



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Appeal 178 of 2005**

**ANN KARAMBU ..... APPELLANT/APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of the learned*

*Resident Magistrate (Mr. G. Oyugi) in Tigania Criminal Case No. 311 of 2005 dated 21<sup>st</sup> September 2005)*

**JUDGMENT OF THE COURT**

The appellant, ANN KARAMBU was charged with one count of obtaining by false pretences contrary to section 313 of the Penal Code in Tigania Criminal Case No. 311 of 2005. The particulars of the offence were that on the 29<sup>th</sup> day of January 2005 at Kianjai market, Kianjai Location in Meru North district within the Eastern Province with intent to defraud, obtained from JOSEPH KOBIA the sum of Kshs. 59,400/= by falsely pretending that she would buy him (sic) 27 bags of beans valued at the said sum of Kshs. 59,400/=.

The appellant was tried, found guilty and accordingly convicted. She was sentenced to eight (8) months imprisonment. The appellant has appealed against both conviction and sentence. She has set out five (5) grounds of appeal in her Petition of Appeal dated 3.10.2005 and filed in court on the same date. These are that:-

1. The learned trial magistrate erred in law and in fact in that he convicted the appellant on a charge that had not been proved and on evidence that was at variance with charge (sic)
2. The learned trial magistrate misinterpreted and failed to comprehend the meaning of the charge thereby convicting the appellant on insufficient evidence.
3. The learned trial magistrate totally ignored to consider the appellant's defence and only considered wrong and irrelevant issues.
4. The sentence of the learned trial magistrate is harsh, excessive and unreasonable in that he totally failed to direct his mind to the fact that the appellant is single mother with several children in school who are now left destitute.
5. The learned trial magistrate's sentence is harsh and excessive to a first offender who had indicated she had school going children.

The facts of this case emerge from the evidence of PW1, JOSEPH KOBIA and PW3 DENNIS MUCHUI.

PWI testified that on the 29.1.2005, he bought 53 bags of beans from the appellant at the rate of Kshs. 2,200/= per bag. He paid Kshs. 116,600/= but because he did not have the means to transport the beans immediately, he left the beans with the appellant. PWI rushed to Meru to look for transport but on returning to Kianjai, the appellant was not at her place of business. Later, PWI learnt that the appellant had gone to attend a funeral. The appellant's 2 employees however released 26 bags of beans to PWI leaving the balance of 27 bags behind and to be collected later. When PWI sent for the 27 bags after a period of three (3) weeks, the appellant refused to release the beans to PWI's emissary one THURANIRA. The appellant has never released the beans to date.

PW3 was DENNIS MUCHUI, who was well known to both PWI and the appellant. He testified that on the 26.1.2005, together with PWI, they bought 53 bags of beans from the appellant for which PWI paid the appellant the sum of Kshs. 116,600/=. PWI carried away 26 out of the 53 bags leaving the balance, which according to this witness was 26 bags. PW3 testified that one Thurania was also present when PWI bought and paid for the 53 bags of beans. When PW3 and Thurania went to the appellant's store to carry away the balance of the bags of beans, the appellant refused to release the same to them.

In his further testimony, PW3 testified that he is a brother to PWI.

The appellant gave sworn evidence and stated that for a while from 1997, she and PWI did business together of buying and selling cereals. They also stayed together in her store. The business grew to such a level that they started supplying maize to the cereals board at Isiolo. At one point, they were paid Kshs. 207,580.50/= by cheque from the cereals board. Though the cheque was in her name, PWI demanded that the amount be banked in his name. In the years 2001 and 2002, the appellant obtained two Kshs. 90,000/= loans from the Cooperative Bank both of which she repaid.

Sometime after 2002, the appellant took maternity leave. When she resumed she found that the store which she and PWI were using for the business had been leased to somebody else by PWI so she had to find alternative storage space behind the same building on which her old store used to be. In 2004, the appellant took a loan of Kshs. 140,000/= out of which PWI took Kshs. 130,000/=. PWI then vanished and started some secret construction of a building. When he finally appeared on 29.1.2005, PWI took away some 26 bags of beans from the appellant's store after which he again vanished. When the appellant finally caught up with PWI, she asked him about the outstanding Cooperative loan of Kshs. 140,000/=. The two disagreed when the loan repayment issue came up. She denied committing the offence.

The appellant called one witness, one CHARLES MUCHIRI who testified as DW2. He told the court that PWI and the appellant used to work together. The arrangement was such that whenever PWI went to the complainant's cereals store, he would be given whatever cereal he wanted and any amount he so wished. On the 29.1.2005 PWI was given 26 bags of beans which he carried away in a lorry KAD 104K.

The learned trial magistrate gave a two page judgment in which he found that the prosecution had proved its case beyond any reasonable doubt and accordingly found against the appellant.

During the hearing of the appeal, Mr. Justice (Rtd) D. Rimita reiterated the grounds of appeal and in support thereof relied on sections 312 and 313 of the Penal Code and also cited the following authorities:-

**(a) Criminal Law in East Africa PP 255 to 259**

**(b) Nyaga -vs- R (1975) E.A. 118**

Sections 312 and 313 of the Penal Code provide 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 pretence.***

***“313 – 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.”***

In the case of **NYAGA – VS – REPUBLIC (supra)** (a case of persuasive authority to this court) the court held that “a false pretence must be a pretence about an existing fact and this is not satisfied by a promise for the future”. It must be proved that the accused not only obtained something by a false pretence, but also that he intended to defraud. However, in the majority of cases, the court may infer an intent to defraud from the facts of the case. (see **R. – vs – Ferguson (1913) 9 Cr. App. R. 113**). Indeed where money or goods are obtained by pretences that are false, prima facie, there is an intent to defraud.” The statutes and the decided cases are clear that the pretence must relate to a matter of fact not to a statement of opinion and the pretence must relate to a past or present fact, not to a future intention.

On the other hand, Mr. Muteti submitted that the prosecution in the lower court proved its case beyond any reasonable doubt against the appellant. He submitted that there was no doubt that the appellant delivered 26 bags out of the 53 bags of beans and that it was the balance of 27 bags that the appellant was charged with failing to supply.

In Mr. Muteti’s view, the appellant’s failure to deliver the 27 bags of beans amounted to a false pretence because the appellant pretended to have 53 bags for sale.

On sentence, Mr. Muteti submitted that eight (8) months’ imprisonment was not excessive in the circumstances when compared with the maximum sentence of three (3) years’ imprisonment.

In the case before me, it is alleged that the appellant, with intent to defraud, obtained from the complainant the sum of Kshs. 59,400/= by falsely pretending that she would buy him 27 bags of beans valued at the said sum of Kshs. 59,400/=. Applying the law and the principles enunciated in cases I have referred to herein, it seems to me that the intent here referred to a future event which does not fall under the provisions of the law now under consideration. Secondly, the court is not persuaded by the complainant’s story that he bought 53 bags of beans and carried away 26 and only sent for the balance some 3 weeks later. The complainant told the court that on the very day he bought the beans, he rushed to Meru to look for transport but does not satisfactorily explain what happened to that transport until three weeks later. The evidence on record shows that the complainant went to the appellant’s store with a lorry KAD 104K onto which the 26 bags of beans were loaded.

A closer look at the evidence given by the appellant and her witness seems more likely than that given by the complainant and his witnesses. This is a case in which the complainant tried to get even with the appellant when she asked him about the various amounts of money he had taken from her, including loan funds which he had refused to pay.

In the result, I am in agreement with learned counsel for the appellant that the learned trial magistrate did not give a proper interpretation to the charge and that the charge against the appellant was not proved beyond any reasonable doubt. It is also clear that if the learned trial magistrate had carefully considered the appellant’s defence, he would have found that the same completely dislodged the prosecution’s evidence against the appellant.

In the result, I find that the appellant’s appeal has merit. The same is allowed. The conviction is quashed and the sentence of eight (8) months’ imprisonment imposed upon the appellant is set aside. Unless otherwise lawfully held, the appellant is to be set free from prison custody forthwith.

Orders accordingly.

Dated and delivered at Meru this 26<sup>th</sup> day of July, 2006.

**RUTH N. SITATI**

**JUDGE**