



**Mwongera v Republic (Criminal Appeal E104 of 2021)
[2023] KEHC 1945 (KLR) (13 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E104 OF 2021
JM CHIGITI, J
MARCH 13, 2023**

BETWEEN

LEVI KINOTI MWONGERA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Brief Introduction

1. This appeal emanates from the judgment of the Kiambu Chief Magistrate court in criminal case no 924 of 2016, where the Appellant herein Levi Kinoti Mwongera was charged with the offence of obtaining money by false pretense contrary to section 313 of the [Penal Code](#).
2. The particulars are that on diverse dates between October 9, 2014 and December 20, 2014, within the republic of Kenya with intent to defraud, the Appellant obtained Kshs 1,825,500/= from James Nyakundi Nyarienda by falsely pretending to be in a position to import a tractor, a fact he knew was false.
3. When the Appellant was arraigned in court for plea taking on April 18, 2016, the particulars were read out to him and he pleaded not guilty. A plea of not guilty was entered.
4. The matter proceeded for trial with the Prosecution calling a total of 8 witnesses in an attempt to prove its case. On his part, the Appellant called 2 witnesses.
5. At the end of the hearing the trial the court found that the Prosecution had proved its case beyond reasonable doubt and proceeded to convict the accused under Section 215 of the [Criminal Procedure Code](#). The Appellant was fined a sum of Kshs 500,000/= and in default serve 2 years in prison.
6. Aggrieved by both the conviction and sentencing the Appellant filed a memorandum of appeal dated October 13, 2021, citing 13 grounds.



7. The appeal was heard through oral submissions.

Appellant's submissions

8. Counsel for the Appellant submitted that the evidence of the Prosecution at the trial court was marred with inconsistencies which could not sustain a conviction. The Prosecution failed to prove the case against the Appellant beyond reasonable doubt and shifted the burden of proof to the Appellant.
9. Counsel urged the court to find that the charge of obtaining by false pretence cannot hold as the tractor was purchased and delivered to the complainant who is still in possession of the same. The ingredients of obtaining by false pretence were not properly proved. Counsel went further to submit that the trial court disregarded the evidence of the Appellant.
10. The Appellant seeks that the court allow the appeal and quash the conviction and sentence as well as order a refund of the fine of Kshs 500,000/= deposited.

Respondent's submissions

11. In opposing the appeal counsel for the Respondent filed submission on January 23, 2023 and argued that the Prosecution proved its case beyond reasonable doubt as per the [*Gerald Ndoho Munjuga vs R HC Criminal Appeal no 213 of 2011*](#).
12. Counsel submitted that the Appellant induced the complainant to pay for the tractor falsely with intent to defraud him. Counsel submits the sentence meted was proper and urged the court to uphold the trial courts conviction and sentence.

Analysis and determination

13. 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.
14. As stated in the case of *Selle & Another vs 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.
15. The trial magistrate, in this case, found that the Prosecution had proved the charges against the Appellant to the requisite standard of beyond any reasonable doubt. The court is called to re-evaluate the evidence of the trial court which I hereby do.

Trial court evidence

16. PW1 Cosmas Nyakundi testified that after seeing several samples of tractors online he settled for one tractor and gave the accused the go-ahead to import the same for him. In June 2014 he engaged the Appellant to import a tractor on his behalf by making a deposit of Kshs 310,000/= and Kshs 88,400/= towards the purchase price.
17. When the tractor arrived in Nakuru he noticed that the tractor was not usable and unserviceable and that it had rusted and had no keys. He consulted Messey Ferguson for repair services and the quotation issued was for Kshs 800,000/=. PW1 informed the accused of the foregoing who promised to replace



- the tractor but failed to. He confirms that as from the import document, the engine number of the delivered tractor was different from the one imported.
18. During cross examination, he states he knew the condition of the tractor he has viewed online but was not sure whether it was the one delivered.
 19. PW2 Edward Luka Muthengi testified that he works as a Yard Manager in Mombasa Container Terminal. He testified that his duties is to recover containers from the port, store it and await verification by the customs department.
 20. He testified that on December 18, 2014 he received a request for verification and took the container where it was to be verified, opened it and confirmed that the shipping seal and KRA were intact before unlocking the container. He testified that the seal was GPO109309. Upon opening the client confirmed that the tractor was there and was satisfied. The container was thereafter released vide a terminal delivery order.
 21. During cross examination he testified that the seals were intact at the time of verification. According to him the container was intact and everything appeared regular.
 22. PW3 James Nyakundi Nyariega testified that he was to import a tractor with the help the Appellant. The purchase price was Kshs 1,038,000/= out of which he deposited Kshs 500,000/= in the account given by the Appellant while his daughter Teresia deposited 639,000/= and Mercy Kamunto deposited Kshs 100,000/=.
 23. He told the court that on December 20, 2014 when the tractor was offloaded from the container the same was not serviceable and that the cabin was broken. He asked the driver for the import documents and the ignition key which the driver told him were with the Appellant who has never availed them. He confirmed with the KRA and he was informed the documents given by the Appellant were for goods going to south Sudan.
 24. PW5 CPL Patrick Ngugi testified that he was an investigating officer from DCI headquarters investigating the case. He confirmed the tractor was delivered to the complainant in poor condition and a valuation from Massey Ferguson Nakuru gave a quotation for repairing the tractor at Kshs 750,000/=.
 25. He testified that from records from the registrar of companies, the accused is a director of Keynaut logistics that received the money sent by the complainant.
 26. The NTSA report confirms the make of the tractor delivered is unknown. According to PW5 the tractor which was imported was not the one delivered to the complainant.
 27. PW5 was recalled and he adduced statements showing money deposits to Keynaut Logistics Ltd by the complainant and his family. He told the court the total money lost by the complainant is Kshs 1,227,500/=
 28. During cross examination he stated the bill of lading documents and the tractor details differed. He confirmed that the documents of the tractor were okay and thus could not charge the accused with forgery.
 29. PW6 Anthony Ochieng Joel testified that he worked at the KRA customs department since 2009 and currently works as a valuation officer at the Mombasa KRA office.
 30. He told the court that he opened container No MRKU 7803950 and verified the tractor inside was a used Massey Ferguson 290 4WD, the model was 240 80HP serial no HI44207 engine no x191744 and



the year of manufacture was 1982, red in colour. He filed the details in the KRA system via account no 2014 Mombasa 7876790.

31. PW7 Stephen Kibocha testified that he worked as a former County Mechanical engineer, in Nakuru. He told the court that on August 23, 2017, he inspected the Tractor at Nakuru and prepared a report. The tractor was not registered as it had no registration plate and thus the make could not be ascertained. The engine no LF 224784312 and the chassis number were not there and the odometer was not available. In his report, he opined the tractor was not usable.
32. During cross-examination he testified that he inspected the tractor in 2017 and he could not tell the previous condition of the tractor. He states that the photographs were taken in 2015 show the make of the tractor.
33. PW8 CPL Robbinson Maina testified that on February 19, 2015 he visited the home of the complainant and saw the tractor and that from the observation it looked new, the name of the tractor was miss-pelt, and that it had worn out tyres, and an eroded driver's cabin. He adduced the photographs taken as evidence.
34. PW9 Peter Koome testified he works as a fraud investigator with DT Bank, he received a warrant to investigate an account no 0320417001 in the names of Keynaut logistics Ltd. He retrieved the account statements and account opening documents which confirmed the accused as the account holder. He stated that he provided the investigating officer with an advice used to wire money from Keynaut logistics account to an account in United Kingdom for 8,800GBP.
35. On the part of the defence the Appellant was the first to testify as DW1. He testified that he deals with logistics in clearing and forwarding. He testified that when the complainant approached him to help in importing a tractor he consulted his uncle in the UK and got a quotation of the QF tractor on October 11, 2014 for 7,700 Euros. He then contacted the complainant and shared the photos and the complainant approved the same.
36. The Massey Ferguson s no N144207 tractor was then loaded on surf marine aboard Swaziland voyage 13. He testified the tractor arrived in Mombasa on December 3, 2014 and he proceeded to lodge an entry e-ship for tax duty for clearance. The details used were the ones in the bill of lading.
37. He testified that the tractor was chasis no 8144207 and engine number x191799 with the year of manufacture 1982. He testified that he was to deliver the tractor to Elburgon but after he quoted the price, the complainant sourced his own transport. He further stated that the complaint was raised to him after 3 months testifying that the charges were false.
38. The Prosecution in this case had failed to establish where what he cleared disappeared to. He testified that the inspection of the motor vehicle after 3 years would give a serious variance in the condition.
39. DW2 Joseph Mutua Muthoka testified he engages in the business of clearing and forwarding and is based in Mombasa. He testified he cleared the tractor at the port. He testified that after clearance at the port, the complainant declined their transport and arranged for his own transport. He testified that goods cannot be cleared if there is a discrepancy.
40. Section 313 of the Penal Code provided;

'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.'



41. The essential elements of the offence of obtaining through false pretences can be summarized as obtaining something capable of being stolen, obtaining the money through a false pretence and obtaining the money with the intention to defraud.
42. I will first deal with the first element of the thing obtained that must be capable of being stolen. The Appellant obtained from the complainant Kshs 1,825,500/= for the purchase of the tractor. It is not disputed that the complainant and his family wired the money to the accused company by the name Keynaut Logistics Ltd, it is also evident as per the evidence of PW9 who confirmed the money was aired by the Appellant to an account held in the UK. This is evidence that Appellant received money from the complainant and paid for the tractor in the UK.
43. The second ingredient is false pretence with intent to defraud.
44. Section 312 of the Penal Code defines false pretence 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.'
45. The Prosecution witnesses confirm the tractor was shipped and cleared from the port. All the clearance rates were paid and the tractor was set for delivery to the client.
46. In my view, it does not appear to have been false pretence as envisaged in Section 312 of the Penal Code or intention to defraud on the part of the Appellant herein. The tractor was shipped and the bill of lading documents confirm this as much.
47. What is in dispute is quality or the standard of what was delivered to the complainant. DW1 testified that he went to the complainant's home 3 months after the delivery and wondered what had happened to the tractor. DW1 states that after clearing the tractor at the port the complainant used another transport company to get the tractor to Elburgon.
48. From the record, I find that the Prosecution failed to demonstrate that the Appellant concealed a material fact to induce PW1 to act on false representation and channel the money for the tractor.
49. In regard to the Appellant's ground that the trial court shifted the burden of proof to him contrary to the established principle that the burden of proof at all times lies with the Prosecution. The same has no legal basis, the Appellant was called upon to answer to the charges as framed by the Prosecution.

Disposition:

50. I find that the Prosecution did not prove its case to the required standard, which in criminal cases is proof beyond reasonable doubt. I find the evidence adduced by the Prosecution is not sufficient to warrant a conviction.
51. The Appellant has adduced evidence that indeed the money was not obtained through false pretence. He deals with the business of logistics clearing and forwarding. He shipped the tractor confirmed by the complainant and facilitated the same having delivered at the port. From the evidence it is not in doubt that the tractor was shipped and cleared at the port.
52. The KRA officer testified that the seals were intact, the bill of lading was intact and there is no way the tractor could have left the port if the paper work was incomplete. The complainant transported the tractor to his home through his own means from Mombasa port. Anything could have happened when the tractor was in transit in his hands.



Order:

1. The appeal has merits.
2. The conviction and sentence be set aside.
3. The money deposited by the Appellant be refunded.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS 13TH DAY OF MARCH, 2023.

JOHN CHIGITI (SC)

JUDGE

