



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 476 of 2006

(From original conviction (s) and Sentence(s) in Criminal Case No. 4570 of 2006 of the Chief Magistrate's Court at Makadara (Mrs. G.L. Nzioka – PM.)

MILDRED KARAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

MILDRED KARAGA was convicted on her own plea of guilty to the offence of **OBTAINING MONEY BY FALSE PRETENCES** contrary to **Section 313** of the **Penal Code** and sentenced to 2 years imprisonment on 22/8/06. The Appellant was not satisfied with the conviction and sentence and therefore lodged this appeal.

The Appellant has two grounds of appeal.

- 1. That the learned trial magistrate erred in convicting the Appellant when it was clear the plea was not equivocal.**
- 2. That the sentence was excessive in the circumstances of the case.**

The facts of the prosecution case were given as follows: -

“Prosecutor: On diverse dates between 5th November 2004 and 22nd August 2005 the accused introduced herself as an employee of Touch Africa Wamalwa Foundation and they import motor vehicles from Dubai. The complainant developed an interest to purchase a motor vehicle, a Nissan Matatu. The accused asked for a deposit and the complainant paid Kshs.200,000/-. She continued paying until the money reached Kshs.678,500/- After paying the accused failed to give her the motor vehicle and to date the motor vehicle has not been given to the Complainant. She was purchasing a Nissan matatu and a saloon motor vehicle. To date the money has not been refunded. She was arrested and charged.”

Mr. Nganga appeared for the Appellant and argued this appeal on her behalf. The Respondent was represented by **Miss Wafula** State counsel. The State opposed the appeal.

Mr. Nganga, in support of the first ground of appeal, submitted that the plea was not unequivocal. Counsel submitted that the offence was coined in technical sense, which the Appellant could not

understand. That the facts of the prosecution did not show that the Appellant had an intention to defraud. **Miss Wafula** for the State submitted that the plea of guilty was unequivocal because it was neither vague nor ambiguous. Counsel submitted that the Appellant clearly admitted to having received the money at the time she gave her mitigation. **Miss Wafula** also submitted that under **Section 348** of the **Criminal Procedure Code** the Appellant had no right of appeal having pleaded guilty to the charge.

I will start at the point where **Miss Wafula** ended. The Appellant had no right to appeal unless she was challenging the conviction on the basis that the plea of guilty was equivocal. That is the Appellant's first ground of appeal in this case and therefore the Appellant had brought herself within the exemption to the bar to appeal contained in the said provision. The appeal was therefore properly before the court. **Mr. Nganga** did not expound clearly why the plea of guilty was equivocal except to say plainly that the intention to defraud was not established in the facts given by the prosecution. The prosecution had a duty to demonstrate in the facts supporting their case:

One, that the Appellant obtained Kshs.678,500/-

Two that the appellant had an intention to defraud at the time she obtained the said money.

Three that the Appellant was in no position to purchase two cars or

Four the Appellant had no intention to purchase the said vehicles.

I have already outlined the facts of the prosecution in this judgment. These facts were that after the Appellant obtained the money she failed to supply the vehicle. That failure needed to be brought within proof of fact that it was occasioned by no other motive than the Appellant's intention to defraud the Complainant of her money. From the facts of the prosecution case, the Appellant set herself out as a businesswoman. There is no allegation that she was falsely pretending to be one. She set out herself as working for a Foundation which purchases vehicles. There was nothing said in those facts to suggest that the Appellant did not work at the said Foundation or that the Foundation did not deal with importation of cars. The Appellant's failure to supply a vehicle as agreed, looked at in the circumstances of the case was not proved to have been motivated by fraud or intention to defraud. Those facts were ambiguous, wanting and did not therefore disclose the offence charged.

As **Miss Wafula** stated in her submission, the Appellant admitted taking the money. In a charge of obtaining money by false pretences, under **Section 313** of the **Penal Code**, it is not the taking of the money which is wrong but the intention to defraud. Mere admission that the Appellant took the money in order for her family not to suffer is neither here nor there. In any event, at the time the "admission" was made, the Appellant had already been convicted based on the facts given by the prosecution. The admission cannot be viewed as strengthening the said conviction.

Having considered this appeal, I find that the plea of guilty was equivocal and cannot be allowed to stand. I will allow the appeal and set aside both the conviction and sentence. This is a fit case for a retrial. The Appellant will not suffer any prejudice. She has been in prison for 2 months only. I believe that it is in the interest of justice that the case goes back to the lower court for a retrial. In the circumstances, I order that there be a retrial. The Appellant shall remain in custody until 3rd November 2006 when she should be produced before Makadara Chief Magistrates Court for a plea in the self same charge.

Dated at Nairobi this 1st day of November 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Nganga for the Appellant

Miss Wafula for State

CC: Tabitha

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LESIIT, J.

JUDGE