



REPUBLIC OF KENYA



**Republic v Kinyua (Criminal Appeal E029 of 2023)
[2025] KEHC 13230 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E029 OF 2023
EM MURIITHI, J
SEPTEMBER 25, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

JAMES MAINA KINYUA RESPONDENT

*(Being an appeal for the judgment of Chief Magistrate Alex Ithuku
delivered on 19/7/2023 in Kerugoya CMCR No. 817 of 2020)*

JUDGMENT

1. The Appellant being aggrieved and dissatisfied with the Judgment of Hon. A. K. Ithuku, Chief Magistrate, delivered on 19th July, 2023 in Kerugoya Criminal Case No. 817 of 2020, appeals against the conviction and sentence on grounds that:
 1. The learned Magistrate erred in Law and fact in failing to consider the weight of the evidence by the appellant and ended up with the wrong finding.
 2. The learned Trial Magistrate erred in law and fact in failing to find there was reasonable grounds to convict the Accused Person.
 3. The learned Trial Magistrate erred in law and fact by failing to take into consideration / credibility of the circumstances under which the Accused Persons was charged.
 4. The entire judgement and subsequent acquittal is misleading and is against the weight of evidence against the principles of a fair trial and natural justice.

Brief facts

2. The accused herein was charged with obtaining good by false pretenses Contrary to Section 313 of the Penal Code. The Particulars are that on diverse dates between 13th July, 2020 and 6th August, 2020 at



Kagumo Township within Kirinyaga County the accused person with intent to defraud obtained shop goods worth Ksh.86,1707= from Alpha Shop Owned By Ann Nyawira Wangechi by falsely pretending that he was in a position of sending amount through MPESA a fact he knew was false.

3. The prosecution called three witnesses. In defense the accused person gave a sworn statement and called two witnesses.
4. The judgement was delivered on 19th July, 2023 and the accused was found not guilty and hence acquitted under section 215 of the Criminal Procedure Code.

Prosecution Case

PW1- Ann Nyawira Wangechi

5. She is the complainant. She sells miraa. She testified that on 13.7.2020 the accused person visited her shop as a customer. He was a regular customer. He took Miraa and promised to pay through Mpesa Payment system. That he also bought goods valued at Kshs. 32,800/=. They usually record in a sales book.
6. After one month she confirmed that he had not paid. Its receipt no. 5775. It's for kshs 3,510. Receipt no 5778 is for kshs 2, 950. It was her testimony that the total amount owing was Kshs. 80,000/=.
7. In Cross examination, she denied that the shop is owned by one Wilson Mwangi. He was a customer. She said that the receipts and books were filled by her workers. They are Loice, Njeri and Phoebe, the Accountant. She did not write the receipts and debt book. She gave the police the receipt books. The accused did not sign the debt book. He did not sign the delivery note. She got to know the accused person debt in August, 2020. She knows the accused's wife. She is a customer (witness shown Mpesa statement). It shows that he sent her kshs 4000 in October, 2020.

PW2- Phoebe Wamutira

8. She works for PW1 in the accounts section of the complaint's shop. On 13th July, 2020 a customer by the name of James Maina said that he was to pay through MPESA. In August, he got goods worth kshs 30,000. He did not pay. He promised to pay by MPESA. On 16th August, 2020 he paid kshs 7,500. The balance of kshs 6,080. Was to be paid by MPESA. It was to be paid. The total was kshs 86,170.
9. On cross-examination, she said that she knew the accused person and his wife. She said that receipt books were filled by Njeri. Loise was issuing receipts. The two were also writing on the debt book. She did not know who wrote the receipts in cash she did reconciliation daily. She said in case a customer paid for goods that are not paid in the store they refund. She did not see any signature by the accused committing to pay any debt. She was not filling any written reconciliation reports.

PW3 – PC Peter Njuguna

10. He is the investigating officer. It's a case of obtaining goods by false pretense. The goods were worth kshs 86,170. The accused obtained them from the complainant's shop in 2020. On 13th July, 2020 he took goods worth 32,820. He had a receipt from the shop. The receipt dated 21st July, 2020 he took goods worth kshs 30,050. On 6th August, 2020 he took goods worth kshs 13, 800. The accused had claimed to have paid through Mpesa but the statement showed kshs 4,900 was paid. The money was deposited by the accused. He was to pay kshs 23, 900. After this payment kshs 86, 170 remain unpaid. All the receipts are indicated "to pay" MFI 5 shows that he paid kshs 7000. He produced the receipts as exhibits.



11. On cross-examination, he said that he did not know who wrote the debt book. It is not Phoebe. He only recorded a statement from Phoebe. He knew that he could get Safaricom liason office to get information. He knew that the court could ask. The agency called Kinokia sent money to Wamutira. The accused has not signed anywhere to commit to payment. He did not know the process of approving credit in the shop. He did not know who releases the goods.

Defence case

Dw1 – James Maina Kinyua

12. The accused person denied the charges in a sworn statement.
13. He stated that he is a businessman. He operates a shop at a place called Ndiriti. That he operates the shop with his wife, Pauline Muthoni. He stated that he used to buy goods from the complainant in cash. Never on credit. That sometimes goods paid for but was not available in the store. The complainant would refund the money by cash or Mpesa. She refunded through his wife's numberXXXXXXXXXX. She refunded on 7th October, 2020. He has never had any goods on credit.
14. He had receipts showing some of the payments he made. They are stamped with his name Mwereni. The receipts that were produced did not have stamps. He did not know about the books produced by the prosecution. He did not sign them. He has no debts.

Dw2- Pauline Muthoni Maina

15. The accused is her husband. They bought goods from Alpha shop. They bought on cash or Mpesa. The statement shows that the complainant sent her Ksh.500 and 3,550. She was refunding her. She was paying for the goods that were missing in his shop. On cross-examination, she said that Mwireri was her husband. She knew the complainant. They run an Mpesa business.

Dw 3- Sgt. Mary Wambui

16. She performs general duties at Kagumo Police Station. She had OB No. 3/17/10/2020. The reportee was James Maina Kinyua. He reported a threat. She produced it as exhibit 6.

Appellant submissions

17. The appellant submits that the elements to the instant case is evident through the testimony of the three Prosecution Witnesses that goods worth ksh.86,170 were obtained by the respondent on the understanding that he was to pay for them. Moreover, the said evidence was unchallenged by the appellant.
18. It's the Appellant's submission that Pw 2 an accountant of the said Alpha shop testified that the respondent obtained the subject goods. The witness also produced documentary proof vide receipts and cashbook that were produced as P-exhibit 1 to P-Exhibit 3. The Appellant therefore submits that it was erroneous for the trial court to hold that there was no evidence to suggest that there was an existing debt between the parties and non-payment of the same. Citing section 143 of the *Evidence Act* and the case law authority of *Bukenya & Others v. Republic (1972) EA 549*, it was urged that the Prosecution had proved the case by sufficient evidence on the number of witnesses called by the Prosecution.
19. Lastly, the appellant reiterates that the trial court misdirected itself by basing its acquittal on a document (M-Pesa statement) that was remote and immaterial to the charge. The two other witness account was of no probative value irrelevant to the case at hand.



Respondent submissions

20. As at 11/9/2025, there were no submissions on record.

Issues

21. Whether the offence of obtaining goods by false pretences had been proved against the accused beyond reasonable doubt.

Analysis

22. The duty of the first appellate court is well settled it was held in the case of *Okeno vs. Republic* (1972) EA 32 to reevaluate the evidence tendered before the trial court afresh, and draw to its own independent conclusion of the matter bearing in mind that the trial court had the advantage of observing the demeanor of witnesses.

23. Needless to state as observed by the Court of Appeal in *Pius Arap Maina v Republic* [2013] eKLR “[T]he prosecution must prove a criminal charge beyond reasonable doubt and, as a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”

24. Section 313 of the Penal Code provides for three ingredients of the offence of obtaining by false pretences, namely: (1) obtaining something capable of being stolen; (2) by false pretence and (3) with intent to defraud, as follows-

“Any person who by 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 triable to imprisonment for three years.”

25. I have noted the decision of the Court in *Gerald Ndoho Munjuga v Republic* [2016] KEHC 6508 (KLR) (Mativo J.) where it was held in similar terms that “The offence of obtaining by false pretence means knowingly obtaining another person’s property by means of a misrepresentation of fact with intent to defraud. For the offence of obtaining by false pretences to be committed, the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen.

26. The first element of the subject offence that needed to be proved is whether the Appellant obtained something capable of being stolen.

27. The appellant case is that the PW1 had a business relationship with the respondent. He was a regular customer and she could supply him goods on credit. PW1 states that goods were obtained by credit by the respondent and he did not pay.

28. PW1- She testified that on 13.7.2020 the accused person visited her shop as a customer. He was a regular customer. He took Miraa and promised to pay through MPESA PAYMENT system. That he also bought goods valued at Kshs. 32, 800/= . They usually record in a sales book.

29. On cross-examination she said that the accused did not sign the debt book for kshs 80,000.

30. PW2- On cross-examination, she said that she knew the accused person and his wife. She said that receipt books were filled by Njeri. Loise was issuing receipts. The two were also writing on the debt book. She did not know who wrote the receipts in cash she did reconciliation daily.



31. The second element for the offence of obtaining money by false pretences is to demonstrate that there was false pretence. A false pretence is defined in section 312 of the Penal Code as follows: “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.”
32. PW3 testified that the accused took from the complainant’s shop goods worth ksh.86,170. On 13th July, 2020 he took goods worth 32,820. He had a receipt from the shop. The receipt dated 21st July, 2020 he took goods worth ksh.30,050. On 6th August, 2020 he took goods worth ksh.13, 800. The accused had claimed to have paid through Mpesa but the statement showed Ksh.4,900 was paid.
33. The accused has not signed anywhere to commit to payment or to acknowledge the debt.
34. In his defence, DW1 testified that he used to buy goods from the complainant in cash and never on credit and that sometimes goods paid for but was not available in the store, and the complainant would refund the money by cash or Mpesa. She refunded through his wife’s numberXXXXXXXXXXXX. She refunded on 7th October, 2020. He has never had any goods on credit.
35. The accused’s wife DW2 testified that they bought goods from the complainant’s shop on cash or Mpesa. The statement shows that the complainant sent her Ksh.500 and 3,550. She was refunding her. She was paying for the goods that were missing in his shop. Further, the investigating officer did not get a Safaricom Officer to produce the Mpesa statement.
36. There is no evidence of the Respondent’s indebtedness to the complainant. PW2 did not record the debt owed by the Respondent in the reconciliation report. PW2 evidence on cross-examination goes along way to shown the unhappy state of evidence that the Court was presented with and asked to convict the accused:

“Cross Examination By Mr:"magee

I know the accused person. I also know his wife. We were 12 workers in the shop. Receipt book was filed by Njeri. Loise was issuing receipts. The two were also writing on the debt book. It is a book not loose leaves. Lois and Njeri are the ones who know who is pay cash or on credit (witness is referred referred to MFI 4). I cannot know who write the receipts in cash. I do reconciliation daily. I do not know who wrote to pay. "Cash Sale" means money paid. It could mean paid. MFI 2 says cleared on 5.8.2020. The money was not paid in MPESA. PW1was the cashier. Any payments through MPESA is put on debt book even when paid directly. Money through MPESA goes to PW1. There is no till number. Upon payment the receipt was given to store keeper. The store keeper records in a book. I do not reconcile the record from store with payment. The MPESA statement goes up to 6.8.2020. We get MPESA statement after 3 months. If a customer pays for goods that are not paid in the store we refund. I did not see any signature by the accused committing to pay any debt. I was not filing any written reconciliation reports.”

It showed great failure in accurate maintenance of the books of accounts section of the complainant and it was wholly unsatisfactory to demonstrate any existence of debt and or false promise to pay with intent to defraud. The Court notes, complainant’s employees Loise who was ‘issuing receipts’ and ‘Njeri who filled the Receipt Book’ and both ‘who were also writing on the debt book’ and ‘who knew who is pay cash or on credit’ (according to PW2) were not called as witnesses and it is justified to make an inference that their evidence would have been adverse to the Prosecution’s case. See *Bukenya & Others*, supra, cited by the prosecution.



37. In fact, the Court notes the pages of the debt book produced as ex 1, 2, 3 and cash sale receipts Pex 4 & 5 all showing monies paid in Mpesa and cash by Mwireri which does not support existence of any debt. In the circumstances, it cannot be said that the appellant proved beyond reasonable doubt that respondent obtained goods from the Complainant by false pretences.
38. There being no sufficient evidence of obtaining goods by false misrepresentation, there is no occasion for consideration of the element of intent to defraud.
39. It would be unsafe to convict in such evidence.

Orders

40. Accordingly, for the reasons set out above, the Court finds that the DPP's appeal fails and it is dismissed.
Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for DPP/Appellant.

Ms. Ndwiga for Mr. Magee for the Respondent.

