



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL CASE NO. 144'A' OF 2016**

**MARY WAIThERA KINYANJUI..... APPELLANT**

**SUSAN WANJIRU KINYANJUI .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal from the Judgment of the Resident Magistrate Honourable N. Mosei in Eldoret Chief Magistrate's court Criminal Case No. 182 of 2014 dated 22<sup>nd</sup> December, 2016)**

**JUDGMENT**

Susan Wanjiru Kinyanjui and *Mary Waithera Kinyanjui*, the first and second appellants herein, were charged with the offence of obtaining goods by false pretense, contrary to Section 313 of the Penal Code.

The particulars of this offence are that on the 27<sup>th</sup> day of July 2013 in Eldoret town, Eldoret West District within Uasin Gishu County, the appellant with intent to defraud jointly obtained goods namely Richot 250ml (480 pieces) valued at 126,000/-, Smirnoff 250ml (360 pieces) valued at Kshs.94,500/-, Gilbeys 250ml (400 pieces) valued at 105,000/-, Kenya Cane 250ml (280 pieces) valued 47,000/- and Viceroy 250ml (96 pieces) valued at 340,000/-, all of total value of 407,100/-, from Charity Muthoni Kuria by falsely pretending that they were in a position to sell the same and hand over back the proceeds of 407,100/- to the said Charity Muthoni Kuria, a fact they knew to be false.

The prosecution case is briefly that the complainant in this case was doing business of distributing alcohol in Eldoret town. The first appellant was doing business of selling beer at South Sudan in Juba and was commonly referred to as Shiro Juba. The complainant had previously supplied beer to the 1<sup>st</sup> appellant on cash payment basis. On 27<sup>th</sup> July 2013 the 1<sup>st</sup> appellant was allegedly in South Sudan. She ordered for beers from the complainant as follows:-

1. 480 pieces of Richot 250ml worth 126,000/-.
2. 360 pieces of Smirnof 250ml worth 94,500/-.
3. 400 pieces of Gilbeys 250ml worth 105,000/-.
4. 96 pieces of Viceroy 250ml worth 340,000/-.
5. 280 pieces of Kenya Cane 250ml valued at 47,000/-.

All were of a total value of 340,000/-. The complainant together with her

employee who is PW-2 in this case, hired the motor vehicle of Pw-3 to deliver the said beers to a lorry which was parked at Maili Nne area, of which was to deliver the beers at Juba. However upon arrival they noted the lorry was full and had no space for the beers. They talked to the 1<sup>st</sup> appellant who directed them to deliver the beers to the house of the 2<sup>nd</sup> appellant who is her mother. The 2<sup>nd</sup> appellant was also well known to the complainant. The beers were delivered to the 2<sup>nd</sup> appellant's house, and stored in the table room. She did not sign the invoice as she is illiterate. Three days after delivery the 1<sup>st</sup> appellant called the complainant but thereafter the complainant could not reach her on phone. She, the complainant kept on going to the 2<sup>nd</sup> appellant to see her about the payment and the 2<sup>nd</sup> appellant kept on saying that she could only occasionally reach the 1<sup>st</sup> appellant. On 27/12/2013 the 1<sup>st</sup> appellant called the complainant and told her that she was in Kenya

and the complainant could collect the pay from her house but should go alone. The complainant was scared of collecting the amount alone and did not go. She suggested a convenient place where she could collect the money from but the 1<sup>st</sup> appellant did not meet the appointment. A male person later on called her using the 1<sup>st</sup> appellant's phone. He suggested to her to go for the money in the 1<sup>st</sup> appellant's house. PW2 however advised the complainant against going for payment there alone. The amount was never paid. The complainant saw the 1<sup>st</sup> appellant on 7/1/2014 driving around her place (Road block). She reported her at the police station. The police investigated the matter and arrested the appellants. They were then charged with the offence carried in the charge sheet.

The appellants in their defence denied the offence. The 1<sup>st</sup> appellant stated she was doing animal feed business and not beer business. Though she knew the complainant, she was never supplied with beers by her at any given time.

The second appellant on her part alleged she was operating a boutique. She denied that she received beers in her house on behalf of the 1<sup>st</sup> appellant who is her daughter. She however knew the complainant as a friend of the 1<sup>st</sup> appellant.

The lower court evaluated the evidence and found that beers were delivered as alleged by the complainant and were not paid for. The appellants never intended to pay for it as after some days upon its delivery they cut communication with the complainant. The trial court found the appellants guilty of the offence, convicted them and sentenced each to serve 2 years in prison.

The appellants dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

1. The conviction was not right as the plausible defence warranted an acquittal.
2. Appellants evidence was wrongly disregarded.
3. Extraneous facts were put into consideration.
4. Particulars of the offence were not proved.
5. Wrong principles of law were applied.
6. Prosecution failed to prove their case beyond reasonable doubt.

I have evaluated the charge in place, evidence adduced by both sides, submissions, judgment passed and the sentence. I have as well considered the grounds of appeal and submissions by both sides.

The prosecution, as was rightly found by the trial court were able to establish that the said beers were delivered and were not paid for by the complainants. However the first question which arises is of the role played by the 2<sup>nd</sup> appellant in relation to the said offence. It is clear that she is a mother to the 1<sup>st</sup> appellant. However, she was not a partner in her beer selling business and she had not dealt with the complainant in previous transactions. She is not the one who ordered for the beers or even ordered that it be dropped or stored in her house. It is the 1<sup>st</sup> appellant who did as she was allegedly in Juba and the lorry which was to take the beers there was full. 2<sup>nd</sup> appellant was not the one to pay the complainant. There is no evidence that she ever cheated the complainant in the transaction. She never switched her phone off and she was got by complainant in her house whenever the complainant went looking for her. Her obtaining of the beers was on behalf of her daughter and was not therefore free to deal with it as hers. There is no evidence in place against her that she obtained the beers and had the necessary mens rea that they'll not be paid for. It is evident that the offence was not established against her and should have been acquitted of it.

As regard to the 1<sup>st</sup> appellant there is no doubt as earlier on alluded to, that she obtained the beers through her mother and never paid for them. The particulars of the offence in the charge sheet clearly states she was to pay after selling the beers. This means she was to pay in future and not on the date of delivery which was on 27<sup>th</sup> July, 2013. In the case of **Gerald Ndolo Munjuga –vs- R, HC Criminal Appeal No. 213 of 211 Justice Mativo** observed correctly that:-

- i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intent to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.
- ii. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not false pretence if it is made in relation to the future even if it is made fraudulently. Where however the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false.
- iii. The representation must be made with the specific purpose of getting money from the complainant which he or she would not have given had the true facts been revealed to him.”

The point in the foregoing finding is that the prosecution is obliged to establish that at the time of obtaining goods the appellant had no intention of paying for them and therefore lied that he or she will pay or tricked the complainant to believe so. This constitutes mens rea for the offence at the point of its commission and distinguishes the offence from a commercial transactions where a person may with good intention obtain goods on credit and out of factors beyond his or her control is unable to pay for them as promised. This becomes a civil debt pursuable in a civil case or suit.

The 1<sup>st</sup> appellant had previously paid for the beers she had obtained from the complainant. It is only that in the incident constituting this case she was unable to pay as promised. She was to pay in future after selling the beers as indicated in the particulars of the charge sheet. Her failure to pay perse does not constitute the necessary mens rea for the offence. There is no evidence in place that she never intended to pay for the beers on the day she obtained them and therefore cheated or tricked the complainant that she will pay. There is no tangible evidence that she switched her phone off.

There is evidence she called the complainant and even invited her to collect cash from the house. The facts discloses a civil debt which should have been pursued in a civil case. The facts do establish an offence as charged and the 1<sup>st</sup> accused should as well have been acquitted.

I accordingly find the conviction unsafe. It is quashed as well as the sentence. The appellants are set free unless otherwise lawfully held.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 4<sup>th</sup> day of March, 2020.**

In the presence of:-

1. Mr. Ndege holding brief for Mr. Nyachiro for appellant
2. Mrs. Limo for State
3. Mr. Eululo- Court assistant

**COURT:-**

Sureties are discharged.

**SIGNED**

**S. M. GITHINJI**

**JUDGE**