial Court explained in its judgment how the offence was proved as well as this Court in this judgment. The issue of shifting or lowering of the burden of proof does not, therefore, arise. The defence was as well duly considered.

57. The contention is overruled.

58. On the contention that crucial witnesses were not called without any reasonable explanation, the prosecution has a discretion to call any witnesses. (Section 143 of the *Evidence Act*). It is only in instances where crucial witnesses are not called and no plausible explanation is given when a Court may raise a red flag. (See Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280 and Nguku versus Republic (1985) KLR 412).

59. The witnesses called in this case were sufficient to prove the offence.

60. Deriving from the above, this Court is satisfied that the charge was duly proved and the Appellant properly convicted. The appeal against the conviction is, hence, unsuccessful.

The sentence:

61. On the appeal against the sentence, the High Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and

excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

62. The trial Court properly dealt with the issue of sentencing. It received mitigations and considered the same in the sentence. The Court fined the Appellant.

63. The Appellant did not point out how the sentencing Court erred in arriving at the sentence. With such an offence at hand, the sentence meted was very reasonable.

64. This Court equally finds the appeal on sentence unmerited.

Disposition:

65. On the basis of the above, the appeals against the conviction and sentence are hereby dismissed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 26TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Mr. Bikundo, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.