



REPUBLIC OF KENYA



**KENYA LAW**  
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**Guyo v Republic (Criminal Appeal E001 of 2023)  
[2023] KEHC 2015 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2015 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL APPEAL E001 OF 2023**

**JN NJAGI, J**

**MARCH 16, 2023**

**BETWEEN**

**OLLA GOLLO GUYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. Simon Arome, SRM, in Marsabit Chief Magistrate's Court Criminal Case No. E381 of 2021 delivered on 22/6/22)*

**JUDGMENT**

1. The appellant was convicted of two counts of the offence of obtaining money by false pretence contrary to section 313 of the *Penal Code* and was sentenced to a combined fine of Ksh 700,000/= in default to serve two years imprisonment. The particulars of the offence in count 1 were that on the 14<sup>th</sup> day May 2021 at Badauri hills within Marsabit County with intent to defraud obtained from Ola Elema Isaako a sum of Ksh 110,000/= by falsely pretending that he was in a position to buy goats for him, a fact he knew to be false.
2. The particulars of the offence in count 2 were that on the same day and place as in count 1 with intent to defraud obtained from Hirbo Chogo a sum of Ksh 628,000/= by falsely pretending that he was in a position to buy goats for him, a fact he knew to be false.
3. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that the trial magistrate did not accord him a fair trial; that the trial magistrate relied on evidence that did not link him with the commission of the offence and that the trial magistrate failed to consider that the investigation conducted in the case was shoddy.
4. The case for the prosecution was that the two complainants are livestock traders. That on the material day the 1<sup>st</sup> complainant, PW1, was at Baudari area when he met the Appellant who was known to him



as a livestock trader. The Appellant told him that he was headed to Baldesa to buy goats but that he did not have enough money. He requested that he adds him some money. The Appellant told him that the cost of one goat was Ksh 3,300/=. PW1 gave him a sum of Ksh 110,000/= to buy 33 goats. The Appellant went into hiding and switched off his phone. The complainant reported to the area chief, elders and to the police.

5. The second complainant, Abaya Hirbo, testified that he was on the material day at Badauri area where he was looking for goats to buy. He met the Appellant who was also a livestock trader. The Appellant told him that he had found 190 goats at Baldesa area selling at Ksh 3,300 each. They agreed that the complainant gives him money for him to buy the goats for him. The complainant gave him Ksh 628,000/=. The Appellant went into hiding and switched off his phone. The complainant looked for him and did not find him. He reported to the police. The Appellant was later arrested.
6. The two cases were investigated by Sgt Gabriel Komote PW3 of DCI, Marsabit Central. He charged the Appellant with the offences.
7. In his defence the Appellant stated that he was in business of livestock trading with the brother to the 2<sup>nd</sup> complainant called Abaya Hirbo Ali. That the 2<sup>nd</sup> complainant sent his brother Abaya with some money for the Appellant and Abaya to buy livestock in Huri area. It is Abaya who had the money. They bought livestock but the Appellant was using his own money to buy the livestock. Abaya took the first 2 lorries of the livestock to Nairobi. He sold the livestock. He ordered for another lorry full of livestock. Abaya sold the fourth lorry in Isiolo. After the business transactions Abaya owed him Ksh 558,000/=. Abaya sent him Ksh 124,000/= through Mpesa and remained with a balance of Ksh 414,000/=. Abaya later called him and asked him to come to Marsabit for them to share out the money. He came to Marsabit. He was arrested by DCI Officers.
8. On the claim by the first complaint of Ksh 110,000/=:, the Appellant admitted owing the money but said that it is part of the money he is claiming from Abaya and that he will settle it once he is paid the money.
9. The appeal proceeded by way of oral submissions of the appellant and those of the Respondent through the Prosecution Counsel, Mr Otieno. The appellant submitted that the trial magistrate when sentencing him did not consider the time spent in custody while awaiting trial.
10. The state submitted that the prosecution had proved the charges against the appellant beyond reasonable doubt and therefore that the Appellant was correctly convicted of the offences. That the ingredients of the offence of obtaining by false pretence was proved. Counsel relied on the definition of the term ‘false pretence’ as stated in the case of *Joseph Wanyonyi Wafuko v Republic* (2014) eKLR.
11. On sentence the state submitted that the sentence of 2 years was proper. The prosecution Counsel cited the case of *Bernard Kimani Gacheru v Republic* (2002) eKLR where the Court of Appeal held that a court should not interfere with a sentence merely because had it tried the case itself it would have given a different sentence. The Respondent urged the court to dismiss the appeal.

#### **Analysis and determination -**

12. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced before the trial court and draw its own independent conclusions. In the case of *Okeno v Republic* [1972] EA 32, East Africa Court of Appeal put this duty as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R, [1957] EA 336) and to the appellate



court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M Ruwala v R*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see *Peters v Sunday Post*, [1958] EA 424.”

13. In the case of *David Njuguna Wairimu v Republic* (2010) eKLR the Court of Appeal stated that;

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

14. In his judgment the trial magistrate held as follows:

Evaluating the evidence against the defence, I find the prosecution witnesses reliable, consistent and trustworthy. The accused's defence is an afterthought. The prosecution has proved beyond reasonable doubt that the accused received the money and never bought goats as agreed. He is convicted under section 215 of the [CPC](#).

15. The two complainants stated in their evidence that they gave the Appellant money for him to buy them goats which he failed to do. He instead went underground and switched off his phone.

16. The Appellant admitted owing the 1<sup>st</sup> complainant the sum claimed but said that the money is being withheld by the 2<sup>nd</sup> complainant's brother called Abaya. On the claim by the 2<sup>nd</sup> complainant, he said the 2<sup>nd</sup> complainant sent his brother Abaya for them to buy goats. That it is Abaya who had the money and they were to share the profits after the sale. Thereafter Abaya paid him part of the money and was left with part of the money.

17. It is clear from the evidence that was adduced before the trial court that there were business transactions between the Appellant and the two complainants. The Appellant admitted owing the 1<sup>st</sup> complainant the sum of Ksh 110,000/=. He did not explain the circumstances under which the said complainant gave him the money. The evidence of the 1<sup>st</sup> complainant then must be true that he gave the Appellant the money for him to buy him goats which he failed to do.

18. The second complainant, Abaya Hirbo Ali, produced an Mpesa statement showing that he transferred a sum of Ksh 100,000/= and another sum of Ksh 150,000/= to the Appellant on the May 14, 2021 vide his Mpesa account No 254701455793 in the name Ola Golo Guyo. The witness said that the other sum of Ksh 378,000/= was paid in cash.

19. The Appellant did not explain the purpose for which the complainant in count 2, Abaya Hirbo, paid him the sum of Ksh 250,000/= through Mpesa. In the absence of any explanation the evidence of the complainant that he paid the money for the Appellant to buy him goats must be true. The evidence of the Appellant that he did not receive the money must be a lie. The evidence of the complainant that he paid the Appellant a total sum of Ksh 628,000/= so as to buy him goats is believable.



20. Having proved that the Appellant received the money for the purpose of buying goats for the complainants, the question was whether failure to buy the goats as promised amounted to obtaining money by false pretence. The trial magistrate did not address the issue in his judgment.
21. The charges were under Section 313 of the *Penal Code* which provides 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 liable to imprisonment for three years.”
22. Section 313 *Penal Code* brings out three essential elements of the offence of obtaining by false pretences which are:-
- (a) Obtaining something capable of being stolen.
  - (b) Obtaining it through a false pretence.
  - (c) Obtaining it with intention to defraud.
23. The *Penal Code* defines “false Pretence” under section 312 to be:
- “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.”
24. The operative word under Section 312 is representation which is applicable in the following circumstances: -
- 1) A representation by words, writing or conduct.
  - 2) A representation in either past or present.
  - 3) A representation that is false.
  - 4) A representation made knowing it to be false or believed not to be true.
25. It is settled law that a future representation does not amount to obtaining by false pretence. In the case of *Stephen Ndungwa v Republic* (2020) eKLR, Ong’udi J. cited the English case of *Republic v Dent* (1955) 2 ALL ER 806 where it was held that;
- “....., we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence, in criminal law.”
- See also the decision in the case of *Joseph Wanyonyi Wafukho v Republic* (2014) eKLR cited in the same judgment where the court held that a false pretence can only apply to a past and present fact and not a future fact.
26. In the instant case, it is my considered view that the promise by the appellant to buy goats for the complainants was a future representation which did not amount to obtaining money by false pretence. A false representation can only apply to a past or present fact and not to a future fact. In the premises there was no evidence that the appellant obtained the money by false pretence. The transactions between the complaints and the Appellant disclosed a civil dispute that did not transcend



to a criminal matter. The trial magistrate erred in failing to address the issue whether the obtaining in the circumstances of the case amounted to false pretence.

27. In view of the foregoing, it is my finding that the charges against the appellant were not proved. The appeal is thus upheld. Consequently, I quash the conviction and set aside the sentence imposed on the appellant. I order the appellant to be set at liberty forthwith unless lawfully held.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

Mr. Otieno for Respondent

Appellant – Present in person

Court Assistant - Mahmud

14 days R/A.

