

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO. 100 OF 2004

JOSEPH MUTURI KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant seeks bail pending Appeal.

2. In lengthy Submissions before me, the Applicant's Counsel argued that there were no sufficient grounds for convicting the Appellant of the offence of obtaining money by false pretences. That for that offence to be proved, there must be an existing fact which is shown to be false and known to be false by the person being charged. In the case before the lower court, the Applicant was accused of obtaining Ksh.83,276/= purportedly to enable him connect electrical power to the complainant's house. This was, a future event and not a present existing fact and the offence cannot attach even if true.

3. Secondly, a number of contradictions in the evidence of the witnesses as regards receipt of the money were pointed out. For example, it is said that it was not clear when the money was given to the Applicant as PW5 denied seeing the exchange while PW1 said that she was with PW5 when the money was given to the Applicant. The other contradiction was with regard to a receipt for the money. It was issued in the name of Kenya Power and lighting Co. Ltd with certain alterations. PW3 said that he was the custodian of that of that receipt but no explanation for the alterations to it were made and how anyone else accessed it. These matters, I was told were material to the charge.

4. Counsel for the Republic poured cold water on all these assertions and insisted that the definition of the offence of obtaining money by false pretences as cited from **Archbold on Criminal Pleadings Evidence and Practise 25th Edition by Butler and Garsia** was correct and fitted the charge facing the Applicant. As regards the contradictions cited, those I was told were immaterial in the end and the Applicant was correctly convicted.

5. I have listened to the Submissions by Counsel and read the record of the lower court. I am satisfied that the Appeal is not frivolous and there certainly is something to be argued in substance. The technical definition of the offence as against the facts would make for a good case, and I say so guardedly and without making any determinant finding.

6. I shall exercise my discretion, and grant bail pending appeal in the sum of Ksh.50,000/= together with one surety of a similar amount. The surety to be approved by the Deputy Registrar of this Court.

Orders accordingly.

Dated and delivered in open court on this 25th day of November.

I.LENAOLA

AG. JUDGE

Mr.Momanyi for Mr. Okwaro for Applicant

Mr. Omwega for Republic.

I.LENAOLA

AG. JUDGE