



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Criminal Appeal 116 of 2008**

**BARCAK NDIEGE NGOYE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*[From original conviction and sentence in Criminal Case number 95 of 2007 of the Chief*

*Magistrate's Court at Kisumu*

**JUDGMENT**

**Barack Ndiege Ngoye** (herein the appellant) was charged together with another with the offence of attempting to obtain by false pretences contrary to Section 313 of the Penal Code.

This was the fourth count out of ten (10) counts, nine of which involved the appellant's co-accused.

The particulars of the charge were that on the 7<sup>th</sup> November 2006 at Mona General Merchants Kiboswa Market Kisumu District Nyanza Province, jointly with others not before court, with intent to defraud, attempted to obtain thirty meters of barbed wire, one hundred and fifty rods of Y10 twisted wire, one hundred and fifty rods of Y12 twisted wire, fifty bags of Bamburi Cement, seventy two iron – sheets, gauge 30-3 meters, forty eight iron-sheets gauge 30-2½ meters and forty tins of vinch mathemulsion paints, all valued at Kshs. 413,500/=.

After the trial before the principal Magistrate at Kisumu, the appellant was convicted and sentenced to two (2) years imprisonment.

Not being satisfied with the conviction and sentence, the appellant filed the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 27<sup>th</sup> August 2008.

The grounds are basically a complaint on the inadequacy of the prosecution evidence and more so that of identification and a complaint on the appellant's conviction upon a defective charge.

The appellant argued the grounds in person and contended that other than PW5, none of the other witnesses mentioned his name and that although PW1 and PW5 referred to an identification parade, the necessary parade forms were not produced thereby creating doubt as to whether an identification parade was indeed held.

The appellant further contended that PW1 did not give his description to the police therefore her purported identification of him was never confirmed in any identification parade thereby confirming that he was never seen at the scene. He said that PW2 did not also give his (Appellant's) description and his was a mere dock-identification. He contended that the identification evidence against him was worthless as to be relied upon.

The appellant argued and contended that the charge was defective in that the particulars of the charge did not disclose any offence.

The learned Senior State Counsel, M/s Oundo, opposed the appeal on behalf of the state and contended that the appellant was properly identified as he had approached the complainant more than once and even presented a local purchase order (L. P. O.) . The learned State counsel also contended that the complainant had all the opportunity to see the appellant and even if the identification forms were not produced they were not vital as there was adequate opportunity and favourable conditions for the identification of the appellant by the complainant.

The learned State Counsel further contended that the appellant was convicted of attempting to obtain by false pretences and that evidence showed that he and others falsely informed the complainant that they had been given a tender by Action – Aid to construct a hospital at Mamboleo and in the process issued a false local purchase order.

The learned State Counsel said that even though the evidence of the document examiner incriminated the appellant's co-accused, the appellant was also a co-offender.

The learned State Counsel therefore urged this court to dismiss the appeal.

Being a first appellate court, the role of this court is to re-consider the evidence afresh and make its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, Okeno v Republic [1972] E. A. 32).

Towards that end and considering that the appellant was only charged with a single offence of attempting to obtain false pretences, it would be unnecessary to consider aspects of evidence which did not relate to that offence.

The evidence leading to the conviction of the appellant was mostly that of the complainant Monica Ambuka Onyino (PW1), her husband David Onyino (PW2) and the investigating officer Sgt Orengo Odenyo (PW5) of C. I. D. Kisumu.

The complainant stated that sometime in the month of October 2006 two people whom she had never met before came to her business premises at Kiboswa Market and identified themselves as employees of Action Aid by names of Barrack Ochieng and William Ochieng. They stated that they had been awarded a tender to construct a hospital near the Mamboleo Showground and had been contracted by Action – Aid. They therefore wanted to purchase building materials including barbed wires, cement, poles etc. They went away and returned after two weeks with a local purchase order dated 30<sup>th</sup> October 2006 for goods valued at Kshs. 413,500/=

On 5<sup>th</sup> November 2006, the complainant proceeded to the offices of Action Aid in Kisumu and was informed that the Local Purchase Order was false and that those who presented it were not employees of Action Aid.

On 6<sup>th</sup> November 2006, the complainant was at home when she was called by her husband and told to proceed to their shop. On arrival, she found that a person called Kennedy Kavai had been apprehended by people from Action – Aid and the police.

On the 6<sup>th</sup> February 2007, the complainant was called to the Central Police Station Kisumu where she

identified the appellant in an identification parade. She said that the appellant was one of the those who went to her shop purporting to have been sent by Action – Aid .

The complainant's husband ( PW2) stated that he was informed by the complainant about the people from Action – Aid and the Local Purchase Order they presented. This was on the 1<sup>st</sup> November 2006. He later informed the complainant to make enquires with the Action Aid office in Kisumu but on the 2<sup>nd</sup> November 2006 three people approached him. Two of them entered his office while one remained in a white saloon vehicle. He questioned them about the local purchase order which he found to be too large for his level of business.

He also questioned them about their not involving the regional office of Action –Aid. They answered that the regional office was corrupt and introduced themselves as William Ochieng of Siaya Office and Barrack Ochieng of Action Aid headquarters. When they gave him the wrong name of the Action – Aid manager of Western Region he became suspicious. They gave him the name Musumba, the person who signed the suspected local purchase order.

He told them that the required materials would be supplied. In the meantime, he asked the complainant to go and confirm the authenticity of the local purchase order.

On 7<sup>th</sup> November 2006 while the complainant's husband was in their shop, a person called Kennedy Kavai arrived and said that he had been sent by William Ochieng to collect the goods. The person presented a complimentary slip and a cheque for the payment of the goods. The complimentary slip was headed Action – Aid and the cheque was for Kshs. 413,500/= drawn against the Kenya Commercial Bank ( KCB) and dated 6<sup>th</sup> November 2006.

The complainant's husband was surprised by the cheque. He knew that previous orders made by Action – Aid were paid for vide cheques drawn against the Standard Bank. He was however called by the said William Ochieng who asked him to supply the goods as they were getting late. He ( PW2) then called Action-Aid. Officers from the organization arrived in his shop accompanied by police officers. They arrested the said Kennedy Kavai. He (PW2) said that William Ochieng thereafter called and threatened him. He confirmed that William Ochieng is the one who came to his office accompanied by Barrack Ochieng who was the appellant.

The investigating officer (PW5) stated that he took over the investigations of this case from Riat Police base after a suspect was arrested. He confirmed that the material local purchase order and cheque issued for the supply of building materials were false documents.

He said that the appellant was arrested in connection with other offences and while being interrogated turned out to be Barrack Ngoya Ndiege who had allegedly been mentioned together with a person called William by his co-accused. The investigation officer then summoned the complainant who came and identified the appellant as one of those who went to her shop and placed an order for goods.

The appellant was thereafter charged with the present offence.

In his defence, the appellant made a sworn statement and contended that he was arrested on 5<sup>th</sup> February 2007 at Nyamasaria for an offence of burglary. He was taken to Central Police Station and booked in the cells. He was interrogated on 6<sup>th</sup> February 2007 and was informed that an identification parade would be carried out.

A certain woman pointed him out in the parade which he believed was in connection with the offence of burglary since he had not been informed of any other offence. It was only when his case was consolidated with another that he first met his co-accused. He knew nothing about the present offence and believed that he was charged because of the identification parade whose forms were never tendered in court. He also believed that he was charged because he declined to give money to one P. C. Sanga who did not testify in court.

The learned trial magistrate considered all the foregoing evidence and concluded that the appellant was positively identified by the complainant ( PW1) and her husband ( PW2) as one of those who attempted to obtain by false pretences. He was therefore convicted. The learned trial magistrate was of the view that the non-production of the identification parade forms was not fatal since an explanation for the omission was given by the investigating officer ( PW5).

Having considered the entire evidence afresh, this court is of the opinion that the appellant's conviction by the trial court was not proper and safe for the main reason that the charge placed before the court was defective from the beginning and no attempt was made by the prosecution or the court to correct the defect.

The defect was clearly reflected in the particulars of the charge in that the name of the complainant was not indicated. The person against whom the attempt to obtain the property was made was not mentioned whereas the evidence indicated that the attempt could have been directed to the complainant ( PW1) or her husband ( PW2) or both.

The particulars were incomplete thereby rendering the charge defective and incapable of sustaining a conviction.

Although there was sufficient evidence showing that the appellant was one of those who attempted to obtain building materials from either the complainant or her husband, he was tried and convicted on the basis of a defective charge.

The conviction was therefore improper and unsafe. Under Section 214 (1) of the Criminal Procedure Code it is provided that:-

“Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charged is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case.....”

In the case of Yongo vs= republic [1983] KLR 319, it was observed by the Court of appeal that a charge is defective under Section 214 (1) of the Criminal procedure Code where “inter – alia” it does not accord with the evidence given at the trial or it gives a misdescription of the alleged offence in the particulars.

Herein, the trial commenced with a defective charge and ended likewise.

A conviction based on a defective charge is unlawful.

Consequently, this appeal must succeed to the extent that the conviction of the appellant is quashed and the sentence set aside.

The appellant be released forthwith unless otherwise lawfully held.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 18<sup>th</sup> day of November 2009.

J. R. KARANJA

JUDGE

*JRK/aao*