



IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO 15 OF 2014

(Appeal from original Conviction and Sentence in Murang'a CM Criminal Case No 1051 of 2012 – T Nzyoki, Ag SPM)

JAMES KAMAU MBACA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, **James Kamau Mbaca**, was charged with and convicted after trial of **obtaining money by false pretenses** contrary to **section 313** of the **Penal Code**. It was alleged in the particulars of the offence that on diverse dates between 26th February and 26th May 2008 in Murang'a Town within Murang'a County, with intent to defraud, he obtained from one **Joyce Nyambura Mochuriku** the sum of KShs 179,000/00 by falsely pretending that he was in a position to offer a business premises, namely shop, within Murang'a Town, to the said Joyce Nyambura Mochuriku, a fact he knew to be false.

2. The Appellant was fined KShs 100,000/00 and in default of payment to serve 12 months imprisonment. He paid the fine.

3. The main ground of appeal as appears in the petition is that the dispute between the Appellant and the complainant was purely civil in nature, and that no criminal offence was disclosed. Learned counsel for the Appellant pointed out that there was no criminal intent established, and that this was purely a deal over "goodwill" for some business premises that went sour. He further pointed out that it took the complainant over two (2) years to report the matter to the police, a pointer to the civil nature of the dispute.

4. Learned prosecution counsel conceded the appeal upon the ground that the representation proved was in the future, not present or past. He pointed out that the representation was that the Appellant, upon payment of certain monies by the complainant, would transfer to her some shop premises at some point in the future.

5. False pretense is defined as follows in **section 312** of the Penal Code –

“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 pretense.”

The false pretense charged in the particulars of the offence was that the Appellant was

...in a position to offer a business premises, namely a shop within Murang'a Town, to the complainant ...

That pretense was in the future; it was not past or present.

6. In her testimony, the complainant (PW1) clearly testified that she paid to the Appellant KShs 100,000/00 on 26/02/2008 and a further KShs 79,000/00 the following day. The Appellant was to leave to her the shop he was occupying when he eventually vacated. He vacated the shop two (2) years later, but he gave it to someone else. He did not refund to the complainant her KShs 179,000/00 despite many promises to do so. In desperation the complainant reported the matter to the police. This was purely a civil dispute where one party failed to perform his part of the contract. It was a classic case of one party who had paid some money demanding a refund for failure of consideration. The police had no business in it, and should not have charged the Appellant.

7. Neither the particulars of the offence in the charge sheet nor the testimony of the complainant disclosed the offence charged. The Appellant was wrongly convicted.

8. In the result I will allow the appeal in its entirety. The Appellant's conviction is hereby quashed and the sentence set aside. He shall be refunded the fine of KShs 100,000/00 that he paid upon production of the original official receipt for the same. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF APRIL 2018.

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 20TH DAY OF APRIL 2018.