



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 21B OF 2018**

**STEPHEN NDUNGWA *alias* KITHUKU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(From the original conviction and sentence of Hon. C. A. Mayamba (SRM) in***

***Kilungu Resident Magistrate's Court Criminal Case No. 109 of 2016 delivered on 39<sup>th</sup> May, 2018).***

**JUDGMENT**

1. **Stephen Ndungwa *alias* Kithuku** the appellant was charged with the offence of obtaining by false pretences contrary to Section 313 of the Penal Code. The particulars were that the appellant on diverse dates on the month of August, 2015 at Nunguni market, Kithembe Location in Kilungu Sub-County within Makeni County, with another not before court in incurring a debt or liability to Benson Mwangangi obtained money to the amount of Kshs. 60,000/= from the said Benson Mwangangi by falsely pretending that he could recruit his wife in the Teachers Service Commission.

2. He denied the charge and the matter proceeded to full hearing after which he was found guilty, convicted and sentenced to a fine of Kshs. 60,000/= in default 14 months imprisonment.

3. Being aggrieved by the Judgment he filed this appeal through Andrew Makundi & Advocate listing the following grounds:-

***(i) That the learned trial magistrate erred in law and in fact in convicting the appellant on a defective charge sheet.***

***(ii) That learned trial magistrate erred in law and in fact in failing to find and appreciate that the offence of obtaining by false pretences contrary to Section 313 of the Penal Code was not proved, even after his attention was drawn to the same by submissions filed by counsel for the appellant.***

***(iii) That learned trial magistrate erred in law and in fact in failing to find and appreciate that indeed PW3 was duly employed as promised, by the TSC, and therefore there was no breach of promise.***

***(iv) That the learned trial magistrate erred in law and in fact in failing to find that the receipt of the money by the appellant could not in any way amount to stealing as indeed the complainant testified that he was giving the money in "appreciation".***

***(v) That the learned trial magistrate erred in law and in fact in sentencing, the sentence imposed was excessive in the circumstances.***

4. The prosecution case was premised on the evidence of four (4) witnesses. **PW1 Benson Mwangangi Musyoka** is a business man in Nairobi, and a neighbour to the appellant. His wife PW3 Stella Wanza Mulei had trained as a teacher and was looking forward to being employed by the TSC. The appellant a retired secondary school principal of a public school agreed to assist PW3 get employed by the TSC. He went with her to the TSC offices and assisted her fill and submit the forms, after which they were told to wait for the outcome.

5. Later, on 11<sup>th</sup> August 2015 PW1, PW2 and PW3 met with the appellant to give him an appreciation for what he had done for PW3. The appreciation was in the form of cash amounting to Kshs. 60,000/=. He was given Kshs. 30,000/= in cash while Kshs. 30,000/= was sent to him vide Mpesa. The appellant's phone number is 0726353886, while that of PW1 is 0720472799. Two recruitments were done in August/September 2015 and February 2016 but PW3 was not on the list. PW1 then reported the matter to Kilome police station demanding for a return of his money.

6. **PW2 Nicholas Wambua** a business man is known to both PW1 and the appellant and was present on 11<sup>th</sup> August 2015 when the appellant was given Kshs. 30,000/= (cash) by PW1. PW3 gave similar evidence to that of her husband (PW1). She said the money given to the Appellant was to help in her posting as a teacher with TSC. She confirmed that she was a teacher with the TSC under No. 614733 having been employed on 27<sup>th</sup> January 2017.

7. **PW4 Daniel Kariuki Muhuhi** the investigating officer testified that it is the appellant who approached PW1 over the recruitment. He produced the Mpesa statement (PEXB1) showing receipt of Kshs. 20,100/= by the appellant and a communication statement from safaricom (PEXB2). In cross examination he confirmed not having seen the TSC APPT/IA form nor reference number. He did not go to the TSC to make any inquiries. He denied that PW3 did not know about the procedure of getting employed by the TSC.

8. In his unsworn defence the appellant denied the charge. He confirmed being a teacher and retiring in 2007. He said he was approached by PW1 and his son in 2015 while at his home, and requested to assist PW3 get a teaching with the TSC. He made consultations and asked for PW3 to meet him with all her professional documents. He met with PW3 and his TSC friend on 11<sup>th</sup> August 2015 in Nairobi and the former filled the forms (TSC/APPT/IA). PW3 gave the TSC man Kshs. 30,000/=.

9. He was then sent Kshs. 30,000/= as an appreciation, and PW3 got employed. It is his evidence that the TSC/APPT/IA form is audited and only filled once and that's what enabled her to be employed. He denied making any demands for appreciation.

10. The appeal was heard by way of written submissions. Mr. Makundi for the appellant in his submissions on grounds 1 & 2 argues that the offence as charged was not proved. He considered the contents of sections 312 and 313 of the Penal Code and referred to PW1's evidence at page 11 of the record of appeal. To buttress his submission he refers to the case of **Mathlida Akinyi Oware –Vs- Republic (1989) eKLR** where the court of appeal relied on the sentiments of Devlin J. in the case of **Republic –Vs- Dent (1975)2 ALL E.R 806** at page 807 saying;

*“To constitute a false pretence the false statement must be of an existing fact, at page 808 he said that:*

*“A 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.”*

11. He also refers to the case of **Abdallah –Vs- Republic (1970) E.A. 657** where it was held that a representation as to a future event cannot support a charge of obtaining money by false pretences. Also referred to is the case of **Joseph Wanyonyi Wafukho –Vs Republic (2014) eKLR** to support his argument that the recruitment was for a future event.

12. On ground 3 he submits that PW3 was eventually employed and so a charge of obtaining by false pretence can't stand. He further submits that the evidence is that the money was an appreciation and not a bribe to pay any TSC official. He finally submits that in view of the evidence adduced, the sentence imposed is excessive and harsh.

13. The appeal is opposed by the Respondent through Mrs. Owenga. She submits that from the evidence adduced and observations made it is clear that the appellant was paid by PW1 to assist in securing a job for PW3.

14. She explains that the obtaining by pretence was the appellant's promise for recruitment when he was no longer in employment and he was not a holder of a senior position at the TSC. She therefore submits that the appellant was rightly convicted and sentenced for the offence as charged and the sentence she argues is commensurate with the offence he faced.

15. This is a first appeal and this court has a duty to re-analyze and re-consider the evidence on record and arrive at its own conclusion. This court is guided by the principles set out in the case of **David Njuguna Wairimu –Vs- Republic (2010) eKLR** where the court of appeal stated that;

*“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”*

16. In a much earlier decision, the Court of Appeal similarly held in **Okeno –Vs- Republic (1972) E.A. 32** that;

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a 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 conclusions. 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 the witnesses, see Peters v Sunday Post [1958] EA 424.”*

17. I have carefully considered the evidence on record, grounds of appeal, both parties' submissions and authorities cited. I find the main issue falling for determination to be whether the prosecution proved the case of obtaining by false pretences against the Appellant. The undisputed facts are as follows:-

· PW3 applied for recruitment by the TSC as a teacher in August 2015.

- The application was done only once.
- PW3 was recruited in January 2017.
- The Appellant received Kshs. 60,000/= as an “appreciation” in the recruitment of PW3.

18. The offence of obtaining by false pretence is defined under Section 313 of the Penal Code which provides;

***“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 misdemeanor and is liable to imprisonment for three years.”***

19. Section 313 Penal Code therefore brings out three essential elements of this offence which are as follows:-

- (a) Obtaining something capable of being stolen.
- (b) Obtaining it through a false pretence.
- (c) Obtaining it with intention to defraud.

20. It’s clear from the evidence that the appellant obtained Kshs. 60,000/= from PW1, which is something capable of being stolen. It’s not however the taking of the money that constitutes an offence, but rather that it was taken with the intention to defraud.

21. So what is a false pretence? Section 312 of the Penal Code defines it 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.”***

22. From the above definition the following elements clearly come out viz:-

- a. A representation of word, writing or conduct.
- b. The representation is either past or present.
- c. The representation must be false; and
- d. The person makes the representation knowing it to be false or does not believe it to be true.

23. This court must determine whether the evidence adduced revealed a false pretence. Mr. Makundi for the appellant in his reply to Miss. Owenga’s submission submitted that the agreement was in respect to a future happening, and indeed she was employed. That the money was for appreciation and no offence was committed.

24. Section 312 of the Penal Code clearly indicates that in a charge of obtaining by false pretence the representation must be of either a past or present fact and not a future fact. In the case of **Republic –Vs- Dent (1955) 2 ALL E.R. 806** the court held thus;

***“....., we are satisfied that a long course of authorities in criminal cases has laid it 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 will amount to a false pretence, in criminal law.”***

25. The court went further and stated that;

***“It is clear from the authorities that the law does not seek to divide the future meticulously from the present.....it has so far not been necessary to determine where the dividing line between present and future is to be drawn. The reason for this is, we think, that there can in the nature of things be few promises intended to be performed immediately which do not import some statement about the promissor’s readiness to perform his promise.....”***

***The point about readiness depends of course on the circumstances of the case. It is not inevitably excluded by the fact that the promise is to do an act some time ahead, for the act may be one which makes it necessary to get ready some time before.....; for the Lord Chief Justice had earlier in his Judgment adopted as the governing principle the statement.....***

***That a promise to do a thing in future may involve a false pretence that the promissor has the power to do that thing.”***

26. Justice Gikonyo in the case of **Joseph Wanyonyi Wafukho –Vs- Republic (2014) eKLR** applying the same principle found that a false pretence can only apply to a past and present fact and not a future fact. This court must now dissect the facts herein to determine whether the representation herein amounts to a false pretence in the future.

27. PW4 the investigating officer, stated that the report he received was that the appellant approached PW1 showing his readiness to assist PW3 to be employed by the TSC. However when PW1 and PW3 testified they did not mention anything on how it all started. On this point the court can't rely on PW4's word without a back up from the originators of the story i.e. PW1 and PW3. Though PW4 denied that PW3 knew about the procedure of getting employed by the TSC her own husband (PW1) said the lady did not know. PW1 at page 10 R.O.A lines 14-17 states;

***“My wife did not know where the TSC offices were. Accused took her there. He also helped her fill TSC forms.***

***My wife informed me that they filled the forms and submitted them and were told to wait.”***

28. When the forms were filled and submitted PW3 and the appellant were told to wait. There was no definite period given to them as to when PW3 would be recruited. The court was not given any dates as to when the recruitment was to be undertaken. When PW1 missed PW3's name in the recruitment of August/September 2015 and February 2016 he reported the matter to the police. He does not however say that he had been promised she would be employed either in August/September 2015 or February 2016. She was finally employed on 27<sup>th</sup> January 2017.

29. When talking about the money this is what PW1 says;

**Page 9:** *“He asked for appreciation and I gave him Kshs. 60,000/=.”*

**Page 10:** *“I gave him money for something I believed he had done.”*

**Page 10:** *“She was employed after I gave accused Kshs. 60,000/=. I gave the money in appreciation.”*

**Page 11:** *“I was granting money in appreciation.”*

On the other hand this is what PW3 states about the money.

**Page 19:** *“We met one Stephen Ndungwa who had been given money by my husband. He had demanded for money after promising that I would be employed by TSC.”*

**Page 19:** *“The money was to help in my posting as a teacher with TSC.”*

**Page 20:** *“It was accused who demanded for the money. The money was for securing a job for me. The money was not to bribe any TSC official. Yes, we were to give him money but he was not to mention. He asked for money but the employment did not go through. It was not a bribe. Yes, he brought me forms to fill. It was the first time I was filling the forms. Yes, I went with him to Nairobi and forms were left therein. I am now employed after one year.”*

30. After all this, and when asked why he reported the appellant to the police this is what PW1 said at page 11;

*“I took him to the police because he did not receive my calls and no communication. We called him for two weeks.”*

PW3 at page 19 states;

*“He refused to pick our calls, hence the case.”*

This clearly shows that he did not report him for defrauding him but for refusing to pick his calls. The money he gave was in appreciation for something to be done in the future. There was no promise of an instant recruitment.

31. PW4 the investigating officer did not visit the TSC headquarters during his investigation. He did not even find out when those who applied in August 2015 were actually recruited. He did not therefore investigate the status of employment, and the period of waiting before recruitment. Did the appellant pose as an agent of TSC as alleged by PW4? There is no such evidence from PW1 – PW3. In his judgment at paragraph 13 the learned trial magistrate states that the appellant posed as an agent which he was not by taking PW3 to Nairobi to fill forms for a TSC number, which he supervised.

32. PW3 who was with the appellant in Nairobi did not say anything close to that. Even if he was found to be an agent would it have been proper for him to receive appreciation money? The answer is no. The appellant was not charged under ACECA for receiving a bribe as can be clearly seen from the charge and evidence.

33. PW1, PW2, PW3 and the appellant all agreed to do what they did. PW1 and PW3 have said why they reported the appellant to the police. PW3 was eventually recruited without having to fill other forms or raising a complaint with TSC. If the money was incurred as a debt and/or liability as the particulars of the charge state then they should have known how to deal with it in a more civil way.

34. All in all I find that the representation by the appellant was about a future fact (recruitment) which does not amount to a false pretence. Secondly, PW3 was recruited in January 2017. Had the trial court considered all these facts he would not have convicted the appellant.

35. The upshot is that the appeal has merit. It is allowed, the conviction quashed and sentence set aside. The fine paid to be reimbursed to the appellant.

Orders accordingly.

Delivered, signed & dated this 6<sup>th</sup> day of February 2020, in open court at Makueni.

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H. I. Ong'udi

Judge