



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**HIGH COURT CRIMINAL APPEAL NO. 43 OF 2016**  
**(CORAM: J.A. MAKAU – J)**

**ELISHA NYAGAYA ONDURO..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against both the conviction and the sentence in Criminal Case No. 337 of 2014 in Bondo Law Court before Hon. M.M. NAFULA – AG. SRM)*

**JUDGMENT**

1. The Appellant **ELISHA NYANGAYA ONDURO** was charged with an offence of **Obtaining Money by False Pretences contrary to Section 313 of the Penal Code**. The particulars of the offence are that on the diverse dates between 23<sup>rd</sup> February 2013 and 4<sup>th</sup> January 2014, at Bondo Township in Bondo District within Siaya County with intent to defraud, obtained KShs.800,000/= from **DOMINIC ONYANGO POLO** by falsely pretending that he was in a position to deliver to him a Motor Vehicle a fact he knew to be false or untrue.
2. That after full trial, the appellant was found guilty, convicted and sentenced to a fine of KShs.260,000/= in default to serve 2 years imprisonment.
3. Aggrieved by the conviction and sentence the appellant preferred this appeal setting out six (6) grounds of appeal being as follows:-
  - a. *The trial Magistrate erred in law and in fact in convicting the appellant on a charge of obtaining money by false pretence contrary to section 313 of the penal code and sentencing him to 2 years imprisonment or a fine of KShs.260,000.00 the prosecution did not establish the ingredients of the said charge as required by the law.*
  - b. *The trial Court abdicated her duty by not assessing the evidence of each prosecution witness with care and balancing it with the Appellant's own evidence and submissions before drawing conclusions, rather, she glossed over the evidence in their rush to judgment.*
  - c. *The trial Court misdirected herself grossly in evaluating the prosecution case in isolation and drawing conclusions from it thereby precluding herself from considering or properly considering the Appellant's evidence and submissions which was strong enough to secure acquittal if carefully and put into consideration.*
  - d. *The trial Court erred in law in placing the burden of proof onto the Appellant.*

***e. The trial Court accepted facts which were woefully short of the standard required for as conviction in a charge of obtaining money by false pretence contrary to Section 313 of the Penal Code.***

4. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 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.”***

***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”***

5. At the hearing of the appeal Mr. Odindo Learned Advocate appeared for the Appellant whereas M/s. Odumba Learned prosecution Counsel represented the State.

6. The facts of the prosecution case are found in the record of appeal and I need not reproduce the same, however I shall summarize the prosecution case and the defence.

7. The prosecution case is briefly as follows:- PW1 Dominic Onyango who is the complainant herein, on 20.2.2013 at around 10.00 a.m. while at his place of work he met the Appellant who told him he could deliver him a vehicle from Japan. The complainant wanted a Nissan Vennette and the Appellant told him he will look for the vehicle before they could agree. The following day the Appellant told the assailant that the price was KShs.680,000/= and the complainant offered to pay KShs.200,000/= into Account Number 0290190317988 in the name of Pindra Systems as given by the Appellant being the company of the Appellant. PW1 produced the slip as exhibit P1. That the vehicle had not been delivered by September 2013. The Appellant asked PW1 to add more cash telling him to be patient as he was awaiting for some cash to deliver the vehicle. PW1 deposited further KShs.100,000/= in the Appellant's account in the October 2013 and called the Appellant who told him the vehicle was at the Port and that he needed some money so that he could get a clearance. That on 24.10.2014 PW1 deposited further 100,000/= into KCB account in the Appellant's name. PW1 produced banking slip as exhibit 2 and P Exhibit 3. In December 2013 PW1 was informed by the Appellant of the clearance but the owner of the vehicles had not gone for them. On 23.1.2014 Appellant informed PW1 that the storage charge of the vehicle had been hinked to KShs.70,000/= and PW1 agreed to deposit KkSKShs.400,000/=. That by 23.11.2013 PW1 and the Appellant made an agreement in writing as he did not trust the Appellant. The agreement includes MFI – 4. PW1 had by then deposited KShs.800,000/=. That on 4.1.2014 PW1 deposited KShs.400,000/= into the Appellants Bank Account with KCB Bankslip marked PMF1-5. PW1 had by then deposited KShs.800,000/= into the Appellant's account and was to pay KShs.50,000/= upon delivery of the vehicle. The Appellant asked for three weeks to make delivery which lapsed without delivery. On 9.2.2014, PW1 reported the matter at Bondo Police Station. PW1 further stated the Appellant had not yet refunded his money.

8. The Appellant denied the offence and stated that in August PW1 approached him to import a Nissan Vannette from Japan through Pindra Systems and Dohal Limited in which the Appellant is a Director. That he informed PW1 the vehicle will cost 680,000/=. He demanded that the complainant make a down payment of KShs.340,000/= being 50%. PW1 instructed the Appellant to go on with the deal. The Appellant paid KShs.100,000/= on 23.9.2013 to the company in Japan and on 24.10.2013 PW1 paid Shs.100,000/=, on 1.11.2013 inspection was done at Japan. The Appellant produced Report as exhibit 1. That the vehicle was shipped to Kenya. The Appellant produced Bill of Lading as D exhibit 2, export

certificate as D exhibit 3. That the vehicle arrived in Kenya in December 2013, by which time the complainant had not paid the required money. That the Appellant used their mutual friend to talk to PW1. That on 3.1.2014 the Appellant went to PW1's place, discussed the matter and on 4.1.2014 he paid KShs.400,000/=. Then the appellant paid the money to Japan. The Appellant produced a cash order dated 1.4.2014 as D exhibit 3. That on 2.4.2014 the Appellant was arrested and charged with this offence.

9. Mr. Odino, Learned Advocate, for the Appellant in support of the appeal urged that two grounds of appeal. The grounds of appeal were that the trial Court erred in convicting and sentencing the appellant with an offence contrary **to Section 313 of the Penal Code** when the prosecution had not established the ingredients of an offence of obtaining money by false pretences as required by law. The second ground of appeal is that the prosecution did not prove their case beyond reasonable doubt as required by law. Mr. Odino cited the case of **Samuel Mbugua Kibe V Republic HCCRA 197 of 1990** and urged that, the Court in acquitting the appellant, in the said case held that the matter before Learned trial Magistrate were contractual where the alternative remedy available was specific performance or refund of the alleged consideration, and further that Criminal jurisdiction could not be invoked where the issue were clearly Civil in nature. He further urged under **Section 313 of the Criminal Procedure Code** amongst the ingredients, it must be shown that there is intention to defraud or obtain by false pretences. That there was no evidence in support of intention to defraud. Mr. Odino also relied in the case of **Melissa Regan Malombe V R HCCRA 122 of 2001** where the Court held:

*“The defence of the appellant mentioned this pending suit. Yet in her judgment the Learned trial Magistrate stated that the appellant has not given this Court any good reason why he has failed to transfer the land. In effect she shifted the burden of proof to the appellant.*

*Finally the matters before the learned trial Magistrate were contractual where the ultimate remedy available was specific performance or refund of the alleged consideration. In my view criminal jurisdiction could not be invoked where the issues were clearly civil in nature.*

*In the end must find, as I hereby do, that the charge against the appellant was not proved to the required standard that is beyond reasonable doubt.”*

10. The State opposed the appeal through M/s. Odumba Learned State Counsel who submitted the evidence was properly evaluated and the court came to right conclusion, urging parties entered that an agreement, to which the complainant honoured his part of the bargain by paying KShs.8,000,000/= but the Appellant failed to deliver the motor vehicle. That all ingredients of an offence of obtaining by false pretences were considered. M/s. Odumba submitted the Appellant failed to give reason for failure to deliver the vehicle which he has stated was still in the country urging the conviction and sentence was proper.

11. Mr. Odino in a quick rejoinder urged that the Appellant proved court's order as exhibit 3 imported the vehicle and that is sufficient explanation for further to deliver that vehicle.

12. In the instant case the Appellant faced an offence of **obtaining money by false pretences Contrary to Section 313 of the Penal Code.**

13. The issues of consideration in this appeal are as follows:-

*a. What are the essential elements of an offence of obtaining money by false pretences?*

*b. Whether a charge of obtaining money by false pretences to have been proved beyond any reasonable doubt?*

*c. Whether the matter before trial Court was contractual or whether alternative remedy available was specific performance or referred of the alleged consideration and whether criminal jurisdiction could have been involved where the issues are clearly Civil in nature?*

14. The essential elements of the offence of obtaining through false pretences are as follows:-

- i. Obtaining something capable of being stolen.*
- ii. Obtaining the money through a false pretence.*
- iii. Obtaining the money with intention to defraud.*

15. The Penal Code defines “*False pretence*” 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 presentence.”**

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

- i. A representation by words, writing or conduct.*
- ii. A representation is either past or present.*
- iii. A representation that is false.*
- iv. A representation made knowing it to be false or believed not to be true.*

17. 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 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.”**

18. In the instant case PW1 testified that he made an oral as well as written agreement with the Appellant in which the Appellant was to deliver to PW1 a vehicle from Japan. The written agreement P exhibit 4 is dated 3.01.2014 and gave a date of delivery of the vehicle as 25.01.2014. PW2 and PW3 witnessed the agreement dated 3.1.2014 in which PW1 was to pay KShs.400,000/= on 4.01.2014 to enable the vehicle delivered to PW1. PW1 paid part of the consideration before reducing and own the agreement down in writing. That when he paid the first installment on 23.2.2013 it was clearly believed the two parties that the vehicle was to be imported from Japan and date of delivery had not been agreed upon, however in the agreement of 3.01.2014, the date of delivery was agreed to be of 20.1.2014 and that was after order dated 15<sup>th</sup> December 2014 D exhibit 7 had been issued restraining the Appellant and others from disposing off, selling or parting with ownership or possession of motor vehicle registration No. KBW 684Z, KBX 224D and motor vehicle serial number VPE 25-114651 Nissan Vannette pending interpartes hearing of the application on 11.4.2014. It can therefore be safely said the agreement between the complainant and the Appellant related to the future event which in my view do not constitute an element of obtaining by false pretences.

19. Whether a charge of obtaining money by false pretences has been proved beyond any reasonable doubt. The prosecution in this case needed to demonstrate that the Appellant received money for delivery of the vehicle for which he had not intention of delivering. From the evidence of PW1, PW2,

PW3, PW4, PW5 and PW6 there is no dispute that the Appellant received money from PW1 for delivery of motor vehicle. There is evidence from PW1 that the vehicle being sold to him was to be imported from Japan. DW1 in his defence testified that PW1 was required to pay 50 percent of the purchase price to enable the vehicle to be imported. He demonstrated that on 23.9.2013 his company paid KShs.100,000 but PW1 delayed in making further prompt payments. That on 1.11.2013 the vehicle was inspected in Japan as per inspection Report D exhibit 1. The vehicle was shipped to Kenya as per bill of lading D exhibit 2. The Appellant produced export certificate D exhibit 3 and testified the vehicle arrived in Kenya in December 2013 by which time PW1 had not paid the agreed 50 percent alleging the Appellant had conned him. That on 3.1.2014 followed by discussion on 4.1.2014 the complainant paid KShs.400,000/= which the Appellant testified he paid in Japan. He produced Court Order dated 1.4.2014 as D exhibit 7. I have carefully perused the defence exhibits which the prosecution did not challenge and I am satisfied from the defence exhibits and the evidence of the Appellant that his conduct is not a conduct of someone one who had an intention to defraud. That though the vehicle delivery was delayed and in view of the court's restraining orders, that it is not possible to make a finding that the Appellant intended to defraud the complainant as his promise represented the future promise, which unfortunately was frustrated by PW1 in delaying the remittance 50 per cent of the consideration as initially agreed and further by the order of court in **CMCC No. 1709 of 2014 Elisha Nyagaya Onduru and 2 Others V. FSI Capitol Limited D, exhibit 7.**

20. Whether the matter before trial Court was contractual or whether alternative remedy available is specific performance or refund of the alleged consideration and whether Criminal jurisdiction could have been involved, where the issues are clearly civil in nature? PW1 in his evidence and that of his two witnesses PW2 and PW3 is that the Appellant had entered into an agreement to import a car for PW1 at a consideration. That on 3.01.2014 the parties reduced the oral agreement into writing. The Appellant do not deny the existence of the agreement nor the receipt of the money and has mitigated the delay in delivery of the vehicle. I have very carefully considered the evidence adduced by both parties and I find that the matter before the trial court was contractual where the complainant in breach of the contract would seek remedy by way of seeking specific payment or refund of the consideration instead of involving criminal jurisdiction as the claim is Civil in nature and remedy can only be sought through application of Civil Jurisdiction.

21. Having considered the Appellant's grounds of appeal, I find that the prosecution did not establish the three essential elements of the offence of obtaining through false pretences. The prosecution did establish that the money was obtained through false pretence and with intention to defraud. I further find that the prosecution did not adduce sufficient evidence to prove the charge of obtaining by false pretences beyond any reasonable doubt as required by law.

**22. The upshot is that the appeal is allowed, sentence set aside. That as the Appellant had paid the fine on 20.4.2015 through Receipt No. 3024529 in Cr. C 337/2015, I order that the sum of KShs.258,940/= paid as fine be refunded to the Appellant, if the State do not file an appeal against this judgment within the prescribed period for lodging an appeal to the Court of Appeal.**

**DATED AND SIGNED AT SIAYA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN THE OPEN COURT THIS 27<sup>TH</sup> DAY OF OCTOBER, 2014.**

**IN THE PRESENCE OF:**

**MR. ODINO FOR THE APPELLANT**

**M/S. ODUMBA FOR THE STATE**

**C.A. K. ODHIAMBO**

**J. A. MAKAU**

**JUDGE**