



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**HC CRIMINAL APPEAL NO 88 OF 2014**

**(Appeal from conviction and sentence in Murang'a CM Criminal Case No. 1059 OF 2012 - T. Nzyoki Ag. SPM)**

**JOHN NGOTHO MAINA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

1. The Appellant **John Ngoto Maina** was convicted of obtaining by false pretenses contrary to **section 313** of the **Penal Code**. He was on 5<sup>th</sup> June 2014 sentenced to serve two (2) years imprisonment. He has appealed against both conviction and sentence and has advanced various grounds of appeal.

2. I have read the evidence placed before trial court and the judgment of the learned trial magistrate. The particulars of the offence as stated in the charge were that on 6<sup>th</sup> August 2012 at **Kahatia Equity Bank** branch in **Murang'a County**, with intent to defraud, he obtained KShs 400,000/00 from one **Robinson Njau Kariuhu**

*“by falsely pretending that he was in a position to sell to him motor vehicle Reg. No. KAE 596 F make Isuzu.*

3. **False pretense** is defined in **section 312** of the Penal Code as follows –

**“312. 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 pretense.”**

The representation alleged in the particulars of offence in the present case was that the Appellant was in a position **to sell** to the complainant the motor vehicle sometime in the **future**. The representation was not of a false **past** or **present** fact. There was no false pretense.

4. The evidence laid before the trial court disclosed a **future promise** – that the Appellant was **going to sell** to the complainant the motor vehicle sometime in the **future**. The evidence also disclosed that when he obtained the KShs 400,000/00 from the complainant he had the full authority to sell the motor vehicle as an agent of the owners thereof. The owners subsequently stopped the proposed sale. The Appellant however never released the money to owners of the motor vehicle; nor did he refund it to the complainant. He retained the money and apparently converted it to his own use. There may have been **theft** under **section 279** of the Penal Code. But theft is a more serious offence than obtaining money by false pretenses. It is not minor and cognate to the latter.

5. Not only did the particulars alleged in the charge not disclose the offence charged, there was no evidence of the same. The conviction cannot stand. It is hereby quashed and the sentence imposed upon the Appellant set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 11<sup>TH</sup> DAY OF JUNE 2015**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 12<sup>TH</sup> DAY OF JUNE 2015**