



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.476 OF 2009**

***(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE***

***OF C.GITHUA (MRS) - SPM DELIVERED ON 29<sup>TH</sup> OCTOBER 2009 IN NAIROBI***

***CM. CR. CASE NO.1942 OF 2006)***

**VINCENT PATRICK KAMAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Vincent Patrick Kamau was charged with two (2) counts of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 7<sup>th</sup> and 8<sup>th</sup> August 2005 at Western Union, Diamond Trust House along Kimathi Street in Nairobi County, the Appellant, jointly with another not before court with intent to defraud, obtained the sums of Kshs.41,726/- and Kshs.75,198/- from Joseph Mwangi Maina and Nicholas Muchiri Kamau under the false pretence that he was in a position to secure their travel for a conference to the United States of America. The Appellant pleaded not guilty to both counts. After full trial, the Appellant was convicted on the second count. He was sentenced to serve two (2) years imprisonment. The Appellant has already served his sentence. He told the court that he was proceeding with the appeal for the sole purpose of clearing his name.

In his petition of appeal, the Appellant raised several grounds challenging his conviction. He was aggrieved that he had been convicted on the basis of documentary evidence which did not link him to the offence. He took issue with the fact that the trial court had relied on photocopied documents to sustain his conviction. He faulted the trial magistrate for failing to take into consideration the fact that crucial witnesses were not called to testify in the case and therefore prejudiced his case. He was aggrieved that the trial magistrate had failed to properly weigh the credibility of witnesses before reaching the finding that he was guilty of the offence. He faulted the trial magistrate for relying on documents that he considered doctored to sustain his conviction. On the strength of the above grounds, the Appellant urged the court to allow his appeal and quash his conviction. During the hearing of the appeal, this court heard oral rival submission made by the Appellant, who was acting in person and by Ms. Ngetich for the State. Whereas the Appellant made a case for the appeal to be allowed, Ms. Ngetich submitted that the prosecution had established its case on the charge that was brought against the Appellant to the required standard of proof.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court so as to enable it to reach its independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to always have in mind the fact that it never saw nor heard the witnesses as they testified and therefore cannot make any finding regarding the demeanor of witnesses (See **Njoroge –vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established the charge of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

**Section 312** of the **Penal Code** defines false pretence thus:

***“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 false pretence.”***

To establish the charge of obtaining by false pretence, the prosecution is required to prove that the person accused made representation to the complainant, knowing such representation to be false or untrue, which representation induced the complainant to part with money or any other property. An essential ingredient of the charge of **obtaining by false pretence** is that there must be an element of the intention to defraud.

In the present appeal, it was the prosecution’s case that the Appellant, with intent to defraud, made representations to PW1 Nicholas Jackson Kamau Muchiri and PW4 Loice Nyawira Kamau Wamutitu (a husband and wife)(the complainants) that he was in a position to secure them travel documents and visas to enable them travel for a conference in the United States of America and Italy. According to the complainants, they were informed by one Joseph Mwangi who was a former Provincial Administrator in their home area, that there was a man who was organizing a trip for people to travel to the United States of America and Italy to attend a conference. The complainants were interested. Joseph Mwangi organized for them to travel from Murang’a to Nairobi on 8<sup>th</sup> August 2005 where they were introduced to the Appellant.

The Appellant told them that he was indeed in a position to facilitate their travel to the United States of America and Italy. In view of the short time (the alleged conference was scheduled for the 21<sup>st</sup> to 24<sup>th</sup> August 2005), the Appellant requested them to pay in total, a sum of Kshs.75,000/- to enable him secure for them travel documents to attend the conference. The complainants paid this sum to the Appellant. The Appellant escorted them to Diamond Trust Bank at Nation Centre Branch along Kimathi Street where the Appellant purported to transfer certain funds by Western Union money transfer.

PW2 Kennedy Nyangweso, a Manager with the bank produced records which showed that the Appellant indeed purported to transfer funds denominated in Euros to one Victor Edward. It was the prosecution’s case that the Appellant undertook this transaction in the presence of the complainants with a view to duping them into believing that the transaction was genuine. According to PW2, the Appellant later went to the bank and cancelled the transaction. He was refunded the money. The complainant testified that after paying the money, their effort to contact the Appellant proved futile. They were frustrated by the fact that the Appellant switched off his phone. They were also unable to reach his accomplice. It was then that the complainants realized that they had been conned. They made a report to the police at Kinogo Police Station on 10<sup>th</sup> September 2005. On 21<sup>st</sup> September 2006, the complainants saw a picture of the Appellant in the newspapers. The Appellant had been arrested and was in court having been arraigned for committing a similar offence. PW1 immediately notified the police. It resulted in the Appellant being charged with the offence for which he was convicted. In his defence, the Appellant denied participating in the scheme to defraud the complainants. He reiterated this position in his appeal before this court. In essence, the Appellant argued that the prosecution had not established a chain of events which linked him with the commission of the offence.

On re-evaluation of the evidence, it was clear to this court that the prosecution did indeed establish to the required standard of proof beyond any reasonable doubt that the Appellant obtained the said sum of Kshs.75,000/- from the complainants by falsely pretending that he would be in a position to arrange for

them to travel to the United States of America. The Appellant knew that the information he was giving to the complainants was false. There was no conference which had been organized in the United States of America or Italy where the complainants could attend. The Appellant knew that he was not in a position to organize documents for the complainants to travel to the United States of America or Italy. The Appellant's task was made easier by the fact that the complainants were naïve and appeared not to have been aware of the fact that they could not travel out of the country without a passport or a valid visa issued by the countries they intended to travel to.

Therefore the prosecution established the first ingredient of the charge of obtaining by false pretence by proving that the representation the Appellant made to the complainants was patently false and uttered with the sole intention of defrauding the complainants of the sum said of Kshs.75,000/-. Another aspect of the prosecution's case that was established to the required standard of proof beyond any reasonable doubt was the fact that the complainants paid to the Appellant the said sum of Kshs.75,000/-. The Appellant was paid this sum by the complainants before the Appellant went with them to Diamond Trust Bank, along Kimathi Street. This is where the Appellant pretended to send the money by Western Union Money Transfer to the organizers of the conference. It was clear from the prosecution's evidence that this was what the Appellant intended to do all along: to defraud the complainants of the said sum of Kshs.75,000/-.

The defence put forward by the Appellant did not dent the otherwise strong evidence adduced by prosecution witnesses. The grounds of appeal argued by the Appellant can best be described as self-serving and put forward with the sole intent of exonerating the Appellant from crime which he knowingly committed. The appeal against conviction lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MARCH 2015**

**L. KIMARU**

**JUDGE**