



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kimani (Criminal Appeal E093 of 2021)
[2022] KEHC 10707 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E093 OF 2021
PJO OTIENO, J
MAY 31, 2022**

BETWEEN

REPUBLIC APPELLANT

AND

EDWARD CHOMBA KIMANI RESPONDENT

*(Being an appeal from the original conviction by Hon. E.M
Ayuka SRM in Nkubu Cr. No. 369 of 2019 on 5/5/2021)*

JUDGMENT

1. Edward Chomba Kimani (“the respondent”) was charged with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars were that, between 30/5/2018 and 12/11/2018 in Imenti South Sub-County within Meru County, with intent to defraud, he obtained from Wilson Mwirigi Manyara a sum of Ksh. 270,000(Kenya Shillings Two Hundred and Seventy Thousand) by falsely pretending he was in a position to draw a certified construction plan for plot No. Nkuene/taita/1152and Nkuene/taita/2812 a fact he knew to be false.
2. After he denied the charges, a trial ensued and the prosecution paraded three (3) witnesses in support of its case.
3. PW1, Wilson Mwirigi Manyara, the complainant, was on the material period sourcing for someone to assist him in drawing construction plans for his two (2) plots Nos. Nkuene/Taita/1152 and Nkuene/Taita/2812, when his friend PW2 introduced him to the respondent. The respondent introduced himself as an architect who did building plans, supervision of construction works and even construction. After they had discussed the four (4) stages of how the work would be done and the cost, he sent Ksh. 35,000 to the respondent’s phone number through MPESA, and he was then issued with a receipt duly signed by the respondent. Sometimes later, the respondent asked him for more money which he sent to his phone number through MPESA. The respondent gave him an invoice from the



- county government for Ksh.130,180 which he paid and submitted the receipt to the respondent. The respondent asked him for Ksh. 130,000 to enable him obtain the NEMA approval, which he duly sent to his phone through MPESA. The respondent promised him that the construction work would start by November, 2018, but that never happened. The respondent, who became abusive and evasive, refused to give him any reports, and he severally looked for him to no avail. When PW2 could equally not reach the respondent, he reported the incident to the police station. He had sent the respondent a total of Ksh. 270,000 and he had previously dealt with the respondent.
4. PW2 James Kimathi Kiome, admitted that he was the one who had introduced the respondent, his friend, to the complainant. He knew the respondent as an architect who would undertake building works for the complainant. The two met at his workshop and he learnt much later from the complainant that the respondent had not undertaken the works. The respondent had assured him he was qualified and capable of performing the works.
 5. PW3 Sgt Festus Musyimii of DCI Imenti South, and the investigating officer, was at the office on 3/5/2019, when the complainant reported that someone had obtained money from him. He recorded the witness statements, took possession of the documents in support of the case and charged the respondent. He produced the receipt issued to the complainant by the respondent for Ksh.35,000, the complainant's MPesa statement, 2 invoices for the county government and the invoice for NEMA report as exhibits in court.
 6. The respondent chose not to cross examine all the prosecution witnesses.
 7. In his unsworn defence, DW1, the respondent, stated that on 30/4/2019 he was introduced to the complainant by PW2. They went to the complainant's plots and he was paid Ksh.35,000. In mid June, he was paid Ksh.36,000 totaling to Ksh.71,000. As they had agreed on Ksh.90,000 for the building plans, there was an outstanding balance of Ksh.19,000. In mid August, he took the plans to the physical planning office Meru County where he was issued with 2 invoices for the plans, which he gave to the complainant. After two or so days, the complainant paid the invoiced amount and he took the banking slips to the county revenue officer, who issued him with the receipt produced by the complainant in court. About November 2018, he obtained the NEMA report. The complainant paid him Ksh. 100,000 leaving an unpaid balance of Ksh. 30,000. He produced two (2) original computer prints building plans and a plan for Nkuene/Taita/1152 as Dexh.1, plan for Nkuene/Taita/2812 as Dexh.2, 5 blue prints copies of working drawings all for plot No. Nkuene/Taita/1152 as Dexh. 4, 5 blue prints copies of working drawings all for plot No. Nkuene/Taita/2812 as Dexh.5, NEMA report for plot No. Nkuene/Taita/1152 as Dexh.6 and structural details document for both plots as Dexh.7. He was perplexed by the complainant's allegations that he had obtained money falsely from him, yet it was the complainant who had abandoned the project and failed to fulfill his part, as the complainant still owed him Ksh. 49,000. He stated that he had worked for the complainant, procured all the required approvals and the complainant paid him Ksh.100,000 for the NEMA reports leaving a balance of Ksh.30,000.
 8. After its analysis of the evidence on record, the trial court found that the prosecution had failed to prove its case beyond reasonable doubt, and proceeded to acquit the respondent in accordance with section 215 of the CPC.
 9. Dissatisfied with the respondent's acquittal, the appellant lodged this appeal setting out 6 grounds of appeal which I have collapsed into 3 as follows;
 - a. The trial court erred in law and fact by acquitting the respondent when his defence did not shake the consistent, corroborative and truthful evidence of PW1, PW2 and PW3.



- b. The trial court erred in law and fact by failing to find that the complainant had paid Ksh.270,000 to the respondent for drawing building plan which he did not deliver.
 - c. The judgement of the trial court was against the weight of the evidence, and unless the appeal is allowed, the complainant will suffer irreparably.
10. The appeal was heard by way of written submissions, which were duly filed by the appellant and the respondent. The appellant submitted that it had proved that the respondent obtained monies from the complainant by falsely representing himself as an architect who did building plans, construction and supervision of construction works, yet he did not produce any document to prove his said qualifications. It questioned the authenticity of the building plans produced by the respondent as the same were uncertified and blamed the trial court for hurriedly returning the exhibits to the respondent. It urged the court to set aside the trial court's judgement and convict the respondent, as it had proved that he intended to defraud the complainant of his money by pretending to be in a position to draw building plans and obtain necessary permits.
11. The respondent applauded the trial court for reaching the decision it did, as he had produced all the documents to show that he indeed delivered as agreed. He accused the complainant of being untruthful as he had seen and touched the plans. He advised the complainant to pick the plans from him and take them to the council for further signing, since he had paid for them. According to him, there could be no invoices without the plans.

Analysis and determination

12. It is trite that the role of this court as the first appellate court, is to re-appraise, review and re-evaluate the facts afresh with a view of drawing its own independent conclusions and findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See *Odbiambo v R* (2008) KLR 565.

Did the respondent obtain Ksh.270,000 from the complainant by false pretences?

13. The offence of obtaining by false pretence is defined under Section 313 of the [Penal Code](#) 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.”
14. The three essential elements of the offence as enlisted under aforementioned Section are obtaining something capable of being stolen, obtaining it through a false pretence, and obtaining it with intent to defraud.
13. The complainant testified that, “we discussed about the charges and he said the payment would be in stages as the work progressed. Stage 1 - was the drawing which would cost Ksh.90,000. Stage 2 - was payment to the municipal council of Meru. Stage 3- was acquisition of NEMA report.”
14. The complainant further acknowledged that he had initially paid the respondent Ksh. 35,000 and later sent him more money through MPesa. The MPesa statement reveals that the complainant sent to the respondent a total of Ksh. 195,000.
15. The respondent on the other hand admitted to have received a total of Ksh.71,000 out of the agreed sum of Ksh. 90,000. The complainant sent him Ksh.100,000 which was procurement of the NEMA report. That admitted sum of Ksh.171,000 was something capable of being stolen, and to that extent,



the first ingredient of the offence was fulfilled. Did the respondent by false pretence intend to defraud the complainant by taking that money?

16. False pretence is defined under Section 312 of the Penal Code to mean:- “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.”
17. The complainant contracted the respondent to draw building plans for him at an agreed cost. The respondent admitted to have received money from the complainant but he hastened to add that he had indeed fulfilled his part of the bargain by procuring the requisite approvals from the relevant authorities, and went ahead to produce numerous exhibits in support of his defence. That presentation by the respondent cannot be said to have been falsely made, because the complainant acknowledged that he had received 2 invoices from the county council of Meru in respect to Nkuene/Taita/1152 and Nkuene/Taita/2812, which he duly paid for at the county government. The respondent also produced in court the 2 building plans for Nkuene/Taita/1151 and Nkuene/Taita/2812.
18. The respondent’s qualifications as an architect were fortified by the testimony of PW2. In my candid view therefore, the money received from the complainant by the respondent was for work already done.
19. Based on the evidence on record, I reach the conclusion that the respondent did not obtain money from the complainant by false pretences.

Was the respondent’s acquittal justified?

20. The trial court in acquitting the respondent found that the evidence led by the prosecution fell short of proof beyond reasonable doubt.
21. The burden of proof is always on the prosecution to prove its case beyond reasonable doubt. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that that to find conviction in a Criminal case, the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt. The degree of proof beyond reasonable doubt was discussed in the celebrated case of *Miller v Ministry of Pensions*, [1947] 2 All E R 372, as follows:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
22. Applying the above principles, was there sufficient proof beyond reasonable doubt that the respondent obtained money from the complainant by false pretences? I am afraid not. It must be remembered that the respondent had no obligation to prove his innocence or that his defence was plausible. All that was required of the respondent was to create some doubt in the mind of the court.
23. The respondent testified that he had obtained the necessary approvals but the complainant frustrated the fruition of the completion of the project by neglecting to settle the outstanding amount of Ksh.49,000. I find that the defense offered by the respondent clearly raised doubts on the prosecution’s case, to justify his acquittal.
24. The upshot is that this appeal is without merit and it is dismissed. The record of this file and the Register show that there was also Meru Hccra No. E096 of 2021 filed by the same party. For tidiness of



court records, it is directed that that file, if it existed be bound by this decision and that appeal stands dismissed.

DATED SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 31ST DAY OF MAY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Appellant in person

Ms. Mwaniki for the Respondent

Court Assistant: Mwenda

