



REPUBLIC OF KENYA



**M'anini v Republic (Criminal Appeal E011 of 2022)
[2022] KEHC 12092 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E011 OF 2022
TW CHERERE, J
JUNE 30, 2022**

BETWEEN

DOMISIANO MWENDA M'ANINI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against judgment, conviction and sentence in Nkubu Principal Magistrate's Court Criminal Number E011 of 2022 by Hon. J.Irura (SRM) on 06.01.2022)

JUDGMENT

1. Domisiano Mwenda M'anini (Appellant) was charged with obtaining by false pretences contrary to Section 312 as read with Section 313 of the [Penal Code](#). The particulars of the charge are that; -

On 21.06.2029 at Nkubu Township in Imenti South County within Meru County, with the intent to defraud jointly obtained from Nancy Waithera Baiyu Kshs. 120,000/- by falsely pretending to be an avocado broker who would supply Nancy Waithera Baiyu with avocado fruit of the sum of Kshs. 240,000/-.

The prosecution's case

2. The prosecution called 4 witnesses and the defence called three. PW1 Nancy Waithera Baiyu stated that she used to buy and sell avocados. She recalled that on 21.06.2019, Appellant was introduced to her by PW4 Festus Kiogora and Appellant offered to supply her with 30000/- at Kshs. 8/- each. That on the same day, she paid 120,0000/- to mobile number 0799431959 that Appellant said was his but which after investigations turned out to belong to one Samuel Kipkorir Keter. That Appellant supplied only 945 avocados of export quality contrary to what had been agreed and PW1 reported the matter to police subsequent to which Appellant was arrested and charged. PW2 Peterson Kobia Nkanata recalled selling avocados to Appellant at Kshs. 10/- each on 26.06.2019. On 24.06.2019 and



25.06.2019, PW3 Duncan Gituma Kinja sold a total of 2000 avocados to Appellant at Kshs. 20,000/- which he was paid in full. That the avocados were delivered to the Complainant but she could not take them all since some had already ripened.

Defence case

3. DW1 James Mugo an accountant at Nkubu Law Courts conformed that complainant had filed Nkubu PMCC NO. 95 of 2019 seeking Kshs. 166,000/- from Appellant which case was still pending. Appellant confirmed that he used to buy and sell avocados. He confirmed receiving Kshs. 120,000/- from Complainant for supply of avocados at Kshs. 10/- each. He stated he was only able to collect 8500 of 12000 avocados which he delivered to the chief's camp and he fell out with complainant after she failed to pay for transporting the remaining avocados from the farm subsequent to which he was arrested and charged. DW3 Cyrus Kaaria, Snr. Assistant Chief Mwichiune Sub-Location confirmed that Appellant had on 27.06.2019 deposited some avocados in the office compound and he heard him and Complainant arguing concerning the same and later learnt that Appellant had been arrested.
4. In a judgment dated 06.01.2022, Appellant was convicted and fined Kshs. 150,000/- in default thereof to serve 2 years' imprisonment.

The Appeal

5. The conviction and sentences provoked this appeal in which Appellant raises two main grounds that:
 - i. There's pending a civil suit between the same parties on the same issues.
 - ii. Prosecution case was not proved and secondly that

Analysis and Determination

6. On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit. (See *Kariuki Karanja Vs Republic* [1986] KLR 190).
7. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the State the Appellant having not filed any.
8. Concerning the first ground, there's no dispute that Nkubu PMCC NO. 95 of 2019 I is pending between the parties herein on the same issues. The civil proceedings is however not a bar to criminal proceeding for Section 193 A of the [Criminal Procedure Code](#) provides as follows: -

“Notwithstanding the provisions of written law, the fact that any matter in issue in any criminal proceedings is also directly in issue in any civil proceedings shall not be a ground for stay, prohibition or delay of the criminal proceedings.”

9. To prove the offence of obtaining by false pretence, the Prosecution has the onus to prove that an Accused by a false pretence, with intent to defraud, obtained something of value capable of being stolen from another person. 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 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. 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. (See [David Mutsotso Wendo v Republic](#) [2019] eKLR).

10. Section 312 of the Act contains three essential elements of the offence of obtaining by false pretences, which are:
 - a. Obtaining something capable of being stolen;
 - b. Obtaining through false pretences; and
 - c. Obtaining with intent to defraud.
11. Concerning the first element, Appellant does not deny that he received from the Complainant Kshs. 120,000/- for supply of avocados. Money definitely is something of value capable of being stolen.
12. Section 312 of the Act defines false pretence as follows:

“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.”

13. Whether the Appellant was to supply 30,000 or 12,000 pieces is the Complainant’s word as against Appellant’s word. The foregoing notwithstanding, what is apparent is that Appellant did not keep his word to supply avocados for the value of Kshs. 120,000/- that was paid to him. From the foregoing, I find that the trial magistrate’s finding that Appellant received pretended that he could supply avocados to Complainant and fraudulently received from her Kshs. 120,000/- was well founded.

14. Section 313 of the Act under which Appellant was charged states that:

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

15. I have examined section 28 of the [Penal Code](#) which guides courts on imposition of default sentences and subsection (2) states as follows:

“(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-

Amount Maximum period

Not exceeding Sh. 50014 days

Exceeding Sh. 500 but not exceeding Sh. 2,500 1 month

Exceeding Sh. 2,500 but not exceeding Sh. 15,0003 months



Exceeding Sh. 15,000 but not exceeding Sh.50,0006
months

Exceeding Sh. 50,000 12 months

- (3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.”

16. As pointed out hereinabove, Appellant was fined KShs. 150,000/- and in default of payment to serve 2 years’ imprisonment. The sum of KShs. 150,000/- exceeds KShs. 50,000/- for which the law prescribes a default sentence of 12 months’ imprisonment. I therefore find that the default sentence imposed on the Appellant by the trial court was unlawful and calls for interference by this court.

17. In the end, the appeal partially succeeds and it is hereby ordered:

- 1) Conviction is upheld
- 2) The default sentence of 2 years’ imprisonment is set aside and substituted with a default sentence of 12 months’ imprisonment.

DELIVERED AT MERU THIS 30TH DAY OF JUNE 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present

For Appellant - Mr. Muchiri for Kiogora Arithi & Co. Advocates

For State - Ms. Mwaniki (PPC)

