



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 69 OF 2018**

**JOSEPH AMUNGA OCHIENG.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat Magistrate in Rongo Magistrate's Court Criminal Case No. 491 of 2012 delivered on 16/10/2018)***

**JUDGMENT**

1. **Joseph Amunga Ochieng**, the Appellant herein, was charged with three counts of **Obtaining by False Pretenses** contrary to **Section 313** of the **Penal Code, Cap. 63** of the Laws of Kenya before the Rongo Principal Magistrates Courts on 09/10/2012. He denied all counts and a trial was ordered.
2. Before the trial began on 06/05/2013, the charges were substituted and the Appellant was charged afresh with three counts of **Obtaining by False Pretenses** contrary to **Section 313** of the **Penal Code**. Thereafter PW1 testified and the trial was adjourned. On 01/07/2013 the charges were again substituted by other three counts of **Obtaining by False Pretenses** contrary to **Section 313** of the **Penal Code** and the Appellant took fresh pleas. He again denied the charges and the trial proceeded with the testimony of PW2.
3. The particulars of the three counts of Obtaining by False Pretenses were similar save for the complainants and the amounts of money involved. The particulars were that *'on diverse dates between 14<sup>th</sup> March, 2010 and 30<sup>th</sup> January 2012 at Bomachoge area within Kisii County in the Republic of Kenya jointly with others not before court with intent to defraud obtained a total of Kshs. 2,448,795/= by falsely pretending that a Non-Governmental Organization namely Community Partners Alliance was in a position to connect Bomachoge Self Help Group members to the donor world for financial assistance a fact he knew to be false.'*
4. The Appellant was subsequently tried and acquitted of all the three counts of Obtaining by False Pretenses but instead he was found guilty of the offences of **Cheating** contrary to **Section 315** of the **Penal Code**. The Appellant was accordingly convicted on all the three counts and sentenced to three years' imprisonment on each count which sentences were to run consecutively.
5. Thirteen witnesses testified in support of the prosecution's case. **PW1** was one **Ruth Mwangi**, the Secretary of Wasweta Women Group. The Chairman of Kekoto A Group one **David Odego Thomas** testified as **PW2**. The Chairman of Boochi Igembe Youth Group one **Peter Moseti Onderi** testified as **PW3**. A member of Tosanse Group one **Orindo Peter Kefoi** testified as **PW4**. **PW5** was one **Charles Olwero Konge** the Secretary of Batuko Fish Farmers. **PW6** was **Cynthia Oyugi** who served as the Kuria District Deputy Gender and Social Development Officer. The Operations Manager of Equity Bank at Migori one Rashid Ali Salami testified as **PW7**. The Head of the Social Development Department in Homa Bay County testified as **PW8**. He was one **Charles Sigari Mirima. Rhoda Chepkemei Kemei** was a Social Development Officer in Gucha District and testified as **PW9** whereas the Head of Security of Housing Finance one **Wycliffe Mwangi Kamau** testified as **PW10**. **No. 236114 IP Julius Musoge** attached to the Bank Fraud Investigation Unit in Nairobi testified as **PW11** while **No. 231794 C.I. Charles Kiraitu** attached to DCI Nairobi and who was the Investigating Officer testified as **PW12**. **Dr. James Wambura Nyikal** who was at one time the Principal Secretary of the Ministry of Gender, Children and Social Development testified as **PW13**. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court.
6. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave a sworn defence without calling any witness. Thereafter the court rendered its judgment on 16/10/2018. The Appellant was sentenced on 17/10/2018.
7. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal with the leave of this Court and filed a Memorandum of Appeal on 24/12/2018 where he challenged the judgment on grounds that the trial court erred in finding him guilty of the offence of Cheating which infringed **Section 179** of the **Criminal Procedure Code**.
8. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant expounded on the grounds of appeal. The Appellant prayed that the appeal to be allowed, conviction quashed and sentence be set-aside.

9. The appeal was opposed by the State which submitted that the offences of Cheating were established and proved beyond any peradventure and prayed that the appeal be dismissed.

10. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. Having carefully read the lower court record, the grounds of appeal and heard the parties in their respective submissions I find that the core issue for determination in this appeal is whether the trial court erred in relying on **Section 179** of the **Criminal Procedure Code** to convict the Appellant with the offence of Cheating after it had found that the offences of obtaining by false pretenses were not proved. That being so I will hence consider the issue.

12. **Section 179** of the **Criminal Procedure Code** (hereinafter referred to as '**the CPC**') provides as follows: -

*(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*

*(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

13. The reading of the foregone provision is clear that the offence on which one may be convicted of upon the dismissal of the main charge must be a minor and cognate offence to the main charge. **The Black's Law Dictionary** defines a '*cognate offence*' as "**a lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.**"

14. Courts have as well interrogated **Section 179** of the **CPC** at length. The Court of Appeal sitting in Malindi in **Criminal Appeal No. 5 of 2013 Robert Mutungi Muumbi vs. Republic [2015] eKLR** had the following to say: -

*As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged.*

*An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See **ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171** and **WACHIRA S/O NJENGA V. REGINA (1954) EA 398**).*

*Spry, J. explained the essence of the first consideration as follows in **ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294**, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:*

*Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.*

*That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.*

*The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See **REPUBLIC V. CHEYA & ANOTHER [1973] EA 500**).*

*In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied. (emphasis added).*

15. In Uganda, **Hon. Justice Stephen Mubiru** of the High Court in finding that the offence of Manslaughter was minor and cognate to that of Murder in **Criminal Sessions Case No. 910 of 2014 Uganda -vs- Obe Zayio Bosco** expressed himself thus: -

...a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it (see also *Uganda v. Leo Mubyazita and two others* [1972] HCB 170; *Paipai Aribu v. Uganda* [1964] 1 EA 524 and *Republic v. Cheya and another* [1973] 1 EA 500). The minor offence sought to be entered must belong to the same category with the major offence. The considerations of what constitutes a minor and cognate offence were set out in *Ali Mohamed Hassani Mpanda v. Republic* [1963] 1 EA 294, where the appellant was charged together with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of *The Penal Code Act*. The magistrate found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s.241 of *The Penal Code Act*. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence and whether that offence must be cognate with the major offence charged. The High Court of Tanganyika held that;

*s. 181 of The Criminal Procedure Code (similar to section 87 of The Trial on Indictments Act, Cap 16) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted.*

*Section 87 of The Trial on Indictments Act envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. In the instant case, the only distinction between the offence of Murder c/s 188 and 189 of the Penal Code Act and Manslaughter c/s 187 and 190 of The Penal Code Act, is that the former requires proof of malice aforethought which the latter does not. Therefore, by a process of subtraction, the offence of Manslaughter c/s 187 and 190 of The Penal Code Act is minor and cognate to that of Murder c/s 188 and 189 of the Penal Code Act, and a person indicted with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not indicted with it. The circumstances embodied in the major indictment necessarily and according to the definition of the offence imputed by that indictment constitute the minor offence too. The indictment under sections 188 and 189 of The Penal Code Act gave the accused notice of all the circumstances constituting the offence under sections 187 and 190 of The Penal Code Act for which he can be convicted.*

*In the final result, I find that the prosecution has proved all the essential ingredients of the offence of Manslaughter c/s 187 and 190 of The Penal Code Act beyond reasonable doubt and I hereby find the accused guilty and convict him for the offence of Manslaughter c/s 187 and 190 of The Penal Code.* (emphasis added).

16. The Courts in the above cases rightly so emphasized the need of ascertaining the two key aspects being **cognate** and **minor** while interrogating whether **Section 179** of the **CPC** would be applicable in a case. **Cognate** in the sense that the major offence encompassed all the ingredients of the minor offence. In other words, the ingredients of the minor offence must be wholly ingrained or subsumed in the ingredients of the major offence. **Minor** to mean that the other offence must be a lesser offence to the major offence. It is only after the two key elements are certainly proved that a Court may invoke **Section 179** of the **CPC** to convict on the cognate and minor offence. Ascertaining the two key elements ensures that the accused person's right to a fair trial as guaranteed under **Article 50** of the **Constitution** is not curtailed even in the absence of not calling upon the accused person to take a plea on the cognate and minor offence and also insulates the accused person from any prejudice whatsoever. As rightly put, *'...it involves the process of subtraction from the major offence...'*

17. In this case and as said, the Appellant was charged with the offences of obtaining by false pretenses contrary to **Section 313** of the **Penal Code**, but was found guilty and convicted of the offences of cheating contrary to **Section 315** courtesy of **Section 179** of the **CPC**. For ease of this discussion I will reproduce the said twin sections of the Penal Code as under: -

**313. Any person who by any false pretense, 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 misdemeanour and is liable to imprisonment for three years."**

**315. Any person who by means of any fraudulent trick or device 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 or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years"**

18. The **Penal Code** defines '**false presence**' to be '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 pretense.' From the reading of **Section 313** of the **Penal Code** and the definition of '**false pretense**' juxtaposed against the facts of the case, the trial court was indeed right in finding that the offences of obtaining by false pretenses were not proved *inter alia* as the facts and circumstances related to future contemplated events.

19. As to whether the offence of cheating could stand the legal test in **Section 179** of the **CPC**, a look at the ingredients of each offence is necessary. The ingredients of the offence of obtaining by false pretenses are:

- (a) Obtaining something capable of being stolen;
- (b) Obtaining the thing capable of being stolen by false pretense;
- (c) Obtaining the thing capable of being stolen with a clear intention to defraud.

20. On the other hand, the ingredients of the offence of cheating are:

**(a) Obtaining something capable of being stolen OR inducing one to deliver to any person anything capable of being stolen OR inducing one to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered;**

**(b) Attaining (a) above by way of a fraudulent trick or device.**

21. It is hence crystal clear that the ingredients of the twin offences are very different and one cannot say that the elements of the offence of cheating are ingrained or subsumed in the ingredients of the offence of obtaining by false pretense. The offences are therefore not cognate. Further, the twin offences carry similar maximum sentences hence the offence of cheating is not minor to that of obtaining by false pretense.

22. I hereby find and hold, with tremendous respect to the learned trial court, that the circumstances of this case did not avail the offence of cheating as a cognate and minor to that of obtaining by false pretenses. Consequently, the appeal is hereby allowed, the convictions quashed and the sentences set-aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 21<sup>st</sup> day of May, 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Joseph Amunga Ochieng** the Appellant in person.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant