



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 157 of 2011

MARY NJOKI NJIRU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From the original conviction and sentence in Criminal Case No. 1984 of 2010 of the Chief Magistrate Court at Embu)*

### J U D G M E N T

MARY NJOKI NJIRU hereinafter referred to as the Appellant was charged with 5 counts of obtaining by false pretence. The particulars in the charge sheet were as follows:-

#### OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE

***MARY NJOKI NJIRU: On the 1<sup>st</sup> day of October 2010 at Embu township within the Embu County, jointly with others not before court, with intent to defraud obtained the sum of Kshs.3000/- from MERCY MBUGUA by falsely pretending that you were in a position to recruit her brother in law JOSEPH KIARIE into the Armed Forces of Kenya, a fact she knew to be false.***

#### COUNT II

#### OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE

***MARY NJOKI NJIRU: On the 2<sup>nd</sup> day of October 2010 at Roasters Inn within the Nairobi County, jointly with others not before court, with intent to defraud obtained the sum of Kshs.20,000/- from MERCY MBUGUA by falsely pretending that you were in a position to assist recruit her brother in law JOSEPH KIARIE into the Armed Forces of Kenya, a fact she knew to be false.***

#### COUNT III

#### OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE

**MARY NJOKI NJIRU**: On the 2<sup>nd</sup> day of October 2010 at Roasters Inn within the Nairobi County, jointly with others not before court, with intent to defraud obtained the sum of Kshs.20,000/- from AMINA OMARI by falsely pretending that you were in a position to assist recruit her son HUSSEIN MOHAMED SWALLEH into the Armed Forces of Kenya, a fact she knew to be false.

#### **COUNT IV**

#### **OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE**

**MARY NJOKI NJIRU**: On the 5<sup>th</sup> day of October 2010 at Dallas Estate in Embu West District within Embu County, jointly with others not before court, with intent to defraud obtained the sum of Kshs.5,000/- from AMINA OMARI by falsely pretending that you were in a position to assist recruit her son HUSSEIN MOHAMED SWALLEH into the Armed Forces of Kenya, a fact she knew to be false.

#### **COUNT V**

#### **OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE**

**MARY NJOKI NJIRU**: On the 6<sup>th</sup> day of October 2010 at ROYSAMBU in Kasarani within the Nairobi County, jointly with others not before court, with intent to defraud obtained the sum of Kshs.100,000/- from ISMAEL HASSAN by falsely pretending that you were in a position to assist recruit her son JOSEPH KIARIE and HUSSEIN MOHAMED into the Armed Forces of Kenya, a fact she knew to be false.

The matter proceeded to full hearing and she was convicted and sentenced to 2 years imprisonment. And being aggrieved by the Judgment she has appealed raising the following grounds

1. *The learned Principal Magistrate erred and failed to properly direct herself to the mandatory requirements to Section 210 and 211 of the CPC and misdirected herself when she ruled*

*“The accused has a case to answer and she will be required to make her defence”.*

2. *The learned Principal Magistrate erred and failed to properly direct herself to the mandatory requirements to Section 269(1) of the CPC in that she failed in her judgment to identify the “point or points for determination, the decision thereon and the reasons for the decision” and to hereby misdirected herself on the essential ingredients of the offences of obtaining by false pretences facing the appellant.*

3. *The learned Principal Magistrate erred and failed to properly direct herself to the mandatory provisions of Section 269 (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.*

4. *The learned Principal Magistrate erred and misdirected herself in shifting the burden of proof on the appellant when she convicted the appellant on the “undisputed evidence of prosecution witness”, that such evidence was not “challenged 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”.*

5. *The learned Principal Magistrate having made a finding that “job within the armed forces must and are usually announced publicly and that no money is paid towards the same” erred and acted partially in not applying that observation to the prosecution witnesses, PWs 1,2,3,4 & 5 who admitted to having been privy to the commission of the crime of corruption and conduct contrary to public policy and morality, persons of loose conscience whose conduct was shameful and deplorable and*

***therefore whose credibility was put in issue and therefore discredited.***

**6. *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.***

When the appeal came for hearing Mr. Njage submitted on the grounds and cited several authorities. He submitted that from the record at page 22 it was clear that the learned trial magistrate made a Ruling before the prosecution closed its case under Section 210 of the Criminal Procedure Code. Further she arrived at the points of determination upon considering the evidence of the prosecution alone. It was not clear what the appellant was convicted of.

The State through Ms. Macharia conceded to the Appeal citing irregularities in the proceedings. And that the offence of obtaining by false pretence had not been proved.

As a first appeal Court this Court has a duty to re-evaluate and reconsider the evidence adduced in the Court below and come to its own conclusion.

**REF: 1. *SIMIYU & ANOTHER -VS- REPUBLIC [2005] 1 KLR 92***

**2. *NGUI -VS- REPUBLIC [1984] KLR 929***

Brief facts of this case are that the complainants (P.W.1 – P.W.5) wanted their friends and relatives recruited into the army through a process not provided for under the Law. They approached the Appellant whose husband worked in the army. An arrangement was made and they started meeting with people alleged to be army officers “Majors & Colonels”. In the process they paid money to the accused and these officers. They filled forms and even had their finger prints taken. When they sensed they had been duped they reported the matter to the police who traced the Appellant and arrested and charged her.

In her unsworn defence the Appellant denied the charges saying she knew nothing about the charges and she had done nothing wrong.

The Appellant has attacked irregularities the proceedings, the credibility of the witnesses. I will first address the irregularities in the proceedings.

Before any Ruling on **NO CASE TO ANSWER** is made the prosecution **MUST** close its case (Reference section 210 and 211 Criminal Procedure Code). This is couched in mandatory terms. Page 22 of the record clearly shows that the Prosecution never closed its case. It is nowhere indicated. It is also true that at page 34 the learned trial Magistrate in her Judgment reached her point/points of determination based on the evidence adduced by the Prosecution witnesses only. The evidence must always be considered as a whole. This is what she stated:

***“I have well considered the evidence tendered before the Court by the Prosecution witnesses and in support of the allegations and the committed the offences as charged”.*** ***points to determine herein is whether the accused person***

She therefore did not consider the Appellant's evidence at that point.

In the case of ***LIVINGSTONE -VS- UGANDA [1972] E.A. 196*** the Court of Appeal held that;

- a) ***A Judgment must set out the point or points for determination which must cover essential ingredients of the offence;***
- b) ***Intent is an essential ingredient of the offence charged.***

In this particular case the offence was obtaining by false pretences. The learned trial Magistrate had a duty to establish two ingredients.

**a) Obtaining**

**b) The false pretence involved.**

What her point of determination was whether the Appellant committed the offence or not. With due respect to the learned trial Magistrate she had to first establish the two ingredients above before deciding whether the Appellant committed the offence or not.

In the last paragraph of the Judgment the learned trial Magistrate states;

***“I proceed to declare accused person guilty as charged on 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts. I convict her accordingly under section 215 Criminal Procedure Code, for the 1<sup>st</sup> and 5<sup>th</sup> counts. I proceed to acquit the accused as charged under section 2(i) Criminal Procedure Code for lack of proof on the prosecution case”.***

I have read this typed record and compared it with the original record and find that the person who typed it made the errors. The original shows that the Appellant was acquitted of the 1<sup>st</sup> and 5<sup>th</sup> counts under section 215 Criminal Procedure Code and not under section 2(i) Criminal Procedure Code.

However when it came to sentencing she sentenced the appellant on the first count which she had acquitted her on.

On the issue of the credibility of the witnesses the learned trial Magistrate chose to believe P.W.1 - P.W.5. She said the accused was an accomplice with the major and the colonel. What about the witnesses? Were they not working with them? Had they got the jobs they were allegedly paying money for none of them would have opened his/her mouth to complain. At page 37 lines 11 the learned trial Magistrate says;

***“The accused person knew at all material time that jobs with the Civil Service, to be precise with the armed forces must and are usually announced publicly and that no money is paid towards the same”.***

From this paragraph one gets the impression that it was only the accused who knew that Civil Service jobs are not bought. What about the witnesses? The witnesses in equal measure knew that jobs in the Civil Service were not bought by money and they were not supposed to pay any money to get such jobs.

Therefore my finding is that P.W.1 -P.W.5 were accomplices in perpetrating corruption. Their evidence was accomplice evidence and could not stand on its own. It required corroboration and could not corroborate each other. The evidence of the investigating officer P.W.6 did not corroborate it.

The State has through M/s Macharia conceded to the appeal on the grounds that there were many irregularities as pointed out. And that the offence was not brought out in the evidence. From the discourse above its quite clear that the learned trial Magistrate did not appreciate the issues before her; she did not apply the law to the facts and made procedural blunders. And for the above reasons I find the appeal to have merits.

I quash the conviction on all the counts and set aside the sentence on each count. The Appellant shall be set free unless otherwise held under a separate warrant.

**DATED AND DELIVERED AT EMBU THIS 18<sup>TH</sup> DAY OF OCTOBER 2012.**

**H.I. ONG'UDI  
J U D G E**

**In the presence of:-**

**Ms. Macharia for State**

**Mr. Njage for the Appellant**

**Appellant**

**Njue CC**