



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 4 OF 2019

REPUBLIC.....APPELLANT

VERSUS

JANET ADHIAMBO OKECH.....RESPONDENT

(From the original judgment in Criminal case No. 928 of 2017 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi– Senior Resident Magistrate)

JUDGMENT

1. Janet Adhiambo Okech, the respondent herein, was charged with two counts of obtaining money by false pretences contrary to section 313 of the Penal Code.
2. The particulars of the offence in count one were that on 22nd May 2017 at Barclays Bank Busia Branch within Busia County, with intent to defraud, obtained from Ann Allego cash Kshs. 400,000/= by falsely pretending that she was in a position to supply to her petroleum products.
3. In count two, the particulars were that on 23rd May 2017 at Barclays Bank, Busia Branch within Busia County, with intent to defraud, obtained from Ann Allego cash Kshs.149,000/= by falsely pretending that she was in a position to supply to her petroleum products.
4. After the trial, she was acquitted by the learned trial magistrate. The Republic was dissatisfied and filed this appeal.
5. The appellant was represented by Mr. Gacharia, learned counsel. Four grounds of appeal were raised as follows:
 - a) That the learned trial magistrate erred in law acquitting the respondent despite overwhelming evidence adduced by the prosecution which proved the case beyond any reasonable doubt.
 - b) That the learned trial magistrate erred in law and in fact in finding that the prosecution had not proved the intention to defraud yet this was proved by the totality of evidence adduced.
 - c) That the learned trial magistrate erred in law and in fact in finding that the case before her was civil and would best be adjudicated by a court of civil jurisdiction.
 - d) That the learned trial magistrate erred in law in failing to find that the respondent's defence did not raise any reasonable doubt about the prosecution case which was watertight.
5. The respondent opposed the appeal through Mr. Okutta, learned counsel. The respondent contended that the judgment was proper in law.
6. The facts of the prosecution case were briefly as follows:

The complainant is a dealer in petroleum products. On 22nd May 2017 and 23rd May 2017 she deposited Kshs. 400,000/= and Kshs. 149,000/= respectively in the account of the respondent for delivery of petroleum products. By the time she was charged in court on 21st June 2017, she had not delivered the petroleum products nor refunded the cash.
7. In her defence the respondent contended that she gave the consignment for the delivery to the complainant but the driver she sent failed to do so and she reported to the police.
8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I

have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

9. There is a thin line between the offence of obtaining by false pretences and a civil claim for breach of contract. The offence is a very technical one. The ingredients of the offence of obtaining by false pretences contrary to section 313 of the Penal Code were enumerated in the case of **Amugo vs. Republic High Court (Kisumu) Criminal Appeal No. 320 of 1980** (unreported) as follows:

The offence of obtaining by false pretences has seven possible ingredients which have to be proved beyond doubt before an accused person is convicted. They are as follows:

- a) a false representation;**
- b) which is made;**
- c) by words or writing or conduct;**
- d) of a matter of fact;**
- e) either past or present;**
- f) with knowledge of the falsehood or without belief that the presentation is true; and**
- g) the representation causing the giver to part with the thing obtained.**

The court went on to state for there to be a conviction, all the eight ingredients must be established beyond any reasonable doubt.

10. It is trite law that for an action to amount to a false pretence, it must be of past or present facts and not of future facts. Lord Devlin in the case of **J. R vs. Dent [1955] 2 Q.B. 594** stated:

...a long course of authorities in criminal cases has laid 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.

In the instant case, I will seek to find if the prosecution established the eight ingredients to the required standards and whether the facts were present or past.

11. According to the evidence of the complainant, after she deposited cash, she expected delivery of the fuel on the following day. The issue of deposit was not denied by the respondent. She testified that she purchased the fuel and contracted a trailer driver called Amadi to deliver the fuel. She however learnt that he did not deliver and she reported to the police.

12. The evidence on record therefore established that the facts were present since the expectation was immediate delivery upon payment. Both parties agreed on this fact.

13. The contention by the respondent was that her efforts were frustrated by Mr. Amadi who failed to deliver. If this fact was true, then she could not be convicted of the offence. The evidence on record however did not support her contention. The evidence of the complainant was that she called the respondent severally and was not picking her calls. Once a prima facie was established against the respondent, the onus shifted to her to prove her contention on a balance of probabilities. The respondent would have easily discharged this burden by production of documents or copies therefore to establish that she indeed purchased the fuel and a copy of an extract of the police occurrence book to show that she indeed made a report. None of these documents were produced. This therefore means that she did not discharge her burden.

14. By the time the judgment was delivered on 19th February 2019, the respondent had not refunded the money or delivered the fuel. This coupled by the evidence that she avoided receiving calls from the complainant was a good pointer at her intent.

15. From the foregoing analysis of the evidence on record, I find that the prosecution proved its case against the respondent beyond any reasonable doubt. I therefore set aside the verdict of not guilty and substitute it with that of guilty on both counts.

16. In order to be fair to the respondent, I am making an order that she appears before the Chief Magistrate's Court at Busia on 10th March 2020 for sentencing.

DELIVERED and SIGNED at BUSIA this 3rd day of March, 2020

KIARIE WAWERU KIARIE

JUDGE