



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 183 OF 2004**

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO.**

**2976 OF 2003 OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT**

**KIAMBU**

**JAMES MBUGUA NDEKERE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, **JAMES MBUGUA NDEKERE**, was convicted for the offence of **FRAUDULENT PRETENCE OF MARRIAGE**, contrary to Section 170 of the Penal Code. He was then sentenced to two years imprisonment.

In his appeal against both conviction and sentence, the appellant contends that he was wrongly convicted. He says that he had not pretended to have married the complainant. In his view, he was definitely married to the complainant, and had stayed with her for a period of two months. He had sent the complainant home only temporarily, following some domestic problems, he said.

When canvassing the appeal, the appellant explained that even after he had been convicted and jailed, the complainant continued to visit him in prison. In other words, as far as he is concerned the relationship as between him and the complainant continues to be that of a husband and a wife.

The appellant contends that the only mistake he made was the failure to notify the complainant's parents of his intentions, before he started living with her, as his wife. It was now the appellant's plea that he be pardoned, so that he could have an opportunity to provide for his young family.

In response to the appellant's submissions the learned State Counsel, Mrs. Toigat informed the court that she had been inclined to oppose the appeal. However, after giving the matter some further consideration, especially in the light of the appellant's submissions, Mrs. Toigat felt that the appeal may be merited, after all. In particular, the learned State Counsel noted that during the appellant's mitigation, he had notified the learned trial Magistrate that he had since visited the complainant's parents, to ask them for their daughter's hand in marriage. According to the appellant, the complainant's parents had given him their consent.

While giving consideration to the issues raised in this appeal, I first thought it necessary to set out herein, the wording of the statutory provision which spells out the offence of **“Fraudulent Pretence of Marriage”**. The said provision is to be found in Section 170 of the Penal Code, which is worded as follows:

***“Any person who wilfully and by fraud causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him is guilty of a felony and is liable to imprisonment for ten years.”***

The question I have to ask myself is whether or not the appellant had wilfully and by fraud, caused PW1 to believe that she was his wife.

From the evidence of PW1, it is clear that the appellant persuaded PW1 to stop working as a house help for his neighbour, and to move into his house, so that the two could stay together as a husband and wife. PW1 complied, and moved into the appellant’s house, where she stayed for about three-and-a-half (3 ½) months. At that point in time, PW1 fell ill, and asked the appellant to take her to a doctor, but he declined. Instead, he told PW1 to go back home. When PW1 refused to return to her parents home, the appellant threw out her belongings. PW1 also said that the appellant not only declined to see her parents, but also declined to introduce her (PW1) to his parents. It is in those circumstances that the appellant was arrested and charged. To my mind, the evidence given by the complainant, up to that point, would definitely support the appellant’s conviction. He had caused the complainant to believe that she had become his wife. The appellant cohabited with the complainant. That alone was sufficient to found conviction. But he even went further, to have sexual intercourse with the complainant, which resulted in her becoming pregnant. By so doing, the appellant had committed another act which was sufficient to found conviction.

Having said so, however, I also note that when the appellant was called upon to take a plea, he said:

***It is not true. I have not lied to her. I still love her and would like to have her as my wife. She is expecting my child. I had made arrangements to visit her parents.”***

Thus, as far as the appellant was concerned he had neither wilfully nor fraudulently led the complainant believe that she was his wife.

The evidence adduce by the complainant seemed to suggest a different story altogether. However, I also note that when the trial was due to start, the appellant sought an adjournment, so that he could discuss the issue with the complainant’s parents. By that action, the appellant was not portraying the conduct of a person who was just leading the complainant up the garden path.

The learned trial magistrate granted the adjournment sought by the appellant, and allowed him a week. Thereafter, the case started and PW1 testified. Then, in cross-examination PW1 said:

***On 17.12.04 you escorted me up to Thika and told me to go home. You told me to tell my parents you would come to see my parents after 2 weeks.”***

From that answer, I cannot discern any wilful intention, on the part of the appellant, to mislead the complainant. If anything, it was suggestive that the appellant had a noble intention.

But then when the court allowed the appellant time to go and see the complainant’s parents, he did not keep his word. Both PW2, Irene Wairimu Ndungu (PW1’s mother) and PW3, Peter Ndungu Muchemi (PW1’s father) said that the appellant did not go to see them.

But when cross-examining PW3, the appellant got him to admit that he (PW3) was reluctant to allow PW1 to go live with the appellant, informally. The appellant also said that his mother was sick, at the time when he was supposed to have been having a chat with the complainant’s parents.

Later, in his defence, the appellant said that he was arrested whilst still waiting for the date of the

scheduled reconciliatory talks with the complainant's parents. He also said that during the adjournment (when the court gave him an opportunity to reconcile with PW1's parents), his ailing mother finally succumbed to her ailment, and passed away.

As regards his abandonment of the complainant at Thika, the appellant explained that he was completely scared of facing the complainant's parents, on his own. He decided that he needed time to organize for other people to accompany him to the complainant's home.

Finally, after his conviction, the appellant said, in his mitigation, that he had already been to the home of the complainant, and that her parents had consented to giving him their daughter's hand in marriage.

To my mind, the conduct of the appellant was consistent all through. He made a mistake by taking the complainant as his wife, without first talking to her parents. But even before he was arrested, the appellant had told the complainant that he intended to go and see her parents. Thereafter, when the appellant was charged with the offence, he told the court that he had every intention to marry the complainant. He reiterated that intention, both in his defence and in his mitigation. In those circumstances, I find that there is a very real probability that he genuinely desired to have the complainant as his wife. I therefore hold that it would be unsafe to uphold conviction. However, the appellant must be told, in no uncertain terms, that this has been a very close call. But, this court is ready to give him the opportunity to prove himself. He must nonetheless appreciate that there is a serious danger for any two people, wishing to get married, to do so informally. The lady risks being abandoned altogether by the man, although there might also be scenarios in which the man gets abandoned. But, there is also the possibility that if the man does not honour his word, he may well find himself behind bars. Perhaps this case will serve as a lesson for all those men and women who might be living in "come-we-stay" relationships. It is in your own best interests to clothe your relationship with legality.

In conclusion, I do hereby quash the appellant's conviction and set aside the sentence. I direct that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

It is so ordered.

Dated at Nairobi this 4th day of May, 2005

**FRED A. OCHIENG**

**JUDGE**

**Delivered in the presence of:**

**For State**

**Appellant in person**

**Mr. Odero Court Clerk**