



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 194 OF 2019

ANNE NJAMBI KIRAGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, *Anne Njambi Kiragu*, was charged with the offence of obtaining money by false pretences contrary to *section 313* of the *Penal Code*. The particulars supporting the charge allege that on diverse dates between 6th July 2012 and 22nd October 2012 along Joinsala road in Nairobi within Nairobi county, with intent to defraud, the appellant obtained Kshs.800,000 from *Peter Mbuthia Nganga* by falsely pretending that she was in a position to sell to him a printing machine, a fact she knew to be false.

2. After a full trial, the appellant was convicted and sentenced to pay a fine of KShs.120,000 in default to serve one year imprisonment. She was aggrieved by her conviction and sentence hence this appeal.

3. In her petition of appeal filed on 27th September 2019 through her advocates *Messrs. Wairegi Gatetua & Associates Advocates*, she advanced nine grounds of appeal in which she principally complained that the learned trial magistrate erred in law and fact by: convicting her on the basis of contradictory evidence which did not prove the offence charged beyond any reasonable doubt; failing to appreciate that the evidence presented before the court disclosed a civil complaint and not a criminal offence; disregarding the defence offered by the appellant; and; imposing a severe and excessive sentence despite the existence of a favourable probation officers report.

4. At the hearing, both parties chose to prosecute the appeal by way of written submissions which they duly filed. The submissions were highlighted orally before me by learned counsel *Mr. Wairegi* for the appellant and learned prosecuting counsel *Mr. Kiragu* for the respondent.

5. In his written and oral submissions, *Mr. Wairegi* argued that the trial court erred by convicting the appellant on evidence that did not establish the essential ingredients of the offence preferred against her. Expounding on this proposition, counsel submitted that the prosecution failed to prove that the representation made by the appellant was in fact false and that she made it believing it to be false; that in any event, the representation related to importation of a printing machine from the UK which was a future event and was not a past or present representation which is what qualifies to be one of the essential ingredients of a false pretence.

6. Counsel further contended that what was before the trial court was a civil matter which should not have been entertained as a criminal offence given the complainant's assertion that his only interest was a refund of the deposit he had paid to the appellant; that the civil nature of the transaction founding the charge formed the basis of the appellant's defence which the trial court disregarded when making its decision; that the applicant was wrongly convicted as the prosecution failed to prove all the ingredients of the offence beyond any reasonable doubt.

7. On sentence, *Mr. Wairegi* submitted that the sentence meted out on the appellant was harsh and excessive considering that she was a first offender and the presentence report was favourable.

8. The appeal is contested by the state. In his oral and written submissions, *Mr. Kiragu* invited the court to dismiss the appeal for lack of merit as in his view, the evidence adduced before the trial court proved all the ingredients of the offence beyond reasonable doubt.

Relying on the authority of *Benard Kimani Gacheru V Republic, [2002] KLR*, *Mr. Kiragu* urged the court to find that there was no basis for interfering with the sentence passed by the trial court as the same was lenient and lawful.

9. This is a first appeal to the High Court. I am fully aware of my duty as the first appellate court which is to revisit and to exhaustively re-evaluate all the evidence presented before the trial court to draw my own independent conclusions. I am also mindful of the fact that unlike

the trial court, I did not have the benefit of seeing or hearing the witnesses and that I should give allowance to that disadvantage. See: *Okeno V Republic, 1972 EA 32; Kiilu V Republic, [1987] KLR 99.*

10. I have given due consideration to the grounds of appeal; the evidence adduced before the trial court and the rival submissions made by both parties as well as the authorities cited. I have also read the judgment of the trial court.

Having done so, I find that the key issue which crystalizes for my determination is whether the evidence tendered before the trial court established the offence preferred against the appellant beyond any reasonable doubt and if so, whether the sentence meted out against the appellant was harsh or manifestly excessive.

11. But before delving into this issue, let me briefly address the appellant's complaint that the learned trial magistrate failed to consider her defence before arriving at her decision.

My reading of the trial court's judgment reveals that the learned trial magistrate in fact considered the appellant's defence but after weighing it against the evidence adduced by the prosecution found it to be unworthy of belief. Nothing therefore turns on that ground of appeal.

12. Turning to the merits of the appeal, the offence of obtaining by false pretences is created by 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.”

From the above provision, it is clear that for the prosecution to sustain a conviction on a charge of obtaining by false pretences, it must prove beyond any reasonable doubt that the accused person did the following:

- i) Obtained anything capable of being stolen
- ii) By false pretences
- iii) With an intention to defraud the victim of the alleged offence.

All the above three ingredients must be proved together in order to establish the offence. Proving one or either of them cannot suffice.

13. A false pretence is defined in section 312 of the Penal Code 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.”

14. Bearing in mind the above definition and the aforesaid essential ingredients of the offence, I will proceed to consider whether given the evidence on record, the learned trial magistrate erred in convicting the appellant for the offence charged.

15. I will start by noting that from the evidence adduced before the trial court, it was not disputed that the appellant presented herself to the complainant (PW1) as a business lady who was in the business of importing printing machines; that she promised to import for PW1 a GTO46 printing machine at a cost of KShs.1,400,000 and towards this end, she obtained a total of KShs.800,000 from PW1 as a deposit to facilitate the said importation. The balance of KShs.600,000 was to be paid after the machine was delivered to PW1. It is also not disputed that the parties' agreement was reduced into writing by the applicant. The agreement was produced in evidence as *pexhibit1*.

16. I have scrutinized the aforesaid agreement dated 6th July 2012. In the agreement, the appellant made a representation that she was importing a machine for sale to PW1 at a cost of KShs.1,400,000 and that she had received KShs.200,000 as a deposit to finance process of importation. She subsequently authored two other documents acknowledging a further deposit of KShs.250,000 and KShs.350,000. In the document dated 22nd October 2012, after acknowledging receipt of KShs.350,000, the appellant stated that the balance of KShs.600,000 will be paid after she delivered the machine to PW1.

17. According to the evidence of PW1 which was not materially challenged by the defence, after a period of about one year, the appellant failed to deliver the machine and promised to refund the money received as deposit. This was made in writing vide a document dated 18th June 2013. PW1 recalled that by the time he reported the matter to the police, the appellant had not imported or delivered the machine nor had she refunded the money.

18. It has been argued by *Mr. Wairegi* that the representation made by the appellant related to a future event and that it cannot qualify to be a false pretence since false pretences concern either past or present representations. With all due respect, I do not find any merit in this submission. It is very clear from *pexhibit1* that at the time the appellant made the representation to PW1, she received KShs.200,000 as the initial deposit to finance commencement of the importation process. The representation amounted to a promise to start the importation process immediately and therefore fell squarely within the ambit of section 312 of the Penal Code.

19. Regarding whether the representation was false and whether the appellant made it knowing it to be false with the intention of defrauding PW1, there is evidence from PW2, the investigating officer and the only independent witness who testified in this case that the appellant was

in fact not in the business of importing printing machines as she had presented herself to PW1; that she used to work in an office belonging to one *Nganga*, the person who had introduced PW1 to her.

20. The appellant's claim in her defence that she delayed in importing the machine because PW1 did not pay the entire deposit by end of July as agreed cannot be sustained because she received subsequent deposits in September and October 2012 and still promised to deliver the machine but about two years later when she was arrested, she had not fulfilled her promise.

21. The claim in her defence that she had in fact imported the machine but PW1 refused to collect it from her office claiming that it was not the type he wanted to buy is not credible because first, it was not substantiated by any evidence and secondly, PW2 confirmed in her evidence that after arresting her, the appellant led her to a go down which she identified as her business premises and she did not find a single printing machine there.

22. In any case, if it was true that the appellant had indeed imported the machine but PW1 had rejected it, she would not have pledged to refund the money as late as June 2013 which pledge she also failed to honour.

23. After my independent appraisal of the evidence on record, I am satisfied that the appellant's conduct left no doubt that she obtained the money in question from PW1 by false pretences with the intention of defrauding him. If the appellant had obtained the money in good faith without any intention to defraud, she would have delivered the machine as promised or refunded the money to PW1. I do not therefore find any basis for faulting the learned trial magistrate's finding that the prosecution had proved the charges against the appellant beyond any reasonable doubt.

24. In making the above finding, I am aware of the appellant's submission that the facts in this case disclosed a civil claim as opposed to a criminal offence and that the trial court erred in failing to appreciate this fact and in convicting the appellant. My take is that the evidence in this case fully disclosed and proved the offence charged. The fact that PW1 after realizing that the appellant never intended to deliver the machine as promised demanded a refund of his money does not change this fact. I am therefore satisfied that the appellant was properly convicted. Her appeal against conviction therefore fails.

25. Regarding the appeal against sentence, the offence for which the appellant stands convicted attracts a maximum penalty of three years' imprisonment. It is settled law that sentencing is at the discretion of the trial court. In this case, the learned trial magistrate in her discretion sentenced the appellant to pay a fine of KShs.120,000 in default to serve one year imprisonment.

26. Given the circumstances in which the offence was committed and the amount of money involved, it is my view that the sentence was in fact very lenient but since it is lawful and I cannot substitute my own discretion with that of the trial court, I find no basis to interfere with it. The sentence is therefore upheld.

27. In the end, the appellant's appeal is hereby dismissed in its entirety for lack of merit.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of July 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wairegi for the appellant

Ms Akunja for the respondent

Ms Karwitha: Court Assistant