



**Mugendi v Republic (Criminal Appeal E027 of 2022)
[2023] KEHC 20760 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E027 OF 2022**

LW GITARI, J

JULY 21, 2023

BETWEEN

JULIANO MUGENDI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein was charged in Chuka SRM's Court with the offence of obtaining money by false pretense contrary to Section 312 as read with Section 313 of the Penal Code. It was alleged that on diverse dates between 6th June & 6th November, 2018, the Appellant with intent to defraud obtained from the complainant the sum of Kshs. 946,100/= by falsely pretending that she was in a position to buy a motor vehicle registration No. KAY xxxX for her.

The appellant pleaded not guilty to the charge and the matter proceeded to hearing where five witnesses testified against the appellant.

2. After a full trial, the Appellant was found guilty, convicted, and sentenced to serve two (2) years' imprisonment. In addition, the Appellant was ordered to refund the complainant the sum of Kshs. 946,110/= which he had obtained from the complainant.
3. The appellant was dissatisfied with both the conviction and sentence. The Appellant filed the instant appeal. The appeal is based on the following grounds:
 - a. That the learned trial magistrate erred in law and fact in finding that the charge of obtaining money was proved without inquiry into the absence of photographic evidence as required under Section 78 of the *Evidence Act* (Cap 80 Laws of Kenya)
 - b. That the learned trial magistrate erred in law and fact in awarding excessive sentence when the evidence was based on the same facts.



- c. That the learned trial magistrate erred in law and fact for not considering that both the accused and the complainant were a man and wife with business partnership.
 - d. That the learned trial magistrate erred in law and fact for not considering that the accused and the complainant had cohabited and the marriage ceremonised as per the evidence of the defence witness tendered.
 - e. That the trial magistrate erred in law and fact for not considering that PW5 investigated the case of stealing but not obtaining as per the statement and evidence.
 - f. That the learned trial magistrate erred in law and fact in not considering the evidence tendered by the defense witnesses especially DW2 and DW3.
 - g. That the conviction and sentence is against the weight of the evidence and law.
 - h. That the sentence of two (2) years imprisonment without an option of non-custodial sentence is manifestly excessive and or wrong in law having in mind that the appellant was a first offender.
4. The Appellant thus prays for the appeal to be allowed by quashing his conviction and setting aside the sentence.
 5. This Court gave directions that the appeal be disposed of by way of written submissions. The Respondent filed his written submissions on 30th November, 2022. On the other hand, the Appellant indicated that he filed his submissions on 3rd February, 2021. However, a perusal of the document filed on the said 3rd February, 2021 clearly shows that what the Appellant filed was a replica of his grounds of appeal which I have reproduced earlier in this judgment. I will therefore treat the said grounds as his submissions.
 6. This being a first appeal, and considering the duty of this court is to re-examine and re-evaluate the evidence on record and reach its own conclusion. I will proceed to give the brief analysis of the evidence tendered before the trial court.

The Evidence

7. PW1, Lydia Wanja Njeru, testified that she knows the Appellant as they were friends and they used to go to the same church. That around May 2018, she told the Appellant that she wanted to buy a vehicle and the Appellant told her that he had a friend who was director at Acacia Green Academy and who was selling a 29 seater mini bus at a good price. That they both went to Nairobi to the said school to view the vehicle. It was KAY xxxX and its price was negotiated at Kshs. 500,000/=.
8. It was PW1's testimony that she then applied for a loan from Co-operative Bank of Kshs. 1,916,359/= . That the loan was a top-up and Kshs. 421,639/= was deducted leaving her with Kshs. 1,393,572/= . That the loan went through on 5th June, 2018 and the same was credited in PW1's account. That on 6th June, 2018, she withdrew Kshs. 650,000/= from her account and sent Kshs. 500,000/= to an account at Acacia Green Academy which she had been given by the Appellant. She then sent the Appellant Kshs. 110,000/= to use to change the colour of the vehicle as it had been painted with school colours.
9. On 14th June, 2018, the Appellant indicated that the money sent to him was not enough for the repairs and PW1 sent him a further Kshs. 150,000/= on the same day. PW1 stated that the vehicle was brought to Chuka Town where she resides in July 2018 and she took it to church to have it dedicated. That after four (4) days, the Appellant then took it back to Nairobi so that it could start operating as a Citi



- Hoppa. The Appellant was to be the driver and they agreed that the Appellant would be sending PW1 Kshs. 4,000/= everyday.
10. PW1 stated that she asked the Appellant for the log book of the motor vehicle but he kept saying that the same was still being processed. Further, that the Appellant never sent her any money and kept giving excuses that the motor vehicle had an issue or other times that it had been arrested by the police. On 14th July, 2018, PW1 sent the Appellant Kshs. 14,000/= and some other amounts which came to a total of Kshs. 172,110/=. That the Appellant never sent her any proceeds for the vehicle save for Kshs. 50,000/= which he sent her.
 11. PW1 decided to do a motor vehicle search and she found out that the vehicle was registered in the names of the Appellant as the owner and that a search done on 19th April, 2021 showed that the Appellant had sold the motor vehicle to one Francis Muiruri Gakure. PW1 then reported the matter to the police.
 12. On cross examination, PW1 denied that she was ever in a relationship with the Appellant. It was her testimony that they were only friends and had never lived together.
 13. PW2, Pityness Mukwanjeru, is PW1's mother. She stated that complainant is someone she knew from their church known as World Harvest. She corroborated PW1's testimony on how Pw1 wanted to purchase a motor vehicle and the Appellant agreed to assist her. Later the vehicle was brought to the church where it was dedicated. PW1 then informed her that the appellant had gone with the vehicle to Nairobi to start work but appellant was not sending money.
 14. PW3 was Jane Njeri Ngure, she also corroborated the testimony of PW1 that the Appellant goes to the same church as them and that he conned PW1 of the motor vehicle which he had promised to assist her to buy.
 15. PW4, Rosemary Riungu, is a Credit Manager at Co-operative Bank Chuka. She produced the personal account statement of PW1's account with the bank (P.Exhibit 3) and a loan account statement (P.Exhibit 9) as evidence that PW1 applied for a loan on 30th May, 2018 and the same was successfully credited to her account on 5th June, 2018. On cross-examination, PW4 confirmed that the purpose of the loan was to acquire a motor vehicle. As per the loan statement, she confirmed that the complainant was advanced a loan of Ksh.1,976,359.30
 16. PW5 was P.C. Joseph Olenampaso, the investigating officer. It was his testimony that on 29th November, 2019, he was directed by the DCIO to investigate a case of stealing that had been reported by PW1. That on conducting his investigations, he found that PW1 was interested in buying a commercial motor vehicle in June 2018 and that the Appellant informed her that he knew a person she could purchase the motor vehicle from. That the purchase price was Kshs. 500,000/= and the Appellant gave PW1 the account number where she could deposit the money (that is, 0114876xxxxxxx for Co-operative Bank in the bank in the names of Acacia Green Academy). That thereafter on the complainant sent the Appellant money on diverse days for seats of the vehicle and repairs. The vehicle was finally brought to Chuka for dedication by a pastor and afterwards taken back to Nairobi to start doing business. That PW1 later came to find out that the motor vehicle was transferred to the Appellant's name and that the current search record indicates that the owner is Francis Muiruri Gakure. PW5 produced in evidence the following:
 - a. Deposit slip for Kshs. 500,000/= (P.Exhibit 1)
 - b. Deposit Slip for Kshs. 110,000/= (P.Exhibit 2)
 - c. Deposit slip for Kshs. 150,000/= (P.Exhibit 3)



- d. Deposit Slip for Kshs. 14,000/= (P.Exhibit 5)
 - e. Mpesa Statement from 1st June, 2018 -31st December, 2018 containing a total of Kshs. 172,100/= sent to the Appellant for the repairs of the bus (P.Exhibit 6)
 - f. Motor vehicle search dated 19th April, 2021 (P.Exhibit 7(a))
 - g. Motor vehicle search dated 7th June, 2018 (P.Exhibit 7(b))
 - h. Copy of the Log Book (P.Exhibit 8)
17. The trial magistrate held that the appellant had a case to answer. The Appellant was placed on his defence. He testified as DW1 stating that he met PW1 in November 2017 in Chuka Town through his sister-in-law who was a good friend to PW1. That the Appellant had just lost his wife and the started living together with PW1. That in December 2017, they introduced each other to their families and in May 2018, dowry negotiations started. That later one Dr. Karanja told him that he was selling a motor vehicle. The Appellant maintained that he was not an agent for purposes of buying the vehicle and that they disagreed with PW1 because of debts brought by the losses made in the motor vehicle. He conceded that all the transactions produced in court were true but stated that they used to send each other money. He stated that they attempted to settle the matter between their families but it bore no fruit.
18. On cross examination, the Appellant stated that they he was not legally married to PW1 and that he had no proof that they were business partners. That the monies sent to him were sent to him as her husband and that not all monies used to purchase the motor vehicle came from the complainant. He acknowledges that he was the one who introduced PW1 to the seller and contends that PW1 had always known that he had transferred the motor vehicle to his name. He further stated that the bus is in Nairobi with a friend who owes them money fort the bus. He conceded that the vehicle should have been transferred to the complainant.
19. DW2 was Jane Gatiri, the mother to the Appellant. It was her testimony that the Appellant and PW1 were friends. That they had gone to the family of PW1 and what was remaining was dowry payment. That according to her, the Appellant and PW1 were married.
20. DW3 was one Clara Mwendu Mugendi, the Appellant's daughter aged fourteen (14) years. It was her testimony that the Appellant had a matatu business with PW1. That the two met at a parents meeting in her school and in 2018, the Appellant took them to live with PW1 in Chuka.

Issues for Determination

21. I have re-evaluated the evidence on record. The main issues that arise for determination in this appeal are:
- a. Whether the accused and the complainant were husband and wife.
 - b. Whether the prosecution proved the offence of obtaining by false pretence to the required standard.
 - c. Whether the sentence meted against the Appellant was harsh and excessive in the circumstances.



Analysis

a. Whether the presumption of marriage arises

22. The Appellant has brought this appeal on the ground that the trial magistrate erred in failing to find that the Appellant and the complainant were a man and wife in a business partnership. PW1 denied being in a relationship with the Appellant. On the other hand, the Appellant maintains that he was in a relationship with the complainant and that the disagreements started when their business partnership started making losses.
23. Before considering the facts and merit of this case, it is important to point out again that as a first appellate court, this Court is duty bound to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment. See *Okeno v Republic* [1872] E.A 32 where the court stated that:-

“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 to the appellate court’s own decision on the evidence. 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 findings and conclusions, it must make its own findings and draw its own conclusion. 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 witnesses.”

It is therefore necessary to re-evaluate the evidence and reach a conclusion while bearing in mind that I have not had the advantage of seeing the witnesses.

24. It is apparent from the grounds of appeal that the main contention by the Appellant is that the trial court erred by not considering both the appellant and the complainant were a man and wife with business partnership, see ground No. 3 above.
25. PW1 told the court that they were never in a relationship and had never planned for a wedding. She further denied that the children of the Appellant regard her as their mother. PW2 and PW3 stated that they were friends from the same church. On the other hand, the Appellant stated that he met PW1 after losing his wife and that they started living together as he wanted a mother figure for his children. That their families were introduced to each other and they used to attend functions together. The Appellant called his mother (DW2) and his daughter (DW3) in an attempt to show that the complainant was his wife.
26. In considering whether a marriage could be presumed between the two out of long cohabitation, the trial court relied on the Court of Appeal case of *Mary Njoki v John Kinyanjui Muthuru* [1985] eKLR where it was held that:

“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage



would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”

27. The trial court noted that the Appellant admitted in cross-examination that he had not formally married PW1 and that he had no proof that the two were business partners. That the Appellant’s mother admitted that dowry had not been paid for PW1. Based on this evidence, the trial court opined that the Appellant failed to demonstrate to the required standard that him and the complainant were husband and wife.
28. I have considered the evidence on record and I am inclined to be in agreement with the decision of the trial court on the issue of whether a marriage could be presumed between the Appellant and PW1. It was the Appellant’s testimony that he met PW1 in 2017 and decided to start living together. That in December 2017, they introduced each other to their respective parents and in May 2018, his family met PW1’s family for dowry negotiations. No evidence of these meetings was adduced. In my view, while there was an association between the Appellant and the complainant, the same was not a long association and cohabitation to presume a marriage between the two. Furthermore the prosecution proved that all the monies for the purchase of the said vehicle was paid by the complainant a clear demonstration that they were not in partnership business. There was no evidence placed before the trial court to prove the assertion. I am minded that the appellant bears no burden to prove the allegation. See Article 50(2)a of *the Constitution* which provides that an accused person has the right to be presumed innocent until the contrary is proved. I find that the prosecution proved that no marriage existed between the two and there was nothing the court can hold to find a presumption of marriage.

b. Whether the prosecution proved beyond any reasonable doubt the offence of obtaining by false pretence

29. 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.”

30. From the above provision, and as rightly held by the trial court, 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.
31. On the first element of the subject offence, it clear from the record that the Appellant did obtain money from the complainant. The Appellant himself admitted this. Money is something that is capable



of being stolen. As such, the first element of the charge was proved that the Appellant did obtain something capable of being stolen.

32. The next element is whether he obtained the money under false pretences or with intent to defraud. 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.”

33. The Appellant received money to purchase the motor vehicle as well as do repairs on the subject vehicle. He was also given the responsibility of running the bus business on the understanding that he would remit Kshs. 4,000/= to the complainant on a daily basis. However, the Appellant failed to send the proceeds to PW1. The Appellant’s defence was that the vehicle started making losses and that is when the disagreements started between him and PW1. On cross-examination, he admitted that the vehicle should have been transferred to PW1 as she had paid the purchase price. That he had no proof that the money from the transport business was to be remitted to a joint account with the complainant. In my view, the Appellant’s defence is a sham for the following reasons:-

1. He had the vehicle registered in his name contrary to what was agreed between him and the complainant.
2. He did not involve PW1 when transferring the vehicle to a third party. The appellant made a presentation that was false by informing the PW1 that he would have the vehicle registered in her name. This was never to be. He had the vehicle registered in his name then transferred it to a 3rd party without the knowledge of the appellant. The appellant made the false representations with intent to defraud or to permanently defraud the complainant of the money and the motor vehicle.

The appellant has contended that the PW5 was investigating an allegation of theft, see ground No. 5. The applicant did not submit on this ground. The respondent has urged the court to find that if the offence of obtaining was not proved the court be pleased to invoke Section 179 of the Criminal Procedure Code and convict the applicant under the section, if the prosecution has adduced evidence which does not disclose the offence charged but instead proves the commission of a lesser offence, the court may convict the accused for the for the proved lesser offence. The requirement under the Section is that, one, the offence charged is not proved and two, a lesser offence even if not charged is proved. This is what is referred to as cognate offences. It refers to offences that are related, similar or of the same species. Examples are murder and manslaughter, robbery with violence and stealing. The substituted offence must be lesser and cognate with the offence charged. Section 268 of the Penal Code which defines stealing provides as follows:-

- “(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say -



- (a) an intent permanently to deprive the general or special owner of the thing of it;
- (b) an intent to use the thing as a pledge or security;
- (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
- (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
- (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
- (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”

The punishment for the offence of stealing as provided under Section 275 of the Penal Code is three (3) years. Section 313 of the Penal Code (supra) on the other hand provides the offence of obtaining money by false pretences is a misdemeanour and attracts a sentence of three years upon conviction. These offences are not cognate as none is lesser to the other. The requirement under Section 179 of the Criminal Procedure Code is that one is charged with a serious offence but facts disclose a lesser offence for which an accused person may be convicted. I give examples above. I find that the facts as testified by witnesses disclose the offence which the appellant was charged with.

The appellant did not suffer any prejudice due to the fact that the investigating officer said he was investigating theft. After the investigations were concluded he was charged with specific offence



and particulars of the charge were disclosed. Article 50 (3) (b) of the Constitution provides that;

“Every accused person has a right to a fair trial which includes the right-

- (b) to be informed of the charge with sufficient details to answer it.”

To buttress this Section 134 of the Criminal Procedure Code provides that the charge or information must contain a statement of the specific offence and enough information to demonstrate the nature of the offence charged.

I find that the charge sheet fully complied with the requirements under the Constitution and the Penal Code.

The appellant submitted that Section 78 of the Evidence Act was not complied with. The Section deals with photographic Evidence-admissibility of certificate. The appellant did not advance any submissions and this court is in the dark as to what was not complied with under the Section. The ground is a sham.

- c. Whether the sentence meted out against the Appellant was harsh and excessive in the circumstance

- 34. Sentencing in law lies within the discretion of the trial court. In this case, the Appellant was liable for a sentence of three (3) years as per the provisions of Section 313 of the Penal Code. The trial court sentenced him to serve two (2) years imprisonment. I find that the sentence was not wrong in law and neither was it manifestly excessive or harsh. I find no reason to interfere with the sentence.

Conclusion

- 35. The upshot of the foregoing, is that the appeal has no merits. The conviction of the appellant is proper.

Order:

The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21ST DAY OF JULY 2023.

L.W. GITARI

JUDGE

