



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.138 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.241 of 2017 by: Hon. S.N. Mwangi – S.R.M.)

DANIEL KARIUKI KING'ORI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

Daniel Kariuki King'ori, the appellant, was convicted on his own plea by **Hon. S.N. Mwangi** for the following offences:

Count I: Obtaining by false pretences Contrary to Section 313 of the Penal Code.

Particulars: On diverse dates between 1/8/2016 and 6/2/2017 at Uruku area within Nyandarua County with intent to defraud, obtained from Peter Mureithi Muriuki the sum of Kshs.22,800/= by falsely pretending that you will pray for him and remove a snake in his compound.

Count II: Obtaining by false pretences Contrary to Section 313 of the Penal Code.

Particulars: On diverse dates between 1/8/2016 to 6/2/2017 at Uruku area within Nyandarua County, with intent to defraud, obtained from Chippira Wanjiku Muriuki the sum of Kshs.64,115/= by falsely pretending that you will pray for her and remove a snake from her compound.

Count III: Obtaining by false pretences Contrary to Section 313 of the Penal Code.

Particulars: On diverse dates between 1/8/2016 to 6/2/2017 at Uruku area within Nyandarua County, with intent to defraud, obtained from Margaret Wakarindi Mwangi the sum of Kshs.97,100/= by falsely pretending that you will pray for her and remove a snake from her compound.

The appellant was sentenced to two years imprisonment on each count and the sentences were ordered to run consecutively.

Being aggrieved by both conviction and sentence, the appellant filed the appeal dated 13/2/2017 and further grounds dated 8/6/2017. The grounds of appeal are as follows:

- 1. That the trial court erred in failing to find that the facts read out to the appellant did not support the charges and the plea was not unequivocal;***
- 2. That the sentence is harsh and excessive;***
- 3. That the court should order a retrial.***

The defence counsel **Mr. Waichungo** also filed written submissions in support of the appeal.

Mr. Waichungo argued that the facts read to the accused did not disclose an offence under Section 313 of the Penal Code because, for a representation to amount to a false pretence, it can only relate to a past or present representation but not a future one; that in this case, the complainant believed that there were big snakes in their compounds and the appellant promised to pray for them and they gave the appellant money based on that promise.

Counsel also argued that the court did not consider the appellant's mitigation that he is 72 years old with children in school; that the sentence

of 6 years imprisonment is excessive in the circumstances because there were no aggravating circumstances to warrant the said sentences. Counsel also submitted that though the appellant was charged along with his wife who denied that offence, she was later acquitted under Section 204 Criminal Procedure Code when the money was refunded to the complainant.

Mr. Mutembei learned counsel for the State opposed the application and submitted that the elements that make the offence of obtaining by false pretences were provided to, that something capable of being stolen; that the appellant received money and it was through false pretences; that even as he asked for money, he knew it was a lie; that in regard to the sentence, it was lawful and that though the appellant was ordered to refund the money, he never did. Counsel urged the court to dismiss the appeal.

This is the first appeal and this court is required to re-examine and analyze all the evidence tendered before the trial court and make its own determinations. In this case the appellant pleaded guilty to the charge. Section 348 of the Criminal Procedure Code bars an appeal under the said section save if the appeal relates to the length and legality of the sentence. In the case of ***Olel v Republic [1989] KLR 444*** the court said:

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely.”

The appellant can however challenge the conviction if it is demonstrated that the appeal was not unequivocal.

The first issue to consider is whether the facts that were read to the accused disclosed an offence under Section 313 of the Penal Code. Section 312 of the Penal Code defines a false pretence to mean:

“Any representation, made by words in writing or conduct, of a manner 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.”

Section 313 Penal Code creates the offence, it reads:

“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.”

The definition of a false pretence can be broken down as follows:

- (a) A representation of fact by word, writing or conduct;***
- (b) There presentation is either past or present;***
- (c) The representation must be false;***
- (d) The person made the representation knowing it to be false or did not believe it to be true;***

(See ***Joseph Wanyonyi Wafukho v Republic CRA.200/2012.***)

Mr. Waichungo submitted that the plea was unequivocal because the representation relates to the future. The facts as read to the appellant are as follows:

“The three complainants in this case were all faithfuls of Jehova of Mercy Church, which had the 1st accused as the Reverend and his wife, 2nd accused as the assistant Reverend. The church is based at Uruku area in Kiamariga. On diverse dates between 1st August, 2016 and 6/2/2017, the 2 accused persons approached the 3 complainants telling them that they had seen in their visions they had 3 big snakes in their compound and they were able to invade on every living thing in their compounds. They advised them to sell all their domestic animals and give them the money so that they could pray for the snakes to come out of their compound. The complainants each sold what they had and 1st complainant – Peter Murithi raised Kshs.22,800/=, 2nd complainant – Chipira Wanjiku raised Kshs.64,115/= and 3rd complainant – Margaret Wakarindi raised Kshs.97,100/=. On the evening of 6.2.2017 after they had given the money to the accused person as they sent through the M-pesa, they realized they had been lied to by the accused persons as they continued to inform them that the big snakes were still in their compounds. They reported the matter at Ndaragwa Police Station and investigations commenced and it was revealed that the money sent by the complainants were sent to the number registered to the 1st accused i.e. 0718845042. A request was made to Safaricom for M-pesa statement for No.0718845052 received by 1st accused person from the 3 complainants. On 7.2.2012, the 2 were arrested and charged as herein. M-pesa statement produced as (P.Exhibit 1).”

From the above facts, it is clear that the promise made to the complainants was for the future not the past or present.

There is a wealth of decisions which state the above position. In ***Mathilda Oware v Republic (1984) KLR 2001*** the Court of Appeal said that a representation as to a future event cannot support a charge of obtaining money by false pretences. In the above mentioned case, the case of ***Republic v Dent (1955)2 QB PP 594/5*** was referred to and in which case Devlin J said:

“A long course of authorities in criminal cases has laid down that a statement of intention about future conduct, whether or not

it be statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.”

In light of the authorities considered above and the provisions of Section 312 Penal Code, I am satisfied that the facts read to the appellant did not disclose an offence under Section 313 of the Penal Code. In the case of ***Adan v Republic (1973) EA 445***, the court stated that facts are important in disclosing whether or not an offence has been disclosed. In the end, I find that the trial court erred in convicting the appellant on facts that did not disclose an offence; the conviction is not well founded and it is hereby quashed and the sentence set aside.

The next question then is whether this court can order a retrial. The law on when a court can order a retrial is now settled. In ***Fatehali Manji v Republic [1966] EA 343 East Africa*** the court set out the principles that the court considers before an order of retrial can be made. The court said:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

In this case, the appellant was sentenced to serve a total of 6 years imprisonment and to repay the monies he had received from the complainants. So far he has only served 8 months. The complainants are neighbours of the appellant and are therefore people who can easily be found. In my view, the appellant will not suffer any prejudice if a retrial is ordered. The upshot is that this case is remitted back to the Chief Magistrate’s Court Nyahururu for a fresh trial before another magistrate other than Hon. S.N. Mwangi who took the plea.

Mention before the Chief Magistrate on 22/11/2017 for further orders.

Dated, Signed and Delivered at NYAHURURU this 17th .day of November 2017.

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R.P.V. WENDOH

JUDGE

PRESENT:

..... - Prosecution Counsel

..... - Court Assistant

Appellant - present

..... - for appellant