



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO E025 OF 2021

CHARLES MUTUA MUTEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon P.N. Gesora (CM) delivered at Kisumu in

Chief Magistrate's Court in Criminal Case No 329 of 2020 on 22nd June 2021)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code. The Learned Trial Magistrate Hon P. N Gesora, Chief Magistrate tried and convicted him on the said charge and ordered him to pay a fine of Kshs 300,000/= in default to serve twelve (12) months in prison.
2. Being dissatisfied with the said Judgement, on 23rd June 2021, the Appellant lodged an Appeal herein. His Petition of Appeal was dated 23rd June 2021. He set out two (2) grounds of appeal.
3. His Written Submissions dated 30th September 2021 were filed on 4th October 2021 while those of the State were dated 8th November 2021 and filed on 9th November 2021.
4. This Judgment is based on the said Written Submissions which the parties relied on in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the Grounds of Appeal, his Written Submissions and those of the State, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. **Whether or not the Prosecution proved its case beyond reasonable doubt; and**
 - b. **Whether or not in the circumstances of this case, the fine and or sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.**
8. The court dealt with the two (2) issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

9. Grounds of Appeal Nos (1) and (2) of the Petition of Appeal dated 23rd June 2021 were dealt with together under this head as they were all related.

10. The Appellant referred to Section 313 of the Penal Code which provides that:-

“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.”

11. He submitted that the essential elements of the offence of obtaining through false pretences can be summed up as follows:-

- a. **Obtaining something capable of being stolen** (emphasis court).
- b. **Obtaining the money through a false pretence.**
- c. **Obtaining the money with intention to defraud.**

12. This court therefore found it prudent to deal with the ingredients of the offence of obtaining by false pretences under the distinct and separate heads shown hereinbelow.

A. THING OBTAINED MUST BE CAPABLE OF BEING STOLEN

13. On its part, the Respondent submitted that in his evidence, the Appellant conceded to having received the monies. It stated that it was thus sufficiently proved that Complainant, Victoria Agutu Angawa (hereinafter referred to as “PW 1”) made payments to the Appellant totalling to Kshs 525,500/= for procuring Decra iron sheets (hereinafter referred to as “Decra”) that was supported by deposit receipts into the Appellant’s bank account at Equity Bank No 0700199100279 that she produced as P Exhibit 1-5. CPL No 64426 Stephen Owino of Kisumu Police Station (hereinafter referred to as “PW 4”) produced the five copies of the bank slips which indicated the receiving account as that of the Appellant.

14. Indeed, in his sworn defence, the Appellant admitted that he received a sum of Kshs 525,500/= from Sunstone Company Limited. He was sent the said money as an agent to procure Decra. His assertion that the Sales Manager of Sunstone Limited, Everlyne Wambulua (hereinafter referred to as “PW 2”) deposited money in his account after being instructed to do so by her senior who she did not mention and that he was not aware at the time of the said deposit that it was PW 1’s money that was deposited in his account was thus immaterial.

15. Without belabouring the point, it was evident that the Appellant received money from PW 1 through PW 2, which was something that was capable of being stolen.

B. FALSE PRETENCE WITH INTENT TO DEFRAUD

16. The other ingredient for the offence of obtaining money by false pretences is to demonstrate that there was false pretence.

17. The Appellant submitted that it was not the act of taking of money that constituted the offence but rather that it was taken with intention to defraud. He added that the fraud was to be found in the false pretence. He argued that the operative word under Section 312 of the Penal Code was “representation” which was by a representation by words, writing or conduct, a representation in either past or present, a representation that was false and a representation that was made knowing it to be false or believed not to be true.

18. In this regard, he placed reliance on the case of **Gerald Ndoho Munjuga vs Republic [2016]eKLR** where Mativo J cited the case of **Dr Edwin U. Onwudiwe vs Federal Republic of Nigeria** where it was held that for an offence of false pretence to be proved, the prosecution had to demonstrate that there was pretence, the pretence emanated from the accused person, that it was false, that the accused person knew it was false or did not believe in its truth, that there was an intention to defraud, that the thing was something that was capable of being stolen and that the accused person induced the owner to transfer his whole interest in the property.

19. He observed that the prosecution must prove the ingredients of obtaining by false pretence and that 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.

20. He argued that the testimony of PW 1, PW 2 and Stephen Kevin Otieno (hereinafter referred to as “PW 3”), who at the material time did marketing for Sunstone Limited could not sustain a conviction for obtaining money by false pretence. He was emphatic that from their evidence, it was clear that he was neither part of the conversation or deal nor was he consulted at the time of entering into the contract and/or agreement to purchase the Decra and thus, based on the principle of privity of contract, he could not be legally bound by the acts and omissions arising from any breach of the terms thereon.

21. He was categorical that PW 1 entered into the alleged purchase contract with Sunstone Ltd whose terms and conditions were discussed and agreed to by PW 2 and PW 3 in their capacity as agents of the said company and not his agents. He added that it was evident from the testimonies of PW 1, PW 2 and PW 3 that the purchase contractual amount was received by PW 2 and not him and neither did PW 2 state that she received the same on his instructions or his agent and/or employee.

22. He argued that the Trial Court only rendered itself on the first ingredient of the offence of obtaining money, which he did obtain the sum of Kshs 525,500/= but did not proceed to establish whether the said monies were obtained by false pretence and further, whether he had the intention to defraud. He added that the Trial Court failed to place into consideration the undisputed fact that the said money was received by him as a third party and not as a principal and as such, he was not privy to the contract.

23. He further submitted that despite adducing oral and documentary evidence in his sworn defence to show that the goods were delivered and received by PW 3 on behalf of PW 2, the Trial Court nonetheless still found that the Prosecution had proven its case beyond reasonable doubt and proceeded to find him guilty.

24. He asserted that it was quite a coincidence that PW1 made an order for six hundred and eighty (680) pieces of roofing tiles, forty (40) pieces of ridges and twenty five (25) pieces of valley and that according to the two (2) invoices he tendered in evidence and marked as D Exhibit 3, PW 2 ordered for a total of seven hundred (700) pieces of roofing tiles, twenty five (25) pieces of valley and twenty five (25) pieces of ridges which Sunstone Ltd supplied through Orders Nos 538 and 144.

25. He was emphatic that the Trial Court in convicting him, proceeded to consider extraneous evidence which was not supported by the proceedings on record. He submitted that the ingredients of the offence were not proved beyond reasonable doubt and urged this court to quash his conviction and set aside his sentence and order that the fine he paid in the sum of Kshs 290,000/- be refunded to him.

26. On its part, the State submitted that the Prosecution proved its case against the Appellant beyond reasonable doubt. It added that there were no inconsistencies, the sentence imposed was lawful and commensurate with the offence charged and that all the ingredients of the offence were proved. It was its contention that the defence given by the Appellant at the Trial Court did not raise reasonable doubt to his guilt and was an afterthought.

27. It placed reliance on the case of **Gerald Ndoho Munjuga vs Republic [2016] eKLR** where the court held that 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 would expose an accused person to imprisonment for the offence.

28. It contended that the Appellant made a representation that he would deliver but he failed to do so. It submitted that the Learned Trial Magistrate did not err in his findings and urged this court to dismiss the Appellant's Appeal and uphold the sentence.

29. 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." (emphasis court).

30. As was seen hereinabove, the Appellant admitted having received the sum of Kshs 525,000/= from PW 2. The question was whether he obtained the said monies by false pretences and with an intention to defraud PW 1.

31. Notably, PW 1 testified that she was to purchase six hundred and eighty (680) pieces of roofing tiles, forty (40) pieces of ridge, twenty five (25) pieces of valley and glue twenty (20) kgs, nails and box badge totalling to Kshs 525,000/=. She stated that at the time, there was a lockdown because of COVID. She explained that she called the Appellant who informed her that they were sorting out something after the lockdown. She added that after the lockdown was lifted, the Appellant called her and told her to wait but after two weeks lapsed, she called him and he told her to follow up with PW 2.

32. PW 2 testified that as at the time of the trial, PW 1 had not been supplied with the goods she had ordered and paid for. She stated that she travelled to Nairobi to follow up the matter and that the Nairobi office kept on saying that they were reconciling the account for Kisumu. When she was re-examined, she stated that the delivery that she was shown was for another client at Usenge a fact that was corroborated by PW 3. PW 3 added that goods were also delivered to a client in Homabay. PW 4's testimony corroborated that of PW 1, PW 2 and PW 3 testified. He stated he arrested the Appellant and charged him for the offence.

33. On his part, the Appellant was emphatic that he did not know PW 1. He called three (3) witnesses in support of his averments that the goods that had been ordered were delivered. He tendered in evidence delivery notes evidencing the deliveries.

34. Enock Oluoch, who worked for Johan Freights, (hereinafter referred to as "DW 2") testified that the goods were delivered on 23rd May 2019 and 27th May 2019 and that the same were collected by PW 3 in Motor Vehicle Registration Number KCP 207E Nissan Note.

35. Feng Suemei, a director of Sunstone Limited, (hereinafter referred to as "DW 3") testified that the Appellant used to buy materials from his company and that on 20th -25th May 2019, he made two (2) orders amounting to Kshs 520,500/= under delivery notes 538 and 144 for Kisumu. He was emphatic that the Appellant, PW 2 and PW 3 were not his employees, the latter two (2) having been his brokers. He conceded that the Delivery Notes did not indicate PW 1's name.

36. Beatrice Njeri Mbui, the Office Administrator of Sunstone Limited (hereinafter referred to as "DW 4") told the Trial Court that she released goods to Jihan Freighters in two (2) batches being Delivery Notes 538 and 144. On 21st May 2019, she said that she delivered five hundred (500) roofing tiles, twenty five (25) pieces ridge caps and twenty five (25) pieces of valley for Kshs 387,500/=. On 25th May 2019, she delivered two hundred (200) roofing tiles for Kshs 138,000/=. She was emphatic that it was only PW 2's name that appeared in the Delivery Notes and not that of PW 1.

37. The Appellant was acting on instructions of PW 2 to supply the goods and hence the Delivery Notes could not have been in the name of

PW 1. A perusal of the original delivery notes show that they were in PW 2's name. The Delivery notes showed that goods were delivered to PW 2 who was indicated therein as a customer for the goods that were set out by DW 4 and totaled Kshs 525,500/=.

38. The invoice and Delivery Note both dated 21st May 2019 in the sum of Kshs 387,000/= were for five hundred (500) roofing tiles, twenty five (25) pieces ridge caps and twenty five (25) pieces of valley. The invoice and Delivery Note of 25th May 2019 in the sum of Kshs 138,000/= were for two hundred (200) tiles.

39. The total of the goods that were delivered to Jiham Freights by DW 4 and collected by PW 3 on 21st May 2019 and 27th May 2019 from DW 2 were in the sum of Kshs 525,500/=. Notably, PW 1 deposited several amounts on 25th March 2019, 10th April 2019, 23rd April 2019, 24th April 2019 and 25th May 2019 totalling to the sum of Kshs 525,500/=.

40. There was no inconsistency in the sum the Appellant received, the value and nature of the goods that were collected by PW 3. Notably, the Prosecution did not adduce any evidence to show that the deliveries were for another customer at Usenge and Homabay as the Delivery Notes were in PW 2's name.

41. There did not appear to have been false pretence as envisaged in Section 312 of the Penal Code or intention to defraud on the part of the Appellant herein. The ingredients of fraud were also absent. Fraud is a common law tort of deceit whose ingredients are false representation of a false fact with the intention that the other party should act on it and that party suffers damage. Concealment of a material fact to induce another party to act on false misrepresentation is another important ingredient.

42. Whereas PW 1 appeared to have suffered damage as she was not supplied with the goods she had ordered and paid for, the Prosecution did not adduce any evidence to demonstrate that the Appellant herein made a false representation of an existing fact, that he intended PW 1 to act on that false representation, that PW 1 acted on false representations made by the Appellant, if at all and which this court found not to have been present. The Prosecution failed to demonstrate that the Appellant concealed a material fact to induce PW 1 to act on false representation

43. This court thus reached a conclusion that the Prosecution did not prove its case to the required standard, which in criminal cases is proof beyond reasonable doubt but that in fact the Appellant adduced consistent and cogent evidence to demonstrate that although he received PW 1's money through PW 2, he did not obtain the same falsely and that he had no intention to defraud her. From the evidence of witnesses who testified to support his case, the goods were supplied and collected by PW 3.

44. It was the considered view of this court that The Trial Court therefore erred in having convicted the Appellant and fining him a sum of Kshs 300,000/= and in default to serve twelve (12) months imprisonment.

DISPOSITION

45. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 23rd June 2021 was merited and the same be and is hereby allowed. The effect of this decision is that the judgment of Hon P.N. Gesora (CM) delivered at Kisumu in Chief Magistrate's Court in **Criminal Case No 329 of 2020** on 22nd June 2021 be and is hereby set aside and/or vacated and replaced with an order that the Appellant's conviction be and is hereby set aside and/or vacated as it was clearly unsafe and that the fine of Kshs 290,000/= that was paid by the Appellant herein be refunded to him forthwith.

46. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH 2022

J. KAMAU

JUDGE