REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 213 OF 2011

Gerald Ndoho Munjuga.....…….……Appellant

Versus

Republic……..……..……Respondent

(Appeal against Judgement, sentence and conviction in Criminal case number 195 of 2011, R vs Gerald Ndoho Munjuga at Nyeri, delivered J. Wambililyanga R. M. delivered on 14.10.2011).

JUDGEMENT

Gerald Ndoho Munjuga (hereinafter referred to as the appellant) was arraigned before the Resident Magistrates court at Nyeri charged with the offence of obtaining money by false pretences contrary to Section **313** of the Penal Code.[1] It was alleged that on the 11th day of October 2010, at Nairuria centre within Kieni West District of Central Province, jointly with another not before court with intent to defraud obtained cash Ksh.157,000/= from **Jane Wangui Wachira** by falsely pretending that he will make her son one **Peter Wagura Wangui** be recruited in the Kenya Army a fact he knew to be untrue or false.

The appellant faced a second count of obtaining money by false pretences contrary to Section 313 of the Penal Code.[2] It was alleged that on the 4th Octobr 2010 at Nairutia centre within Kieni West District of Central Province, jointly with another not before court with intent to defraud obtained cash Ksh. 107,000/= from Peter Nderitu Kibue by falsely pretending that he will make his son John Njuguna Nderitu be recruited in the Kenya Army a fact he knew to be un true or false.

This duty of an appellate court was authoritatively stated by the Supreme Court of India in the recent decision in the case of *K. Anbazhagan v. State of Karnataka and Others*,[3] where a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal ruled that:-

> *"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – **sans passion and sans prejudice**. The reflective attitude of the*

Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

The duty of an appellate court is to subject the evidence tendered in the lower court to a fresh and exhaustive examination and draw its own conclusions.[4]

PW1 Jane Wangui Wachira explained how the appellant obtained from her a total of 157,000/= on the promise that he would get her son recruited into the Kenya Army. Some of the money was given in cash and M-pesa. The said promise never materialized.

PW2 Charles Maina Wachira confirmed that he witnessed PW1 withdrawing Ksh. 130,000/= from Equity Bank and he gave the cash to the appellant.

PW3 Peter Nderitu Kibue also testified how the appellant asked for money to facilitate in being recruited in the Kenya Army. First he asked for Ksh. 7,000/= for medical and certificate of good conduct which he was given via M-pesa, then later he asked for Ksh. 100,000/= to cover other needs. He gave the said sum as follows, Ksh. 50,000/= in the presence of his son a one John Njuguna Nderitu and Ksh. 50,000/= via m-pesa. He later gave him what he described as "service number 60125".

PW4 John Njuguna Nderitu son to PW3 and the would be beneficiary of the said arrangement was present when his father PW3 gave the appellant Ksh. 50,000/=. He also accompanied the appellant to Nairobi and they met a person described as a senior officer who removed a medical form which he completed and asked for his i/d card and testimonials. He also witnessed the appellant give the said person Ksh. 20,000/=. He was later given the forms bearing a DOD stamp number 60125. He was asked to go home and await the reporting date which was 8th December 2010. This was not to be.

PW5 No. Francis Kanyugo, the local area chief received a complaint from the two complainants, and summoned the complainants and the appellant and upon getting the information he wanted he reported the matter to the police.

PW6 Cpl Stephen Chesire attached to CID Nyeri took over the case from Nairuta Police Station, he investigated the case

At the close of the prosecution case the trial magistrate was satisfied that a *prima facie* case had been established and put the accused person on his defence. The provisions of section 211 of the Criminal Procedure Code[5] were complied with and the appellant herein opted to give sworn evidence and called one witness.

In his defence, the appellant stated his brother in law had informed him that there was someone who could assist in getting their children employed in the army. He admitted that he went to Nairobi with PW4, where he completed some forms and that he gave all the money to the person they met in Nairobi and that he never retained a single cent. He insisted it is the complainants who approached him. He insisted that he reported the incident at Central Police Station and later at Nyeri Police Station and that the complainants refused to record statements. He alleged the police asked for money for "petrol" to undertake the investigation.

DW2 Janet Wairimu Nduhiu testified that the accused is her father and that in October 2010 her father had told her that he had found someone who could help her join the army, that they met the said person in a hotel together with her uncle, and that the said person gave her medical certificate and told her that on 6.12.10 he would join the armed forces but that was not to be. Later her father (the appellant) told her that the person was could not be traced and that he had given him Ksh. 107,000/=.

After evaluating the prosecution and the defence case, the trial magistrate found the appellant guilty and sentenced him to serve 2 years imprisonment for each count. Both sentences to run concurrently.

Aggrieved by the said finding, the appellant appealed to this court against the conviction and sentence

imposed and raised seven grounds of appeal, which in my view can be reduced into one, namely; **(i)** that the learned magistrate erred in law in concluding that the prosecution had proved its case beyond reasonable doubt.

Both the appellant and Counsel for the DPP filed written submissions. I have carefully considered the submissions by the appellants' advocates and submissions by the learned state counsel and the relevant law and authorities.

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

The key question that this court seeks to answer is whether or not the appellant offered any other explanation that could exonerate him from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. This calls for close examination of the prosecution evidence and the defence offered by the accused.

Section **312** of the Penal Code[6] defines false pretence in the following terms:-

> *"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"*

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

i. *A representation by words, writing or conduct.*
ii. *A representation in either past or present.*
iii. *A representation that is false.*
iv. *A representation made knowing it to be false or believed not to be true.*

The High Court of Botswana in *Lesholo & Another vs The State*[7] dealing with an offence of this nature held that:-

i. *To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intend to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.*
ii. *A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not a false pretence if it is made in relation to the future even if it is made fraudulently. Where however, the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false.**[8]***
iii. .....*The representation must be made with the specific purpose of getting money from the complainant which he/she would not have given had the true facts been revealed to him.*

The offence of obtaining by false pretence means knowingly obtaining another person's property by means of a misrepresentation of fact with intent to defraud. For the offence of obtaining by false pretences to be committed, the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen. An inducement on the part of an accused to make his victim part with a thing capable of being stolen or to make his victim deliver a thing capable of being stolen will expose the accused to imprisonment for the offence.

Perhaps the most explicit exposition of the ingredients of the offence of obtaining by false pretences is to be found in the decision rendered by the Nigerian Supreme Court on Friday April 2006 in the case of *Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria*[9] where the court stated as follows:-

> *"In order to succeed in a charge of obtaining by false pretences, the prosecution must prove:-*

a. *that there is a pretence;*
b. *that the pretence emanated from the accused person;*
c. *that it was false;*
d. *that the accused person knew of its falsity or did not believe in its truth;*
e. *that there was an intention to defraud;*
f. *that the thing is capable of being stolen;*
g. *that the accused person induced the owner to transfer his whole interest in the property."*

> *The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest believe in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence. The above adequately presents the law as in the Penal Code."*

The key question is, does the defence offered by the appellant in the lower court raise doubts as to his guilty? Does it rebut the above ingredients? Is it reasonable in the circumstances? In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in **Re Winship**[10] where the court stated:-

> *"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction……Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"*

The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in *D.P.P vs Woolmington***.** The United States Supreme Court in the above cited case of *Re Winship* held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution.

The explanation given by the appellant was in my view not reasonable nor did it rebut the clear evidence adduced by the prosecution. He claimed that he was also a victim and that he reported the incident to two police stations and the officers asked for money to facilitate the investigation. I find that highly improbable and difficult to believe and in any event he never sought assistance from superiors of the alleged officers nor did he lodge a complaint against the said officers for such an evidently criminal activity. The said explanation, is a mere excuse and totally incredible and a mere afterthought.

The Supreme Court of Nigeria in the case of *Ozaki and another vs The State*[11]stated that *"it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution."*

After weighing the explanation offered by the accused and the prosecution evidence, I find that the prosecution evidence is truthful, credible and probable as opposed to the incredible and highly improbable defence offered by the appellant. The appellants defence did not raise any reasonable doubts on the

prosecution case.

The South African case of *Ricky Ganda vs The State*[12]provides useful guidance. In the said case it was held:-

> *"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true……the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses….it is acceptable in totality in evaluating the evidence to consider the inherent probabilities….*
>
> *The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"*

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am persuaded that the conviction was justifiable. The explanation offered by the accused is in my view improbable and does not cast reasonable doubt on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[13] In 1997, the Supreme Court of Cananda in *R vs Lifchus**[14]*** suggested the following explanation:-

> *"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. ……the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.*
>
> *A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.*
>
> *Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high.*
>
> *In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt"(Emphasis supplied)*

In the present case and after carefully considering the defence and prosecution evidence, I find that there were reasonable basis for holding that the appellant was guilty as charged and I find no reason to interfere with the learned Magistrates findings.

Regarding the sentence imposed, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if

it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principles or if the court exercised its discretion capriciously.[15] In *Shadrack Kipchoge Kogovs Republic*,[16] the court of appeal stated:-

> *"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"*

The Supreme Court of India in *State of M.P. vs Bablu Natt*[17]stated that '*the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.'* Moreover, in *Alister Anthony Pareira vs State of Maharashtra*,**[18]**the court held that:-

> *"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"*

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[19]

I have carefully considered the facts of this case, the nature of the offence and the above principles and the mitigating factors and I have also considered the purpose of sentencing and the principles of sentencing under the common law[20] and the sentencing policy guidelines. The appellant was jailed to two years for each count, both sentences to run concurrently.

I find that the said sentence is not excessive and I order that the appellants proceeds to serve the remaining balance of his jail term. However, I give the appellant the option of a non custodial sentence and order that the appellant may be released upon payment of a fine of **Ksh. 50,000/=** for each count making a total of **Ksh. 100,000/=.**

The upshot is that this appeal against both conviction and sentence fails and the same is hereby dismissed.

Right of appeal 14 days

Dated at **Nyeri** this **7th** day of **March** 2016

John M. Mativo

Judge