



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO.251 OF 2012**  
**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NO.252 OF 2012**

**FRANCIS MWANGI.....1<sup>ST</sup> APPELLANT**

**JAMES NDUNGU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

In Count I both appellants were jointly charged with obtaining by false pretences contrary to Section 313 of the Penal Code.

In Count II the 1<sup>st</sup> appellant was charged with issuing a bad cheque contrary to Section 316(1)(a) of the Penal Code.

Both appellants were convicted in count No.1 and each one of them sentenced to pay a fine of Kshs.400,000/- each in default serve six months imprisonment. In respect of Count II the 1<sup>st</sup> appellant was acquitted on account of insufficient evidence. They were both dissatisfied with the conviction and sentence and preferred this appeal. In respect of the 1<sup>st</sup> appellant, he raised the following issues in his petition of appeal dated 16/10/2012.

- a. That the prosecution did not prove key elements of the offence of obtaining by false pretences, namely that the 1<sup>st</sup> appellant received the maize that was the subject matter of the offence.
- b. That the prosecution did not prove that the cheque that was issued in payment of the maize was drawn by the 1<sup>st</sup> appellant.
- c. That the prosecution did not prove that the 1<sup>st</sup> appellant intended to defraud the complainant.
- d. That the court did not give sufficient regard to the 1<sup>st</sup> appellant's submissions.

The 2<sup>nd</sup> appellant raised the following issues in his petition of appeal dated 18/10/2012.

- a. That the learned trial magistrate erred in convicting the 2<sup>nd</sup> appellant yet evidence was that he only received the goods on behalf of his employer who is the 1<sup>st</sup> appellant. It was not also proved that

- he was a shareholder or a director of the company to which the goods of the subject matter of the case were delivered.
- b. That the elements of the offence of obtaining by false pretences was not proved. Specifically that the fact of misrepresentation was not demonstrated.
  - c. That he was convicted against a backdrop of insufficient and contradictory evidence.
  - d. That the trial court did not appreciate that the matter before it was civil and not criminal in nature.
  - e. That the trial court did not comply with the provisions of the criminal procedure code.
  - f. That the judgment was delivered at 5.45 pm which was way beyond the court's working hours.
  - g. That the sentence imposed was manifestly excessive.

The appeal was canvassed before me on 26<sup>th</sup> March, 2015. Learned Counsel Mr. Ngang'are represented the 1<sup>st</sup> appellant whereas Learned Counsel Mr. Mugo was for the 2<sup>nd</sup> appellant. The respondent was represented by Learned State Counsel M/S Nyaucho. The appeal was disposed off by way of filed submissions. Those of the 1<sup>st</sup> appellant were filed on 8<sup>th</sup> April, 2015 and two issues were raised:-

**Firstly**, the element of obtaining by false pretences was not proved for the following reasons:-

- i. That PW1 who was the complainant gave evidence that she was not present when the maize was delivered. According to her the money was received by a broker who was neither called as a witness nor charged as an accused.
- (ii) None of the other witnesses testified as to having met the appellant.
- (iii) The trial court in its judgment was also categorical that the appellant did not receive the maize and therefore there was no evidence linking him to the offence. In this respect the court was referred to the case of **Patrick Macharia Nderitu –Vs- Republic Criminal Appeal No.1277 of 2001** in which the court outlined the elements of the offence of obtaining by false pretences.
- (iv) That the trial court convicted the 1<sup>st</sup> appellant on account of two post-dated cheques drawn by Prime Pick Ltd in which he was a co-director. This fact ought not to have implicated him because it was not demonstrated that by issuing the two cheques, he intended to defraud the complainant. Again, Prime Pick Ltd and Ngano Feeds Ltd were owned by two directors and shareholders of which he was one of them and it was not clear how the court solely held him culpable. Accordingly, the other director ought to have been charged.

**Secondly**, the element of dishonesty was not proved. In this respect, it was submitted that although the fact that the two post-dated cheques were dishonoured upon presentation, the law was very clear that dishonesty is not proved where a post-dated cheque has been issued. The court was referred to the case of **Republic –Vs- Charles Kithinji HCCA No.159 of 2003** in which it was held that:

**“.....to constitute a false pretence the false statement must be of an existing fact .....a statement of intention about a 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.”**

Also in the case of **Abdalla –Vs- Republic (1971) E.A. 657(CAD)** the court stated that:-

**“In our view the giving of a post-dated cheque is not a representation that there are sufficient funds to meet the cheque. It is a representation that when the cheque is presented on the future date shown on the cheque there will be funds to meet it.....That the appellant, in giving the postdated cheque, was not representing that he had sufficient funds to meet it is clear from undisputed facts. That he asked the treasurer not to present it without prior reference to him, which was not done, so as to give him an opportunity of making arrangements with his bank to meet the cheque. In our view the conviction on count 5 cannot be supported.....”(Emphasis supplied)**

The court was also drawn to the attention of the case of **Oware –Vs- Republic (1989) KLR 289**, in which the Court Appeal noted;

**“Devlin J in the case of R.V Dent (1975) 2 all E.R. 806 at page 807 letter H said that “to constitute a false pretence the false statement must be of an existing fact. “At page 808 letter A he said that:**

**“A statement of intention about a 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.”**

It was also submitted that the matter was of a civil nature given that PW1 testified that she had an agreement with the 1st appellant by which Kshs.150,000/- would be paid per week. The said agreement was written by Ndungu who is the 2<sup>nd</sup> appellant which the parties signed. The same evidence was reiterated by PW2. In this regard the court was drawn to the attention of the case of **Joseph Wanyonyi Wafukho –Vs- Republic Criminal Appeal No.200 of 2012** in which the court held that:-

**“.....that criminal process is never a substitute to criminal remedy or to be used to settle a civil claim or to avail a party in a commercial transaction undue or collateral advantage over the other. That kind of practice is fraudulent, demented and abuse of the court process; should always be avoided by the parties, resisted and forcefully suppressed by courts of law, whenever it manifests itself before court.”**

Further submission was that Ngano Feeds Ltd through the complainant filed a civil case being **CMCC No.3901 of 2010** which on 17<sup>th</sup> November, 2014 was withdrawn.

The 1<sup>st</sup> appellant urged the court to quash the conviction and set aside the fine imposed and that the fine that was already paid be refunded to him.

The 2<sup>nd</sup> appellant's submissions are dated 10<sup>th</sup> April, 2015 and they highlight the following issues:-

**First**, that the evidence on record demonstrated that the 2<sup>nd</sup> appellant received the goods on behalf of his employer the 1<sup>st</sup> appellant herein and could not therefore be held accountable for the debts his employer had with his creditors. And by so receiving the goods the 2<sup>nd</sup> appellant was not committing any offence.

**Second**, the maize belonged to Ngano Feeds Ltd where the 2<sup>nd</sup> appellant was only an employee. He was also neither its director nor shareholder and could not in that regard be held criminally culpable.

**Third**, that the ingredients of obtaining by false pretences were not proved. In this respect the court was urged to look at the authorities in the cases of:

- a. **Criminal Appeal No. 12 of 1989, Court of Appeal at Nairobi – Mathlida-Vs- Republic.**
- b. **Criminal Appeal No.178 of 2005, High Court, Meru – Ann Karambu –Vs- Republic.**
- c. **Criminal appeal No.75 of 2005, High Court, Nakuru – George KiharaNdungú.**

In a nutshell, Counsel for the 2<sup>nd</sup> appellant submitted that to constitute the element of false pretence, the statement must be an existing fact and a statement 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. That in the present case the statement of intention was about a future conduct which of itself was not a false statement.

From the foregoing, this court concludes the issues for determination to be as follows:-

- 1. Whether the elements/ingredients of the offence of obtaining by false pretences were proved in respect of both appellants.**

**2. Whether the prosecution's evidence was contradictory and sufficient to warrant a conviction against both appellants.**

**3. Whether the case was a civil and not criminal matter.**

**4. Whether any of the provisions of the Criminal Procedure Code was not complied with.**

**5. Whether the judgment of the learned trial magistrate was invalid by virtue of having been delivered at 5.45. pm.**

**6. Whether the sentence imposed was harsh and excessive in the circumstances.**

This being the first appellate court, its duty is to consider and reevaluate the evidence on record and come up with its own findings. See the cases of Okeno –Vs- Republic (1972) EA, 32 and Pandya –Vs- Republic (1957) EA, 336.

The prosecution called a total of four witnesses. PW1, Esther WamaithaNjogu was the complainant. She testified that she was a business person engaged in selling cereals. On 8<sup>th</sup> March, 2010 she had four hundred bags of maize of 100 kilogrammes each which she intended to sell in Nairobi. Her broker was one George Wachira. The maize had been provided by Njambi and the 2<sup>nd</sup> accused. Her colleague brought her two cheques for the sum of Kshs.387,775/- each payable to herself. The same were dated 8<sup>th</sup> April, 2010 and 16<sup>th</sup> April, 2010 respectively. She was required to present the cheques to the bank in a month's time. She banked them on 8<sup>th</sup> April, 2010.

Unfortunately they were returned unpaid on account of insufficient funds. She called the broker so that he would in turn get in touch with the buyers to relay the message of the bounced cheques. The broker GeorgeWachiratold her to re-bank the cheques on 16<sup>th</sup> April, 2010 which she did. Again, the cheques were returned unpaid on account of insufficient funds. She met the broker together with the buyer and an agreement was written in which she would be paid Kshs.150,000/- per week for the goods she delivered. The same was dated 13<sup>th</sup> May, 2010 and was entered into between herself and Ngano Feeds Ltd. Unfortunately, the agreement was not honoured which forced her to report the matter to Industrial Area Police station. The agreement was written by one Ndungu who is the 2<sup>nd</sup> appellant and together with the 1<sup>st</sup> appellant who was the buyer of the maize were arrested and charged.

**PW2**, Eunice NjambiKariuki testified that she was in the cereals business together with PW1 and Honea. On the 8<sup>th</sup> March, 2010 herself and Honea travelled from Busia with 400 bags of maize each weighing 100 kilogrammes. They left PW1 behind in Busia. They were to sell the maize through a broker by the name Wachira who was known to Honea and PW1. PW2 together with Honea delivered the maize to the buyer where they met Ndungu the 2<sup>nd</sup> appellant herein who was an employee to the buyer. They were paid by post-dated cheques which were drawn in the name of PW1. PW1 in turn banked them at Equity bank but they were dishonoured. She was issued with two other cheques which were also dishonoured.

On the 13<sup>th</sup> May, 2010 PW2 with her colleagues went to the buyer's premises where they met the 2<sup>nd</sup> appellant who informed them that the buyer (1<sup>st</sup> appellant) would still pay for the maize. He wrote an agreement committing the 1<sup>st</sup> appellant to pay but nevertheless no payments were made. When the agreement was not honoured, the sellers reported the matter to the police; that is how both appellants were arrested.

**PW3**,HawaWanjiraalso a businesswoman engaged in cereals business in Nairobi testified that on the 8<sup>th</sup> March, 2010 she was inBusia with Eunice Njambi and Esther (PW1). She bought 400 bags of maize which together with Eunice and Esther transported to Nairobi. The maize was transported to Ngano Feeds where it was offloaded. She was issued with two cheques dated 8<sup>th</sup> April, 2010 and 7<sup>th</sup> May, 2010 respectively which were to be presented to the bank after one month. These cheques were drawn in the

name of PW1. Upon presentation to the bank the cheque dated 8<sup>th</sup> April, 2010 was dishonoured. Herself and co-business person informed Ndungu (2<sup>nd</sup> appellant) about the dishonoured cheques who asked them to re-bank the cheques on 18<sup>th</sup> April, 2010. They obliged and the two cheques were returned unpaid. That is when a written agreement was made to the effect that installments of Kshs.150,000/- would be made until payment in full. However, this agreement was also not honoured prompting PW3 and the others to report the matter to the police.

It was also the testimony of PW3 that a sum of Kshs.30,000/- was deposited into PW1's account in payment of the debt but no further payments were thereafter made. She testified that the 2<sup>nd</sup> appellant received the maize on behalf of the 1<sup>st</sup> appellant who was his employer. That further all the parties signed the agreement.

**PW4**, Corporal NawiseiMukoma of Industrial Area Police station testified that he was the investigating officer and he took over the conduct of the investigation of the matter on 16<sup>th</sup> June, 2011 from a colleague who was transferred to another police station. He stated that the initial investigator handed over to him three cheques; one from Co-operative Bank dated 8<sup>th</sup> April, 2010 in favour of Esther Njogu for Kshs.385,775/-, another dated 16<sup>th</sup> April, 2010 for Kshs.385,775/- drawn by Prime Pick Ltd and one more dated 27<sup>th</sup> May, 2010 drawn by Ngano Feeds for Kshs.70,000/-. He was also handed over an agreement dated 13<sup>th</sup> May, 2010 on a headline cover letter of Ngano Feeds Ltd. He conducted a search with the Registrar of Companies which showed that Ngano Feeds Ltd shareholders (Directors) were Francis MaingiMwangi (1<sup>st</sup> appellant) and Jane Waigwe. Prime Feeds Ltd was registered under the same names of shareholders (Directors). He produced the letters from the Registrar of Companies as exhibits in this respect.

Upon close of the prosecution's case, the learned trial magistrate found that both appellants had a case to answer and they were put on their defences. The 1<sup>st</sup> appellant gave a sworn statement of defence. He testified as DW1. He stated that he was a shareholder of Ngano Feeds Ltd. alongside Jane Waigwe, which company is run by his workers. He denied he had ever met Esther WamaithaNjogu the complainant in Count I. He stated that a delivery note and invoice must be issued for any payment claims to be honoured and none were presented by the complainant in respect of the maize. He also denied that he issued cheques in respect of the two counts.

The 2<sup>nd</sup> appellant James NdunguMwangiWaigwa testified as DW2 and he also gave a sworn statement of defence. He described himself as an account by profession and at the material time was working at Ngano Feeds Ltd. He stated that he met Mr. Wachira only once when he had gone to claim payments for delivery made to Ngano Feeds Ltd. He said that he did not make any payments as he was not aware of the deliveries since he was only an employee of the company. He also stated that his duties did not include receiving maize and that he was never ordered to prepare the cheques in question. He also indicated that he was neither a director nor a shareholder of Prime Pick Ltd. He stated that when the police came to arrest him they requested him that he shows them the director of the company that issued the cheques. That is when he called the 1<sup>st</sup> appellant who was also arrested. He was surprised that he was charged in court.

Having summarized the evidence as adduced, I now proceed to consider the issues for determination.

#### **Elements of offence of obtaining by false pretence**

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, is guilty of a misdemeanor and is liable to imprisonment for three years.”**

From the definition, the basic ingredients of the offence can be summarized 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 on the other hand 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.”**

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 in 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 evidence in this case is that the appellants (the 2<sup>nd</sup> being an employee of the 1<sup>st</sup> appellant) received 400 bags of maize valued at Kshs.771,550/- from the complainant Esther WamaithaNjogu by falsely pretending that they were in a position to buy the said maize. In making payment for the maize the appellants are said to have issued two cheques that were post-dated, meaning that the payment for the maize was to be in the future as opposed to the past or present.

The fact of a future act, unfortunately does not constitute an element of representation defining **‘false pretence’** under Section 312 of the Penal Code. My attention is drawn to the case of **Oware –Vs- Republic (1989) KLR287** in which 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 –Vs- Dent (1975) 2 All ER, 806 at page 807** in which the court stated 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.”**

My learned brother Justice Gikonyo made similar observations while citing the case of **R –VS- Dent (Supra)** in **Joseph WanyonyiWafukho –Vs- Republic (2004) @ KLR** that the fact of obtaining by false pretences does not relate to future events.

Taking into account the above case law, it is obvious that the fact of representation which was manifested by the issuance of the two post-dated cheques was an act that would be satisfied in future, and it mattered not that the debt existed at the time the cheques were issued. The statement made in issuing those cheques was that it was hoped that the account would have sufficient funds to meet them. The issue at hand then related to a future event which did not constitute an element of obtaining by false pretence.

So then, did the appellants intend to defraud the complainant? For this element to be proved, the prosecution needed to demonstrate that the appellants by receiving the maize had no intention of paying for it. Simply said, they wanted to swindle the complainant. From the foregoing though, the two cheques issued were hoped to clear in the future. As fate had it, they were dishonoured. It followed that at the time of their issuance, there was no evidence that the funds would not be available to clear them. It was a representation that when the cheques were presented on the future dates shown on them, there would be funds to meet them. See **Abdallah –Vs- Republic (1970)1 E.A.657**. Having this in mind, it is difficult

to fathom that the appellants, in particular the 1<sup>st</sup> who issued the cheques intended to defraud the complainant. In any event, the representation which was manifested by the issuance of the cheques was not false because the 1<sup>st</sup> appellant did in fact issue genuine cheques, owned by the respective banks save that they were dishonoured. They represented a future promise, which unfortunately was frustrated.

I would wish to comment on the culpability of the 2<sup>nd</sup> appellant. In this court's view the finding by the learned trial magistrate that the 2<sup>nd</sup> appellant was culpable by the mere fact that he was expected to act according to the lawful instructions of his employer did not have any legal basis. There was totally no iota of evidence that when he received the maize on behalf of the 1<sup>st</sup> appellant he knew that the 1<sup>st</sup> appellant would not pay. There was also no evidence that he had any knowledge of the transactions and the mode of payment of those transactions between the 1<sup>st</sup> appellant and his creditors. Moreover, he was neither a director nor a shareholder of the companies that drew the cheques and received the maize. Had the prosecution properly discharged its burden, it is the 1<sup>st</sup> appellant who solely bore the culpability as he was a shareholder and director of the company that received the maize and issued the cheques.

I now proceed to determine whether the matter before hand was of civil or criminal in nature. Suffices to say, after the cheques were twice dishonoured by the bank the parties entered into an agreement which was produced in court as an exhibit indicating that the 1<sup>st</sup> appellant would liquidate the debts in monthly installments of Kshs.150,000/- per month. The evidence on record shows that this agreement was not honoured. Further, evidence of PW3 was that the 1<sup>st</sup> appellant, pursuant to fulfilling the terms of the agreement deposited a sum of Kshs.30,000/- into PW1's account. This made it a partial fulfillment of the written agreement, effectively drawing the parties into re-negotiating on how the entire amount would be paid. Undisputedly, the agreement having been dishonoured meant that one party had gone against a written contract. That in my view, shifted the nature of the matter from criminal to civil. It is unfortunate that the civil case that had been filed was withdrawn. I must emphasize that courts must at all times resist and avoid to be dragged into aiding parties who take advantage of the criminal justice system to settle civil scores. It amounts to an abuse of the court process, hence a waste of the court's precious time.

Learned Counsel for the 2<sup>nd</sup> appellant did also submit that the court did not comply with some particular provisions of the Criminal Procedure Code. These provisions were not however mentioned or outlined and I am not in a position to make a determination on that aspect.

The court was also told that the judgment was delivered at odd hours thus making it invalid. I have had the advantage of perusing the last sitting of the court prior to the judgment date and the court noted as follows:-

**Court**

**Judgment on 27/7/12 at 2.30 pm**

**Hon. D. Kinaro**

**SRM**

**5/7/12.”**

The court delivered the judgment on 2<sup>nd</sup> August, 2012 and at no time was it indicated that it was so delivered at 5.45 pm as alluded by the 2<sup>nd</sup> appellant. That submission lacks merit.

Having carefully evaluated all the evidence attending the case on record and from my foregoing observations it is clear that sufficient evidence was not tendered to prove the charge of obtaining by false pretences against both appellants. As such the appeal must succeed in any event.

Finally, on the aspect of sentence, I am minded that sentencing is in the discretion of the trial court and an

appellate court cannot disturb the sentence unless the trial court acted upon some wrong principles or overlooked some material factors. The sentence must also be commensurate to the moral blameworthiness of the offender. See the case of **Omuse –VS- Republic (2009), KLR, 214.** This court is also empowered by Section 254(3)(b) of the Criminal Procedure Code where it deems fit in an appeal against sentence to increase or reduce the sentence or alter the nature of the sentence.

Under Section 313 of the Penal Code, a person who is found guilty of the offence of obtaining by false pretences is guilty of a misdemeanor and is liable to imprisonment for three years. In the instant case, the learned trial court opted for a penalty of a fine with a default terms of imprisonment. Each one of them was sentenced to pay a fine of Kshs.400,000/- in default to serve six months imprisonment.

Considering that the offence was a misdemeanor and the appellants were first offenders it beats logic why such hefty fines were imposed. In that respect, had this court upheld the conviction, it would have set aside the hefty fines and substituted them with lesser ones. In the result, the appeals succeed, the conviction is quashed and the sentences set aside.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of MAY 2015.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

1. Mr. Ng'ang'a for the 1<sup>st</sup> appellant
2. Mr. Ng'ang'a holding brief for Mr. Mugofor the 2<sup>nd</sup> appellant
3. Ms. Ndombi for the respondent.