



REPUBLIC OF KENYA



**Ngaywe v Republic (Criminal Appeal E015 of 2023)
[2024] KEHC 5043 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E015 OF 2023
RE ABURILI, J
MAY 13, 2024**

BETWEEN

**KENNEDY OUKO WERE ALIAS NICHOLAS GENGA ALIAS WILSON ARUWA
ALIAS CHARLES NYABOGA NGAYWE APPELLANT**

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence by the Hon. C.N.C Oruo on the 11th November 2022 in the Senior Principal Magistrate's Court in Winam in Criminal Case No. E 155 of 2021)

JUDGMENT

Introduction

1. The appellant herein was charged with four counts of various charges. In count one, the appellant was charged with the offence of obtaining money by false pretence contrary to section 313 of the [Penal Code](#).
2. The particulars of the offence were that on the 4th day of November 2020 at Kisumu town in Kisumu Central sub-county within Kisumu County, jointly with others not before court, with intent to defraud obtained from Benjamin Lwande Kshs. 400,000 by falsely pretending that you would sell to his two 40 feet containers a fact he knew to be false.
3. In Count two, the appellant was charged with forgery contrary to section 349 of the [penal code](#) the particulars being that on the 20th August 2016 at an unknown place with intent to defraud, forged a letter Ref Mwa130205/DOD purporting to have originated from Fewa Logistics.
4. The appellant was also charged with forgery of official document contrary to section 351 of the [Penal Code](#) the particulars being that on the 4th November 2020 at Kondele area in Kisumu County, the



appellant made an official document namely Id Card Serial Number 206122021 for one Charles Nyaboga Ngaywa purporting to be what in fact it was not.

5. Finally, the appellant also faced the charge of uttering a false document contrary to section 353 of the *Penal Code*. The particulars were that on the 4th November 2020 at Kondele area in Kisumu County, the appellant knowingly and fraudulently uttered a forged letter Ref Mwa130205/DOD to Benjamin Lwande purporting to have originated from Fewa Logistics.
6. The trial court after considering the evidence presented by the prosecution convicted the appellant on grounds 1 and 3 but acquitted him on counts 2 and 4. The trial court proceeded to sentence the appellant to serve 3 and 4 years' imprisonment respectively.
7. Aggrieved by the trial court's finding, the appellant filed his petition of appeal dated 16th March 2023 and filed on the 13th April 2023. The grounds of appeal are:
 - i. That the trial erred by accepting the evidence of a single witness without exercising greatest care and caution as required by law.
 - ii. That the trial learned magistrate misdirected his mind and relied on the evidence to the effect that the appellant had the magic to present himself to the complainant as four distinct persons contemporaneously with intent to defraud.
 - iii. That the learned trial magistrate erred in law by returning a guilty verdict without any persuasive, coherent and tangible evidence to sustain a charge of forgery in a court of law.
 - iv. That the learned trial court forgot that its inexcusable duty is to make analysis and determination which is purely and strictly based upon the evidence on records and that extraneously considerations must be avoided.
 - v. That if need be, other grounds may be identified and adduced upon receipt of certified proceedings and with leave of this Hon. Court.

Analysis and Determination

8. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
9. Having examined the Grounds of Appeal and the appellant's written Submissions which I shall consider together with the issues, I find the issues for determination are:
 - a. Whether or not the Prosecution proved its case against the appellant in the two counts beyond reasonable doubt.
 - b. Whether or not in the circumstances of this case, the sentence as imposed was manifestly excessive as to invite this court to interfere with the same.
10. Before addressing the above two key issues, I wish to first briefly deal with the appellant's complaint that the learned trial magistrate failed to appreciate and or disregarded his defence. My reading of the trial court's judgment reveals the opposite. It is evident from the judgment that the learned trial magistrate fully appreciated the appellant's statement in defence given the way she summarized it. The



record shows that the learned trial magistrate actually considered the appellant's defence and weighed it against the evidence adduced by the prosecution before dismissing it arguing that it lacked credibility. Nothing therefore turns on that ground of appeal.

11. As to whether the prosecution proved their case on Counts 1 and 3 beyond reasonable doubt, Section 313 of the *Penal Code* provides as follows:

“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.”

12. From the above provision, it is clear that for the offence to be proved to the required legal standard, the prosecution must prove that the person accused had done the following:

- i. Obtained anything capable of being stolen;
- ii. By false pretences; and
- iii. With an intention to defraud.

13. As was held in *Anne Njambi Kiragu v Republic*, [2021] eKLR, all the above three ingredients must be proved together in order to establish the offence. Proving one or either of them cannot suffice.

14. Though money is obviously something that is capable of being stolen, it is not the receipt of money that constitutes the offence. What establishes the offence is the taking of money or anything capable of being stolen with an intention to defraud. On what demonstrates and intention to defraud, that intention to defraud is found in the alleged false pretence if proved.

15. Section 312 of the *Penal Code* defines a false pretence as:

“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.”

16. From the above definition, it is evident that false pretences consist of the following:

- i. A representation of fact by word, writing or conduct;
- ii. The representation must be past or present;
- iii. The representation must be false; and
- iv. The person making the representation should have made it knowing it to be false or did not believe it to be true.

17. The evidence adduced by the prosecution was that the complainant, Dorothy Adhiambo Odera, met one Mark Ojwang Ogusi sometimes in 2020 who gave her a telephone number for one Charles Nyamboga, the appellant, who purported to sell containers. It was her testimony that the appellant gave her the number of one Nicholas Genga who he stated was his cousin. The complainant testified that she spoke to Nicholas informing him that she had been sent to him by Charles leading up to their meeting.

18. The complainant further testified that she met Nicholas who took her to a site at Coptic and showed her 3 containers of which Nicholas had the key. It was her testimony that she made cash transfers



- at Cooperative Bank Kibuye on the 6.11.2020 and ended up paying Kshs. 200,000 per container to account number 01109614458200 bearing the names Wilson Oloo Arwa. She testified that she also paid Nicholas Kshs. 20,000. The complainant testified that on inquiry as to who Wilson Oloo Arwa was, she was informed by Nicholas that he was one of the persons selling the containers.
19. It was PW1's testimony that she called Mark who informed her that Charles was held up in Mombasa. She testified that she needed 6 more containers and thus kept sending Charles money from the 11.11.2022 to 14.11.2022 an amount that totaled to Kshs. 1.2 million. PW1 testified that she then tried calling Charles but his phone was off and when she went to view the containers at Coptic she did not find them and she thus realised that she had been defrauded. PW1 testified that the appellant presented himself to her as Nicholas Genga and that she met him thrice and even gave him Kshs. 20,000.
 20. In cross-examination, PW1 stated that she never met the appellant with Mark and that it was the appellant who directed her to send the money to the account of Wilson. She further reiterated that the appellant gave her letters stating that he dealt with containers.
 21. PW2 Mark Ochieng Ogusi testified that he did not know PW1 and that he had been summoned to Makongeni Police Station to ascertain the same. He testified that he lost his Identity Card in 2016 on 26.6.2016 and reported and was issued with a new identity card.
 22. PW3, No. 66776 PC Moses Wambua the investigating officer testified that from his investigations, he ascertained that Wilson, an accomplice of the appellant, used someone else's Identity Card to open an account with Cooperative Bank and that the details from the Bank were different from the account opening documents.
 23. PW3 further testified that the complainant paid Kshs. 750,000 that was wired to the appellant from her mpesa account to an accomplice of the appellant who was still at large. It was his testimony that the complainant identified the appellant. In cross-examination, PW3 reiterated that the complainant knew the appellant physically as they had interacted.
 24. In his defence, the appellant denied the charges against him and stated that no identification parade was carried out.
 25. I have considered the above evidence. On identification of the appellant by the complainant, I note that the complainant testified that she had met the appellant and even given him Kshs. 20,000. The appellant was thus recognized by the complainant as someone she had dealt with. The bank statements and Mpesa statements confirmed the payments made to various accounts/numbers provided by the appellant. The appellant took the money on behalf of his accomplices and failed to deliver the containers as agreed.
 26. From the evidence presented before the trial court, it is clear that the appellant presented himself to be who he was not and proceeded to obtain Kshs. 1.2 million from the complainant. The appellant intended to defraud the complainant from the start.
 27. From my foregoing analysis, I have come to the conclusion that the evidence adduced by the prosecution in this case established beyond reasonable doubt the offence of obtaining money by false pretence. I find no reason to interfere with the trial court's finding on the same.
 28. As regards Count 3, the offence of forgery of an official document is created under section 351 of the [Penal Code](#). Section 351 of the [Penal Code](#) provides that:

“ Any person who forges any judicial or official document is liable to imprisonment for seven years.”



29. The evidence adduced by the prosecution witnesses particularly PW3 was that a total of Kshs. 780,000 was wired to Charles Nyabonga Ngaiywa of which the appellant used an identity card to register a Safaricom line and that the said Safaricom line did not belong to him.
30. PW2, Mark Ochieng Ogosi testified that he had lost his ID Card in June 2016, reported the same and was issued a new one. It was his testimony that when summoned by the Police at Makongeni Police Station, he was shown 4 telephone numbers and he only related with one which was his whereas the other 3 were still registered using his ID Card. In his defence, the appellant merely denied involvement.
31. In the circumstances, I find no reason to depart from the trial court's holding that the prosecution had proved its case. The same is thus upheld.
32. As regards the sentences meted out on the appellant, I note that he was sentenced to serve three years' imprisonment on Count 1 and 2 years' imprisonment for Count 2 and the said sentences were to run consecutively.
33. Under section 313 of the *Penal Code*, the offence is considered a misdemeanour and anyone found guilty is liable to imprisonment for three years. In this case, the appellant was sentenced to 3-year imprisonment term in respect of count 1. On the other hand, Section 351 of the *Penal Code* provides for an imprisonment for seven years upon conviction and sentenced to serve two years in prison.
34. The aforementioned sentences were to run consecutively and I find that the said sentences are not excessive and order that the appellant proceed to serve the remaining balance of his jail terms as he has already served three years for count one. It is not lost to this court that albeit the appellant was said to be a first offender as no past criminal records were availed, the offence of obtaining money with false pretences deprives hard working persons of their hard earned money which is never easy to come by. The appellant is no doubt a thorn in the flesh. He earned what he did not work for and caused a lot of financial stress and strain on the complainant. He used all means and names to trick the complainant and defraud her of her hard earned cash. he is a dangerous person to the society.
35. The upshot of the above is that I find the instant appeal lacking in merit and I proceed to dismiss it on both limbs of conviction and sentence. The appellant shall serve the remainder of the sentence so that the society can breathe from his criminal tendencies. Furthermore, the trial court considered the period that the appellant had been in custody in sentencing him.
36. This file is closed and the lower court file to be returned with copy of the judgment herein.
37. Signal to issue. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2024

R.E. ABURILI

JUDGE

