



REPUBLIC OF KENYA



**Ngeno v Republic (Criminal Appeal E100 of 2021)
[2022] KEHC 13091 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E100 OF 2021
GMA DULU, J
SEPTEMBER 22, 2022**

BETWEEN

SAMUEL KIBET NGENO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence of Hon. Otieno J. in Makueni
Chief Magistrate's Court Case No.58 of 2020 pronounced on 28th September 2021)*

JUDGMENT

1. The appellant was charged in the magistrate's court with obtaining money by false pretenses contrary to section 313 of the *Penal Code*. The particulars of the charge were that on diverse dates between December 15, 2016 and December 22, 2016, fraudulently and unlawfully obtained Kshs 300,000/= (three hundred thousand shillings) the property of one Mary Mbenge Mutua falsely pretending to be in a position to sell her a car (Landrover Freelander) registration number K**** knowing it to be false or untrue.
2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to pay a fine of Kshs 600,000/= of which Kshs 300,000/= would be transmitted to compensation, and in default to serve 3 years imprisonment.
3. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal on the following grounds-
 - 1) The element of the charge was not fully fulfilled.
 - 2) The magistrate erred in relying only on oral evidence and ignoring documentary evidence.



- 3) The learned magistrate misdirected herself in finding and holding against the weight of the evidence that the charges of obtaining money by false pretense contrary to section 313 of the *Penal Code* had been proved against the appellant to the required standard.
 - 4) The learned magistrate erred in law in convicting the appellant without evaluating the evidence adduced by the prosecution which evidence otherwise does not support the charge upon which conviction was founded.
 - 5) The trial court's order of compensation to the complainant in default of which the appellant should serve 3 years imprisonment was a misapprehension on how an order to compensation should operate if he fails to compensate the complainant.
 - 6) The learned magistrate erred by failing to observe that the sentence imposed upon the appellant was illegal and not within the context of section 313 of the *Criminal Procedure Code* nor section 25 and 26(5) of the *Victim Protection Act*.
 - 7) The learned magistrate erred by finding that the prosecution discharged its mandate of proving the offence in question beyond reasonable doubt.
 - 8) The learned trial magistrate erred both in law and fact by not considering the plausible defence given by the accused contrary to the provisions of section 169 of the *Criminal Procedure Code*.
 - 9) The learned magistrate erred by contravening article 11 of the *UN Convention of 1969* where Kenya is a signatory dealing with issues concerning debts.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the written submissions filed by the appellant and those filed by the Director of Public Prosecutions.
 5. This being a first appeal, I will start by reminding myself that I am duty bound to evaluate all the evidence on record afresh, and come to my own independent conclusions and inferences, while bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanor – see *Okeno v Republic* [1972] EA 32.
 6. In proving their case, the prosecution called 4 witnesses. On this part, the appellant tendered unsworn defence testimony and did not call any additional witnesses.
 7. I note that in this appeal, the appellant has challenged both the conviction and sentence. In criminal cases, the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt. The accused person has no burden to prove his innocence.
 8. The charge which the appellant faced was for obtaining money by false pretenses contrary to section 313 of the *Criminal Procedure Code*. The said section provides as follows –

313. Any person who by any false presence and with intent to defraud, obtains from any person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stole, is guilty of a misdemeanor and is liable to imprisonment for three years.”
 9. Thus the offence as defined is completed when the culprit obtains from another something capable of being stolen or induces another to deliver something capable of being stolen, through false pretense or fraud.
 10. In the present case, the evidence of the prosecution on record is that PW1 Mary Mbenge Mutua intended to buy a four wheel drive vehicle, and the appellant through OLX advertisement offered to



sell a Land Rover Freelancer vehicle to her through Homestrudes Trading. Though she paid a total Kshs 300,000/= in three installments, two of which the appellant issued her receipts, she was not sold the vehicle, nor repaid her money.

11. The evidence of PW3 Nicholas Murugu Joseph, the owner of the said Landrover Freelander K**** vehicle was that he intended to sell it. That he had left the said vehicle with David Sang to negotiate to sell it. That this attempt to sell the vehicle through David Sang was not successful and in March 2017, he took the vehicle to a bazaar at Jamuhuri and sold the vehicle.
12. In his defence, the appellant did not deny being involved in a transaction to sell the vehicle but stated that the buyer (PW1) did not pay the entire purchase price of Kshs 530,000/= and that is the reason why the transaction collapsed, and that it was a civil debt. From the record also, the appellant during proceedings asked for time to repay the amount a number of times, and though the court granted him the time requested, he did not honour his promise.
13. In my view, from the evidence on record, the appellant was not the owner of the motor vehicle. He also had no authority to sell the vehicle. He did not have authority to receive money or the vehicle purchase price. He did not inform the owner of the vehicle that he was receiving money for the purchase of the vehicle. He did not hand over the money received or any part of it, to the owner of the vehicle.
14. With the above evidence on record, in my view, the trial magistrate was correct in convicting the appellant for the offence of obtaining by false pretenses, as the prosecution proved all the elements of the offence beyond any reasonable doubt. His defence that the aborted sale transaction became a civil could only be tenable if he was the owner of the vehicle or if he had authority to sale of vehicle. That not being the case herein, the appellant was correctly convicted of obtaining by false pretenses contrary to section 313 of the *Penal Code*. I will uphold the conviction.
15. I now turn to the sentence imposed. The appellant was sentenced to pay a fine of Kshs 600,000/= out of which Kshs 300,000/= would be transmitted to compensation and in default to serve 3 years imprisonment.
16. As I have stated earlier in this judgment the maximum statutory sentence is 3 years imprisonment.
17. The appellant has argued that the sentence imposed herein contravenes the law and international instruments, as it imposes compensation element to the complainant (PW1).
18. The statutory sentence provided herein, is imprisonment without the option of a fine. However, section 26 of the *Penal Code* allows imprisonment of a fine where the statutory sentence is a fine. In this regard, section 26(3) states as follows –
 - 26(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment,
Provided that where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment.
19. In my view, what happened in the present case is that the court substituted a sentence of a fine for imprisonment. The court was under the law entitled to do so. In my view also, the court was not in error in ordering that part of the fine goes to compensate the complainant, as such compensation is grounded in section 31 of the *Penal Code*.
20. The only issue that could arise in the sentence imposed is whether it was excessive in the circumstances of the case. I note that in mitigation the appellant asked for non-custodial sentence as he had sustained



injuries in an accident, and asked for an option of settling the claim while serving a non-custodial sentence. He was a first offender.

21. In my view, the sentence imposed was reasonable as the appellant had during the trial acted like he wanted to delay the trial indefinitely. I am also of the view that the trial magistrate was sufficiently magnanimous, to give the appellant the option of a fine, when the statutory sentence was imprisonment, and also to allow that part of the fine be the compensation to the complainant, thus satisfying the request of the appellant.
22. In my view therefore, the trial magistrate exercised her discretion properly in sentencing the appellant. I will thus also uphold the sentence.
23. Consequently, and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.
24. Right of appeal explained.

DELIVERED, SIGNED & DATED THIS 22ND DAY OF SEPTEMBER 2022, IN OPEN COURT AT MAKUENI.

GEORGE DULU

JUDGE

