



**Mutemi v Republic (Criminal Appeal 28 of 2023)
[2024] KEHC 3548 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 28 OF 2023
DR KAVEDZA, J
APRIL 15, 2024**

BETWEEN

MICHAEL MUTINDA MUTEMI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. C. Mwaniki (P.M) on 29th June 2023 at Kibera Chief Magistrate's
Court Criminal Case no. 1101 of 2019 Republic vs Michael Mutinda Mutemi)*

JUDGMENT

1. The background of the case is a complainant who alleged that the appellant deceitfully and fraudulently presented himself as an advocate and obtained money from her. This misrepresentation purportedly conveyed the impression of the appellant's capacity to represent her in court in various legal matters before the court. The narrative is entwined in a case of betrayal of trust and justice denied.
2. The appellant was charged with seven (7) counts of offences. In Count 1, he. was charged with the offence of obtaining money by false pretenses contrary to section 313 of the *Penal Code* (cap 63) Laws of Kenya; in Counts II, IV, and VI. he was charged with the offence of Forgery contrary to section 345 as read with section 349 of the *Penal Code* (cap 63) Laws of Kenya; Counts III, V and VII he was charged with the offence of Making a document without authority contrary to section 357(a) of the *Penal Code* (cap 63) Laws of Kenya;
3. After a full trial, he was convicted on all seven counts. He was sentenced to serve 18 months on count I, and 12 months imprisonment on counts II, III, IV, V, VI, and VII. The sentences for all counts except Count I are to be served concurrently.
4. Being aggrieved he filed an appeal dated 1st August 2023, challenging his conviction and sentence. In his memorandum of appeal, the appellant raised 12 grounds which have been coalized as follows: He



challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.

5. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)
6. The prosecution called four (4) witnesses in support of their case. The complainant Juliet Kamwara encountered the appellant in Thika in 2017 in the company of PW2, where he presented himself as an advocate. Their interaction led to ongoing communication. In 2018, with a case pending at Thika Law Courts, she sought assistance from the appellant. He advised her to replace her current advocate and offered to handle her case and file it afresh in Nairobi for Ksh. 90,000, with Ksh. 20,000 as legal fees and Ksh. 70,000 as court filing fees. After withdrawing the money from the bank, she paid the appellant in cash. He provided a court receipt indicating payment and presented pleadings with her name as the plaintiff and Bernard Kimani Mbogo as a defendant.
7. She informed the court that she hadn't signed any of the pleadings despite their bearing her name. Subsequently, she frequently met with the appellant. During these encounters, she paid him money via Mpesa and in cash, believing it to be legal fees for her case.
8. On July 31, 2019, they attended the hearing at Nairobi's Milimani Commercial Court. When her case was called, she stood up, while the appellant, seated behind her, passed her a note with instructions. When asked if she had legal representation, she claimed she did, believing it was the appellant. However, the appellant left the courtroom. The presiding Magistrate advised her that her pleadings were improperly prepared and suggested she seek competent legal representation, leading her to realise he was not a genuine advocate. Consequently, she reported the matter at Capitol Hill Police Station.
9. Joyce Njeri (PW2) testified that on September 19, 2018, she witnessed her friend (PW1) handing over Ksh. 100,000 to Michael at Buffalo Hotel. She stated that the money was for legal services he was to offer. PW2 was also present at Milimani Commercial Court when the complainant realised Michael was not an advocate. Her account matched PW1's testimony.
10. Corporal Mwalimu Hakim (PW4) from Capitol Hill Police Station initiated an investigation following a report by PW1 on August 5, 2019. He documented statements from PW1 and her witness and collected documents prepared by the appellant for her cases. PW1 provided Mpesa statements as evidence of money transfers to the appellant's phone number (0721993920) and proof of cash withdrawals, some of which she had paid to him in the presence of her witness. The appellant was arrested and interviewed, and he denied any wrongdoing, claiming to be a court process server and refuting unauthorized document signing. He told the court that the appellant refused to provide sample signatures, and PW4 sought forensic analysis. He obtained known signatures from the complainant and submitted them with the pleadings to a document examiner for evaluation.
11. Police Corporal Martin Kitai conducted a forensic examination of the document and compared the signatures on it with the known samples submitted. Upon analysis and comparison of Juliet's (PW1) known and specimen signatures with those on the pleadings, he determined that they were not made by the same hand. He detailed his methodology and presented his report as an exhibit.
12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave sworn testimony and told the court he was a court process server and acknowledged familiarity with the complainant, having first encountered her on October 14, 2017, when serving her with pleadings for civil case number 1170 of 2016, in which she was one of four



defendants. Subsequently, on January 22, 2018, she engaged his services again for the process of serving in Mlimani Civil Case No. 100 of 2018, which involved two defendants. He accompanied her for service and prepared an affidavit accordingly, for which she compensated him. He emphasized that his name neither appeared in the pleadings for the case, except in the affidavit of service, nor on the deposit slip for court filing fees or the subsequent receipt. Additionally, he asserted that the complainant had contracted him for court process serving services in various matters across Kenya, and the money received was remuneration for work done. He criticized the prosecution for failing to provide any "plaint order" referenced in counts 2 and 3.

13. This court has re-evaluated the facts of this case. It has also re-evaluated the rival submissions made by parties to this appeal. Section 313 of the *Penal Code* (Cap 63) Laws of Kenya provides that;

“Any person who by any 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 misdemeanour and is liable to imprisonment for three years.”

14. The prosecution is required to establish that the appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud. In the present appeal, it was the prosecution's case that the appellant presented himself as an advocate and fraudulently obtained money from her totaling Kshs. 366,510. The appellant disputed the transaction arguing that the money received was for services offered as a court process server. It is therefore not in dispute that the money changed hands between the complainant and the appellant. The money received was therefore something capable of being stolen. All in all, the appellant maintained that there was no fraud involved.
15. The second ingredient for determination was whether the money was obtained by false pretenses and with the intention to defraud. From the record, the prosecution evidence was that the appellant falsely presented himself as an advocate and took instructions from the complainant, and went ahead and filed a suit on her behalf. He also received legal fees to that effect. The evidence that the appellant received money from the complainant is corroborated by the evidence of PW 2, who was present when the appellant received Kshs. 100,000 from the appellant. The documentary evidence of the other transactions is documented in the mpesa statement produced as exhibits.
16. On the intention of the funds, the appellant argued that it was for services offered as a process server. When questioned why the amount was a large sum, he argued that the process service fees varied depending on the location of the service across the country.
17. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not a false pretence if it is made in relation to the future even if it is made fraudulently. Where, however, the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false. Perhaps the most explicit exposition of the ingredients of the offence of obtaining by false pretences is to be found in the decision rendered by the Nigerian Supreme Court on Friday April 2006 in the case of *Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria* SC 41/2003 where the court stated as follows:-

“In order to succeed in a charge of obtaining by false pretences, the prosecution must prove:-
that there is a pretence;
that the pretence emanated from the accused person;



that it was false;

that the accused person knew of its falsity or did not believe in its truth;

that there was an intention to defraud;

that the thing is capable of being stolen;

that the accused person induced the owner to transfer his whole interest in the property.”

The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest belief in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence.

The above adequately presents the law as in the *Penal Code*.”

18. The key question is, does the defence offered by the appellant in the lower court raise doubts as to his guilt? Does it rebut the above ingredients? Is it reasonable in the circumstances? In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt.
19. In my assessment, the appellant's explanation lacked reasonableness and failed to counter the compelling evidence presented by the prosecution. The appellant asserted that he solely served as a process server. However, the monetary compensation he received for these purported services greatly exceeded what could be considered reasonable. Even according to his own admission, the minimum charge he imposed was Kshs. 3000. Yet, the documented payments exceeded this amount by over 100 times. Considering the evidence presented, I find the appellant's defense to be highly improbable and challenging to accept.
20. After weighing the explanation offered by the appellant and the prosecution evidence, I find that the prosecution evidence is truthful, credible, and probable as opposed to the highly improbable defence offered by the appellant. The appellant's defence did not raise any reasonable doubts on the prosecution case on count I.
21. On counts II, IV, and VI the appellant was charged with the offence of Forgery contrary to section 345 as read with section 349 of the *Penal Code* (cap 63) Laws of Kenya. He was accused of forging the complainant's signature on the plaint, and verifying affidavit and witness statement.
22. Forgery is defined in section 345, as “the making of a false document with intent to defraud or deceive.” The prosecution was required to prove beyond reasonable doubt that the appellant forged the complainant's signature on the various pleadings presented before court; that it was false and that it was intended to defraud.
23. The prosecution presented testimony from a forensic document examiner who received an exhibit memo from the investigating officer along with signature specimens. These specimens, obtained from the complainant, were found not to correspond with the signatures on the court-filed pleadings. The examiner's report unequivocally concluded that the signatures were incongruent. This substantiated the complainant's claim that she did not authorize her signature on the pleadings supplied by the appellant. She maintained that the documents originated from him, leading to the logical inference that he affixed the signatures. Moreover, the appellant's refusal to furnish sample signatures further cast suspicion on his involvement and culpability. The said signatures if he was indeed not culpable would ultimately remove any doubt of his involvement in the offence he was charged with.



24. In my view, the trial court was right in finding the appellant culpable for the offence of forgery in counts II, IV, and VI.
25. In counts III, V, and VII, the appellant was charged with the offence of making documents without authority contrary to section 357 of the *Penal Code*. The offence of making a document without authority is provided for in section 357 of the Penal Code as follows:
- “ 357. Any person who, with intent to defraud or to deceive –
- (a) without lawful authority or excuse makes, signs, or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or
- (b) knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.”
26. That offence is committed by the making, signing or executing a document, electronic record or writing, for or in the name of another person. In addition, the making, signing or execution must be without lawful authority or excuse, and with the intent to defraud or deceive. As earlier stated, PW4 testified as having examined the pleadings in court and confirmed that the signatures appended thereon were forgeries. In addition, the complainant denied signing the said documents.
27. Furthermore, the pertinent documents under scrutiny, namely the plaint, verifying affidavit, and witness statement, bear the name of the complainant. These documents were provided to the complainant by the appellant and subsequently lodged with the court. The complainant asserted her lack of proficiency in preparing such documentation and thus enlisted the services of the appellant for their preparation. Nevertheless, it is alleged that these documents were fabricated with the intent to deceive, as the appellant lacked the requisite qualifications to draft such legal instruments. Consequently, it is contended that the appellant obtained funds from the complainant through fraudulent means.
28. Considering the above rendition, it is my considered view that the prosecution was able to tender sufficient evidence to prove the elements of the offences in counts III, V, and VII the appellant faced before the trial court. I agree with the trial court’s finding.
29. Having considered the circumstances of this case, the prosecution evidence, and the defence offered by the appellant, I am persuaded that the conviction was justifiable. The explanation offered by the appellant in my view does not cast reasonable doubt on the prosecution case.
30. On sentence, the appellant was sentenced to a cumulative sentence of 18 months imprisonment. The trial court considered his mitigation. In the sentencing proceedings, the court noted that the appellant was not remorseful and did not attempt to compensate the complainant. I find that the sentence was not only legal but also justified.
31. In the end, the appeal is dismissed in its entirety for lacking in merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15TH DAY OF APRIL 2024

D. KAVEDZA



JUDGE

In the presence of:

Mr. Mutuma for the Respondent

Appellant present on the virtual platform

Nelson Court Assistant.

