



REPUBLIC OF KENYA  
AT THE HIGH COURT IN NAIROBI  
CRIMINAL DIVISION  
CRIMINAL APPEAL 31 OF 2019

PETER GICHUHI WACHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 51 of 2018 delivered by Miss Riany, SRM on the 13<sup>th</sup> February, 2019).*

JUDGMENT

Background

1. The Appellant was convicted of **obtaining by false pretences contrary to section 312 as read with section 313 of the Penal Code**. The particulars were that the Appellant on 20<sup>th</sup> June, 2016 at Equity Bank, Tom Mboya Branch, in Nairobi within the Nairobi County with intent to defraud obtained a sum of Kshs. 295 000/- from John Kaguamba Wachira by falsely pretending to be in a position to transact together a business of buying a motor vehicle make Mercedes Benz for taxi business in Nairobi a fact he knew to be false.

2. He was convicted accordingly and sentenced to pay a fine Kshs. 400 000/- in default to serve two (2) years imprisonment. He was aggrieved by the decision of the court and preferred this Appeal. He premised his appeal on ground that the evidence was insufficient to warrant a conviction.

Summary of evidence

3. I am minded that this is a first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republik (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

4. **PW1, John Wachira**, the complainant testified that he and the Appellant, being brothers, had mutually agreed to put together monies to purchase a motor vehicle. The purpose of this purchase was to venture them into a taxi business. They were meant to raise three hundred thousand each and pool those monies to do the purchase. On the 20<sup>th</sup> June, 2016, he went with his brother to Equity Bank, Tom Mboya Branch. There he transferred to his brother Kshs. 295 000/-. After a while he realized that the business had not taken off. PW1 therefore sought to have his brother return the money that he had given him. The Appellant dodged this discussion and even presented to PW1 a car that he had bought to do the taxi business. It was a Mercedes Benz vehicle registration KYR 987.

5. PW1 testified that the vehicle was always faulty and therefore it was difficult if not impossible to use it for the very purpose intended. Further, even after the purchase of the vehicle it was evident that the taxi business did not still start up. He also insisted that the vehicle was used exclusively by the Appellant and therefore PW1 accrued no benefit from it. The investigating officer, PW2 produced bank statements to establish the transaction that PW1 did with the Appellant.

6. The Appellant in his defense argued that he is unaware that he owed the complainant any money. He testified that he was the one who loaned the complainant money, about Kshs. 241 000/-. He testified that this money was a loan to assist the complainant with advocate's fees arising from an employment case he had. PW1 admitted that there was a case but it had no connection to the present dispute.

Analysis and determination

7. The Appellant was charged with obtaining by false pretences. The offence is defined under Section 313 of the Penal Code as:-

**“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.”**

8. From the definition, the basic ingredients of the offence can be summarized as follows:-

- a) The act of obtaining something capable of being stolen.
- b) Obtaining the thing by false pretences.
- c) Obtaining the thing with intent to defraud.

9. The definition of false pretence on the other hand is given under Section 312 of the Penal Code 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.”**

10. The operative word under Section 312 is **representation** which is applicable in the following circumstances:-

- a) A representation by words, writing or conduct.
- b) A representation in either past or present.
- c) A representation that is false.
- d) A representation made knowing it to be false or believed not to be true.

11. Therefore, it is imperative from the evidence of the prosecution to establish that the appellant's actions or inactions fit the definition provided above. The first issue I grapple with is whether there existed *obtaining something capable of being stolen*? The act of obtaining something capable of being stolen has to be supported by evidence. In this case the allegation was that the Appellant received Kshs. 295,000/- from the complainant. It was the testimony of the PW2 that this was done by RTGS.

12. PW2, produced a copy of the deposit slip and bank statement to establish the movement of funds. However, this evidence was not conclusive as there was no evidence of ownership of the accounts. Further, the documents were supposedly from a bank that never sent a representative to produce the same to ascertain their origin. These documents were inadmissible for want of compliance with Section 106B of the Evidence Act. The same provides that the production of such electronically produced must be accompanied by a certificate confirming the manner of their production and as to their authenticity.

13. I accordingly find that the prosecution failed to establish that the Appellant obtained anything from the complainant. His culpability was thus not proved. If the foregoing it beats logic to further reanalyse the evidence with a view to determining whether other elements of the offence charged were established. have been obtained. It is not useful to proceed to determine the other elements of this charge.

14. In the upshot, I find the appeal with merit. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. I further order that the fine of Ksh. 400,000/ paid by the Appellant be refunded to him or the payee.

**Dated and delivered in Nairobi This 9<sup>th</sup> Day of April, 2020.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence:**

1. Mr. Omware for the Appellant.
2. Miss Chege for the Respondent.