



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

**CORAM: D.S MAJANJA J.**

**CRIMINAL APPEAL NO. 92 OF 2018**

**BETWEEN**

**WILFRED GETANDA NYAKWEBE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. M.M. Nafula SRM dated 4<sup>th</sup> May 2018 at the Principal Magistrate's Court at Ogembo in Criminal Case No. 323 of 2015)*

**JUDGMENT**

1. The appellant, **WILFRED GETANDA NYAKWEBE**, was charged and convicted of the offence of obtaining goods by false pretences contrary to **section 313** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were as follows:

*On the 10<sup>th</sup> day of December 2013 at Magenche Sub-location in Kenyenyia Sub-County within Kisii County, with intent to defraud obtained 45 tonnes of sugarcane worth Kshs. 73,000/= from PETER MAROKO OBUNGA by falsely pretending that the said WILFRED GETANDA NYAKWEBE was in a position to pay for the consignment of sugarcane to the said PETER MAROKO OBUNGA.*

2. The appellant was fined Kshs. 30,000/= in default 6 months' imprisonment. He now appeals against conviction and sentence. In the grounds of the appeal set out in the petition dated 28<sup>th</sup> September 2018, the appellant contends that the matter was a civil nature devoid of any criminal element hence the prosecution did not prove the offence.

3. Counsel for the respondent conceded the appeal on grounds that the matter was a civil mature. He submitted that transaction subject of the case was based on a contract which was breached and which in the circumstances did not warrant criminal proceedings being commenced.

4. Notwithstanding the concession of the respondent, this court is obliged to review the evidence before the trial court and reach its independent decision whether or not to uphold the conviction and sentence.

5. The prosecution called four witnesses to prove its case. Peter Maroko Obunga (PW 1), Erick Sageka (PW 2), Saul Orange Masabi (PW 3) and PC Job Kipyegon (PW 4). The respondent gave sworn testimony in his defence.

6. The common thread in the testimony of PW 1, PW 2 and PW 3 is that the appellant entered into an agreement on 10<sup>th</sup> December 2013 which provided as follows:

*Agreement between Erick Sageka, Robert Obunga and Wilfred Getanda Nyakweba about sugarcane worth 73,000.*

*WILFRED GETANDA bought sugarcane worth 73000 on 10/12/2013 at 5.56 at Robert Obunga place. GETANDA paid 3000 shillings as deposit. The rest of the money should be paid as follows within the agreement between ERICK and OBUNGA who are the sellers of the sugarcane and WILFRED GETANDA who is the buyer. The following are the conditions: -*

*After the first ten days WILFRED GETANDA agreed to pay 30,000 shillings. GETANDA agreed that after other ten days he will pay 20,000 shillings. After finishing other ten days GETANDA will pay the rest of the money which is 20,000. As agreed between the buyer and the seller WILFRED GETANDA will be storing the sugarcane at ROBERT OBUNGA place until he has covered all the money.*

*The following are the names of the buyer and seller as they appear on the national identity*

WILFRED GETANDA NYAKWEBE ID 21924924, ERICK SAGEKA ID 23693357, ROBERT OBUNGA ID 1673429. The witnesses present on the agreement day DAMACLIN SAGEKA OSEBE ID 29447653 JANET NYABOKA ID 30369450.

7. The agreement produced in evidence had endorsements which were made after parties met subsequent to signing the first agreement I have set out above. The agreement was endorsed as follows:

*The second meeting the following changes were agreed:*

*As from 22/12/2013 the (sic) sugar to be at store of the sales and Wilfred to pay as he agreed above in the first meeting. The following were present*

*DAVID SAGEKA ID 9404665, DANIEL H. OMOKE ID 9699062, WILFRED NYAKWEBE ID 21924924, JAPHETH OMBATI ID 7858512, ATIKA MACHERA ID 21809645, ERICK SAGEKA ID 23693357, ORANDO NYABAYO ID 142252, ROBAERT OBUNGA ID 1653409. They agreed above: The copies should be given to the buyer and Orando Nyabuya and the original to be remaining at the sellers who are Eric and Obunga.*

*Agreement extended as follows:*

*The buyer will give the money to Erick on 15<sup>th</sup> February 2014 (15/2/2014) after the sugarcane has been taken to Transmara factory. Witnesses JANET NYABOKE ID 30369450, SAUL MASABE. The machine to remain to Erick till Getanda clears the balance.*

8. According to PW 1 and PW 2, the appellant harvested the sugarcane and delivered it to Transmara Sugar factory whereupon he was paid but he did not re-pay the money as agreed. In his defence, the appellant accepted that he entered into the agreement and paid a deposit of Kshs. 3,000/=. He stated that he was to pay the balance after crushing the cane. He testified that he was later advised to take the cane to Transmara Sugar Factory. He took the sugar cane there but realized a loss.

9. The investigating officer, PW 4, confirmed that the appellant had obtained 42 tonnes of sugarcane worth Kshs. 73,000/= which he had not paid for despite the fact that he had delivered the cane to Transmara Sugar factory. He confirmed that at the time the cane was still in the process at the factory.

10. Having reviewed the evidence, I am satisfied that there was an agreement between the appellant, PW 2 and one Robert Obunga. It is not clear how the complainant, PW 1, came to be a party to the agreement. The prosecution did not establish that he was the owner of the sugarcane or the person otherwise entitled to payment. For this reason, the charges against the appellant could not be maintained as PW 1 was not party to the agreement. In simple terms, nothing was obtained from him.

11. Further, the facts of the case show that the appellant, having taken possession of the cane, defaulted in payment under the agreement. The last endorsement under the agreement shows that the appellant was to pay the debt after delivering the sugar cane to Transmara Sugar factory. Thus, his obligation under the contract was to make payment of the cane, a matter which is civil in nature and which from the circumstances negates any felonious intent on the part of the appellant to defraud the other parties to the agreement.

12. For the reasons I have set out, I find that the prosecution did not prove the elements of the offence of obtaining by false pretense. I therefore allow the appeal, set aside the conviction and sentence and order that the fine paid by the appellant be refunded to him.

**DATED and DELIVERED at KISII on this 5<sup>th</sup> day of FEBRUARY 2019.**

**D.S MAJANJA**

**JUDGE**

Mr O. M. Otieno, Advocate for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.