



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 51 OF 2019

RUTH WAMBUI GITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Application for bail pending appeal from the decision of M. Wachira, Chief Magistrate, in Criminal Case No. 637 of 2016 at Murang'a delivered on 13th November 2019]

JUDGMENT

1. The appellant was convicted for *obtaining money by false pretences* contrary to section 313 of the **Penal Code**. She was imprisoned for 2½ years.
2. The particulars were that on diverse dates in the year 2016, she received Kshs 1,100,000 from the complainants by falsely pretending that she was in a position to facilitate their company acquire "*operational licences and permits and that the money was the required fee a fact [she] knew to be untrue*".
3. The appellant lodged a petition of appeal on 25th November 2019. She has raised seven grounds but which can be condensed into three: Firstly, that the essential elements of the offence were not proved; secondly, that the learned magistrate misapprehended the provisions of section 313 of the code; and, thirdly, that the burden was unfairly shifted to the appellant.
4. The appeal is contested by the Republic. The gist of submissions by the learned prosecution counsel is that the State proved that the appellant obtained money from the complainant through false pretences.
5. On 11th February 2021, I heard brief submissions from learned counsel for the parties.
6. The appellant's learned counsel, *Mr. Ndegwa*, relied on the list of authorities filed on 5th February 2021. He emphasized that the evidence did not reach the threshold required by section 313 of the Code because firstly, it referred to a future event which diluted the element of false pretence; and, secondly, there was no tangible evidence that the appellant received money from the complainants or for what purpose.
7. This is a first appeal to the High Court. I have examined the record; re-evaluated the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
8. Six witnesses testified for the Republic. The material testimony was from PW1, PW2 and PW3. They claimed that the appellant presented herself as capable of facilitating the processing of a coffee export license for the complainants' company. She asked them for money to obtain a *CR12 Form* and clearance from National Construction Authority. The complainants made a number of payments to the accused in the form of cash, *M-pesa* transfers and bank transfers through RTGS.
9. The basic ingredients of the offence facing the appellant required prove of the following facts: *the act of obtaining something capable of being stolen; obtaining the thing by false pretence; and, obtaining the thing with intent to defraud*.
10. Section 313 of the **Penal Code** 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.
11. I agree with the appellant that there was insufficient evidence for *some* of the payments. For instance, the bank and *M-pesa* transactions

(Exhibits 3-5) were not fully supported by bank statements bearing the details of the appellant's account. No representative from either of the banks confirmed it. The same may be said of the *M-pesa* transactions which did not show that the appellant was the subscriber of the offensive line.

12. But that would be simplistic. The appellant and complainants had met on a number of occasions. There was no doubt of the person they were dealing with, a fact confirmed emphatically by PW3 and PW5. The question of identification is thus answered affirmatively. The appellant projected herself as well connected in government circles through a governor, cabinet secretary and even the president. And she had a picture taken with the president to prove the point to the complainants. At one point, she even got the complainants to write a letter to the "president" thanking him in advance for his assistance in getting the licence.

13. The complainants were an easy bait. They lived in Sweden and had returned to Kenya. They were keen to get the coffee licences. The documents such as the *CR12 Form* or the clearance from National Construction Authority were perhaps unnecessary for obtaining a coffee licence.

14. There is then the meeting that took place at Blue Posts Hotel in Thika on 1st April 2016 attended by PW1, PW2, PW3, PW4 and PW5. The appellant had summoned them. She demanded Kshs 800,000 for the assignment. PW1 said she withdrew Kshs 200,000 from her bank at Thika, a fact supported by the statements. She was emphatic that she handed over Kshs 200,000 in a brown envelope to the appellant in the presence of the four other witnesses. Another 200,000 was paid to the appellant on 4th April 2016 at the same hotel. There were further cash payments including Kshs 200,000 on 8th April 2016 at the home of PW3 at Prestige Apartments; Kshs 200,000 on 11th April 2016 at Trattoria Restaurant; and, Kshs 200,000 on 12th April 2016 at Agip House.

15. The complainants were able to show that they withdrew the amounts from their accounts on the dates they paid the appellant. Even after they flew back to Sweden on 13th April 2016, the appellant continued to pester them for more funds. Some amounts were paid via *m-pesa*. I have already touched on the veracity of the evidence regarding the electronic payments.

16. The appellant's submission that there was no evidence of cash payment is unbelievable in view of the consolidated evidence of the five witnesses. I see no basis to doubt them. Considering the nature of the offence, it would be preposterous to expect the appellant to have acknowledged receipt in writing.

17. When the appellant took to the stand, she made an unsworn statement denying the offence and claimed that the charges were trumped up to disguise a dispute with her Bishop. She stated that she was a member of the Mount William Church together with the complainants. She said there was some bad blood between her and PW3 (the Bishop) who had promised to avenge the appellant's failure to procure a guest for the church's *harambee*.

18. Like the learned trial magistrate, I find the entire defence to be a sham.

19. Learned counsel for the appellant made a strong submission that the offence was not made out because it referred to a *future event*. I am alive that to constitute a false pretence, the false statement must be of an existing fact. See **R. V. Dent** [1975] 2 All E.R. 806 at page 807-

... a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.

20. See also **Abdallah v. Republic** [1970] E. A. 657. *Mr. Ndegwa* relied on the decision in **Mathlida Akinyi Oware v Republic**, Nairobi Criminal Appeal No. 12 of 1989 [1989] eKLR. However, the facts of that case revolved around theft by a servant and can easily be distinguished from those here.

21. In the instant case, the appellant received the cash payments. Money is capable of being stolen. True, the promised licences or approvals were to be procured in the future. However, the hard truth is that she was lying through her teeth. The evidence showed she obtained the money by a false pretence and to defraud the complainants. Her conduct falls squarely within the definition of a *false pretence* expounded in section 312 of the **Penal Code**.

22. It is a truism that the legal and evidential burden rested squarely on the Republic. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332. However, I am unable, on the totality of the evidence to say that the burden was shifted to the appellant.

23. On a full re-appraisal of the prosecution's evidence and the counterfeit defence set up by the appellant, I readily find that all the necessary elements of the offence were present and proved beyond reasonable doubt. It follows that the conviction for the misdemeanour was safe.

24. Although the appellant has not challenged her sentence, I am also satisfied that the law provided for a sentence of up to three years. The lower court took into account that the appellant was remorseful and was a first offender. Considering the nature and circumstances of the offence, I cannot say that the sentence of 2½ years was draconian.

25. The upshot is that the entire appeal is devoid of merit and is hereby *dismissed*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 25TH DAY OF MARCH 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Mbue Ndegwa for the appellant instructed by Mbue Ndegwa & Company Advocates.

Ms. Adera holding brief for Mr. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi and Ms. Susan Waiganjo, Court Assistants.