



**Mutwiri v Republic (Criminal Appeal E016 of 2022)
[2023] KEHC 19805 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL E016 OF 2022**

DR KAVEDZA, J

JULY 6, 2023

BETWEEN

PATRICK GIKUNDA MUTWIRI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. H.M Nyaga C.M delivered on 12th November 2021 at Makadara Chief Magistrate's Court Criminal case no. 2295 of 2015 Republic vs Patrick Gikunda Mutwiri)

JUDGMENT

1. The appellant was charged and after full trial convicted on three counts of the offence of obtaining goods by false pretense contrary to section 313 of the [Penal Code](#) (cap 63) Laws of Kenya. He was sentenced to pay a fine of Kshs. 100,000 on each count in default to serve 1-year imprisonment on each. In addition, he was directed to reimburse the complainant the full amount owed. Being dissatisfied, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, the appellant raised 9 grounds which have been coalized as follows: The appellant challenged the totality of the prosecution's evidence against which he was convicted. The appellant argued that the trial court failed to consider his defence. He further complained that the trial court failed to comply with the provisions of section 169 of the [Criminal Procedure Code](#) (cap 75) Laws of Kenya. He maintained that his conviction was unsafe and should be quashed.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of [Okeno v Republic](#) [1972] EA 32 and further in the Court of Appeal case of [Mark Oruri Mose v R](#) [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its 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.

4. The prosecution called six (6) witnesses in support of their case. Ruth Omukitsa Osolo (PW 1) the complainant herein told the court that she is a business lady and the sole proprietor of Docutech Systems and Communication company. She testified that she saw an advert in the local daily newspaper dated September 12, 2014 of a tender by an NGO known as Restoration of Eastern Commonwealth Organisation (RECO). She approached the organisation intending to tender for the supply of goods. She purchased two sets of documents and made a formal bid. She was later invited to the opening of the tendering and sent a representative. She told the court that the representative was informed that they had come second in their bid to supply stationery and ninth in their bid to supply building material.
5. She narrated that she later received a call from an individual known as Muthiora who introduced himself as RECO's project manager. He informed her that he would facilitate the order of the supply of office stationery. She visited RECO's offices in Karen where she met the appellant with whom they discussed payment for the goods to be supplied. He wrote a letter of confirmation which was received via email. She confirmed the authenticity of the organisation and started the process of supplying the goods. Subsequently, she delivered office stationery worth Kshs.4,500,000 which was done in 3 batches receipt of which was confirmed.
6. In December of the same year, the appellant deposited Kshs. 200,000 to her account being part-payment for the goods supplied. She told the court that she followed up on the balance to no avail. The appellant's offices were locked. On confronting the appellant, he alluded to the failure to pay the amount due to frozen accounts. However, despite giving him time to settle the balance, the appellant failed to pay. She reported the matter to the police who arrested him after tracing him through social media.
7. Jean Zacharia Osolo (PW 2) testified that he is the complainant's husband. Reiterated the evidence of PW 1 on the tendering process. In addition, he testified that during the process, the appellant presented himself as the procurement manager of RECO. That once, PW 1 received a call that the local purchase order was ready, they organised a motor vehicle to ferry the goods to a godown in Donholm and another to offices in Karen. It was his evidence that the appellant gave the directions on where the goods were to be delivered. However, the payment was never made.
8. Jackson Misika Ogotu (PW 3) testified that he was a taxi driver. On September 12, 2014, the complainant hired him to ferry goods to Karen. He ferried the goods and was compensated for the work done.
9. Mayen Patel (PW 4) testified that he operates a shop along Gawana Road dealing in stationery. He told the court that on November 12, 2014, the complainant requested and was issued a quotation of assorted stationery items. The complainant paid in cash and was supplied with the goods. He issued the complainant with a receipt of goods valued at Kshs. 2,200,000.
10. No. 235261 CI Susan Wambugu (PW 5) a forensic document examiner AT DCI headquarters told the court that on May 16, 2015, she received exhibits from DCI Buru Buru being specimen signatures and handwriting of the appellant. She was required to match the specimens with the handwriting to determine whether they matched. She conducted a forensic comparison. She concluded that the two sets of documents were made by the same author. She made a report to that effect and produced the same in court.
11. No. 72450 CPL Kennedy Chembaros (PW 6) the investigating officer told the court that he was directed to investigate the case after a report was made by the complainant. The appellant had allegedly



obtained goods by falsely pretending that he could pay for them, a fact which he knew was false. He did a search of the appellant's organisation at the company's registry and NGO Board and found that the company did not exist. The complainant traced the appellant and he was subsequently arrested at his place of work.

12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave sworn evidence and called one witness in support. It was his testimony that he an employee of Methodist Church Kenya since 2005. That he works from 8 am to 5 pm on weekdays and deals with the church program on weekends. He denied knowing the complainant and only met her when he was arrested. He also denied ever tendering for and receiving any goods from the complainant.
13. Amos Kisimi Mbaya (DW 2) told the court that he works as a treasurer at the Methodist Church in Kawangware. He knows the appellant as a colleague who is an accountant. He testified that the appellant works from 8 am to 5 pm and had no time to be employed anywhere else as alleged by the complainant.
14. The trial court found the appellant guilty and convicted him accordingly.

****Analysis and determination.****

15. In his appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the trial magistrate failed to consider the law governing the operations of companies and the tendering process. Further, the prosecution witnesses gave inconsistent and contradictory evidence. This is because the complainant did not prove that the alleged tender was between her and the RECO. Secondly, the goods which were allegedly supplied were received by the appellant. In addition, there was no evidence on record that the alleged organisation (RECO) had any connection to the appellant. He challenged the evidence of the complainant specifically that she was issued with a business card by the appellant. He maintained that the business card did not bear his name but the name of Patrick Kigunda who was not known to him. In addition, the evidence of the taxi driver (PW 4) who allegedly ferried the goods contradicts that of PW 2. PW 2 claimed that the goods were ferried in a lorry while PW 4 claimed to have used a Toyota Probox. In totality, the appellant maintained that the prosecution failed to prove the ingredients of the offence he was charged with.
16. This court has re-evaluated the facts of this case. It has also re-evaluated the rival submissions made by parties to this appeal. section 313 of the *Penal Code* (cap 63) Laws of Kenya provides that;

“ 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.”
17. The prosecution is required to establish that the appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud. In the present appeal, it was the complainant's case that she was awarded a tender by the Restoration of Eastern Commonwealth Organisation (RECO) for the supply of assorted office stationery. She met and dealt with the appellant who was a procurement manager of the said organisation. She stated that the appellant requested her for a quotation and they agreed on the cost of the stationery items supplied. The appellant directed her to deliver the office stationery to a godown in Donholm and others in Karen. The payment was supposed to be made on delivery of the goods. She delivered the stationery and the receipt was acknowledged by stamping on the delivery notes produced in court.



18. The complainant followed up on the payment for several months. She only received Kshs. 200,000 from the appellant. The appellant promised to pay her once he sorts out issues he had with an alleged frozen account. When she continued pursuing her payment, her calls went unanswered and the appellant blocked her. She visited RECO premises only to find them locked. She traced the appellant through his social media accounts and discovered where he was working. She was able to track him down and he was subsequently arrested by the police. The complainant is yet to receive any further payment.
19. The appellant on his part denies receiving the stationery from the complainant. He denies tendering for the supply of any goods on behalf of RECO or even being affiliated with RECO.
20. From the evidence adduced, there is no doubt that the complainant delivered assorted office stationery to the Restoration of Eastern Commonwealth Organisation. The prosecution produced evidence being copies of delivery notes from Docutech System & Communication the complainant's company. The delivery notes (prosecution exhibit no.7 a, b & c) contained a stamp from RECO confirming receipt of the same on 12th, 13th, and 18th November 2014.
21. The question is whether these goods were supplied at the direction of the appellant. The appellant denied any affiliation with RECO. PW 6 the investigating officer told the court that he did a search at the company's registry and the NGO Board and found that the organisation did not exist. It was therefore used as a disguise in an attempt to shield perpetrators of any fraudulent activities undertaken. It was the complainant's testimony that she primarily dealt with the appellant. She also dealt with Muthiora Mbaya who presented himself as the Project Manager. The complainant and PW 2 both gave evidence that they dealt with the appellant who presented himself and the project manager during their transaction. He was therefore well known to them. The business card produced shows the name of the appellant with the title of procurement manager of RECO.
22. The appellant alluded to the fact that the name is spelt as Kigunda and not Gikunda implying that it was not him. However, I find that this is not a case of mistaken identity. The complainant and PW 2 were able to recognise him. They interacted with him several times. The identification of the appellant was therefore by recognition. In addition, the report by PW 5 the document examiner confirmed that the appellant issued the business card on record to the complainant. It was her opinion that the handwritten number on the business card matched the appellant's handwriting. It is my finding that goods were supplied and received at the direction of the appellant.
23. The next issue is whether the assorted stationery delivered by the complainant is something capable of being stolen under the law. Were the goods obtained in false pretense and to defraud the complainant? Section 312 of the *Penal Code* defines the term false pretence as:

“ 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 complainant stated that the appellant indicated that he would pay her a total of Kshs.3,526,500 for the delivered stationery. She told the court that the appellant requested for her quotation. They agreed on the pricing of each item. The payment was to be made on delivery of the goods. She however received only Kshs. 200,000 as part-payment after the delivery of the goods to the appellant.
25. Having already found that the appellant received the goods and is directly linked to RECO, the appellant did not dispute making a payment of Kshs. 200,000 to the complainant. Without any



evidence to the contrary, this court can only assume that the amounts were paid by the appellant as part payment for the delivery of the stationery supplied and delivered.

26. The appellant was therefore required to pay the balance of Kshs. 3,326,500. The appellant made a false representation that he was in a position to pay the complainant the said amount for delivery of the stationery. His conduct after the complainant delivered the goods goes to show his guilt. He however did not fulfil his obligation and made a promise to pay the amount and to date, the complainant is yet to receive payment. He even stopped receiving the complainant's calls and blocked her number. To add salt to injury, the appellant vacated the premises and he could not be located. The complainant had to go to great lengths to trace him. The appellant was later arrested after the complainant reported the matter to the police. The appellant had therefore defrauded the complainant.
27. The defence of the appellant did not dent the otherwise strong culpatory evidence adduced by the prosecution witnesses. It was properly dismissed as being of no evidential value. His guilt was established to the required standard of proof beyond any reasonable doubt. This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. His appeal against conviction is hereby dismissed.
28. From the evidence and judgment of the court, the appellant obtained assorted office stationery valued over Kshs. 3 million from the complainant. For a sentence to meet the goal of discouraging crime, it must be commensurate with the injury occasioned to the victim of crime. Here, I find that the sentence meted out to the appellant was proper, noting that the maximum sentence is up to three years imprisonment, and deserves no interference by the court in the circumstances. It is however worth noting that, such would be the appropriate cases for the trial court to order restitution under section 178 of the *Criminal Procedure Code* (cap 75) Laws of Kenya.
29. Consequently, I find that this appeal is without merit and it is therefore dismissed.

Judgement dated and delivered virtually this 6th day of July 2023.

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the State

Mr. Oduk for the Appellant.

Habiba C/A

