



**Giakanu v Republic (Criminal Appeal E044 of 2024)
[2024] KEHC 12805 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E044 OF 2024
LM NJUGUNA, J
OCTOBER 23, 2024**

BETWEEN

JOSEPH MUTURI GIAKANU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of Obtaining goods by false pretences Contrary to Section 313 of the Penal Code, in criminal case number 261 of 2018 at Siakago Law Courts. The particulars of the charge were that, on diverse dates between 15th January 2018 to 1st April 2018, at Siakago town in Mbeere North Sub County within Embu County, with intent to defraud, obtained assorted alcoholic drinks valued at Ksh.661,300 from MS Platinum Distillers Limited by falsely pretending that he had deposited the said amount into the account of MS Platinum Distillers Limited, the fact he knew to be false.
2. The matter proceeded to full hearing with the prosecution calling a total of seven witnesses after which the appellant was placed on his defence. He gave sworn evidence and called one witness in support of his case.
3. Upon the evaluation of evidence adduced before the trial court, he was found guilty, convicted and sentenced to three years imprisonment.
4. The summary of the evidence that was adduced before the trial court was as follows; PW1 was Martin Kavenjo who stated that he is a manager at Platinum Distillers Limited at its depot in Kunyangari and that his duty is to receive money, bank slips and cheques in payment. That he deposits cheques and cash in the bank accounts held in Equity and Co-Operative banks account numbers 00901xxxxxx and 01148xxxxxx respectively and keep the documents in the file. He stated that their client Joseph Muturi, the appellant herein purchased liquor from the complainant between January 2018 and April 2018



- and he used to pay cash or deposit the money in the bank in accounts held by Onesmus Muturi Mburu who is one of the Directors of the Complainant and would then forward the bank slips to him.
5. It was his further evidence that, as from January to April 2018 he had not taken stock and/or audited the stock and payments but when they compared the records and the Bank statements with the help of Onesmus Muturi and the accountant, they realized that the banking slips taken to him by the appellant were not reflecting in the bank statements. That the appellant used to call him and would send one Evans to collect the goods and would explain the mode of payment. That the total amount that was not reflecting was Ksh.661,300. He reported the matter to the police and the appellant was arrested. On X-examination, he stated that he knew the appellant from January 2018 and that he was supplied with the liquor and did not pay though he did not have any invoice or agreement to show that the appellant was supplied with any goods. That the receipts used to be given to Evans together with the goods to be delivered to the appellant and that they used to call the accused Jose. Further, that he did not have documents in court indicating the existence of Platinum Distillers Limited or KRA payments for the company. That the names of the depositors are people not known to him.
 6. PW2 was Evans Muthee Muriuki who stated that during the period in question, he was driving a probox registration number KBY 079D. That the appellant on several occasions, engaged his services to carry liquor for him which he could collect from PW1 and take to the appellant in Embu town. That PW1 used to record in a book and papers and he could take the receipts to the appellant who could give him an envelope that he could take to PW1. The appellant later called him and informed him that he was arrested and was being held at Siakago Police Station. That he delivered all the liquor to the appellant and he received it from PW1 and that he has no grudge with the appellant. On X-examination, he stated that he started dealing with the appellant in December 2017 and that the first time he saw the appellant is when he went with him to the complainant's Depot and that he knew him as Joseph.
 7. PW3 was Julius Mungai Ndung'u who stated that he was the one who was taking stock at the Complainant. That on the 2/04/2018, as he was taking stock with Onesmus, they noted that some slips were not reflected in the bank statements and that there was a deficit of Ksh.661,300. That the appellant did not join them for the stock taking and when they tried to call him, he did not pick up their calls and they reported the matter at Siakago Police Station. Further, that the appellant would collect the liquor and sign delivery slips on collecting the liquor. He would then go and sell and would deposit the money and take the receipts. On X-examination, he stated that the appellant goes by the name Jose which is a nickname and that he was the only one who used to collect the stock for sale and distribution. That the name of the appellant does not appear in the deposit slips that were produced in court.
 8. PW4 was PC Sudi Simiyu Wekesa, the investigating officer who stated that he recorded statement of witnesses and in the course of investigations, he learnt that on diverse dates between February 2018 and April 2018, the appellant was supplied with liquor from the complainant's depot and that when the stock was taken on the 2/04/2018, the accountant realized that there were discrepancies in the amount in the bank statement and the actual receipts they had from the bank agents which the customer, the appellant herein had purported to have banked. That the appellant used to buy the liquor using cash but he could also deposit the money in the bank account and that he used to send Evans Muthee to transport the liquor. That during the process, it was realized that a total of Ksh.660,300 was missing and the matter was reported at Siakago Police Station as it was realized that some of the deposits slips were not reflecting in the bank account statement. He produced several bank slips which he said were obtained from the complainant who said he received them from the appellant



9. PW5 was Onesmus Muturi who stated that he is a marketer at the complainant's depot at Siakago. He confirmed the account details for the complainant's accounts in Equity and Co-Operative banks as given by PW1. That in January, the accountant who used to reconcile the complainant's accounts realized that there was some money that was missing, yet, he had the deposit slips. That the money had purportedly been deposited in Equity and Co-Operative bank accounts and that the total amount missing was Ksh.661,300 and that the appellant is the one who had been supplied with alcohol. That he used to supply the appellant with alcohol and he is a person he had known for a long time as he had employed him at the company. In X-examination, he stated that he had employed the appellant in 2017 as a salesman and his work was to look for market and supply the alcohol. That after he left employment, he could pick alcohol for customers, pay and supply them. He stated that though Martin Kariuki is the complainant in the case, he (PW5) is the owner of the company which manufactures and sells alcohol but he did not have the documents for registration of the company.
10. That he did not investigate further to find out from whom the slips were obtained but the money was never deposited in the account. That they issue receipts and invoices and the same used to be issued by the person in the depot and that the money used to be deposited in the personal account as the company did not have an account at the material time. Further, that they knew the bankslips were fake when they looked at the bank statements and it was the appellant who used to take the deposits to the depot. On X-examination, he stated that the appellant was their distributor but he had already left when the sales herein were placed with the complainant. That the appellant could come with a driver he had employed, hand over the slips and he could be supplied with the alcohol.
11. PW6 was Shadrack Malonzi who stated that in the year 2018, he was working for the company at its depot in Siakago where he worked as a receptionist for a month and his duty was to receive alcohol. That on the 2/04/2018, when the stock was taken, it was discovered that receipts by the appellant showed that the deposit slips did not reflect in the bank statement and the same had been brought by the appellant whom he knew quite well because he had worked with him at the company. That he could give the appellant alcohol and he would go to sell and bring the bank slips of the money but there were times he could pay in cash. On X- examination, he stated that he served the appellant from December 2017 to April 2018 and that he knew him well. That the appellant could bring the slips and give them to him.
12. When he was placed on his defence, the appellant testified as DW1. He stated that the company had given him the role to distribute alcohol having been given the contract by one Wilfred Kigoro who was one of its directors. That he was doing the marketing as the company's agent and he was also a driver and that he worked with the company for six months and then left. That his duties entailed marketing and identification of the places where alcohol was to be delivered. That he was involved in an accident and when he sued the complainant, their relationship deteriorated as he had been threatened not to file the suit and he decided to quit the job. He denied ever having been a customer of the company but averred that he was its employee. He also denied ever depositing money in an account buying alcohol or any account owned by Onesmus Muturi. He stated that his work was just to deliver but not to deposit money. On X- examination, he stated that he used to work with Martin who lied to the court that he used to collect alcohol and that he could also send someone to collect it at times. He stated that he is not called Jose and insisted that he was an employee of the complainant.
13. DW2 was Wilfred Karimi Kigunda who stated that he was a sales representative with the company for Embu, Kutus, Kiambu and Kirinyaga up to until 2017. That when he was engaged, he was given a mandate to recruit three people to help him do the marketing as distributors and salesmen and he recruited the appellant who did so well in that area until Onesmus started having a negative attitude towards Muturi as the company was performing better than they had expected. That he was still with



the company when the alleged fraud happened but he was not informed of it and only got to know about it after the appellant was arrested. That he never heard of the fake receipts. That most of the customers used to pay through cheques but there were those who could deposit cash. That in 2019 when his phone got lost, he had a meeting with the Onesmus Muturi Mburu and he said he would use his money and ensure that the appellant was jailed. On X-examination, he stated that he recruited the appellant to work for the complainant as a sales representative and he was being paid on commission basis.

14. The trial court after considering the evidence, convicted the appellant and sentenced him to serve three years imprisonment and being dissatisfied with the conviction and the sentence, has appealed to this court through the Memorandum of appeal dated the 7th, May 2024 wherein he has raised eight grounds of appeal as hereunder;
 1. The learned magistrate erred in law and in fact in finding that the prosecution has proved its case beyond any shadow of doubt in circumstances where the evidence presented was clearly inadequate to sustain and prove the charges preferred.
 2. The learned magistrate erred in law and in fact in relying on and giving due credence to the prosecution's evidence which was inconsistent, full of glaring contradictions and loose ends incapable of proving the charges against the appellant.
 3. The learned magistrate erred in law and in fact in finding that the ingredients of the offence of obtaining by false pretences had been proved against the evidence presented.
 4. The learned magistrate erred in law and in fact by disregarding and failing to consider the sworn testimony of the appellant and that of DW2 which testimony was unshaken by the prosecution.
 5. The learned magistrate erred in law and in fact by reaching conclusions on facts and giving opinions not founded in or supported by the evidence tendered by any witnesses.
 6. The learned magistrate erred in law and in fact by convicting the appellant of the charges without the benefit of any evidence to support the charges.
 7. The learned magistrate erred in law and in fact by disregarding the submissions and the authorities cited on behalf of the appellant.
 8. Without prejudice to all the foregoing, the learned magistrate erred in law and in fact by imposing an excessive sentence upon the appellant.
15. In this appeal, the court gave directions on filing of submissions but only the appellant complied with the said directions. The court has considered the submissions filed herein.
16. The appellant submitted on the burden of proof and cited the case of *Woolmington Vs. DPP* and contended that the prosecution failed to discharge the burden of proof. Further, that there were glaring material contradictions in the testimony of the witness, some of them bordering on witch-hunt against him. He stated that he was not a customer of the complainant but he was an employee. He placed reliance on the cases of *Charles Mutua Mutemi Vs. Republic (2022) eKLR* and that of *Samat Bhima Keswale Vs. Republic (1992) eKLR* on the ingredients of the offence of obtaining by false pretences.
17. The appellant also took issue with the name that appeared on the deposit slips, which he denied was his name and that the deposit slips were not subjected to forensic analysis to prove that they were false. He urged the court to find that the prosecution failed to prove its case against him and allow the appeal.



18. From the foregoing, it is my view that the issues for determination are as follows:
 - a. Whether the prosecution proved its case against the appellant beyond reasonable doubt.
 - b. Whether the sentence meted to him is excessive.
19. This Court is well aware of its obligations as a first appellate Court and it endeavours to review the evidence at trial and reach its own conclusion. In the case of *Okeno Vs. Republic* (1972) EA 32 the Court held;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses”.
20. In support of its case, the prosecution called six witnesses. PW1 was the manager of the complainant at its branch at a depot called Kinyangari in Siakago. He was involved in the day to day running of the business. It was his duty to receive cash cheques and pay slips where money was deposited in the Bank account by a customer. That sometimes in the month of April 2018, he was involved in the taking of stocks together with PW3 and PW5 who is one of the directors of the complainant and the wife to PW5.
21. That on comparing the bank slips with the bank statements, they discovered that some bank slips did not reflect in any of the two bank accounts operated by the complainant in Equity and Co-operative banks which accounts were in the name of PW5. They discovered that the Bank slips were from the appellant who had purchased liquor from the complainant for the period between January to April 2018 and could pay by cash or bank slips.
22. It was his further evidence that he used to indicate the name Jose on the bankslips which is the short form of Joseph, the appellant herein. The appellant used to collect the liquor himself but, in most cases, he could send PW2 to transport it for him from the complainant to a depot in Embu town where he could supply to various outlets. PW1 knew the appellant quite well as he had dealt with him for quite some time.
23. The bank statements for co-operative Bank dated the 24/08/2018 for transactions between 4/1/2018 to 30/4/2018 and that of Equity Bank for the period between 1/1/2018 to 30/4/2018 were produced as exhibits which showed that indeed the money was not deposited in any of those two accounts.
24. PW2 in his evidence confirmed that indeed, the appellant used to send him to collect liquor from PW1 and that he could be given bankslips by the appellant to take to PW1 and that PW1 could give him receipts to take back to the appellant and this happened severally over a period of time. PW2 was a person known to the appellant before this incident and he told the Court that he had no grudge with the appellant.
25. PW3 who took stock for the complainant also confirmed that the receipts not reflected in the statements belonged to the appellant and the total amount not reflecting was Kshs.661.300/- and that the appellant was the only person who used to collect the stock for sale and distribution. PW5 who is a director of the complainant and in whose name both the Equity and Co-operative bank accounts were



operated, confirmed the loss. He knew the appellant well as the appellant was his former employee and he confirmed that he used to supply him with liquor and that he did not have a grudge with him. That he had employed the appellant as a salesman in the year 2017 up to January 2018 but by the time of the incident he had already left his employment.

26. Though the appellant did not deposit any of the alleged monies reflected in the bank slips, there is sufficient evidence to prove that he was supplied with the liquor and that he was using other people to author the fake bank slips to avoid being caught in the fraud.
27. Section 313 of the Penal Code under which he was charged provides:-

“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 liable to imprisonment for three years”.

From the evidence on record, all the elements of the offence were proved against the appellant.

28. I have considered the appellant’s defence and he stated that he was not a customer but an employee. I note that this defence was introduced when he was put on his defence and the agreement was mentioned for the 1st time in his defence. The prosecution witnesses were not cross examined on it and I therefore find the same to be unbelievable and an afterthought. The evidence of PW1, PW2, and PW3 is a clear that by the time of the incident he had already left the complainant’s employment.
29. The appellant has challenged the sentence as excessive. The legal position on sentencing was stated succinctly by the court of appeal for Eastern Africa in the case of Ogola s/o Owuore vs Reginum (1954) 21 270 as follows: -

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V- R (1980) 18 EACA 147;

+“It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

This would also add a third criterion namely, that the sentence is manifesting excessive in view of the circumstances of the the case R Vs. Shershewky, (1912) C.C.A 28 T. L. R 364.”

30. The appellant has not shown how the learned magistrate erred in principle when she imposed the sentence that she did. I find no reason to interfere with the sentence.
31. In the end, I find that the appeal has no merit and it is dismissed.
32. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

