



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 226 OF 2010**

**BETWEEN**

**JULIUS MAKORI ONDICHO..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal from the judgment of Hon. P.L. Shinyada, RM, delivered on**

**21st October 2010 in the original Kisii CM's Court Criminal Case No.11 of 2009)**

**JUDGMENT**

**Introduction**

1. The appellant herein Julius Makori was the accused in the Chief Magistrate's Court at Kisii Criminal Case No.11 of 2009. He was charged with obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on the 31<sup>st</sup> day October 2008 at Nyakuberi village in Kisii Central District within Nyanza Province jointly with others not before court with intent to defraud obtained Kshs.32,000/= from Cornelius Oronyi Omariba by falsely pretending that he was in position to install electricity in his shop.

**The Prosecution Case**

2. He pleaded not guilty to the charges and trial ensued. PW1 was Lawrence Kigege Ayoti an employee with KPLC Kisii Branch. He told the trial court that on 14<sup>th</sup> November 2008 a report was made to him that there was an electric meter which did not look genuine. He received the report from one Peter Murage and the meter was said to be in Nyamataro area. PW1 proceeded to Nyamataro and on arrival at the site, he found the meter which was not genuine as it had 7 digits while KPLC's meters usually have 8 digits. He proceeded to remove the meter and advised the owner of the premises to report to the KPLC's office. He also took away the power connecting cable.

3. The complainant then proceeded to report to KPLC Office. He also noted that one of the digits had been scratched from the meter making it difficult to tell what meter it was. He then submitted his report to his boss who took over the matter. He identified the meter as **PMF1-1**.

4. On cross examination, PW1 stated that before power supply is connected to any premises, one has to apply, be given a quotation, a file opened for survey which is done after payment and KPLC has to be aware of this process. That after survey, the place is designed, construction then follows and then the

meter is installed. That all meters used in the installation are supplied by KPLC and not by a contractor or a neighbour.

5. PW2 was Cornelius Orangi Omari the complainant. He told the court that he knew the appellant as he was the one who installed power in his (PW2's) premises. That he had applied for power early in October, filled the forms and returned the same to KPLC through one James Nyabari. After about 3 weeks he was called by one Evans, a neighbour, who told him that they had received his application and he was required to pay Kshs.32,000/=. Afterwards, some people arrived in his homestead and told him they had been sent from KPLC by Evans. They carried copies of his application form and he assured them that upon installation, he would pay them their money.

6. On 30<sup>th</sup> October 2008, the same people came to his homestead in a

white motor vehicle with a cable and fixed power in his house, after which he paid them Kshs.32,000/=, but after only 4 days the meter reader came and made inquiries from him as to who had fixed the meter. PW1 told the meter reader it was appellant who had made the connection. He then called one Ayeti from KPLC who copied the meter number and went back to the office. PW2 used the power until December 2008, but in meantime, he called the appellant to inform him about the meter. The appellant sent someone to pick up the meter and brought it back 3 days later. In December KPLC employees came again, complained that the meter was defective and he in turn informed them that he had notified the person who had fixed it.

7. He later reported to KPLC's offices, found their boss one Machoka who instructed one of his workers to take him to the police station. By that time PW2 had in his possession a cable.

8. PW2 reiterated at the police station that it was the appellant who had installed the faulty meter in his premises, his phone number being 0728987525 and that of his neighbour Evans being 0722392457. That they used to call him confirming that his application had been received and that they would come. He identified PMF1-2 as the cable and PMF1-1 as the meter installed in his premises. That he gave the Kshs.32,000/= to the appellant who told him that he would avail a receipt after his boss had signed it but when he called the appellant after 2 days, could not find him on phone.

9. PW3 was Yucabeth Nyabato Orangi, PW2's wife. She corroborated PW2's testimony and further stated that on 15<sup>th</sup> December 2008 a KPLC official who had come to read the meter said that the same was faulty; they later came back the same day and took away the meter and cable. That KPLC official told PW2 and Evans to report to the KPLC offices. Evans never turned up and his phone was off. PW2 was then arrested on grounds that he had stolen power, he requested to be given time to arrest the appellant and later appellant was traced in Keroka. She identified both the meter and cable as PMF1-1 and PMF1-2. She also identified the appellant as the person PW2 gave money after he installed power for them.

10. PW4 was No.47332 Senior Sergeant Benson Naibei attached to DCIO's office Kisii Central. He told the court that on 30<sup>th</sup> December 2008 he received instructions from the DCIO to take over a case from Cpl Amimo who was unwell. He was given PW2's statement together with PMF1-1 and PMF1-2 after which he carried out more investigations by taking more witness statements and looking for appellant with PW2's assistance.

11. Eventually, with PW2's help appellant was arrested and he explained the reason why he sent complainant to identify appellant to the officers so that he could be arrested. He then charged appellant with the offence of obtaining Kshs.32,000/= from PW2 by false pretences. He produced PMF1-4 and PMF1-2 as **P. Exhibit 1** and **2** respectively.

12. On cross examination, PW4 stated that an illegal connection of power is an offence but he could not charge PW2 simply because PW2 was tricked.

13. PW5 was NO.60953 PC Kipngetich Ruto from Keroka police post. He told the court that on 30<sup>th</sup> December 2008 at around 15.00 hours he was in the office with one PC Normal Chemeso, when he received information that the appellant was wanted by CIP Kisii for charges of obtaining money by false pretences. With the help of PW2 and another person, the appellant was identified. He then proceeded to arrest the appellant and took him to the CIP, at Keroka. The appellant was booked in the cells and collected the following day by personnel from Kisii. He identified the appellant as the person he had arrested.

#### The Defence case

14. At the close of the prosecution case, the trial court after evaluating the above evidence, was satisfied that the prosecution had indeed established a *prima facie* case against the appellant and placed him on his defence. The appellant gave sworn testimony. He also called PW4 who produced the witness statements for PW2 and PW3 on the appellant's behalf. The appellant stated that he was an electrician. He denied ever knowing PW2 and PW3. That he only knew PW2 when he was arrested and he knew PW3 when she adduced evidence in court.

15. He acknowledged that one Evans Ogeto had asked him to repair an electric fault at Nyamataro in Kisii, that on reaching Nyamataro Evans directed him to a house where there was a boy who was on an electric pole and others at the meter box. They alleged that they had installed power but it was not lighting. He denied ever being given Kshs.32,000 by PW2. The appellant stated that on checking on the work to be done he found that the wires had already been repaired, so he was given fare by Evans Ogeto and he went back to his home in Keroka. He denied ever being given Kshs.32,000/= by PW2. During cross examination the applicant confirmed that he had no grudges with both PW2 and PW3 because he did not know them in the first place. He could not say why Evans Ogeto was never arrested.

#### Judgment of the Trial Court

16. In her judgment the learned trial magistrate found the charges against the appellant proved beyond reasonable doubt. The appellant was convicted and sentenced to pay a fine of Kshs.30,000/= or face 6 months imprisonment. The appellant paid the fine.

#### The Appeal

17. The appellant was aggrieved by both conviction and sentence, hence this appeal. In his petition of appeal dated 11<sup>th</sup> November 2010 and filed in court on 15<sup>th</sup> March 2012, the appellant through the firm of B.N. Ogari & Co. Advocates, set out the following grounds:-

1. *That the learned trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt whereas from the evidence on record this is not the case.*
2. *That the learned trial magistrate erred in law and in fact in convicting the appellant on insufficient and contradictory evidence adduced by the prosecution.*
3. *The learned trial magistrate erred in law and in fact in failing to appreciate and consider the submissions by the appellant together with its decisions from the superior court.*
4. *That the trial magistrate erred in law and in fact in failing to analyze and appreciate the evidence on record that the appellant did not make any representation to the respondent.*
5. *That the learned trial magistrate erred in law and in fact in failing to appreciate the definition of the offence and the interpretation given by the superior court.*
6. *That the learned trial magistrate erred in law and in fact in rejecting the appellant's defence without giving reasons.*
7. *That the learned trial magistrate erred in law and in fact by failing to appreciate the evidence on record that the respondent had the benefit of using electricity in his shop.*

#### The Submissions

18. The appellant has filed written submission through his advocate dated 16<sup>th</sup> October 2013. In his submissions the appellant contends that no evidence is on record to demonstrate that the appellant made any representation to the complainant since he did not know appellant's name or mention the appellant's name when he was making his statement. Secondly that there was a contradiction between PW2 and PW3's testimony as to whether PW3 saw PW2 giving the appellant money.

19. When the matter came before me on 5<sup>th</sup> December 2013, Mr. Ogari for the appellant submitted that the appeal was against conviction only. That for a conviction to accrue under **Section 313** certain ingredients must be proved thus:-

1. *It must be shown that the appellant made a representation to complainant in the form of inducement which inducement the appellant knew or knows he will not carry out.*
2. *The inducement must be made with fraud.*

20. Counsel submitted that from the evidence on record, the appellant did not approach complainant promising to supply electricity is given money. That PW2 and PW3 were approached by one Evans Ogeto the person who should have been charged with the offence and not the appellant.

21. He finally submitted that the trial magistrate failed to analyze and evaluate the evidence on record and thereby reached the wrong decision. He urged the court to allow the appeal.

22. The appeal was opposed by the State. Mr. Majale, learned counsel for the State submitted that the ingredients of the offence were satisfied by the acts of the appellant and the prosecution therefore proved its case beyond reasonable doubt and the appellant was properly convicted. He urged the court to look at the evidence in its entirety and to find that the conviction of the appellant was safe.

23. Mr. Ogari in reply submitted that it was Evans Ogeto who called complainant not the appellant. That the complainant PW2 only met appellant when appellant allegedly went to pick the money. He prayed that the court allows the appeal.

#### First Appeal

24. This is a first appeal. As was held in **Okeno –vs- Republic [1972] EA 32** at page 36 para C:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (Pandya –vs- R[1957] EA 336) 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 (Shantilal M. Ruwala –vs- R[1957] EA 570). 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 conclusion; it must make its own findings and draw its own conclusions.”**

The above is my duty but I am aware that I do not have the privilege of seeing and hearing any witnesses.

#### Findings

25. In the instant appeal the appellant was charged with the offence of obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. According to **Section 312** of the **Penal Code**, false pretences is defined as:-

**“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.”**

26. In **Silumu & another –vs- Republic [1986] KLR 259** a persuasive authority it was held that on a

charge of false pretences, the prosecution must prove the making of the pretences as stated in the indictment and where there is a substantial variation between the false pretence as alleged in the indictment and the pretences proved in the case, this will be fatal to the case.

27. The prosecution's case against the appellant was that he pretended that he was legally an employee of Kenya power & Lighting Company Limited and therefore in a position to connect the complainant's premises with electricity. That the appellant did obtain money from the complainant though he indeed knew that he was not an employee of KP&LC and that any power connection he made would be found illegal.

28. According to the evidence of the complainant PW2 he applied for power by filling in requisite forms which he gave his neighbour one James Nyabari to return to KP&LC. After about 3 weeks he was called by his neighbour Evans who was also a KP&LC contractor who told him that they had received his application and he was to pay Kshs.32,000/= according to their quotation. He also informed him that they had sent surveyors who had inspected the site and afterwards some people came saying they had been sent by Evans with copies of the complainant's application form.

29. On the 30<sup>th</sup> October 2008, the same people who included the appellant returned in a white motor vehicle with cables and fixed power in his house. The appellant then demanded that the complainant buys items to be fixed on the following day. The complainant did so. He used power for 4 days before the meter reader came and alarmed him that their meter was faulty. According to the evidence of the complainant the appellant had told him that he worked for KP&LC Kisumu.

30. The complainant on being informed that his meter was faulty called the appellant who in turn instructed one of his workers who came and removed the meter and returned it after 3 days. Afterwards, the officers from Kenya Power still came and informed the complainant that the meter was faulty.

31. Under cross examination, the complainant stated:-

**“I knew Julius Makori on 30<sup>th</sup> October 2008. He came to my home. He came to install electricity in my home. He came to install power. He was with Evans and three other men whom I did not know.**

**.... I gave the money to the accused.**

According to PW3's evidence, she stated this during evidence in chief:-

**“After some time some people came and one of them introduced himself as a KP&LC official and wanted to install power. He asked if we had money ready. We paid him Kshs.32,000/= after installing the power. We asked for receipts and he said they would send the receipts later. The said man is in court (points at accused). He was in the company of other 2 whom I did not know.”**

32. From the above evidence adduced by the prosecution, it is evident that the complainant only came to know the appellant through Evans who was his neighbour and is still at large. Evans and the appellant were the persons, apparently working for KP&LC whom the complainant was in constant communication with regarding power connection in his premises as he knew both their mobile phone numbers.

33. Counsel for the appellant has submitted that since the complainant did not know the appellant previously, then the appellant's conviction cannot stand. In my considered view, that submission is a misapprehension of the law. **Section 312** of the **Penal Code**, which defines the term **“false pretence”** does not require that the person making the representation must have been known by the person to whom the representation is made. The requirement is that the person making the representation must either know that the representation is false or that he does not believe the representation to be true.

34. Further, the appellant was jointly charged with others not before the court. These others included

Evans Ogeto who is said to be still at large. The appellant introduced himself to the complainant as an employee of KP&LC based in Kisumu, a fact he knew was false.

35. This fact of the appellant introducing himself as an employee of KP&LC based in Kisumu itself convinced the complainant that both Evans and appellant were employees of KP&LC and would ensure that his premises got power. Furthermore, the evidence of the complainant as to who received Kshs.32,000/= remained unshaken even in cross examination. The conduct of the appellant in this case was that of co-perpetrator in the sense that both he and Evans Ogeto misrepresented themselves to the complainant to be KP&LC's employees, and thereafter secured an illegal connection for the complainant for which the appellant made away with Kshs.32,000/=. The conduct of the appellant of not responding to the complainant's calls after he had been paid Kshs.32,000/= does not show that the appellant was innocent.

36. The appellant in his defence merely denied that he knew both PW2 and PW3 but admitted that he was an electrician who was told by Evans to go to Nyamataro and repair some wires, but on checking the wires, he found them to have already been repaired.

37. The learned trial magistrate's words in concluding her judgment were:-

**“The accused was also identified by the complainant when he was arrested. The complainant could not have just pointed at the accused if he did not know the accused person. The accused stayed at the complainant's home for sometime while he installed the illegal power. The complainant even had his phone number on which he called complaining about the first meter.”**

There is thus no doubt in my mind that the appellant committed the offence jointly with others not before the court.

38. The upshot of all the above is that this appeal must fail. The trial court's conviction is upheld.

39. Orders accordingly.

**Dated and delivered at Kisii this 6<sup>th</sup> day of March, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:

Mr. G.M. Nyambati for B.N. Ogari for Appellant

Miss Cheruiyot (present) for Respondent

Mr. Bibu - Court Clerk