Republic v Mwove (Criminal Case 333 of 2019) [2025] KEMC 112 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEMC 112 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CRIMINAL CASE 333 OF 2019

YA SHIKANDA, SPM

MAY 15, 2025

BETWEEN

REPUBLIC .... PROSECUTION

AND

DAVID MUUA MWOVE .... ACCUSED

RULING

1. David Muua Mwove (hereinafter referred to as the accused person) is charged with the offence of obtaining money by false pretence contrary to section 313 of the Penal code. The particulars of the offence are that on diverse dates between 21/11/2000 and 29/12/2015 at Ikoyo village, Makindu Sub-county within Makueni County, the accused person with intent to defraud, obtained Ksh. 160,000/= from Damaris Kanini by falsely pretending that he would sell her a 10 acre piece of land. When the plea was taken, the accused person pleaded not guilty. The matter was then set down for hearing.

The Evidence

2. The prosecution case was substantially heard by another Magistrate who was subsequently transferred. When the matter was placed before me for directions, the parties agreed to proceed from where the matter had reached. I then heard the evidence of the last witness on the part of the prosecution. At the close of the prosecution case, sic (6) witnesses had testified. PW 1 Damaris Kanini Muthongi (hereinafter referred to as the complainant) testified that on 21/11/2000 her husband bought land at Ikoyo area from the accused person at a price of Ksh. 160,000/= for 10 acres. The land was bought piecemeal and so were the payments.

3. The complainant testified that her husband died leaving a balance of Ksh. 5,500/= which the complainant paid. In 2018, the complainant went to the land but was denied access by the accused person. That the accused person had sold the land to another person. The complainant reported to the elders who held a meeting with the disputing parties but to no avail. The matter was escalated to the Assistant Chief but the accused person insisted that the complainant had no land. The complainant

then reported to the police. PW 2 Peter Muasya Mwove testified that the complainant's husband informed him that he was buying land from the accused person who was PW 2's brother. The witness stated that he was present when the sale agreement was executed and that he also signed it.

4. PW 2 stated that he was present when the complainant paid the balance of Ksh. 5,500/= after the death of her husband. It was the evidence of PW 2 that in 2025, the complainant asked him to accompany her to the land. When they got there, the accused person stated that the complainant had no land. PW 2 advised the complainant to call the elders. There were several meetings but no amicable settlement was reached. The matter was then reported to the police. PW 3 Benjamin Mwove testified that he came to learn that his brother who is the accused person herein had sold 10 acres of land to the complainant's husband. PW 3's testimony was similar to that of PW 2.

5. PW 4 Titus Mbubo Sako testified that he was aware of a land dispute involving the complainant and the accused person. The witness stated that he was part of the elders that attended reconciliation meetings between the complainant and the accused person. That the accused person stated that he had sold the land to another person. The matter was later reported to the police. PW 5 Magdaline Muunda testified that she was the sister to the complainant's deceased husband. Her evidence was that she was with the complainant when the latter paid the balance of Ksh. 5,500/= to the accused person. That the complainant was not given the land. PW 6 Isaac Musyoka Mwove testified that the accused person was his elder brother. That in 2018 he attended a family gathering at the accused person's home. PW 6 stated that a lady claimed that her husband had bought land from the accused person. The dispute was not resolved at the meeting.

Main Issue For Determination

6. The main issue for determination at this stage is whether the prosecution has established a prima faciecase to warrant the accused person to be placed on his defence in respect of the offence.

Submissions By The Defence

7. Counsel for the accused person filed written submissions at the close of the prosecution case. It was submitted that the prosecution case was fundamentally flawed and lacked the necessary legal and factual foundation to sustain a conviction. The accused person submitted that it took 19 years for full payment to be made to the accused person. That the delay was prejudicial to the accused person. That by the time the final payment was made, the land had appreciated and as such, the accused person suffered financial loss. The defence argued that the accused person should not be penalized for the complainant's delay in fulfilling the terms of the contract. It was further argued that the complainant made final payment on behalf of the estate of the deceased without prior authority. That the complainant did not demonstrate that she had a grant of representation.

8. The defence submitted that the prosecution case was riddled with inconsistencies and failure to conduct due diligence. That the investigating officer did not visit the scene to ascertain the actual size and location of the land. It was argued that the witnesses who testified were not parties to the sale agreement. The defence contended that the prosecution failed to discharge its burden and relied on hearsay. It was argued that there was no evidence to show that the accused person intended to defraud and misrepresented the facts. The defence urged the court to acquit the accused person and relied on the following authorities:

    a. Nairobi HCCC No. 671 OF 2005- Mugoya Construction and Engineering Ltd v Board of Trustees, National Social Security Fund;

    b. Nairobi HC Succession Cause No. 399 of 2007- In re Estate of John Musambayi Katumanga;

c. Nairobi HC Succession Cause No. 417 of 2005- In re estate of Juluis Mimano.

Analysis And Determination

9. I have carefully considered the evidence on record as well as the law applicable. I have further considered the submissions filed by the defence. The defence submissions were substantially misplaced. The submissions were as though the accused person was facing a civil case of breach of contract. A prima faciecase is defined in the Mozley and Whiteley's Law Dictionary 11th Editionas:

> " A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side." Emphasis added

10. The locus classicuson what constitutes a prima faciecase is to be found in the celebrated case of Ramanlal Trambaklal Bhatt v. R [1957] E.A 332at 334 and 335, where the court stated as follows:

> " Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence....... It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."(Underlining mine)

11. In the authority of Ronald Nyaga Kiura v Republic [2018] eKLR, the court observed that a prima faciecase is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. In my considered view, for the court to find that a prima faciecase has been made out against an accused person, the prosecution must have established the following:

    a. That the offence complained of was indeed committed; and

    b. That the evidence links the accused person to the offence complained of.

12. It is my further opinion that in order to show that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. A prima faciecase is an early screen for a court to determine whether the prosecution can go forward to try the accused person fully for the crime. As such, the standard of proof that the prosecution must satisfy at the prima facie case stage is lower than that for proof that the accused is guilty, that is, lower than proof beyond reasonable doubt. In order to establish a prima faciecase, a prosecutor need only offer credible evidence in support of each element of a crime.

The Law

13. 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."

14. 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.

15. 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
>
> b) With the intention to defraud."

16. 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."

17. 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.

18. In a decision rendered by the High court of Botswana in the case of Lesholo & Another v The Statequoted 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."

19. 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.

20. Case law as well confirms the same position. Devlin J in the case ofR v Dent [1955] 2 Q.Bat 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”.

21. 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."

Analysis

22. Having laid down the law with regard to the offence, I wish to consider the evidence in support of the charge. From the evidence on record, the following facts are discernible, on the face of it:

    1. The accused person owned a parcel of land;

    2. The accused person sold land to the complainant's husband;

    3. The complainant's husband paid a substantial amount for the land and the balance was completed by the complainant;

    4. The accused person did not surrender the land to the complainant's husband or his family;

    5. The complainant did not eventually occupy the land;

    6. The accused person did not refund the money paid to the complainant.

23. The particulars of the charge indicate that the accused person obtained Ksh. 160,000/= from the complainant by falsely pretending that he would sell her a 10 acre piece of land. To begin with, the evidence indicates that the sale agreement was between the accused person and the complainant's husband. That the complainant's husband paid a substantial amount towards the purchase of the land. According to the evidence on record, the complainant paid a sum of Ksh. 5,500/= only. Clearly, the charge is at variance with the evidence. I am informed that according to the Bible, when a man and woman get married, they become one. Unfortunately, that philosophy does not apply in legal circles. In law, the complainant is a separate person from her husband.

24. It was a misdirection on the part of the prosecution to charge the accused person with obtaining money by false pretence from the complainant then adduce evidence indicating that the money was obtained from the complainant's husband. This created confusion. Secondly, the way the particulars of the charge are framed implies that the accused person obtained money in order to perform an obligation in the future. I have already stated that the offence herein does not relate to future events. The evidence does not also show that the accused person made any representation to the complainant. If the prosecution evidence is anything to go by, the dealings were between the accused person and the complainant's husband. In the absence of a representation, it cannot be said that there was a false representation.

25. The prosecution evidence indicates that the accused person owned the land. PW 5 stated that she visited the land in the company of the deceased purchaser. There is no evidence to show that the accused person did not have land. The investigating officer was not called to testify and no reasons were given for such failure. The complaint is that the accused person sold land to the complainant's husband and after the latter's demise, the accused person declined to hand it over to the complainant. There was no false pretence as envisaged by law. The foregoing clearly indicates that the complaint involved breach of the sale agreement. The agreements that were mentioned by the prosecution witnesses were marked for identification but were not produced in evidence.

26. In the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR, the Court of Appeal held as follows:

> "The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof;

a document is not proved merely because it has been marked for identification. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record".

27. In Des Raj Sharma v Reginam [1953] 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa v The State [1994] 7-8 SCNJ 144, it was held by the Supreme court that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence. If the court has to interpret the sale agreement to ascertain whether or not the accused person reneged on the same, then that falls in the realm or ambit of civil law and in particular breach of contract. This court as constituted cannot be expected to interpret the terms of the sale agreement in determining whether or not the accused person committed the offence. If the prosecution evidence is anything to go by, there was no false pretence on the part of the accused person as it appears that he had authority over the land and that the land was available for sale. It is only that he could have failed to transfer the land to the purchaser.

28. 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 the sale agreement? 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."

29. 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.

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 to bear pressure on the applicants in order to settle the civil dispute".

29. 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.

30. When a prosecution 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. In the case of Andrew Mcghie v Catherine Wembridge Baumgarten & 5 others [2016] eKLR, Chitembwe J 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."

31. The dispute herein is clearly of a civil nature and any remedy for wrongdoing on the part of the accused person lies in a civil court. In as much as the court may be sympathetic to the complainant for what might have befallen him, this is not his place to complain.

32. The test in determining a prima facie case was laid down in Republic v Galbraith [1981] WLR 1039, in the following words:

    1. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case;

2. The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence;

    (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

    (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

33. It is the duty of the prosecution to prove the charge against the accused person. To this end, the prosecution must satisfy the ingredients of the offence at a prima facielevel before the accused person is called upon to offer an explanation. In my view, before the court places an accused person on their defence, there must be credible evidence to show that the offence complained of was committed and that the evidence links the accused person to the offence. I think I have said enough to show that the charge is untenable. If I were to place the accused person on his defence and he opted to remain silent in defence, this court would not convict him. It is not the duty of the accused person to fill in the gaps or tie up the loose ends in the prosecution case.

34. In the instant case, there is absolutely no acceptable evidence to show that the accused person committed the offence. In the circumstances, I have no difficulty in stopping the case at this juncture. I agree with the observation made by the High Court of Malaysia in Criminal Appeal No. 41LB-202-08/2013 – Public Prosecution v Zainal Abidin B. Maidin & Anotherthat the defence ought not to be called merely to clear or clarify doubts. In the case of Public Prosecutor v Saimin & Ors[1971] 2 MLJ 16,Sharma J held:

> " It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence, to rule that there is a case for the accused to answer."

35. I may be curious to know what the accused person has to say about the allegations but curiosity is not a reason enough to place the accused person on his defence. The prosecution of the accused person was a shot in the dark. It is unfortunate that the matter has taken over six years yet the case was a non-starter.

Disposition

36. In view of the foregoing, I find that the prosecution has failed to establish a prima faciecase to warrant the accused person to be placed on his defence. Consequently, I find and hold that the accused person has no case to answer and i proceed to acquit him accordingly under section 210 of the *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 15TH DAY OF MAY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON Y.A. SHIKANDA