Republic v Nyamu (Criminal Case 552 of 2019) [2025] KEMC 42 (KLR) (11 March 2025) (Judgment)

Neutral citation: [2025] KEMC 42 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CRIMINAL CASE 552 OF 2019

YA SHIKANDA, SPM

MARCH 11, 2025

BETWEEN

REPUBLIC .... PROSECUTION

AND

GREGORY MUTUNGA NYAMU .... ACCUSED

JUDGMENT

The Charge

1. Gregory Mutunga Nyamu (hereinafter referred to as the accused person) is charged with the offence of obtaining goods by false pretence contrary to section 313 of the Penal code. The particulars of the offence are that on diverse dates between 19/2/2019 and 7/3/2019 at Kwa Nthoka and Son Hardware in Makindu township, Makindu Sub-county within Makueni County, the accused person, with intent to defraud, obtained from Josephat Mulandi Mwilu some building materials of assorted type, worth Ksh. 296,270/= by falsely pretending to pay after being supplied with the materials. When the plea was taken, the accused person pleaded not guilty where after the matter was set down for hearing.

The Evidence

2. The entire prosecution case was heard by another Magistrate who was subsequently transferred. When the matter was placed before me, directions were given under section 200(3) of the *Criminal Procedure Code* and the matter proceeded from where it had reached. I then heard the defence case. I will thus rely on the record as far as the prosecution case is concerned.

The Prosecution Case

3. The prosecution called a total of three (3) witnesses in a bid to prove its case against the accused person. PW 1 Josephat Mulandi Mwilu (hereinafter referred to as the complainant) testified that he operated a Hardware shop within Makindu town. That on 19/2/2019, the accused person went to

the complainant's hardware and informed the latter that he had secured a construction contract that required him to construct two classrooms at a school in Kilungu. The accused person did not have money. It was agreed that the complainant would supply the accused persons with building materials and the accused would pay for them later. The complainant stated that he took a loan from the bank and bought the building materials then supplied them to the accused person.

4. It was the testimony of the complainant that he supplied building materials worth Ksh. 294,270/= or 296,270/= to the accused person. That the accused person completed the construction and was paid but he did not pay the complainant. The complainant then reported the matter to the police. PW 2 Alexander Mukwati Kyalo testified that he was employed by the complainant as a driver. The witness stated that he was the one who delivered the building materials to the accused person's construction site. That he delivered the building materials on several occasions. PW 3 Police Constable Wesley Matara testified that he was the investigating officer in the matter. He did not however conduct any investigations as he took over the matter after investigations had been completed. The witness produced in evidence documents in support of the prosecution case.

The Defence Case

5. Upon being placed on his defence, the accused person gave sworn testimony without calling any other witness. The accused person testified that he was a Contractor in the construction industry. He admitted knowing the complainant and stated that he did business with him from 2008 to 2019. That he used to buy building materials from the complainant. It was the evidence of the accused person that he always bought the building materials on cash. That after sometime, he stopped buying from the complainant and opted to buy from the complainant's brother in-law. When the complainant realised that the accused person was buying the materials elsewhere, he asked the accused person to resume buying from him and threatened to take the accused person to court if he failed to do so. The accused person denied owing the complainant any money and maintained that he always bought items from the complainant on cash. The accused person contended that the complainant framed him up because he had stopped buying building materials from him.

Facts not in Dispute

6. Having considered the entire evidence on record, the following facts are not in dispute:

a. The accused person and the complainant were well known to each other;

b. The accused person used to buy building materials from the complainant and that they did business from 2008 to 2019.

Main Issues for Determination

7. In my view, the main issues for determination are as follows:

    i. Whether the accused person obtained building materials from the complainant;

    ii. Whether the accused person obtained the building materials with intent to defraud the complainant;

    iii. Whether the accused person obtained the goods by a false pretence; and

    iv. Whether the prosecution has proven its case against the accused person to the required standard.

Analysis and Determination

8. I have carefully considered the evidence on record as well as the law applicable.

The Law

Section 313 of the Penal code provides as follows:

> " Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years."

9. From the above provision, I gather that the ingredients of the offence of obtaining by false pretence and which the prosecution must establish or prove are as follows:

    a. The accused person must have acted under a false pretence;

    b. The accused person must have intended to defraud;

    c. The accused person must have obtained from any person anything capable of being stolen or induced any other person to deliver to any person anything capable of being stolen.

10. My view is buttressed by the authority of Joseph Wanyonyi Wafukho v Republic [2014] eKLR, wherein the court held as follows:

> " ....the following essential elements of the offence of obtaining through false pretences are discernible: that the person;
>
> a) Obtained something capable of being stolen;
>
> b) Obtained it through a false pretence; and
>
> c) With the intention to defraud."

11. The phrase "False pretence" has been defined under section 312 of the Penal code 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."

12. For purposes of clarity, a false pretence bears the following elements:

    i. There must be a representation;

    ii. The representation must be by words or writing or conduct;

    iii. The representation must be of a matter of fact;

    iv. The matter of fact must be either past or present;

    v. The representation must be false;

    vi. The person making the representation must know it to be false or must not believe it to be true.

13. In a decision rendered by the High court of Botswana in the case of Lesholo & Another v The State quoted with approval by Mativo J (as he then was) in the case of Gerald Ndoho Munjuga v Republic [2016] eKLR, the court observed as follows:

> “ i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intent 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.
>
> 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." (Emphasis supplied)

14. Basically, 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 person 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 person to culpability for the offence. I must emphasize that the offence of obtaining by false pretence does not relate to future events. Section 312 of the Penal code proclaims that the representation should be of either a past or present fact, not a future fact.

15. Case law as well confirms the same position. Devlin J in the case of R v Dent [1955] 2 Q.B at pp 594/5 observed that:

> “ ...a long course of authorities in criminal cases has laid down 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”.

16. In Mathlida Akinyi Oware v Republic [1989] eKLR, the Court of Appeal observed thus:

> “ 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."

17. An interesting observation was made by the Court of Appeal in the case of Makupe v Republic [1989] KLR 523. In this case, the court was of the view that:

> " Obtaining by false pretences contrary to section 313 Penal code includes an obtaining with intent to defraud by a false pretence and a model of such a charge and its particulars is provided in the Second Schedule to the *Criminal Procedure Code*. It is not one of the offences for which it is sufficient to specify the gross amount of property in respect of which the offence is alleged to have been committed or the dates between which the offence is alleged to have been committed without specifying particular times or exact dates - section 137 (j) *Criminal Procedure Code*. So, the learned judge was correct when he said this charge which the appellant faced was duplex. The various sums of cash and the watch, radio, spectacles and spoon should have been in separate counts. The appellant might have wished to plead guilty or not guilty to everything lumped together in one count." (Emphasis supplied)

Analysis

18. Having laid down the law with regard to the offence, I wish to consider the charge. If the authority of Makupe (supra) is anything to go by, then the charge herein is bad for duplicity. It implies that each transaction ought to have formed a separate count of the charge. However, in the same case, the court cited other authorities and held that such a charge is curable. The court cited R v Sowedi Kauta Tanywamugwabi [1933], 15 KLR 105 (CA-U) which declared that a charge with one count of murdering two persons was bad in law but such defect was curable.

19. In R v Odda Tore and another [1934] 1 EACA 114 (CA-K), there was one charge which included six victims. The Court of Appeal acknowledged that the charge was duplex but held that if the accused had not been embarrassed or prejudiced in fact when making his defence, then his conviction ought to stand. Being guided by the above authorities, I will let the charge stand as the accused person was under no illusion as to what he was being accused of and was able to put up a defence.

20. The accused person disputes having asked for and received any building materials from the complainant on credit. The complainant did not personally deliver the goods to the accused person. PW 2 claimed to have delivered the building materials to the accused person. However, his evidence was that he did not deliver the goods to the accused personally. That the goods were delivered to the accused person's employees who signed for them. The prosecution relies on some invoices and delivery notes to prove that the goods were supplied to the accused person. The documents are photocopies which are not even certified. There was no explanation as where the original documents were and how the photocopies were obtained.

21. Furthermore, the invoices and delivery notes were issued to an entity known as Nzeveni Contractors. The prosecution did not adduce evidence to establish a link between the accused person and Nzeveni Contractors. There is even a phone number on the delivery notes and invoices but no effort was made to establish in whose name the phone number was registered. No registration details of Nzeveni Contractors were furnished so as to link them to the accused person or to any other person. The invoices and one delivery note were not signed. Some delivery notes are signed and a certain number indicated next to the signatures. The investigating officer did not bother to find out who signed for

the goods when they were allegedly delivered, given the fact that they were not delivered to the accused person himself.

22. With the evidence on record, I cannot state with conviction that the accused person received the building materials. There is reasonable doubt as to whether he obtained or received the building materials. Assuming that the accused person received the goods, did he obtain them through a false pretence and with intent to defraud the complainant? The evidence on record indicates that the accused person and the complainant did business for a long time. The particulars of the charge indicate that the accused person obtained the goods "by falsely pretending to pay after being supplied with the materials." This implies that if true, the conduct of the accused person related to a future event.

23. The accused person (if true) simply ordered for goods on credit in the normal course of business with a promise to pay in the future. It is worth noting that the goods were not even obtained at the time of making the request for supply. This does not fall within the realm of a false pretence. In any event, the prosecution was not able to demonstrate the false pretence on the part of the accused person. If the prosecution evidence is anything to go by, this was a business transaction that could have gone sour. This could have been a breach of contract that attracts civil remedies as opposed to criminal sanctions.

24. The question that I wish to pose at this juncture is this; was it proper for the accused to be charged with a criminal offence in a bid to enforce an agreement or undertaking? To answer this pertinent question, I will consider some authorities. In the case of Peter Macharia Ruchachu v Director of Public Prosecution & another [2014] eKLR, the criminal case against the applicant stemmed from a dispute between him and the complainant in the criminal trial over performance of a contract. One of the issues for determination was whether a dispute over performance of a contract could form a basis to prosecute one of the parties to the dispute. Ngaah J held as follows:

> "Upholding criminal justice through a criminal prosecution as opposed to misusing the prosecution as an instrument to bring pressure to bear upon a party to settle a civil dispute is a question that has engaged the minds of learned judges in our courts on numerous occasions. Apparently, whenever such a question has arisen in cases before them, the learned judges have been consistent and are in agreement in their decisions that the institution of a criminal case for a purpose other than upholding the criminal justice is an abuse of the criminal process and it is upon the courts, whenever such scenario emerges, to rise to the occasion and halt such criminal proceedings....................When I consider totality of the circumstances comprising the background of the dispute between the complainant and the applicant, the manner of the applicant's arrest and finally the charge which was preferred against him, I am persuaded that the prosecution of the applicant was influenced by ulterior motives; in other words, the criminal case against him was for a purpose other than upholding the criminal law. It is meant to bring pressure to bear upon the applicant to settle a civil dispute. Such a trial cannot be allowed to proceed."

25. In Republic v Director of Public Prosecutions & Chief Magistrate's Court, Milimani [2017] eKLR, it was alleged that the issues in the criminal case were purely civil in nature, and it was evident that the complainant in the criminal case intended to settle a civil claim using criminal avenue. The court found that the dispute between the parties therein rested on the breach of a sale agreement between the applicant and the complainant in the criminal case. Odunga J (as he then was) observed that the dispute between the applicant therein and the complainant in the criminal case arose from the breach of the terms of the agreement between the two parties and was thus purely a civil matter. The court further observed that the institution of the criminal proceedings was meant to compel the applicant to settle a civil debt. That it was an abuse of power and was not for the purpose of criminal proceedings.

26. Similarly, in Kuria & 3 Others v Attorney General [2002] 2 KLR 69, the court held thus:

> "The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform…A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious…The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta………The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer…In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute".

27. In Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, the court held that it was not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public. When a prosecution is not impartial or when it is being used to further a civil case, the same cannot be condoned by the court. When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement.

28. In the case of Andrew Mcghie v Catherine Wembridge Baumgarten & 5 others [2016] eKLR, Chitembwe J (as he then was) observed that:

> "It is my view that where the dispute is purely civil in nature, creating an offence out of a civil arrangement is tantamount to an abuse of the legal process. The 1st respondent's first action was to file a civil suit. The suit was to be fast tracked. By the end of the day the court will be called upon to quantify what was done under the terms of the contract against what was paid. That connotes a civil dispute. It cannot be an intention to obtain money by false pretence."

29. In the instant case, the complainant stated that the accused person owed him another debt of Ksh. 300,000/= and had only paid Ksh. 50,000/=. That the reason why the accused person complained to the police in this matter was because he had taken a bank loan to buy the building materials. This shows that the accused person invoked the criminal justice system in order to enforce a civil debt. The remedy available to the complainant is to institute recovery proceedings in a civil court. Contracts or agreements cannot be enforced through criminal proceedings. The continued prosecution was ill-advised and cannot be allowed to stand, no matter the evidence. The conclusion I draw is that if the allegations by the prosecution are true, then this could have been a case of a frustrated agreement between the complainant and the accused person. For the above reasons, the case must of necessity fail.

30. I have considered the accused person's defence, bearing in mind that he has no duty of proving his innocence. The duty is on the prosecution to prove its case against the accused person beyond reasonable doubt. In Philip Nzaka Watu v Republic [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in Stephen Nguli Mulili v Republic [2014] eKLR:

> "It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR."

31. In the famous case of Miller v Ministry of Pensions [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

32. In Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

> "Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability." (Emphasis mine)

33. It matters not that the accused person may not have told the truth. What matters is whether there is sufficient evidence against him. The key ingredients of the offence remain unsatisfied. The prosecution must prove the case against the accused person beyond any reasonable doubt. Court decisions are guided by the law and evidence. Sections 107 and 109 of the *Evidence Act* are clear that who alleges must prove. The standard of proof in criminal cases is beyond reasonable doubt. I am afraid that the prosecution has failed to discharge its burden. As already indicated, the remedy available to the complainant lies in a civil court.

34. What we have on record is mere suspicion against the accused person. In the case of Joan Chebichii Sawe v Republic [2003] eKLR, the Court of Appeal held thus:

> "The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal

No. 17 of 1998 (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence"

35. Having considered the entire evidence on record, I find that reasonable doubt has been cast on the prosecution case. As a matter of law, the doubt must be resolved in favour of the accused person. The investigations herein, if at all, were quite shoddy. The investigating officer appears to have just recorded statements from witnesses and dragged the accused person to court. Even the ODPP was not keen on making the decision to charge.

Disposition

36. In view of the foregoing, I find that the prosecution has failed to prove its case against the accused person beyond reasonable doubt. Consequently, I find and hold that the accused person is not guilty of the offence of obtaining goods by false pretence contrary to section 313 of the Penal code and as the glove does not fit, I proceed to acquit him accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 11TH DAY OF MARCH, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.