



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 79 Of 2016**  
**JOSPHAT KARIUKI KARIUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case 682 of 2015 delivered by Hon. M. W. Kurumbe, RM on 16<sup>th</sup> May 2016.)*

**JUDGMENT**

**Background**

Josphat Kariuki Kariuki, the Appellant herein was charged with two counts, the first being for the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code and the second for the offence of obtaining by false pretences contrary to Section 312 as read with Section 313 of the Penal Code. The particulars of the first count were that on or before 26<sup>th</sup> January, 2015 at an unknown place within the Republic of Kenya, jointly with others not before the court, conspired to commit a felony, namely, to steal USD 100,050/= equivalent to Kshs. 10,000,000/= the property of one James Kamau Mbua.

The particulars of the second count were that on 27<sup>th</sup> January, 2015 at Diamond Trust Bank, Wabera Street Branch in Nairobi within Nairobi county, jointly with others not before the court, with intent to defraud obtained USD 100,050/=, equivalent to Kshs. 10,000,000/=, from James Mbua Kamau by pretending that you and IronFX global Limited were able to carry out online trading on behalf of the said James Mbua Kamau, a fact he knew to be false.

The Appellant was found guilty in the second count and on conviction was sentenced to pay a fine of Kshs. 500,000/= in default serve two years imprisonment. He was dissatisfied with that court's decision as a result of which he preferred the instant appeal. The Appellant filed, cumulatively, the following grounds of appeal:

1. That the prosecution failed to discharge its duty to prove the case beyond a reasonable doubt.
2. That the court failed to address itself on the strength, or otherwise, of the circumstantial evidence adduced.
3. That the conviction was not safe as it was wholly based on the complainant's evidence that

clearly showed that the financial transaction at the core of the matter was entered into voluntarily.

4. That the prosecution did not prove that the Appellant used false pretences to lure the complainant into the transaction.
5. That the burden of proof was shifted upon the Appellant.

### **Submissions**

*The Appellant relied on written submissions filed on 6<sup>th</sup> January, 2017. He submitted that the prosecution relied on circumstantial evidence that was basically hearsay evidence. He faulted the investigating officer's evidence as weak which pointed to a failure to carry out adequate investigations. With regard to the offence of obtaining by false pretences, he submitted that key elements of the offence were not proved. In particular he stated that the representation of facts must relate to either present or past event but not to a future event. He referred the court to the cases of **Francis Mwangi & anor v. Republic[2015] eKLR**, **Joseph Wanyonyi Wafukho v. Republic[2014] eKLR**, **Joseph Amunga Ochieng v. Republic[2016] eKLR** and **Nabil Adamjee v. Republic[2010] eKLR** to buttress this point.*

*He submitted that the complainant filed three bank statements with the police which he opened after venturing into the investment. These statements together with those the Appellant recorded with the police were riddled with inconsistencies which weakened the prosecution case. He concluded by submitting that the sentence was harsh and excessive given that he was a first offender. He urged the court to either reduce his sentence or discharge him altogether.*

*Learned State Counsel, Ms. Atina submitted that all the three elements of the offence of obtaining by false pretences namely; obtaining something capable of being stolen, obtaining through false pretences and the intention to defraud were proved. She submitted that the prosecution proved that the Appellant obtained Kshs. 10,000,000/= from the complainant, that it was proved that the Appellant represented himself as a director of IronFX Global Limited and that he intimated to the complainant that the company was making profits. She submitted that it was proved that he also told the complainant to open various accounts that enabled the transfer of money.*

*She submitted that the Appellant's defence was weakened when he produced a swift copy that showed a different account from that of the complainant. She submitted that the Appellant knew what he was doing and took steps to perpetrate the crime. She was of the view that the Appellant's defence was considered but was dismissed as it lacked merit. With regard to the statements recorded by the Appellant, M/s Atina submitted that the Appellant recorded the first statement when he was sick but he later recorded a second one which aptly gave a true account of what transpired. Finally, counsel submitted that the penalty imposed was reasonable taking into account the circumstances of the case.*

### **Evidence.**

*The prosecution's case was majorly centered around the evidence of **PW1, James Kamau Mbuia** who was the complainant. He recalled that in January, 2014 he met the Appellant together with some estate agents in his farm in Runda. They had visited him because he had some plots for sale. They did not agree on the sale. He again met the Appellant sometime in January, 2015 along Mama Ngina Street. As they exchanged pleasantries, the Appellant introduced him to an investment venture with a company known as IronFX Grobal Forex Trading Company. It was a foreign company operating in Kenya and dealing with foreign exchange. He told PW1 that he was already trading with the company and the profits earned were lucrative. He asked PW1 if he would be interested in venturing in the investment. The two met again on 24<sup>th</sup> January, 2015 when the Appellant told PW1 that he could introduce him to bank managers with Diamond Trust Bank (DTB) where he would open an account to facilitate the trade. The two proceeded to the Village Market Branch where the Appellant introduced PW1 to the manager one Mr. Halif. On the following Monday, upon introduction to a manager at Wabera Street branch, PW1 opened three accounts for Kenya Shillings, US Dollars and Euros being account numbers 0052573001, 0052573002 and 0052573003 respectively. The Appellant then withdrew a total of Kshs. 10,000,000/ from his Equity Bank*

account and deposited it into account No. 0052573001. The bank manager, one Mr. Edwin told him that since his account was new, it could not attract good exchange rates. Accordingly, on 27<sup>th</sup> January, 2015, he transferred US Dollars 100,050 into the Appellant's DTB account number 0052573002 through an in-house cheque. The money was thereafter wired to the account of IronFX Global Company number 19077673. The Appellant immediately started trading on behalf of PW1. He informed PW1 that if any profits would be realized it would accrue after a fortnight. The Appellant also requested PW1 to sign a Power of Attorney indicating that any profits earned would be shared on a 50:50 basis between the two of them. PW1 however declined to sign the Power of Attorney.

As time went on, no single cent was sent to the account of PW1 and after four months he became suspicious. He visited his DTB Bank which called IronFX Global Company enquiring about the investment. The latter informed the bank to ask PW1 to write an email making the enquiry himself. He obliged and the response was that neither the principal amount nor any profits was available against his account. He was further informed that the investment had suffered total loss. It is important to note that as at the time the money was wired to IronFX Global Company, it had been transmitted back from the Appellant's account into PW1's account. It is therefore, PW1 himself who wired the money into the investor's account.

**PW2, Edwin Kuria Mwangi** was the Branch Manager at DTB Wabera Branch. He confirmed that PW1 opened the three accounts and that the Appellant also owned two accounts with the bank, numbers 0085664004 and 0085664001. He testified that he knew PW1 only at the introduction to the bank for purposes of opening an account so that PW1 would trade with a company called IronFX. He did also confirm that PW1 deposited Kshs. 10 million with the bank and on 27<sup>th</sup> January, 2015 the money was transferred into the Appellant's account for the purpose of conversion into dollars. After the conversion the money was transferred back to PW1's account. It was not until in April, 2015 that PW1 complained to him that he had not received any proceeds of his investment.

Thereafter, PW1 reported the matter to the police and the same was investigated by PW3, Chief Inspector Michael Kirwa Melly of Banking Fraud Investigation Unit. He entirely corroborated the evidence of PW1 and 2. His further testimony was that as at the time he accessed PW1's account number 19077673 with IronFX, it only had a balance of Kshs. 7,000/= . He charged the Appellant as the principal offender. He testified that although the available evidence was circumstantial, the same linked the Appellant to the offence because he is the one who introduced PW1 to IronFX Global Company.

After the close of the prosecution's case, the trial court ruled that the prosecution had made out a prima facie case sufficient to warrant the Appellant to be put on his defence. He gave a sworn statement of defence in which he denied committing the offences. The gist of his defence was that he was only a financial advisor to PW1. He agreed he introduced PW1 to the investment venture with IronFX. However, PW1 upon visiting IronFX Global was informed that the investment attracted heavy risks and he could make profits or none at all. He therefore entered into the business knowing very well the risks involved. PW1 was to blame for failing to do due diligence before investing in the company. Furthermore, it was clear that he never at any one time personally transferred the money into the account of IronFX Global. It was PW1, who, on his own volition transferred the money into the investment and had to bear the attendant loss. Finally, he stated that the prosecution witnesses did not prove the case beyond a reasonable doubt and urged for an acquittal.

### **Determination**

It is now the duty of this court to reevaluate the evidence and come up with its own independent conclusions. See: **Okeno v. Republic[1972] EA 32**. After considering the evidence on record I find the issue for determination to be whether the offence of obtaining money by false pretences was proved beyond a reasonable doubt. The offence is defined under Section 313 of the Penal Code as:

**‘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.....’**

As this court held in **Francis Mwangi & James Ndungu v. Republic**(Criminal Appeals 251 and 252 of 2012);

that

*“... the basic ingredients of the offence can be summarised as follows:-*

- 1. The act of obtaining something capable of being stolen.*
- 2. Obtaining the thing by false pretences.*
- 3. Obtaining the thing with intent to defraud.”*

The definition of false pretence is given under Section 312 of the Penal Code 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”.*

Therefore, the operative word under Section 312 is representation which is applicable in the following circumstances:-

1. A representation by words, writing or conduct.
2. A representation either past or present.
3. A representation that is false.
4. A representation made knowing it to be false or believed not to be true.”

The court must then interrogate the representation forming the basis of this charge to determine whether it falls within the definition under Section 312 of the Penal Code. The complainant testified that the Appellant informed him of a very lucrative business venture, with IronFX Global Limited, leading him to invest Kshs. 10,000,000/= with the promise of profits to be shared between the parties but it ultimately led to the loss of the amount invested. The test is whether the promise made was of existing facts or of a promise of future events. Guidance on this comes from Lord Wilberforce’s finding in **British Airways Board v. Taylor**[1976] 1 WLR 13, to wit:

*“My Lords, the distinction in law between a promise as a future action, which may be broken or kept, and a statement as to existing fact, which may be true or false, is clear enough. There may be inherent in a promise an implied statement as to fact, and where this is really the case, the court can attach appropriate consequences to any falsity in, or recklessness in the making of, that statement. Everyone is familiar with the proposition that a statement of intention may itself be a statement of fact and so capable of being true or false. But this proposition should not be used as a general solvent to transform the one type of assurance with another: the distinction is a real one and requires to be respected, particularly where the effect of treating an assurance as a statement is to attract criminal consequences...”*

From the complainant’s evidence it is clear that he knew the Appellant before they met along Mama Ngina Street. The Appellant then informed him he worked at the Nairobi Forex and Shares Bureau which was the right investment if he had any money to spare. They thereafter met severally and the complainant agreed to invest in Foreign exchange with IronFX Global leading to the ‘loss’ of the money. The discussion between the two meant that it was up to the complainant (PW1) to make his own informed decision if he wanted to take the risk to invest his money. Thus, the Appellant’s promise of returns could never be construed as a statement of facts, implied or otherwise. This is further affirmed in **United Arab Emirates v. Amanda Jane Allen**[2012] EWHC Admin 1712, viz:

*“As a matter of common law, a representation must be capable of being expressed as a statement of the past or present. A statement which amounts only to a statement as to the future may have*

***effect as a contractual promise, but it will not come within the legal classification of a representation.”***

Back to our local jurisdiction, in **Oware v Republic (1989)KLR, 287**, the Court of Appeal sitting in Nairobi held that;

***A representation as to a future event cannot support a charge of obtaining money by false pretences”***

The **Oware** case referred to **R v Dent (1975) 2 All ER, 806 at p 807** thus’;

***‘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 the present case, the profit that would accrue would be realized in a future event. It was not a promise of immediate or past benefit. In fact, PW1 was promised that the IronFX account would start earning interests two weeks from the date of the investment. Therefore, the representation was about a future event, hence a key ingredient of the offence of obtaining by false pretence was not satisfied.

Be that as it may, it is abundantly clear that PW1 entered all the transactions of his own volition. The Appellant’s role was merely one of a financial advisor. PW1 was adequately advised of the risks involved in investing his monies in the securities at IronFX. Indeed, the Appellant only handled his money when he banked it in his account so that PW1 could get a good exchange rate. After the exchange, the money was transferred back into PW1’s account. PW1 then wired it off to his own IronFX account where it “disappeared”. Therefore, the Appellant could not be held to blame or accountable for the loss. It follows that PW1 undertook a risk by venturing into murky waters of risky securities. It was only after the loss that he blamed the man who introduced him into the venture; the Appellant. But as I have said, the Appellant only acted as a financial advisor, and nothing more. Therefore, the Appellant was the author of his own misfortunes. He failed to exercise due diligence in the circumstances.

In view of the foregoing, I find that the prosecution failed to prove its case beyond a reasonable doubt. I allow the appeal. I quash the conviction and set aside the sentence. I order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> APRIL, 2017.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant in person.*
2. *Miss Atina for the Respondent.*