



**Odemba v Republic (Criminal Appeal E111 of 2021)  
[2023] KEHC 2502 (KLR) (Crim) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2502 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E111 OF 2021  
JM BWONWONG'A, J  
MARCH 16, 2023**

**BETWEEN**

**DANIEL OMONDI ODEMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence delivered by Hon. A.R Kithinji C.M, on 21st October 2021 in Makadara Chief Magistrate's Court in Criminal Case No. 1484 of 2016 Republic vs Daniel Omondi Odemba)*

**JUDGMENT**

1. The appellant was charged with the offence of obtaining money by false pretences contrary to section 313 of the [Penal Code](#) (Cap 63) Laws of Kenya.  
He pleaded not guilty and after a full trial was convicted.
2. He was sentenced to a fine of Kshs 500,000/= in default to serve two years imprisonment. In addition, the appellant was ordered to pay compensation in the sum of Kshs 4,229,000/= to the complainant, which compensation to was to take precedence.
3. Being dissatisfied with the conviction and sentence, he filed a petition of appeal dated November 21, 2021, in which he raised 10 grounds of appeal.
4. The main grounds raised are as follows. In a coalesced form in grounds 1, 2, and 3, the appellant faulted the trial court in convicting him on insufficient evidence. He claimed the ingredients of the offence of obtaining money by false pretense were not established and the defence evidence was not properly analysed thus reaching a wrong verdict. Again in a coalesced form in grounds 4, 5, 6, 7 and 8 the appellant complained that the trial court wrongly exercised its discretion and imposed a



punitive condition precedent to the sentence imposed calling for the appellant to compensate the complainant Kshs 4,229,000/=. This was without ascertaining the quantum of the civil liability, the sum was disputed and substantial payments had already been made for the benefit of the complainant. In ground 9, the appellant argued that the trial court failed to afford him the right to reply and be heard on the question of compensation and quantum. In ground 10, the appellant stated that the trial court failed to consider the mitigating circumstances, while sentencing him.

5. In response to the appeal, the respondent filed grounds of opposition dated July 5, 2022. The grounds raised were that the appeal lacks merit, is misconceived and is unsubstantiated. The appellant was properly convicted by the trial court and the prosecution discharged its burden of proof beyond reasonable doubt. The sentence imposed by the trial court is lawful.

The appeal be dismissed in its entirety.

6. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs R* [2013] e-KLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
7. Charles Kinyua Kanyi (Pw 1), the complainant, testified that he operates a tents business under the name Charmania Events Limited. Sometimes in 2015, he ordered assorted chairs from China. Upon arrival, he sought the services of the appellant who was known to him as a clearing agent for over 4 years. The appellant operated under the name Key West Logistics, where he is the majority shareholder. He told the court that he paid the appellant Kshs 800,000/= in cash through a petty cash voucher, which sum was withdrawn from CBA Upper Hill Branch on July 13, 2015. The appellant started the process of clearing and informed him that he had encountered difficulties from Kenya Revenue Authority because of the change of value. The appellant was still not able to clear the goods and stated that it would take up to October of the same year.
8. The complainant told the court on November 2, 2015, the appellant asked for more money and was given Kshs 500,000/= through a petty cash voucher. Later on, the appellant gave his final invoice of Kshs 1,039,000, which the complainant paid out to the appellant in cash. However, the appellant did not manage to clear the container. The complainant told the court that around the same time, he was expecting another container from South Africa, and did a bank cheque in favour of the appellant to facilitate its clearance. The amount paid was Kshs 950,000/= through cheque No 00791 Equity Bank and Kshs 950,000/= through cheque No 000189 Cooperative Bank. The appellant also failed to clear the container from South Africa. In 2016, the complainant stated that he put pressure on the appellant and he stated that he had encountered problems. He did not pay the amount.
9. Dennis Otieno Nyamothi (Pw 2) an employee of Chairmania Events as Accounts Receivable Manager stated that on November 2, 2015, he paid out Kshs 500,000/= to the appellant in cash. He also issued him with two cheques of Kshs 950,000/= each. He told the court that the appellant did not clear the containers, and they were cleared by another company.
10. No 64114 PC Ramadhan Yusuf (Pw 3) of Industrial Area Police Station told the court that he was asked by CPL Talam to assist him arrest the appellant. He accompanied his colleague to Java CBD Embassy House where the appellant was meeting a client. The accused was positively identified by the complainant and he was arrested and booked at the station.



11. No 235261 CI Susan Wambugu (Pw 4) a forensic document examiner of the Directorate of Criminal Investigation testified for the prosecution. She told the court that on April 10, 2018, she received exhibits from Industrial Area police station from Cpl Talam. They were petty cash vouchers dated November 21, 2015, November 2, 2015 and July 13, 2015. She was tasked to ascertain whether the signatures contained in the petty cash vouchers were made by the same author of signature marked as Exhibit B1 and B2. It was her opinion that they were considering the pen inks baseline alignment, pen pressure, ink flow, arrangements and terminal flow. She produced the report in court. In cross-examination, she indicated that she did not know the appellant and only analysed the specimen she received.
12. No 67515 CPL Julius Talam (Pw 5) the investigating officer told the court he was tasked to investigate the matter on May 5, 2016. He recorded statements of witnesses and the appellant was arrested May 19, 2016. The appellant was alleged to have obtained Kshs 4,229,000/= by purporting that he was able to clear containers for the complainant. He produced a certificate of incorporation of the appellant's company which was authenticated. He also told the court that he obtained a sample specimen signature from the appellant which was sent to the document examiner for analysis. On April 10, 2018, the examiner's report indicated that the appellant's signature marched those on the petty cash vouchers.
13. In cross-examination, he told the court that he was not aware whether any quotation was issued by Kenya Revenue Authority. He was also not aware whether the appellant made payments towards the clearing of the containers. The petty cash vouchers were written by the complainant and signed by the appellant. He was also not aware that the petty cash vouchers were written at the same date.
14. After the close of the prosecution's case, the trial court found that the appellant had a case to answer and he was put on his defense. In his defence he gave sworn evidence and did not call any witnesses. In his defence, the appellant testified that he had worked with the complainant for over 3 years, during which time he advised on a shipment that arrived on September 20, 2015. That the complainant sent him a document from KRA that indicated that he owed Kshs 2,756,402/= in taxes. That he was tasked with taking over clearance from another agent.
15. He testified that he opened a file for the complainant of October 1, 2015 and the complainant paid a first instalment. He also reimbursed Export Consolidation Keys Limited, the other agent on October 7, 2015. In December 2015, he made payments of 1000 dollars as container deposit and an additional 3590 as detention fees and local shipping charges when the complainant deposited an additional amount. He stated that the amount was not enough to cater for the taxes and the complainant was not willing to pay the full amount, he proposed to return his documents and refund the money.
16. Concerning the 2<sup>nd</sup> container, he stated that he spent around Kshs 1,600,000 in the clearing process. Further, he had paid some amount to auctioneers, the complainant's advocate pursuant to a civil suit. It was his testimony that the complainant refused all proposals for reimbursement and caused his license to be suspended.
17. After the close of the defense case, the appellant was convicted and sentenced.

### **Analysis and determination**

18. In grounds 1, 2, and 3, the appellant challenged the totality of the evidence by the trial court to reach a verdict. He claimed the ingredients of the offence of obtaining money by false pretense were not established and the defence evidence was not properly analysed thus reaching a wrong verdict.
19. In his submissions, the appellant submitted that he was a licensed clearing agent and had successful business with the complainant on several occasions. Therefore, he did not make a false representation



that he will clear the complainant's goods. He argued that no evidence was adduced to establish false misrepresentation as the same must relate to a past or present fact and not a future fact or event. That clearing goods was premised on a future event, which cannot support the charge.

20. Further, he also submitted that he took steps to clear the goods by engaging the complainant's previous agent Export Consolidation Keys Limited and made payments to facilitate the clearing. This evidence was not challenged by the prosecution. However, the court castigated him as his only duty was to clear the goods. However, such payments were required to be made before any clearance could take place on behalf of the client/complainant. In addition, the payments were also not challenged by the prosecution. He maintained that there was no intention to defraud, as found by the trial court.
21. In rebuttal, the respondent submitted that the appellant obtained money from the complainant with the understanding that he would clear the container from the port. The payment was done as agreed but the goods were not delivered. Further, a refund of the money was never done.
22. The offence of obtaining by false pretence is defined under Section 313 of the Penal Code which 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.”

23. There are three essential elements of the offence of obtaining by false pretences, which are:
  - i. Obtaining something capable of being stolen;
  - ii. Obtaining through false pretences; and
  - iii. Obtaining with intent to defraud.
24. The first element of the subject offence that needed to be proved is whether the appellant obtained something capable of being stolen. From the record, there is evidence that the appellant obtained money. It was Pw 1's evidence that the appellant received Kshs, 800,000/=, Kshs 500,000/=, 1,039,000/= and two cheques of Kshs 950,000 each, which were cashed by the appellant. The appellant did not dispute he received the said amount, which was intended to clear the complainant's goods at the port. It is therefore clear from the evidence that the appellant obtained money from the complainant and money is something that is capable of being stolen. However, the taking of the money did not solely constitute the offence and it was for the prosecution to prove that the same was obtained through false pretences and with intention to defraud.
25. Secondly, did the appellant obtain the money by false pretence or with the intention to defraud the complainant?

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.”

From the definition, there must be:

- a. A representation of fact by word, writing or conduct;
- b. The representation is either past or present;



- c. The representation must be false; and
- d. The person made the representation knowing it to be false or did not believe it to be true.
26. Section 313 of the Penal Code codified the position in the above cases; the representation of fact must be either past or present, and not future. From the above definitions it is clear that the offence of obtaining by false pretences does not relate to future events. This section provides that the representation should be of either a past or present fact but not a future fact. In the case of *Oware V. Republic* (1984) KLR 2001 the Court of Appeal sitting at Nairobi addressed itself thus:-
- “A representation as to a future event cannot support a charge of obtaining money by false pretences.”
27. In the above-mentioned the case of *R. V. Dent* (1955) 2 QB PP 594/5 was referred to and in which case Devlin, J. stated that:
- “a long course of authorities in criminal cases has laid 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 stated will amount to false pretense in criminal law”
28. It is not in dispute that the complainant sought the services of the appellant to clear goods which were at the port. The complainant told the court that he previously worked with the appellant and contracted him to clear two containers one from China and another from South Africa. In his defense, the appellant stated that he began the process of clearing the goods, but had to make payments to KRA and other institutions before he could complete the process.
29. However, the money given by the complainant was not enough to cover the expenses incurred. Further, that the clearance of the goods was subject to the payment of the full amount which the complainant opted not to.
30. It was therefore upon the prosecution to prove that the appellant received the full amount but refused and/or failed to clear the goods at the port. From the record, there were two separate transactions involved between the appellant and the complainant. The first was for a container from China and the second, a container from South Africa. For the 1<sup>st</sup> container, the appellant issued a final invoice of 1,039,000/= which was paid out believing that after payment the goods would be delivered. Similarly, the was issued and cashed two cheques of Kshs. 950,000/= each. In his defence, the appellant did not indicate what amount was required to enable him clear the goods, only that he was not able to clear them.
31. The appellant’s defence was that he needed more money to enable him clear the goods. Further, when the complainant refused, he decided to refund him, which he did not. In addition, he had additional incurred expenses payable in chargeable fees to the complainant such as KRA duty and levy which he paid.
32. The issue in dispute is whether the appellant intended to clear the goods at the port. The appellant stated that when he sent cheques to the complainant, he refused to cash them. However, this was only done after he had been arrested and charged before the trial court. The trial court noted that the appellant falsely misrepresented himself that he was in a position to clear the complainant’s goods but failed to do so. It was based on this misrepresentation that the complainant parted with his money.
33. Section 312 of the Penal Code confirms this position by decreeing that the representation must be of either a past or present fact. The Court of Appeal pronounced itself on this position in *Matblida*



*Akinyi Oware vs Republic*, [1989] e-KLR where it cited with approval the holding of Devlin, J in the case of *R. V. Dent*, [1975] 2 All E.R. 806 and held that to constitute a false pretence, the false statement must be of an existing fact. I find that the payment was for a future act. The Court of Appeal in that regard held that:

“A statement of intention about future conduct whether it be a statement of existing fact, is not such a statement as null amount to a false pretence in Criminal Law”

34. The court was saying that the fact of obtaining by false pretences does not relate to future events.
35. The clearing of goods at the port is a process that is future oriented and that must be why there were timelines for the process to be completed and the payment of money. The goods were not supposed to be cleared and received by the complainant on the same day.
36. In the premises, the facts in this case undoubtedly reveal that the appellant’s representation related to a future event which, as demonstrated earlier, cannot support a charge of obtaining by false pretences. The facts are insufficient to prove the offences charged in this case to the required legal standard.
37. In addition, it was not disputed that the appellant was a licensed clearing agent and had on several occasions done business with the complainant. His representation that he could clear the complainant’s goods was therefore not false.

In the premises, the appeal succeeds.

38. The conviction and sentence recorded against the appellant are hereby quashed.
39. The appellant is hereby ordered set free unless he is held on other lawful warrants.

**Judgement signed, dated and delivered in open court at Nairobi this 16<sup>th</sup> day of March 2023.**

**J M BWONWONG’A**

**JUDGE**

**In the presence of-**

Mr. Kinyua court assistant.

Mr Amalemba for the appellant

Mr. Mutuma for the respondent.

The appellant in person.

