



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO 638 OF 1992**

**ABEDINEGO MUTISO MUSYOKI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Abedinego Mutiso Musyoki, was convicted after trial by the learned Ag. Resident Magistrate, Mombasa on a charge of obtaining money by false pretences contrary to section 313 of the penal Code and sentenced to serve 6 months imprisonment. He now appeals to this court against such conviction and sentence.

The facts giving rise to the charge that was laid against the Appellant were relatively clear and were largely not in dispute except for the amount of money that the Appellant had been given.

It is not disputed that the complainant, Mathias Karcher (PW.1) who was a German National had come to Kenya on holidays in the company of his Kenyan born girl-friend, Margaret Kamene Mulwa (PW.2). They were both staying in Germany. While in Kenya, the intended to get finally married after the complainant had met with the parents of the lady. However, they did not know the procedure to follow in a civil marriage in Kenya. They therefore contacted the Appellant who had become their friend to assist. The Appellant made them believe that he was in a position to assist them and get them a Marriage Certificate. The appellant asked for and was given Kshs 1,000/- by the complainant which he stated was for collecting information about the marriage procedure. He was subsequently paid Kshs 15,000/- which he stated was needed for payment to the various Government Departments in order to allow the marriage and to obtain the Marriage Certificate. The complainant further paid him a sum of Kshs 1,500/- merely as a gift. This was at Oceanic Hotel, Mombasa.

As it turned out, the Appellant did not assist the couple to get married and instead he kept on asking for more money. The complainant was later assisted by their German Consulate in Mombasa and they got married. He then reported the matter to the police and the Appellant was arrested.

The Appellant who described himself as a freelance Salesman – hawker, testified that he had done several jobs for the complainant who was well known to him. The complainant indicated to him his desire to get married in Kenya to PW.2 and told him that he had already applied for such marriage through the Kenyan Embassy in Germany. The complainant asked him if he knew anyone who could assist them and he agreed. He was then given a bottle of Vodka and Kshs 1,000/- as a gift. He testified that he then went to the Registrar’s office and enquired how the couple could get married. He spoke to one Omari who told him that the said couple would be required to go the Office of the Registrar of Marriage themselves with Kshs 1,217/- and their passports and Identity Cards for the lady. He pass on the information to the said couple and further told the complainant that he will have to swear an affidavit that he was not married in Germany. As he was then unwell, the complainant gave him Kshs 1,500/- for treatment. He went down with malaria and did not see the couple again for some days. The police officers later came with his photograph and arrested him. He denied having been paid the alleged money by he complainant.

The learned trial Magistrate considered the evidence before him. He believed the evidence of the complainant and his wife that they gave the Appellant Kshs 15,000/- which was allegedly for payment to various Government Departments for their marriage. He disbelieved the testimony of the defence no such money was paid. He found that no such payment was required and that the Appellant had therefore

obtained the sum of Kshs 15,000/- by false pretences.

Although the Appellant denies that he was paid the said sum of Kshs 15,000/-. I am satisfied on the evidence of PW1 and PW2 that he had received this money. According to the evidence of these witnesses, he had received this money on the pretext that it was required to be paid to various Government Departments in order to enable the Appellant and his wife to undergo a Civil Marriage in Kenya. However, it was clear to the complainant and his wife when they gave out such money that the Appellant was not the one to issue them with the Marriage Certificate. The role of the Appellant was merely to assist them by showing them how to undergo a Civil Marriage.

I am not satisfied that the charge as laid against the Appellant was proper. It alleges that the Appellant had obtained the said money by “falsely pretending that he could obtain a Marriage Certificate”.

At no time did the Appellant represent or inform the complainant and his wife that he could obtain for them the Marriage Certificate. In any case, the words “could obtain” refers to a future event. A charge under section 313 of the Penal Code not related to a past or present event and not a future event. It follows therefore that the charge as laid against the Appellant was defective and the Appellant ought not therefore to have been convicted on such a charge. His appeal must therefore succeed.

Looking at the evidence that was adduced in the court below, I believe that the most appropriate charge that ought to have been preferred against the Appellant was that of simple theft contrary to section 275 of the Penal Code.

The Appellant who was a freelance hawker that possibly included the hawking of information, took advantage of the fact that the complainant and his wife were ignorant of the Civil Magistrate procedure in this country. He therefore deceived them that Kshs 15,000/- was necessary for payment in various offices in the Government before they could be allowed to undergo the marriage. Once he was given the money, he disappeared till he was arrested by the police.

An offence under section 275 of the Penal Code is not a non and cognate offence to that of obtaining by false pretences under section 313 of the Penal Code as both offences attract the same penalty. Even though I am satisfied that the Appellant had stolen from the complainant Kshs 15,000/- I cannot substitute any conviction under section 275 of the Penal Code. Moreover, the charge that was laid against the Appellant was defective.

For reasons given, I allow this appeal. I quash the conviction of the Appellant and order that he shall be set free and be released forthwith unless otherwise lawfully held.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of March 30, 1995**

**S.O Oguk**

**JUDGE**