



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Apaloo, Masime JJ A & Gicheru Ag JA)

CRIMINAL APPEAL NO 12 OF 1989

BETWEEN

MATHLIDA AKINYI OWARE..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a conviction and sentence, judgment of the High Court at Nairobi, Dugdale J, on 10 November 1988,

in

Criminal Appeal No 234 of 1988)

April 3, 1989, the following Judgment of the Court was delivered. Mathlida Akinyi Oware, the appellant, was charged before the Resident Magistrate's Court at Thika with the offence of stealing by agent contrary to section 283 (b) of the Penal Code the particulars whereof were that:

On the 14th day of August, 1987 at T.U.D.C. Estate within Thika in Kiambu District of the Central Province, she stole shs. 11,400/= in cash which had been entrusted to her by Cicilia Wanjiku Kiarie in order to buy some bales of *khangas*.

She pleaded guilty to this charge and in outlining the facts upon which the charge was founded, the prosecutor said that the appellant and Cicilia Wanjiku Kiarie, the complainant, lived in the same estate and were doing the business of buying and selling *khangas* within Thika. On 14th August, 1987 the appellant approached the complainant and informed her that she was in a position to buy some *khangas* for her (the complainant). After some discussions, the complainant gave the appellant shs. 11,400/=. The appellant then disappeared and was not seen again until 11th December, 1987. On the latter date, the appellant had neither the Shs. 11,400/= nor the *khangas*. She was arrested and charged. The appellant accepted these facts as correct and admitted them. She was convicted on her own plea of guilty and sentenced to 2 year's imprisonment. She appealed to the High Court of Kenya at Nairobi (Dugdale, J.) against conviction and sentence.

From the admitted facts set out above, Dugdale, J. inferred that the appellant obtained the Shs. 11,400/=

by false pretences and with intent to defraud. Under the provisions of section 188 (b) of the Criminal Procedure Code, he therefore substituted the appellant's conviction for the offence of stealing by agent contrary to section 283 (b) of the Penal Code with a conviction for the offence obtaining by false pretences contrary to section 313 of the Penal Code and dismissed the appellant's first appeal in its entirety. The appellant has now appealed to this court on a matter of law. Her chief complaint in this regard is that from the facts set out above, the offence of obtaining by false pretences contrary to section 313 of the Penal Code could not stand as from the said facts, the alleged false pretence related to a representation as to a future event.

Devlin, J. in the case of *R. V. Dent*, [1975] 2 All E.R. 806 at page 807 letter H said that "to constitute a false pretence the false statement must be of an existing fact." At page 808 letter A he said that:

"... a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law".

Law, J.A. in the case of *Abdallah v. Republic*, [1970] E.A. 657 at page 658 letter 1 said that a representation as to a future event cannot support a charge of obtaining money by false pretences.

In the instant appeal, the appellant's representation was that she was in a position to buy some *khangas* for the complainant. Consequent to this representation, the complainant gave her (the appellant) Shs. 11,400/= to buy *khangas* for her (the complainant). It was not clear when the appellant was to buy the *khangas* for the complainant. However, the representation that the appellant was in a position to buy some *khangas* for the complainant was a representation of an existing fact. The question is whether this representation was false in fact. Section 312 of the Penal Code provides that:

"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."

Both the appellant and the complainant had some dealing in *khangas*. It may well therefore be that the appellant was in a position to buy some *khangas* for the complainant. At any rate, the facts outlined by the court prosecutor in support of the charge preferred against the appellant as are set out above did not indicate in any way whatsoever that when the appellant informed the complainant that she was in a position to buy some *khangas* for her (the complainant) she (the appellant) indeed was not in such a position. Her acceptance and admission of the aforesaid facts did not therefore constitute an admission of one of the essential elements of the offence of obtaining by false pretences contrary to section 313 of the Penal Code false pretence. That element was not proved against the appellant. Her inability or failure thereafter to buy some *khangas* for the complainant related to an event *de futuro* which cannot support the offence of obtaining by false pretences. The substitution of the appellant's conviction for the offence of false pretences as is mentioned above was incorrect.

When the appellant was spotted on 11th December, 1987 she could neither produce the Shs. 11,400/= nor the *khangas*. This was nearly four months after she obtained this sum of money from the complainant. She therefore fraudulently converted this money to her own use. She stole the same. She could therefore have been charged with the offence of stealing contrary to section 275 of the Penal Code.

Both sections 283 (b) and 275 of the Penal Code deal with the offence of stealing. Stealing is a "particular" common to both sections. Section 283 (b) contains an additional "particular" namely; the fact of entrustment of the property in question for a particular purpose. The maximum penalty provided for an offence under section 285 (b) is imprisonment for seven years. That under section 275 is imprisonment for three years. It follows that the offence under section 275 compared with that under section 385 (b) is a "minor offence" within the meaning of section 179 of the Criminal Procedure Code. If the stealing in the charge under section 283 (b) was established, but not the entrustment, it follows that under section 179 (1) of the Criminal Procedure Code the appellant could have been convicted of the minor offence under section 275. See the case of *Rev v. George Biazzos*, [1964] EA 190 at page 192.

As is mentioned above, the appellant's theft of Shs. 11,400/= from the complainant was established, but from the facts referred to above, the entrustment of this money was not. The appellant's appropriate substituted conviction would have been for the offence of stealing contrary to section 275 of the Penal Code from that of the offence of stealing by agent contrary to section 283 (b) of the Penal Code. Under the provisions of section 261 (2) of the Procedure Code, we therefore vary the judgment of the 1st appellate court (Dugdale, J.) and set aside the appellant's substituted conviction of obtaining by false pretences contrary to section 313 of the Penal Code and substitute therefor a conviction for the offence of stealing contrary to Section 275 of the Penal Code. In the result, the appellant's appeal is dismissed.

That is the order of the Court.

Dated and Delivered at Nairobi this 3rd April , 1989

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR