



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 293 OF 2008

JACINTA WAITHIEGENI NDEGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Othaya Resident Magistrates' Court Criminal Case No. 45 of 2007 (Hon. L.O. Onyina)

JUDGMENT

The appellant was charged with three counts of obtaining by false pretences contrary to **section 313** of the **Penal Code, Cap 63**. In the first count, the particulars were that on the 20th day of September, 2006 at Othaya Township in Nyeri District within Central Province, with intent to defraud, the appellant obtained Kshs 40,000/= cash from Beatrice Wanjiru by falsely pretending that she was in a position to secure employment in the Administration Police force for her daughter Ann Gathoni, a fact she knew to be false or believed not to be true.

According to the particulars in the second count, it was alleged that on the 20th day of September, 2006 at Othaya Township in Nyeri District within Central Province, with intent to defraud, the appellant obtained Kshs 50,000/= cash from Lucy Wangari Nderitu by falsely pretending that she was in a position to secure employment in the Administration Police force for her son George Wanjohi Nderitu, a fact she knew to be false or believed not to be true.

And finally, in the third count, the particulars were that on the 20th day of September, 2006 at Nyahururu own in Nyandarua District within Central Province, with intent to defraud, the appellant obtained Kshs 40,000/= cash from Margaret Wanjiku Wambugu by falsely pretending that she was in a position to secure employment in the Administration Police force for her son John Chege, a fact she knew to be false or believed not to be true.

The appellant was acquitted of the first and third counts but convicted on the second count and sentenced to serve eighteen months imprisonment; she has appealed against the conviction and sentence and in her petition she has set forth the following grounds:-

1. The learned magistrate erred in law and in fact in convicting the appellant on a defective charge hence occasioning miscarriage of justice.
2. The learned magistrate erred in law and in fact in failing to appreciate that the evidence tendered by the prosecution did not prove the charge.

3. The learned magistrate erred in law and in fact in failing to appreciate that the date of the commission of the offence in the charge sheet was different from the dates given in evidence.
4. The learned magistrate erred in law and in fact in convicting the appellant on the evidence of an accomplice which evidence clearly brought out an offence under the Anti-Corruption and Economic Crimes Act, 2003 and the complainant should have been jointly charged with the appellant for the offence.
5. The learned magistrate erred in law and in fact in failing to appreciate that there was no evidence of an investigating officer to corroborate the evidence of the complainant.
6. The learned magistrate erred in law and in fact in failing to consider the alibi defence of the appellant.
7. The learned magistrate erred in law and in fact in failing to appreciate that an offence of obtaining money by false pretences cannot be based on a promise of a future event hence occasioning miscarriage of justice.
8. The learned magistrate erred in law and in fact in failing to appreciate that the appellant was detained in custody for a longer period than that stipulated under the Constitution and her rights were violated hence she should have been acquitted.
9. The learned magistrate erred in law and in fact in failing to resolve the inconsistencies and doubts in the evidence tendered to the benefit of the appellant.
10. The learned magistrate erred in law and in fact in failing to appreciate that the money allegedly advanced to the appellant could only constitute a civil debt and is not subject to criminal proceedings.
11. The learned magistrate erred in law and in fact in failing to appreciate that the money obtained was colossal and there ought to be a written acknowledgment of the same by the appellant.
12. The learned magistrate erred in law and in fact in failing to take into consideration of the appellant's mitigation and accord her a non-custodial sentence.

Both the counsel for the appellant and the state sought to have the appeal heard by way of written submissions and this court issued directions accordingly. I have to consider these submissions in the light of the evidence tendered at the trial and the applicable law. As the first appellate court, it is incumbent upon this court to consider and evaluate afresh the evidence tendered at the trial and come to its own conclusions irrespective of the conclusions arrived at by the learned magistrate but bearing in mind that it is only the trial court that had the advantage of seeing and hearing the witnesses. (**See Okeno versus Republic 1972 EA 3**).

Beatrice Wangari (PW1) testified that the appellant undertook to have her son, Matthew Kiama, admitted to an administration police training college if she was paid Kshs 30,000/=. The complainant had been introduced to the appellant by one Wachira who gave her the appellant's cell phone number. She met the appellant at Ngerenaro primary school where the appellant is said to have been a primary school teacher. On 23rd May, 2006 she paid the complainant Kshs. 10,000/= and on 6th June, 2006 she made a further payment of Kshs. 20,000/=.

The witness also introduced **Margaret Wanjiku (PW2)** who was her sister-in-law to the appellant; she witnessed her pay the appellant Kshs 40,000/= to have her son enrolled at the same administration police institution.

Margaret Wanjiku (PW2) herself testified that indeed she was introduced to the appellant by **Beatrice Wangari (PW1)** sometimes in 2006. According to her, **Beatrice Wangari (PW1)** told her that the appellant could procure a vacancy for her son at the Administration Police training college. She paid the

appellant in two instalments; the first instalment of Kshs 11,000/= was paid on 9th June, 2006 at Ngerenaro primary school while the balance of Kshs 29,000/= was paid at a hotel. In both instances the payments were made in the presence of **Beatrice Wangari (PW1)**.

The appellant is said to have told both **Margaret Wanjiku (2)** and **Beatrice Wangari (1)** that their sons were going to be admitted at the police college on 25th July, 2006; they were, however, not admitted as promised.

Just as she was introduced to the appellant by **PW1, Margaret Wanjiku (PW2)** introduced **Beatrice Wanjiru Mureithi (PW3)** to the appellant for the same reason of securing a vacancy for a relative at the police training college. According to **PW3** she had a niece whom she wanted to join the college and therefore she also sought the appellant's help in securing a place in the college for her. She was asked to pay Kshs 40,000/= which she paid to the appellant on 20th September, 2006. The payment is said to have been made at her shop in the presence of **Margaret Wanjiku (2)** and **Lucy Wangari (PW4)**.

Lucy Wangari (PW4) testified that **Margaret Wanjiku (2)** informed her that the appellant was recruiting those who wished to join the administration police training college. She testified that on 11th September, 2006 the appellant called her together with **Margaret Wanjiku (PW2)** and asked them to meet her at Nyahururu/Nyeri stage. On that day this witness paid the appellant the sum of Kshs 20,000/= and added Kshs 30,000/= on 20th October for the admission of her own son into the police training college. This payment, according to this complainant, was made in Othaya in the presence of both **Beatrice Wanjiru Mureithi (PW3)** and **Margaret Wanjiku (2)**. The witness testified that the appellant promised to have her son admitted together with the rest of the recruits on 27th September, 2006.

Sometimes later, the complainants realised that they had been defrauded and therefore they lodged their complaints at Nyandarua police station. On 8th January, 2007 **Beatrice Wanjiru Mureithi (PW3)** and **Lucy Wangari (PW4)** assisted Police Constable Michael Kiprono (**PW5**) from the station arrest the appellant at Ngerenaro primary school.

The appellant testified on oath and said that she was a teacher and an official of Kenya National Union of Teachers. She denied the charges against her and testified that contrary to the complainants' allegations, she was in a workshop at Roswam in Kerugoya town between the 17th September, 2006 and 23rd September, 2006.

According to the appellant, three women came to her school sometimes in November, 2006 and enquired from her the progress she had made towards recruiting their sons to the police college. They told the appellant that they had been referred to her by a certain man. Since the appellant had not neither seen them before nor knew the man they were talking about, she asked them to come along with the man. The appellant testified that as an official of Kenya National Union of Teachers she handled a budget of Kshs 5,000,000/= yearly and therefore it did not make sense that she could swindle people of what she described as "small amounts of money". It was her case that if at all money exchanged hands as alleged then she ought to have been charged together with all the complainants. She testified that the charges were a scheme to "finish" her and dim her rising political star.

Lydia Nyokabi Kaburugo (DW2) testified on behalf of the appellant and said that she had known the appellant since 1996 both as a fellow teacher and as an official of Kenya National Union of Teachers. According to her no complaint has ever been raised against the appellant though she handled teachers' finances. She was with the appellant at a hotel in Kerugoya between 17th and 23rd September, 2006 where they participated in a workshop.

Also testifying for the appellant was **Stephen Mureithi Kamanja (DW3)**. He said he was the executive secretary of the teachers' union in Laikipia branch and that he wrote the invitation letter to the appellant amongst other participants inviting them to attend a workshop at Kerugoya. Since he did not attend the seminar himself, the witness could not confirm whether the appellant was in attendance or not.

The evidence by both the prosecution and the appellant together with her witnesses has to be evaluated in the context of the law under which the appellant was charged and convicted which is section 313 of the Penal Code; that section provides as follows:-

313. Obtaining by false pretences

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.

In order to convict under this section it must be proved beyond all reasonable doubt that firstly, there was false pretence on the part of the accused person and secondly, the motive behind the false pretence was his intention to defraud; thirdly, the accused person obtained anything capable of being stolen or induced any other person to deliver to any other person anything capable of being stolen. It follows that false pretence, intention to defraud and obtaining of anything capable of being stolen whether by the accused person or by any other person are all pertinent elements of this particular offence.

As earlier noted, the appellant was convicted of the second count amongst the three counts she was charged with and therefore it is necessary at this juncture to focus on the evidence relating to this particular count and determine whether these elements of the offence as understood under **section 313** of the **Penal Code** were proved to the required standard.

The complainant in this particular count was **Lucy Wangari Nderitu (PW4)** who testified that **Margaret Wanjiku (PW2)** informed her that the appellant was in a position to recruit her son into the administration police training college at Embakasi in Nairobi. Margaret Wanjiku had herself been introduced to the appellant by **Beatrice Wangari (PW1)**. It was the complainant's evidence that the appellant met her together with **Margaret Wanjiku (PW2)** on 11th September, 2006 at Nyeri/Nyahururu bus stage where she gave the appellant the sum of Kshs 20,000/= as part payment for recruitment of her son into a police training college; on 20th October, 2006, she made a further payment of Kshs 30,000/= to the appellant for the same purpose and this latter payment was made at Othaya in the presence of **Margaret Wanjiku (PW2)** and **Beatrice Wanjiru Mureithi (PW3)**. The appellant is said to have promised to have the complainant's son recruited in the police college on 27th September, 2006 upon receiving the total sum of Kshs 50,000/=.

Although the complainant testified that both **Margaret Wanjiku (PW2)** and **Beatrice Wanjiru Mureithi (PW3)** witnessed the payments she made to the appellant on diverse dates at Nyeri/Nyahururu bust stage and at Othaya, neither of these witnesses ever testified as having witnessed any payments made by the complainant to the appellant as alleged. Having been mentioned as witnesses to the payments, their evidence in this regard would have been crucial in corroborating the complainant's testimony on whether she made any payments at all and if so the particular dates and places where those payments were allegedly made. It must be remembered that in her defence the appellant denied having met the complainant or any of these witnesses and in analysing the evidence against the appellant, the learned magistrate came to the conclusion in her judgment that it was not clear whether the appellant was ever in **Beatrice Wanjiru Mureithi's (PW3's)** house on 20th October, 2006 when the second instalment of Kshs 30,000/= is alleged to have been made. Suffice it to say without the corroborative evidence of **Margaret Wanjiku (PW2)** and **Beatrice Wanjiru Mureithi (PW3)**, the complainant's evidence is cast in doubt and in my view a conviction solely based on this evidence is unsafe.

It is curious that although the learned magistrate doubted whether the appellant was in **Beatrice Wanjiru Mureithi's (PW3's)** house on 20th October, 2006 when the payment of Kshs 30,000/= is alleged to have been made, and also whether the place where the payment is alleged to have been made was in Othaya or not, she still held that there was "credible evidence that the accused received the sum of Kshs 50,000/=" from the complainant. With due respect to the learned magistrate, there is no way the evidence of receiving the amount of Kshs 50,000/= would be said to be credible in the midst of doubts expressed by the learned magistrate herself as to whether the payment was made as alleged or at all.

I am not satisfied that any of the ingredients of the offence of obtaining by false pretences as understood under **section 313** of the Penal Code was proved beyond reasonable doubt in respect of the second count for which the appellant was charged and convicted. I will allow the appeal, quash the conviction and set aside the sentence. It is so ordered.

Signed, dated and delivered in open court this 26th day of February, 2016

Ngaah Jairus

JUDGE