



**REPUBLIC OF KENYA**

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

**HCCRA NO. 60 OF 2019**

**NANCY MUNYIVA JACOB.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the Senior Resident Magistrate Hon. E. Muiiru dated 17/04/2018 in Kilungu SRMCR No. 420 of 2016.)*

**JUDGMENT**

1. **Nancy Munyiva Jacob** the Appellant herein, was charged with the following offences:

**Count I: Obtaining money by false pretence contrary to section 313 of the Penal Code.** Particulars were that on the 8<sup>th</sup> day of June, 2016 at Malili market in Mukaa sub-county within Makueni county jointly with others not before court with intent to defraud, the Appellant obtained from Dennix Mayabi Kshs.56,000/= by false pretence pretending that she would supply and buy **MIRMA SHUDH** salt from **Dennix Mayabi**.

**Count II: Obtaining money by false pretence contrary to section 313 of the Penal Code.** Particulars being that the Appellant on the 18<sup>th</sup> day of July 2017 at Salama market in Mukaa sub-county within Makueni county jointly with others not before court with intent to defraud obtained from **Stephen Mwau Masaku** Kshs.29,000/= by false pretence.

**Count III: Stealing contrary to section 275 of the Penal Code.** Particulars being that on the 8<sup>th</sup> day of July 2017 the Appellant at Kasokoni village, Kikoko location in Kilungu sub-county within Makueni county jointly with others not before court, stole Kshs.73,800/= from **Florence Mutulu Kitumba**.

2. She pleaded not guilty and the matter proceeded to full hearing with the prosecution calling eight (8) witnesses. The Appellant was finally acquitted of the 1<sup>st</sup> count and convicted on the 2<sup>nd</sup> and 3<sup>rd</sup> counts. She was sentenced to serve three (3) years imprisonment, on each count with the sentences running concurrently. The 3<sup>rd</sup> count was substituted to obtaining by false pretence before conviction.

3. Being aggrieved with the judgment, she filed this appeal citing the following grounds:

- a) **That**, she pleaded not guilty to the charges.
- b) **That**, the sentence imposed was harsh and excessive.
- c) **That**, the trial court did not put into adequate consideration her issues of mitigation.
- d) **That**, the prosecution case was riddled with lots of malice, contradictions and inconsistency which could have been looked upon before arising the decision to convict.
- e) **That**, the trial court erred in law and fact by failing to give her defense adequate consideration.
- f) **That**, the trial court erred in law by failing to observe, analyze and evaluate the entire evidence and find that there was no evidence to convict.

4. The Appellant was charged alongside two others whose appeals (*Makueni HCRA NO. 37 of 2018 & HCRA 52/2018 consolidated*) were heard and determined on 3<sup>rd</sup> May, 2019. One of the witnesses who made mention of the Appellant herein is **Pw1 Florence Matulu**

**Kitumba.** She said the Appellant had been sent to her by one Chris Munyao (*1<sup>st</sup> accused in the lower court*). She asked if Pw1 had the salt and she answered in the affirmative. The Appellant went away promising to return with more products and to pay but she did not. She kept calling Chris Munyao and the Appellant, for more information.

5. The other witness **Pw2 Stephen Mwau Kasaku** in cross examination said he gave the Appellant Kshs.20,000/= for goods she had bought.

6. **Pw6 No. 74341 Cpl. Edward Njeru** an Investigating officer herein said the Appellant was connected with this offence because her people followed up with the complainant on repayment. That they were working in groups to defraud people. Further that on tracking her phone they established that she had been communicating with Chris Munyao (*1<sup>st</sup> accused*).

7. All in all, Pw3, Pw4, Pw5 and Pw7 did not say anything against the Appellant.

8. The Appellant gave an unsworn statement in her defence. She said she is a business woman operating a shop and M-pesa in Embakasi. She recalled having been arrested at Makindu where she had stopped to see a friend. At the CID offices where she was taken she met her two co-accused. They were told to hold packets of salt and photos taken and she was later charged. She admitted having known Pw1 but denied transacting with her. She dismissed the evidence of Pw1 and Pw4 as not adding up.

9. It was her evidence that the Investigating officer had told the court she had been arrested because her family followed up on the case. She stated that **Pw2 Stephen Mwau Kasaku** was not able to explain how he gave her money (Kshs.20,000/=). Finally, she said the other witnesses were not able to explain how she was involved in this.

10. The Appellant and Respondent filed written submissions which they highlighted. The Appellant submits that the investigations were poorly done and that's how she ended up being acquitted in the **1<sup>st</sup>** count. There was no proof of any communication as she was not found with any gadget, phone or sim card.

11. She adds that she was confused with one Faith, and it was not clear where she had been arrested from i.e. whether at Emali or Makindu. She reckons that the charge sheet in the **3<sup>rd</sup>** count was defective. She submits she was given the maximum penalty despite her strong mitigation.

12. In highlighting her submissions, she reiterated what she had said in her written submissions. She then proceeded to mitigate for a reduced sentence.

13. Mr. Kihara learned counsel for the Respondent relied on the submissions filed on 6<sup>th</sup> February, 2020. It is the Respondent's submission that the appellant was mentioned by Pw3 and Pw5 as being one of those who conned them. He says the Appellant was properly convicted and the sentence is lawful.

14. Mr. Kihara added that the Appellant had introduced herself as Faith only for Pw1 to learn that she was actually Nancy. He further submitted that the proceedings had no errors and neither had any errors been pointed out by the Appellant.

### **Analysis and determination**

15. This is a first appeal and this court has a duty to re-analyse and re-evaluate the evidence on record and arrive at its own conclusion. It must also bear in mind that it never saw or heard the witnesses and so give an allowance for that. See **Okeno –vs- R 1972 E.A 32; Boru & Anor –vs- R (2005) IKLR 649.**

16. After due consideration of the evidence on record, grounds of appeal and submissions, I find the only issue for determination to be whether the Appellant was identified as one of the persons who conned the complainant in counts no. 2 and 3.

17. The complainant in count No. 2 is **Pw2 Stephen Mwau Masaku**. It was his evidence that it is Chris Munyao (*1<sup>st</sup> accused*) who first approached him and promised to send someone called Faith to come and collect the salt. The person who came introduced herself as Faith. He had been given instructions by the **3<sup>rd</sup>** accused whom he knew as Ndunge.

18. The said Ndunge had even given him Faith's and **1<sup>st</sup>** accused's telephone numbers. He gave the said Faith Kshs.20,000/= (cash). He identified the Appellant as the Faith he had given the Kshs.20,000/=. The Appellant called him later asking for Kshs.4,000/= which he sent her. It went to the account of Faith Muriuki.

19. The charge sheet shows the Appellant as Nancy Wavinya Jacob. Pw2 stated that the person sent to him was Faith and the money he sent went to the account of Faith Muriuki. The investigating officer (Pw6) told the court at page 30 Record of Appeal lines 12 as follows:

***“Faith Muriuki and Faith Muinde is one and the same person. Faith is the 3<sup>rd</sup> accused and Chris is 1<sup>st</sup> accused.***

20. In cross examination, Pw2 insisted that it is the appellant whom he gave Kshs.20,000/=. He had been told by his friend Ndunge to give the Kshs.20,000/= to Faith. The simple question is whether the Appellant is also known as Faith. There is no alias name to the Appellant's name, in the charge sheet. How was she then arrested?

21. **Pw6 No. 74341 Cpl. Edward Njeru** says he used the intelligence unit officers to assist in tracking the suspects. They were traced by use

of the numbers the complainant had used to communicate with them. They were finally found in Makindu. Now narrowing down to the Appellant it is not indicated how she was traced and arrested. After the arrest they were taken to Kilome police station and charged the next day.

22. There is no evidence of how Pw6 and his team were able to physically identify the suspects arrested. Pw1, Pw2, Pw3 and Pw5 knew the people they had dealt with and who had stolen money from them. Upon arrest of the suspects an identification parade ought to have been conducted for the victims to identify the culprits.

23. What happened in this case was pure dock identification. There is no evidence of the complainants having given any description of the culprits save for names Faith and Nancy and the telephone numbers used in communication. Dock identification on its own is not sufficient to form the basis of a conviction.

24. In the case of **James Timega Omwenga –vs- Republic Criminal Appeal No. 143 of 2011** the Court of Appeal expressed itself as follows:

***“The law is settled that in general identification of a suspect who was a stranger at the time the offence was committed which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identity by pointing out the suspect is a dock identification which in some cases is regarded as worthless”***

25. In cross examination by the Appellant this is what Pw6 states at page 31 lines 9 – 15

***“Your number was not used to transact. However, your people sought to get in touch with complainant and raised suspicion on your engagement. It is normal for an investigating officer to allow a suspect’s relative to follow up on the case but how your relatives approached the issue was suspicious. I did not carry out an identification parade for your identification. On tracking your phone, we established you had been communicating with Chris”.***

26. From the evidence on record, it is revealed that Pw1 and Pw2 had never dealt with the Appellant before. A name had been given to them. Was it Nancy or Faith? Whatever the case the investigators had a duty to connect the physical person to whatever name. This could only have been done through a properly conducted identification parade.

27. Pw6 states in cross examination that investigations revealed that the Appellant had been communicating with Chris. People talk with others. So it was important for them to show the connection between that communication and the commission of the offence. That was never done.

28. All this goes to show that the Investigating officer took a number of things for granted. It has not been shown how the numbers used in communication revealed that it was the Appellant involved. The call data was not produced. **Pw7 No. 68893 Cpl. Fred Wanjala Muandiki** is another Investigating officer and he exonerated the Appellant.

29. From the evidence including that of Pw7 its shown that a number of those conning the complainant were ladies. There is Faith Muriuki, Faith Muinde, Cecilia Ndunge and Nancy. It was therefore besides the word of mouth important for the prosecution to establish how the Appellant was identified hence the need for an identification parade.

30. In the 3<sup>rd</sup> count the complainant is Florence Mutulu Kitumba. It was her evidence that she had been told that Nancy would come but when she came she introduced herself as Faith. She left saying she was to get her other products and also make some payments. She never saw her again. She confirmed that besides that appearance she did not send her or give her any money.

31. Section 313 of the Penal Code defines obtaining through false pretence as follows:

#### **Obtaining by false pretense**

***“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”.***

For this offence to be proved it must be shown that the identified person obtained something capable of being stolen by means of false pretences and that the intention was to defraud.

32. For any of these ingredients to be proved there must be an identified person who is alleged to have committed all this. In this case, the element of identification is missing. Pw1 did not identify the Appellant at any identification parade. Pw1 and Pw2 had not known the Appellant before this incident. Secondly both investigating officers (*Pw6 and Pw7*) did not find the Appellant to have been culpable. One then wonders why they then charged her in the first place.

33. Upon analysis of the evidence by the prosecution witnesses, the defence and the submissions, I find this to have been a straight forward case which would have succeeded had proper investigations and proper procedures of identification been carried out.

34. The upshot is that the appeal succeeds and is allowed. The conviction on both counts is quashed and the sentence on both counts set

aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 3<sup>rd</sup> day of April 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**