



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**HIGH COURT CRIMINAL APPEAL NO. 94 OF 2015**

**(CORAM: J. A. MAKAU – J.)**

**JOSEPH AMUNGA OCHIENG ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both the conviction and the sentence in Criminal Case No. 840 of 2013 in Bondo Law Court before Hon. M. OBIERO – P.M.)*

**JUDGMENT**

1. The appellant **Joseph Amunga Ochieng** was charged with four counts of obtaining by **false pretences contrary to Section 313 of the Penal Code**. The counts were as follows:-

*Count I on diverse dates between July 2013 and August 2013 in Bondo District within Siaya County with intent to defraud obtained from Lilian Atieno Ochieng a member of Karemo Credit Villagers a sum of Ksh.33,500/= by falsely pretending that he will give her financial services in the form of a loan a fact he knew to be false or untrue.*

*Count II on diverse dates between July 2013 and August 2013 in Bondo District within Siaya County with intent to defraud obtained from Caroline Atieno Ochieng a member of Karemo Credit Villagers a sum of Ksh.41,500/= by falsely pretending that he will give her financial services in the form of a loan a fact he knew to be false or untrue.*

*Count III on diverse dates between July 2013 and August 2013 in Bondo District within Siaya County with intent to defraud obtained from Consolata Ogot a member of Karemo Credit Villagers a sum of Ksh.20,600/= by falsely pretending that he will give her financial services in the form of a loan a fact he knew to be false or untrue.*

*Count IV on diverse dates between July 2013 and August 2013 in Bondo District within Siaya County with intent to defraud obtained from Elizabeth Atieno a member of Karemo Credit Villagers of sum of Ksh.9,250/= by falsely pretending that he will give her financial services in the form of a loan a fact he knew to be false or untrue.*

2. **PW1 Lilian Atieno Ochieng** was the complainant in Count I. She testified that she was a member

of Karemo Credit Villagers and that they met the appellant who told them to form a micro finance society and that they should save money so that he could give them loans. That PW1 was the chairlady of the society and she used to deposit money in his company in Nakuru, that she has 22 receipts in respect of money she deposited in his account. The 22 receipts were marked as MFI – P1. She stated she had list of all members of Karemo Credit Villagers and that amount paid by each member. She testified they paid a total of Ksh.945,990/= as per. List of members marked MFI P exhibit 2. That the appellant used to come and promise that he was going to give the group loans but he failed to do so. That on 7.9.2013 the group decided to look for the accused who through PW1 used to communicate with her, as he was not coming to Siaya. PW1 produced minutes as exhibit P. Exhibit 4 and 5. She testified she went to Nakuru with three officers at the appellant's office and Police conducted a search in the appellant's presence whereby they recovered their documents marked MFI P6 and bundle of receipts MFI P7. During cross-examination PW1 testified that out of 31 members 7 members received their money (loans) and were repaying their loans. PW1 did not know whether any of the members defaulted in repayments of the loans. PW1 testified that she paid Ksh.33,500/= to the organization and that receipts for 2010 were missing. That as per MFI P7, PW1 paid Ksh.13,500/= but insist she paid Ksh.17,500/=. She stated they were not taking loans in groups but individually. She stated they did not sign any agreement. PW1 admitted she was given Ksh.10,000/= and told it was her salary. She did not have any document to show Ksh.10,000/= was salary.

3. **PW2 Caroline Atieno Ochieng** the complainant in count II testified that she was a member of Karemo Credit Villagers which had been formed in 2010. She stated she used to contribute money to the organization and the money would be remitted by the chairlady to the accused. That after the contribution the appellant disappeared. That the members met and instructed the chairlady to report the matter to the Police. She stated she did not receive the loan which the appellant had promised. PW2 stated she paid Ksh.41,500/= to the group. She stated she is in the list of members who paid as per P. Exhibit 2. That the appellant upon arrest he promised to pay back the money. During cross-examination PW2 testified that some members of Karemo Credit Villagers group were given loans and that she is aware the members have defaulted in repayment. She stated her receipts on payment of Ksh.41,500/= are with the chairlady (PW1). PW2 testified that she is not aware whether PW1 delivered the group's money to the appellant.

4. **PW3 Elizabeth Atieno** complainant in count IV testified that she was a member of Karemo Creditor Villagers Group formed in 2010, comprising of 80 members after appellant advised them to form the group. That they used to contribute money to the chairlady who used to take it to the appellant and she used to keep the receipts, after paying the money to the appellant. She stated she deposited Ksh.9,250/= and she is recorded in the list of payment to show her name is on it. She identified the appellant in the dock and stated she has never been given her money back. That they met and instructed PW1 to lodge a complaint with the Police. On being cross-examined PW3 testified that P. exhibit 2 is a list of members printed by the appellant and that no one in the group was refunded any money.

5. **PW4 Consolata Ogot** complainant in count III testified that she was a member of Karemo Credit Villagers group formed in 2010 which used to contribute money to be send to the appellant through chairlady. She testified that she contributed Ksh.20,000/= and her name is among the name in P. Exhibit 2 (*list of members*). That PW1 used to bring the receipts to show that money was received by the appellant. She stated that they were not given the loans and wanted their money back. During cross-examination PW4 testified that she does not know if statement reads Ksh.12,000/= as it was PW1 who used to keep their records and that some of the members were given loans.

6. **PW5 No. 866997 P.C. Abulrahman** testified that on 20.9.2013, complainant made a report at C.I.D. Bondo that the appellant had refused to honour an agreement they had. He booked the report and recorded witnesses statements. He stated the appellant was engaged in table banking. That they used to save money in bits through their chairlady (PW1). That the appellant approached the women and told them he would be saving their savings to his organization Comicrev Fosa facility and after saving with them for 10 weeks a member will be eligible for a loan that the group saved as per P. exhibit 2. That they were 80 members and after 10 weeks though qualified, the appellant started evading them. That the members saved their money through PW1 who used to submit the savings to Nakuru. That she used to be issued with receipts every week as per P. exhibit P.1. That members met when the appellant evaded

them and decided to report to Police. PW4 concluded the investigation and visited appellant's firm at Nakuru and confiscated documents and a computer, bundle of receipts P. exhibit 5. That he printed information from the computer print out P. exhibit 7 and computer CPU P. exhibit 6. That he also retrieved as printout of items and consolidation of the appellant's firm agreements print out – P exhibit 8. He produced bundle of receipts P. exhibit 1. During cross-examination he stated he did not know whether the appellant's organization was registered. PW4 stated he did not know whether the appellants signed the agreements with the complainants. He stated P. exhibit 2 was prepaid by the members. He admitted that he did not receive all receipts from Karemo Villagers Group. He stated P. exhibit 6 show that appellant had communication with the complainant.

7. The appellant when put on his defence opted to give sworn statement and call witnesses.

8. The appellant denied the offences and stated he was currently working with Central Organization of Micro Development Villagers which amongst other activities promotes membership based on savings and loan activities. That the appellant was based at Nakuru. He stated all the time he was working with an organization by the name Community Partners Alliance, and at that time he worked with Siaya County with Membership Savings and Loan Groups around Karemo Division. That during that time he met Lilian Ochieng (PW1) who acted as a mobilizer for the said organization. That in February 2012 there was a complaint on the Community Partners Alliance leading to its suspension. That in July 2013 the appellant met Lilian (PW1) at his office in Nakuru who wanted to know whether there was a way to salvage the program that Community partner Alliance had started at Karemo. He briefed his directors who had no objection as the activity was to promote the table banking activity, in which, the community was to make minimal savings and the organization to boost the savings and the members were to use their group as a security to obtain loan.

9. The activity according to the appellant divided the members into three classes, ordinary members or Starters whose weekly saving was Ksh.650/=, Devolves whose weekly savings was Ksh.1200/= and the Operators whose weekly savings was Ksh.1750/=. There was also fixed share which was Kshs.150/= for Starters, and loan cover Ksh.500 who were to give Ksh.650/= weekly. The loan cover he stated was to determine the amount of a loan a member could get, whereas fixed share was used to determine the amount of dividend for the loan interest as members could earn at the end of 60 week savings period.

10. The appellant contended considering that Karemo had invested some money earlier with the Community Partners Alliance it was agreed the exercise begin as from 8 week meaning their savings for week 1 to 8 were off set by appellant's organization and the appellant's group was to claim money from Community Partners Alliance. That meant if a member had saved Ksh.500/= for 10 weeks she could get a loan of Ksh.5000/=. He also stated the members of the group were to be guarantors.

11. The Appellant contended groups they began with Karemo team created three groups, that there was Karemo "A" with 15 members, "B" with 8 members and "C" with 3 members. That the initial Karemo group continued with 80 members.

12. The appellant on the charge of obtaining money by false pretences testified that he had duplicate receipts which he wished to produce. He stated between 1.7.2003 and 5.8.2013 Karemo "A" made seven deposits through Lilian Atieno (PW1). He stated Caroline Achieng (PW2) was a member of Karemo "A". On Karemo "B" which convened on 10.7.2013, four (4) deposits were made between 16.7.2013 and 5.8.2013, Karemo "C" deposited money on the loan two (2) times on 29.7.2013 and 5.8.2013. He stated the total amount deposited by Karemo "A" was Ksh.117,300/= by Karemo "B" Ksh.60,044/= and Karemo "C" Ksh.15,500/= all in all being Ksh. 192,844/=.

13. The appellant testified that during the said period the organization provided loans for both Karemo "A" and Karemo "B". He testified that Roselyne Atieno who was the fourth complainant is a member of Karemo "C" Consolata, Caroline and Lilian he stated were members of Karemo "A" that the three were all at Operators stage and were contributing Ksh.1750/= per week, while Roselyne Atieno was at the Recovery stage contributing Ksh.1200 per week. He stated that loans for Karemo "A" and "B" was

processed. He stated for Karemo "A" he had loan agreement and acknowledgment for John Ogola Ogola for Ksh.25,000/=, John Oyugi Oluoch who received Ksh.25,000/=, Cathy Anyango Ksh.25,000/=, Annet Onyango Ksh.25,000/= Adah Atieno Oyugi Shs.25,000, Florence Awino Ksh.80,000, Anolda Otieno Ochieng Sh.5000/= on Karemo "B" he stated Melfrida Oyugi got a loan of Kshs.75,000/=, Isaac Opiyo Sh. 75,000/=, Uniter Anyango Oduor Sh.75,000. He stated that they disbursed Kshs.525,000/= to Karemo by the time of his arrest, while preparation of loans for Victor Ayogo, David Wesley Ochieng, Margaret Atieno Oluoch, Consolata Ngote Ogot (PW4), Carolyn Atieno Ochieng (PW2) and Lilian Atieno Ochieng (PW1) had not been finished and had just been suspended. That the loans for Karemo "B" for refinancing Atieno was put on hold.

14. The appellant contended their agreement which was there was between Karemo as a group and the Central Organization which did not involve individual members, adding the report did not indicate individual members. He testified that report indicates Karemo "A" received Kshs.300,000/= against a savings of 117,300/= while "B" received Kshs.225,000/= against a saving of Ksh.60,044/=, stating it is because of that the complainant did not receive their loans due to default of repayment of loan received by group members. He stated the complainant admitted loans were given to their members. He added the complainants were members to a group and did not come to them as individuals. The appellant produced exhibits through receipt for Karemo "A", seven loans as exhibit 1 (a) - (g), receipts for Karemo "B" Five loan – as exhibit 2 (a) – (e) Receipt, Karemo "C". Two loans – as exhibit 3, Karemo "B" (a) – (d) 3 receipts – as exhibit 5 (a) – (c). During cross-examination the appellant testified that he is a Senior Programmer Coordinator in the organization which had directors. That the money was being received by the accountant. He stated loan could be given in form of cash or cheque. He testified that he produced all receipts and there were no others. He testified they did not return the savings to the members because they owed them money which had been given as loans. He stated they were donor funded by USAID. He denied obtaining money from the complainants.

15. The trial Magistrate evaluated prosecution's evidence and convicted the appellant for offence of obtaining money by false pretences in respect of the four (4) counts against the appellant and sentenced him to serve two years imprisonment in respect of each count and sentence to run concurrently.

16. Aggrieved by the conviction and sentence the appellants preferred this appeal raising the following grounds:-

***a) The learned Principal Magistrate erred and failed to properly direct himself to the mandatory requirements to Section 169(1) of the CPC in that he failed in his judgment to identify the "point or points for determination, the decision thereon and the reasons for the decision" and to hereby misdirected himself on the essential ingredients of the offences of obtaining by false pretences facing the appellant.***

***b) The learned Principal Magistrate erred and failed to properly direct himself to the mandatory provisions of Section 169 (2) of the CPC with regard to conviction and in particular to specify the "section of the Penal Code or other law" under which the accused is convicted or acquitted.***

***c) The learned Principal Magistrate erred and misdirected himself in shifting the burden of proof on the appellant when he convicted the appellant on the "undisputed evidence of prosecution single witness" that such evidence was not "unchallenged by the defence in cross-examination and that "the accused cannot be heard to deny knowing anything about the allegations herein" and dismissing the defence as "mere denial which failed to discredit the prosecution evidence".***

***d) The conviction of the appellant was the result of an irregular trial, evidence of doubtful and discredited characters, a bad judgment and a bad conviction and therefore very unsafe.***

17. At the hearing of the appeal the appellant appeared in person while M/s. Maurine Odumba learned State Counsel appeared for the State.

18. The appellant relied on written submissions which he handed over to the court. The appellant

emphasized that the key issue in the appeal relates to trial court's non-compliance with **Section 169(1) and (2) of the Criminal Procedure Code**, failing to determine whether the essential elements of Obtaining through False Pretences were satisfied, that the prosecution failure to prove their case to the required standard, thus beyond any reasonable doubt, that the trial court shifted the burden of proof to the appellant and that the trial court failed to appreciate the complainant's claim was of civil nature and criminal process should not have been used when remedy was available in civil procedure.

19. The State in opposing the appeal submitted that the learned trial Magistrate's judgment was well analyzed and that issues for determination were raised. That prosecution's witnesses evidence was consistent, that prosecution established that there was obtaining money by the appellant, that there was False Pretences as the appellant was out to defraud the complainants adding the ingredients of False Pretences were proved and lastly submitted the appellant's defence was considered.

20. At the conclusion of the submission by rival parties the court noted the exhibits were not in the Court file and directed the same be traced and be put in court file. The exhibits were found at the registry and availed to the court subsequently.

21. This is first appellate court and I have subjected the entire evidence adduced before trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Kiilu and Another V. R. (2005) I KLR 174** where the Court of Appeal held thus:

***“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions.”***

22. The appellant contend that the learned trial Magistrate failed to properly direct himself to the mandatory requirements to **Section 169 (1) of the Criminal Procedure Code** in that he failed in his judgment to identify the *“point or points for determination, the decision thereon and the reasons for the decision.”* and thereby misdirected himself on the essential ingredients of the offence of obtaining by pretences facing the appellant.

23. **Section 169 of the Criminal Procedure Code** provides:

***“(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

24. I have perused the court's judgment and have noted that the trial court did not comply with **S.169(1) of C.P.C.** as the trial court's judgment do not contain the point or points for determination, the decision therein and the reason for the decision though same is dated and signed by the presiding officer. The trial Magistrate in his judgment without complying with **Section 169 (1) of C.P.C.** stated on page 26 of his judgment as follows:

***I have considered the evidence on record together with the circumstances of this case. It is not in dispute that the complainants herein were members of Karemo Credit Villagers. It is also not in dispute that the accused person herein transacted with the group. It is also that the accused person was involved in working for organizations which were receiving money from the group and promised to give them loans after depositing money for a given period of time. It is also not in dispute that some members of Karemo Credit Villagers were given loans. It is also not in dispute that the complainants herein did not receive loans from the organization which the accused worked for at the time relevant to this case.***

25. The trial Magistrate was in error in failing to ascertain the point or points for determination, making

decision on the points and the reasons for the same. The appellant felt prejudiced by such failure however as this court is going to evaluate and analyze the whole evidence and come to its own conclusion in exercise of its duties as the first appellate court, the appellant wont be prejudiced by such failure by trial court. It is however important for trial courts to comply with **Section 169 (1) of C.P.C.** so that the accused have confidence with courts and be satisfied that the court's are following to the letter and spirit of the Constitution and that justice is done to all irrespective of their status and lastly accused are getting fair trial.

26. The appellant under ground No. 2 of the appeal contended that the learned trial Magistrate erred and failed to properly direct himself to the mandatory provisions of **Section 169(2) of the Criminal procedure Code** with regard to conviction and in failing to specify the “*Section of the Penal Code or Law*” under which the accused was convicted or acquitted.

**Section 169 (2) of Criminal Procedure Code** Provides:

*“In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is acquitted, and shall direct that he be set at liberty.”*

27. In the instant case the learned trial Magistrate in his judgment stated:-

*“In the light of the above, I do sentence the accused to serve imprisonment term of two years on each of the four counts. The sentence to run concurrently.”*

28. **Section 169 (2) C.P.C.** requires that in case of conviction, the judgment to specify offence of which and the Section of the Penal Code or other law under which the accused person is convicted and punishment to which the accused is sentenced. The trial Magistrate erred in law in failing to specify the offence and the Section of the Penal Code under which the appellant was convicted and in failing specifically state the sentence for each offence but combined all charges and sentences into one, contrary to **Section 169 (2) C.P.C.** however I do not find such an error to be fatal as it is curable under **Section 382 of the Criminal Procedure Code** which provides:-

*“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice*

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”*

29. The critical issues for my consideration in the instant case are as follows:-

- (a) *What are the essential elements of an offence of obtaining money through false pretences?*
- (b) *Whether a charge of obtaining money through false pretences has been proved beyond any reasonable doubt?*
- (c) *Whether the complainant's claim was a Civil or Criminal action and whether it was proper for complainant's to invoke criminal justice system in pursuance of their claim?*
- (d) *Whether appellant's defence was considered?*

30. The appellant faced four counts of obtaining money by *false pretences* under **Section 313 of the**

**Penal Code** under the said Section provided 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.”***

31. It is evident from the above Section the essential elements of the offence of obtaining through false pretences can be summed up as follows:-

- (a) Obtaining something capable of being stolen.***
- (b) Obtaining the money through a false pretence.***
- (c) Obtaining the money with intention to defraud.***

32. That before I proceed to deal with each of the essential elements of obtaining through false pretences it is important to state what the Penal Code defines “false pretence” to be under **Section 312 of the Penal Code** “***False Pretence***” is defined as

***“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.”***

33. The operative word under the said Section is “representation.” which is applicable in the following circumstances:

- (a) A representation by words, writing or conduct***
- (b) A representation in either past or present.***
- (c) A representation that is false.***
- (d) A representation made knowing it to be false or believed not to be true.***

34. From the above it is therefore clear that the offence of obtaining by false pretences does not relate to future events. This section unfortunately proclaims that the representation should be of either a past or present fact but not future fact. The case law points to that position. In the case of **Oware V. Republic (1984) KLR 2001 the Court of Appeal sitting at Nairobi** addressed itself thus:-

***“A representation as to a future event cannot support a charge of obtaining money by false pretences. In the above mentioned the case of R. V. Dent (1955) 2. Q.B. PP 594/5 was referred to and in which case Devlin, J. :-***

***“a long course of authorities in criminal cases has laid down that 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.”***

35. In view of the provisions of **Section 313 of the Penal Code** and several circumstances on the issue of obtaining by pretences, the representation of facts must either be past or present and not future. I must emphasize that in the case of **Joseph Wanyonyi Wafukho V R HCCRA 200 of 2012** my brother **Justice Gikonyo** and in the case of **Francis Mwangi & Another V. Republic HCCRA 251 of 2012** my sister Lady **Justice G.W. Ngenye** made a similar observation while quoting the case of **R. V. Deut (Supra)** in that the fact of obtaining by false pretences does not relate to future events.

36. In the instant case the complainant PW1, PW2, PW3 and PW4 testified that the appellant made an oral representation to Karemo Credit Villagers to save money and therefore he was going to give them

loans. The group therefore started depositing money in the appellant's company in Nakuru and deposited Ksh.945,990/=. The appellant after the group deposited money with his company he started to give some of the members loans, but some did not get loans appellant testified that he was an employee of the organization to which Karemo Credit Villagers deposited their money. He stated the organization had its directors and he was not one of the directors. He stated the group deposited Ksh.192,844 but disbursed a loan of shs.525,000/= to Karemo Credit Group. The Appellant admitted the complainants herein did not receive loans due to non-payment of loans by Karemo Credit Villager Group. That without seriously considering the relevant provisions of the law, the facts may lead one to believe there could be some criminal liability on the part of the appellant for failing to ensure all group members got the loans they expected after according to complainants they had deposited Ksh.945,000/= which the appellant had disputed and stated the group deposited Ksh.192,844/=. The facts of this case reveal that the company for which appellant worked for existed and indeed it received money from the complainants, though there is a dispute as to how much money the group deposited. The facts also reveal that some of the members of the group got loans from the company except the complainants but those who got loans failed to service their loans. This was the cause of the problem. It cannot therefore be said the appellant made a false representation of the fact about giving loans. Further taking into account the case law and facts of this case the facts of representation which was manifested by the Karemo Credit Villagers raising deposits and depositing in the appellant's employers organization was an act that could be satisfied in the future, and in my view it matters not that the complainant did not receive their loans as opposed to other members who got their loans. The issue of giving loans as between the complainant and the appellant related to a future event which does not constitute an element of obtaining by false pretences.

37. Did the prosecution prove the charge of obtaining money through false pretences as to the required standard? The prosecution in the instant case needed to demonstrate that the appellant received the money and had no intention of giving the loan. From the evidence of PW1 she used to deposit the money in the company of the appellant. She produced 22 receipts. PW2, PW3 and PW4 used to give their contribution to PW1 who used to deposit the money with the appellant's company in Nakuru. It is significant to note no individual accounts or receipts or documents were produced to show the exact amount each of the complainant deposited with the company. Further no evidence was produced to show that the company was owned by the appellant and not by any other people as stated by the appellant. From the evidence it follows loans were hoped to be given in the future, that though that turned out to be impossible, due to outstanding and advanced loans to the group members. In view of the above it is not possible to state the appellant intended to defraud the complainants, as his promise represented a future promise, which unfortunately was frustrated by Karemo Credit Villagers who received loans but failed to service the same to enable others enjoy the facilities.

38. I now turn to the issue of whether the complainant's claim is civil or criminal in nature and whether it was proper for complainant to invoke criminal process in pursuance of their claim? The evidence on record shows that the transaction between the complainants and the appellant were commercial in nature. The complainants were to make savings and deposit the same with the appellant's company for them to secure a loan after depositing certain amounts. PW1 testified that the appellant told them to save money and thereafter he was going to give them loans. PW2, PW3 and PW4 testified they used to contribute money to the organization which PW1 used to remit to the appellant. PW2, PW3 and PW4 did not mention anything to do with promise by the appellant to give a loan. PW1, PW2, and PW4 admitted some members of that group were given loans. The giving of some of the members of Karemo Credit Villagers loans was a partial fulfillment of the promise to give loans leaving the complainants. That giving of loans to some of the group members and there being disputes as to sum raised by the complainant's group and the advanced loan alleged to be more than the amount the organization had received from the group, in my view, the turn of events shifted the nature of the complainants' claim from criminal to civil claim as apart from the complainants' claim that they had not been advanced with the loan the organization claims having advanced more money than it had received. It also claimed that the group members who had received loans had defaulted in payment, the complainants in view of that and armed with facts of the case unjustly decided to use criminal justice system to pursue their claim instead of using a civil process. It is in my view the complainants use of the criminal justice system is wrong and unfair to settle a civil dispute. The intention in using criminal justice system is to have the accused punished, humiliated and rather than to settle the claim and such system should not be used to the

disadvantaged of the accused.

39. Whether the appellant's defence was considered? the appellant gave a detailed defence and produced several annexures. The learned trial Magistrate in his judgment as follows in respect of appellant's defence.

***“However, the accused person has raised issues in his defence which deserve consideration. They are three issues and include -----”***

The learned trial Magistrate went ahead and framed issues for consideration of the accused's defence. The issues are as follows:

***“a) That the money was being deposited in the organizations account and not in his account.***

***b) That he was not dealing with the complainants individually and that he is dealing with the group.***

***c) That the complainants had not been given loans because the other members had defaulted.”***

40. The learned trial Magistrate framed issues based on the appellant's defence and not on the prosecution's case. That in doing so the trial Magistrate fell into an error when he failed to note the issue before the court was obtaining money by False Pretences and concentrated on appellant's defence to discredit the same. The trial court failed to appreciate in a criminal case an accused person has no obligation to prove his innocence or that his defence is true but all that is needed is to create some doubt in the mind of the court. In view of the learned trial Magistrate attempt to discredit the appellant's defence he shifted the burden of proof to the accused and made an error in the manner he evaluated and analyzed the appellant's defence. In view of the findings by the learned trial Magistrate he erred in finding that the defence of the appellant that he did receive the money from the complainant was baseless and rejected the same. He erred when he stated that it was duty of the accused person to demonstrate to the Court that he communicated to the complainant, that they could not get loans for reasons that other members had defaulted in repaying the loans which had been advanced to them. I find from the above that the appellant's defence was not properly considered as the trial court erred in failing to put down points for determination and in failing to separate the issues for determination related to the offence of Obtaining Money by False Pretences and not where the money was being deposited or who was dealing with the complainants and failure to give loan.

**41. The upshot is that the Learned trial Magistrate erred in law and fact in convicting the appellant on charges which were not supported by evidence. That had the court addressed its mind on the nature of the charge, the court would not have come to the conclusion it did. The failure of the trial court to frame issues for consideration made the court to come to the wrong decision. The failure to comply with S. 169 of Criminal Procedure Code is in my view the reason for court getting confused on the fair determination in its judgment. The charge of obtaining money through false pretences as stated out in my judgment was not proved at all. It is for those reasons that the appeal succeeds. I allow the appeal, quash the conviction and set aside the sentences. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.**

**DATED AT SIAYA THIS 15TH DAY OF MARCH, 2016.**

**JUDGE**

In the presence of:

Appellant - Present

M/s. Odumba for State

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

**J. A. MAKAU**