



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**HCCRA 98 OF 2018**

**PHILEMON NYANGWESO SONGUYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment dated 19<sup>th</sup> July, 2018 by Hon. E.Malesi,*

*Senior Resident Magistrate at Kakamega CM's Criminal Case No. 2716 of 2017).*

**JUDGMENT**

1. **Phelimon Nyangweso Sunguti** the appellant was charged with three (3) counts of obtaining money by false pretence contrary to section 313 of the Penal Code.

The particulars which are similar all counts are that the appellant on diverse dates during the month of June 2017 at Kakamega town within Kakamega County jointly with others not before court obtained money by false pretences as follows:

Count 1 – Kshs. 600,000/= from Rose Karani for an alleged recruitment of her children into the Kenya Army a fact he knew to be false.

Count 2- Kshs. 416,000/= from Tom Imbavi for an alleged recruitment of his children into the Kenya Army a fact he knew to be false.

Count 3- Kshs. 208,000/= from Beatrice Kadulenge for an alleged recruitment of her child into the Kenya Army a fact he knew to be false.

2. He pleaded not guilty to all the three counts and the case proceeded to full hearing. He was finally found guilty, convicted and sentenced to two (2) years imprisonment on each count, with an order that the sentences run consecutively.

3. Being dissatisfied with the Judgment he appealed raising the following grounds:

i. That the learned trial magistrate grossly erred in law and fact in presiding over a trial that seriously offended section 198(a) of the CPC.

ii. That the learned trial magistrate misdirected himself in basing her decision on the evidence of the investigation officer without proper evaluation.

iii. That the learned trial magistrate grossly erred in law and fact in proving obtaining without considering his argument that he had a business tie between him and the complainant.

iv. That the learned trial magistrate grossly erred in law and fact rejecting his plausible defence without proper evaluation.

4. A summary of the prosecution case is that PW1 **Rose Vinaywa Karanimet** with the appellant and his cousin end of May, 2017 while in Kakamega town. He introduced himself as a Kenya Defence Force (KDF) officer who was in Kakamega for a recruitment exercise. He inquired whether PW1 had any child in need of recruitment which she answered in the negative.

They continued relating over this issue leading to meetings here and there. The appellant introduced her to other people e.g. Eric Odhiambo Senior KDF officer at DOD, and Wesley Bett.

5. One thing led to another and by then money started changing hands, "Admission letters" for the "recruits" were given to PW1 and her friends PW2- PW4 for their children. These were produced as EXB 2a – c, 4a – c.

6. PW1 and her team of eager parents and their children were invited to report at the EldoretMoi barracks by the appellant on 24<sup>th</sup> June, 2017. Things did not work and it then that they all realized they had been conned. The matter was reported to the police.

7. The money to the appellant, Eric Omondi and Wesley Bett was paid in both cash and Mpesa transactions. Statements were produced by the prosecution as EXB1,3,6.

PW5 and PW6 were some of the duped recruits.

8. PW7 **No. 87866 PC James Kangara** of Kakamega Police Station received complaints from PW 1, PW2 and PW3. The appellant was arrested and his house searched. Documents purportedly originating from D.O.D plus alleged recruitment letters for several persons were recovered (EXB 7). The appellant was interrogated and finally charged. PW7 confirmed that the appellant who hails from Sherugha village is not a military officer.

9. In his sworn statement of defence, the appellant denied the charges. He said him and PW1 were engaged in business of maize and beans and she even got him customers. He had given her maize to sell and she delayed in payment. Later PW1 and her friends sent him money via Mpesa for the stock sold. He stated that there was a variance in the evidence adduced and the amounts in the charge sheet. He denied being with the witnesses in Eldoret on the stated date.

10. In his submissions on the appeal he states that the charge sheet was defective as it referred to offences under Section 234 of the penal code. In summarizing the evidence of all the prosecution witnesses he submitted that their evidence was not reliable and was not corroborative. He further stated that his defence was forth right and should have carried the day. He denied having been sent any money by PW2 and PW3.

11. The State through Mr. Mwaura opposed the appeal. It was his submission that the learned trial magistrate well evaluated the evidence and rightly convicted the appellant. That the appellant was not in business ties with PW1. Further that there was an evidence of Mpesa payments by pw1, PW2, and PW3 to the appellant (EXB1 – 3 Mpesa statements).

#### **ANALYSIS AND DETERMINATION**

12. This is a first appeal and this court has a duty to reevaluate and reconsider all the evidence adduced and arrive at its own conclusion. It should bear in mind that it did not see nor hear the witnesses and give an allowance for that. The court of Appeal in the case of **Kiilu and another V Republic (2005) 1 KLR 174** stated the following on the special duty of a first appeal court:

*i. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.*

*ii. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.*

13. I have considered the evidence, grounds of appeal, and submissions by both parties. I find the main issue falling for determination is whether the charge of obtaining by false pretence was proved.

14. I agree as stated by the appellant that the learned trial magistrate quoted the wrong provisions of the law in her Judgment under which the offence of obtaining by false pretences fell.

Did this cause the appellant any injustice and did this make the charge sheet defective? My answer is in the negative for the following reasons.

*i. The charge in the three counts which were read to the appellant clearly show that he was charged with an offence under section 313 of the Penal Code.*

*ii. It was very clear to the court and appellant that he faced a charge of obtaining by false pretences.*

*iii. The citing of section 234 of the penal Code by the learned trial magistrate in the judgment is pure typographical error which did not go to the root of the trial. It has also not prejudiced the appellant in any way.*

I therefore dismiss that ground.

15. The evidence on record is that PW1 was the first person in as far as this case is concerned to meet the appellant. He introduced himself to her as a KDF officer on a recruitment exercise in Kakamega. PW1 in turn introduced PW2 – PW6 to the appellant.

It has indeed been established that the appellant is not a KDF officer and has never been. It has also been established that the appellant was not in any way involved in the recruitment exercise of KDF officers in June, 2017 in Kakamega.

16. The appellant is accused of obtaining money from PW1 – PW4 on the pretext that he and others not before court would assist these over trusting Kenyans to get their children recruited into the KDF.

17. Letters (EXB 2a – d, 4a-c, 5) produced before the court were purportedly issued by the KDF. They were showing that the children relatives of PW1 – PW4 had been recruited into the KDF.

It was the evidence of PW1 – PW6 that these letters were handed over to them by the appellant and one Eric Odhiambo and Wesley Bett. It was finally discovered that there was no such recruitment and the letters did not originate from KDF or D.O.D

18. The charge facing the appellant is grounded on the fact that for these letters to be released PW1- PW4 had to handsomely part with money. Is there that the false pretence comes in What then is a false pretence?

The Webster Law dictionary defines it as:-

***“False representations concerning past or present facts that are made with the intent to defraud another also, the crime of obtaining title to another property by false pretences- compare larceny by trick at Larceny, theft.”***

19. Produced before the court were Mpesa statements EXB 3 and 6 showing how colossal sums of cash were sent to the appellant by PW1 – PW4. The witnesses also testified on how huge sums of cash were given to the appellant and his cronies (Eric Odhiambo and Wesley Bett). The appellant has not denied receiving money from PW1 whom he says was his business partner.

I have gone through the appellant’s cross examination of PW1 and I have failed to find any suggestion that PW1 was his business partner and what business they purportedly did together.

20. The Mpesa statements speak for themselves. The appellant failed to explain satisfactorily the purpose for the receipt of these huge sums of money.

I am satisfied that the learned trial magistrate evaluated the evidence very well and came to the correct conclusion. I have no reason to interfere with the conviction and sentence on all counts.

21. I only have an issue with the order that the sentences run consecutively. The offences the appellant was charged with though falling in three counts were committed under the same circumstances and so should be served concurrently.

22. The appellant should thank God that after committing such a heinous offence he will get away with such a light sentence. I therefore dismiss the appeal on both conviction and sentence.

23. I however set aside the order that the sentences run **consecutively** and substitute it with an order that the sentences run **concurrently**, from the date of conviction and sentence which is 19<sup>th</sup> July, 2018.

Orders accordingly

Delivered signed and dated this 9<sup>th</sup> day of September, 2019 in open court at Kakamega

**H.I. ONG’UDI**

**JUDGE**