

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.183 OF 2002

(From Original conviction and sentence in Criminal Case

No.661 of 2000 of the Chief Magistrate's Court, Mombasa)

JUMAA GANADZA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Jumaa Ganadza, the appellant, was convicted of the offence of Obtaining by false pretences contrary to Section 313 of the Penal Code in that on the 7th December 1999 at Kolongoni Village in Kilifi District within Coast province, with intent to defraud, obtained KSh.53,000/- from Kahindi Chande by falsely pretending that ***“You will sell to him two coins of Queen Elizabeth II”***. He was fined KSh.20,000/- in default he was ordered to serve twelve months imprisonment. This appeal filed through M/s Khatib & Co. Advocates is against both conviction and sentence.

Mr. Khatib advocate, at the outset, has pointed to the court that the prosecution of the case was conducted by unauthorised public prosecutor, one Police Constable Mukonesi, contrary to the provisions of Section 85(2) of the Criminal Procedure Code, a matter which Miss Kwena, learned State Counsel, has conceded.

A Criminal trial in which unauthorised public Prosecutor conducts the prosecution's case is a nullity and a conviction recorded against an accused person in such a trial is unlawful. Therefore the trial of the appellant was a nullity and the conviction recorded against him is unlawful.

There is a second reason why this conviction is unlawful. It is based on a fatally defective charge by reason of the fact that the alleged false pretence relates to a future transaction contrary to section 312 of the Penal Code which defines a false pretence to relate only to either a past or present matter of fact in the following terms:-

“Section 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.”

The false pretence or false representation recorded in the particulars of the offence in the charge sheet relates to a matter of fact of the future in the following words:

“by falsely pretending that you will sell to him two coins of Queen Elizabeth II.”

On these two legal points this appeal succeeds, the conviction of the appellant is quashed and the sentence is set aside. If the fine of Sh.20,000/- was paid, it is to be refunded forthwith to the appellant.

Miss Kwena has applied for a retrial. However, as I have held herein above the charge was fatally

defective. Besides the transaction was purely of a civil nature between the appellant and the complainant. I consequently decline to order a retrial.

Dated this 17th September 2003.

A.G.A. ETYANG

JUDGE