



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. E012 OF 2021

KENNETH NJIRU NJAGI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. M. Mutuku (CM) in Nairobi Chief Magistrate's Criminal Case No. 873 of 2019 dated 10th February 2021

JUDGMENT

1. The appellant, *Kenneth Njiru Njagi* was charged in four counts jointly with *Kensville Motors Limited* with the offence of obtaining money by false pretences contrary to *Section 313* of the *Penal Code*. The appellant was allegedly a shareholder and a director in the said company.

2. In count 1 and count 2, it was alleged that on the 19th and 21st October 2016, at Equity Bank, Westland's Branch in Nairobi County, jointly with others not before the court and with intent to defraud, the appellant obtained KShs.125,000 and KShs.4,291,750 respectively from *Lineal Company Limited* by falsely pretending that he was in a position to import a motor vehicle make BMW Model X3 from the United Kingdom, a fact he knew to be false.

3. In count 3 and count 4, the particulars were that on the 16th and 22nd December 2016, at Equity Bank, Westland's Branch within Nairobi County, jointly with others not before the court and with intent to defraud, the appellant obtained KShs.1,100,000 and KShs.2,000,000 respectively from *Gibson Kimani Maina* by falsely pretending that he was in a position to import a motor vehicle make Lexus SUV RX 450 from the United Kingdom, a fact he knew to be false.

4. After a full trial, the appellant was convicted and sentenced as follows:

Count 1 - To serve six months imprisonment;

Count 2 - To serve eighteen months imprisonment;

Count 3 - To serve twelve months imprisonment;

Count 4 - To serve eighteen months imprisonment.

The sentences were ordered to run consecutively.

5. The appellant was aggrieved by his conviction and sentence hence the instant appeal. In the ten grounds of appeal encapsulated in his petition of appeal filed on 2nd March 2021, the appellant mainly complained that the learned trial magistrate erred in law and fact by: wrongly convicting him on evidence which did not prove the ingredients of the offence charged in each count beyond any reasonable doubt; failing to appreciate and disregarding his defence; convicting and sentencing him in counts 1, 2 and 4 which related to cumulative payments of the same subject matter and by imposing a manifestly excessive sentence considering the circumstances of the case.

6. By consent of the parties, the appeal was prosecuted by way of written submissions. Those filed on behalf of the appellant were briefly highlighted before me on 27th September 2021 by learned counsel for the appellant *Mr. Kangahi*. Learned prosecuting counsel *Ms Chege* chose to rely on the respondent's written submissions filed on 12th May 2021.

7. It is important to note at this juncture that the victims of the offences subject of the appellant's conviction filed an application dated 21st April 2021 seeking leave to participate in the appeal. In a ruling delivered on 30th June 2021 and for reasons stated in the ruling, the court found that only the victim in count 3 and count 4 could be allowed to participate in the appeal. The court allowed the application but limited

the 2nd victim's participation to only filing written submissions on the appellant's appeal against sentence. The firm of *Waruiru, Karuku & Mwangale Advocates* filed the victim's initial written submissions on 10th August 2021 and supplementary written submissions with leave of the court on 24th September 2021.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law.

I am guided by the principle enunciated in a long line of authorities regarding the duty of the first appellate court which is to revisit and to exhaustively re- evaluate the evidence presented before the trial court in order to arrive at its own independent conclusion on the validity or otherwise of the appellant's conviction and sentence. In doing so, I should remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance to that disadvantage: See: ***Okeno V Republic, [1972] EA 32; Kiilu & Another V Republic, [2009] 1 KLR 174.***

9. Having carefully considered the grounds of appeal, the evidence on record, the written submissions filed on behalf of each of the parties including the oral highlights by *Mr. Kangahi* and the authorities cited, I find that only two main issues crystalize for my determination which are the following:

- i. Whether the prosecution proved its case against the appellant beyond any reasonable doubt.
- ii. If the answer to issue (i) is in the affirmative, whether the sentences meted out on the appellant were lawful or harsh and manifestly excessive in the circumstances of this case.

10. Before addressing the above two key issues, I wish to first briefly deal with the appellant's complaint that the learned trial magistrate failed to appreciate and or disregarded his defence. My reading of the trial court's judgment reveals the opposite. It is evident from the judgment that the learned trial magistrate fully appreciated the appellant's statement in defence given the way she summarized it. The record shows that the learned trial magistrate actually considered the appellant's defence and weighed it against the evidence adduced by the prosecution before dismissing it arguing that it lacked credibility. Nothing therefore turns on that ground of appeal.

11. Turning to the first issue, it was submitted on behalf of the appellant that the offences preferred against him were not proved to the required legal standard as the representation made by the appellant to the victims related to importation of vehicles which was a future event; that for a representation to be false, it must be of a past or present fact. For this proposition, reliance was placed on *Section 312* of the *Criminal Procedure Code (CPC)* and the persuasive authority of ***Joseph Wanyonyi Wafukho V Republic, Bungoma CR.A No. 200 of 2021 [2014] eKLR*** .

12. Further, learned counsel *Mr. Kangahi* urged me to find that the prosecution had not proved that the appellant was not a car importer and that he had misrepresented himself as such; that this case was purely civil in nature and the appellant's convictions should be quashed and sentences set aside.

13. In contesting the appeal, learned prosecuting counsel *Ms Akunja* in her written submissions supported the appellant's conviction and sentence. She implored me to find that the prosecution had proved all the ingredients of the offence charged in each count beyond any reasonable doubt and that the appellant was properly convicted. She invited me to dismiss the entire appeal for lack of merit.

14. As stated earlier, the victim's representation in this appeal was limited to filing written submissions on the appeal against sentence. I will consider the victim's submissions together with those made by the appellant and the respondent on the appeal against sentence if my determination on the first issue is to the effect that the appellant was properly convicted.

15. That said, after considering the grounds of appeal, the evidence on record in its entirety alongside the parties' rival submissions, I find that it was not disputed that the appellant was a Director of *Kensville Motors Limited* and a signatory to the company's bank account; that the company was in the trade of importing motor vehicles; that on 18th October 2016, PW1 and PW2 who are mother and son and Directors of *Lineal Company Limited* visited the appellant's offices at Westlands and upon their request, the appellant promised to import for them from the United Kingdom (UK) two motor vehicles namely a BMW X3 and a Lexus SUV RX 450 which they identified from a website shown to them by the appellant.

16. It was also not contested that pursuant to their agreement, the appellant received on the dates stated in the charge sheet a total of KShs.4,416,750 from PW1 being the purchase price of the BMW X3 and KShs.3.1 million from PW2 being the purchase price of the Lexus SUV RX 450. Another fact which was undisputed was that the appellant had not delivered the motor vehicles to PW1 and PW2 by 12th May 2017 when he was arrested.

17. The evidence on record shows that what was strongly challenged was the prosecution's allegation that the appellant had obtained the aforesaid monies by false pretences with the intention of defrauding PW1 and PW2. The question that now begs an answer is this: What constitutes the offence of obtaining by false pretences?

18. The offence is created by *Section 313* of the *Penal Code* which states 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 offence to be proved to the required legal standard, the prosecution must prove that the

person accused had done the following:

- i. Obtained anything capable of being stolen;
- ii. By false pretences; and
- iii. With an intention to defraud.

As I held in *Anne Njambi Kiragu V Republic, [2021] eKLR*, all the above three ingredients must be proved together in order to establish the offence. Proving one or either of them cannot suffice.

19. Though money is obviously something that is capable of being stolen, it is not the receipt of money that constitutes the offence. What establishes the offence is the taking of money or anything capable of being stolen with an intention to defraud. So what demonstrates intention to defraud? My take is that intention to defraud is found in the alleged false pretence if proved.

20. Section 312 of the *Penal Code* defines a 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.”

21. From the above definition, it is evident that false pretences consist of the following:

- i. A representation of fact by word, writing or conduct;
- ii. The representation must be past or present;
- iii. The representation must be false; and
- iv. The person making the representation should have made it knowing it to be false or did not believe it to be true.

22. I entirely agree with *Mr. Kangahi's* submissions that the offence of obtaining by false pretences does not relate to future events. 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 *Mathilda Akinyi Oware V Republic, [1989] eKLR* 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.

The court went further to adopt the sentiments of *Devlin J* in the above case wherein he stated as follows at page 808:

“... a long course of authorities in criminal cases has laid down that statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law...”

The court also agreed with the holding of *Law, J.A.* in the case of *Abdallah V Republic, [1970] E.A. 657* to the effect that:

“a representation as to a future event cannot support a charge of obtaining money by false pretences.”

23. In this case, the evidence on record which as noted earlier is not disputed is that the appellant received from PW1 and PW2 the monies stated in the charge sheet on the dates specified therein with the promise that he was going to import and deliver to them the vehicles in question. The importation was to be done by December 2016 for PW2's vehicle and January 2017 for PW1's vehicle but the appellant did not fulfil his promise.

24. The learned trial magistrate in her judgment made a finding that the fact that the appellant did not fulfil his part of the bargain was sufficient to prove the offences preferred against him. She went further to discredit his defence on grounds that the appellant had failed to adduce evidence to prove that he did not obtain the money by false pretences since he did not adduce evidence to demonstrate that the vehicles actually existed and to substantiate his claim that he had actually bought the vehicles through his agents in the UK.

25. I entirely disagree with the position taken by the learned trial magistrate for three main reasons: First, it was not upon the appellant to prove that the vehicles existed because the prosecution did not allege and did not adduce any evidence to show that the vehicles did not exist so that the evidential burden then shifted to the appellant under Section 111 (1) of the *Evidence Act* which places a burden on the person with special knowledge of a fact to prove that fact. In fact, the existence of the vehicles was one of the facts which were not disputed.

26. Secondly, the law on the burden of proof in criminal cases is well settled. The prosecution had the burden of proving all the ingredients of the offences charged against the appellant beyond any reasonable doubt. This burden remains with the prosecution throughout the trial and does not shift to an accused person. It is trite that an accused person does not have any obligation to prove his or her innocence. **See:** Section 111 (1) of the *Evidence Act*; *Kiarie V Republic, [1984] KLR 739*. The learned trial magistrate appears to have shifted the burden of proof from the prosecution to the appellant which was a misdirection on her part.

27. Thirdly, the court record clearly discloses that the prosecution did not adduce any evidence to prove that the appellant was not infact a motor vehicle dealer or that *Kensville Motors Limited* was not involved in the motor vehicle importation business. So the question is, what false representation was the appellant accused of making? This question was not answered by the evidence adduced by the prosecution in this case.

28. In my view, the evidence proving that the appellant failed to honour his part of the bargain though important did not *per se* amount to proof that the representation made by the appellant was false or that he made it knowing it to be false or had reason to believe the same to be untrue. It did not also amount to proof that the appellant obtained the monies in question with an intention to defraud which is a critical element of the offence of obtaining by false pretences.

29. Further, as correctly stated by the learned trial magistrate, importation of goods involves a process that is future oriented and that must be why the parties agreed on timelines which were in the future for delivery of the vehicles. The vehicles were not supposed to be purchased and delivered at the time money changed hands. In the premises, I agree with *Mr. Kangahi's* submission that 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 may ably support a civil claim but are insufficient to prove the offences charged in this case to the required legal standard.

30. I have noted PW2's evidence that he made the payment of KShs.2,000,000 on 22nd December 2016 after the appellant notified him that the vehicle had arrived in Mombasa and he would have it delivered to him in a week's time which was obviously false. This evidence is however at variance with the particulars supporting the offence charged in Count 4.

31. From my foregoing analysis, I have come to the conclusion that the evidence adduced by the prosecution in this case failed to establish the offences facing the appellant beyond any reasonable doubt. The learned trial magistrate erred by failing to thoroughly interrogate the evidence adduced by the prosecution vis-à-vis the essential elements of the offence of obtaining by false pretences and consequently arrived at the erroneous conclusion that the offences facing the appellant had been proved beyond any reasonable doubt which was not the case.

32. For the reasons stated above, I am satisfied that the appellant was wrongly convicted in each of the four counts preferred against him. It is thus my finding that this appeal is merited and it is hereby allowed in its entirety. The appellant's convictions are hereby quashed and the resultant sentences set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kangahi for the appellant

Mr. Mutumua for the respondent

Appellant present in person

Mr. Wachira for the 2nd victim

Ms Karwitha: Court Assistant