



**Republic v Mutua alias Joseph Mutua Nguli (Criminal Case
1225 of 2018) [2025] KEMC 102 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 102 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CRIMINAL CASE 1225 OF 2018
YA SHIKANDA, SPM
MAY 14, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

FELIX KIMEU MUTUA ALIAS JOSEPH MUTUA NGULI ACCUSED

JUDGMENT

The Charge

1. Following an amendment to the charge on 8/6/2022, Felix Kimeu Mutua alias Joseph Mutua Nguli (hereinafter referred to as the accused person) was faced 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 6/9/2018 and 8/9/2018 at Makindu Township within Makindu Sub-county od Makueni County, the accused person with intent to defraud, obtained from Frankline Mutune Mwololo the sum of Ksh. 116,500/= by falsely pretending that he was an Engineer with Airtel and that he wanted to erect an Airtel communication mast on Frankline's farm. When the plea was taken, the accused person pleaded not guilty. The matter was then set down for hearing.

The Evidence

The Prosecution Case

2. The entire prosecution case was heard by another Magistrate who was subsequently transferred. When the matter was placed before me, the accused person had already been placed on his defence and he had absconded. The prosecution called a total of four (4) witnesses in a bid to prove its case against the accused person. PW 1 Frankline Mutune Mwololo (hereinafter referred to as the complainant) testified that on 6/9/2018 he was at his place of work when he received a call from someone who identified himself as Joseph Mutua Nguli and an employee of Airtel Kenya. The person informed the



complainant that he was looking for land to erect 4G mast and that he had seen the complainant's land and thought it was appropriate.

3. The complainant further testified that the caller informed him that the area had a frequency lower than what was required but stated that if the complainant agreed to his conditions, they would lease his land and erect the mast. That they would pay the complainant Ksh. 5,000,000/= and a monthly payment of between 10,000/= and 20,000/=. The caller asked the complainant to send him his personal details. The complainant sent the details to the caller. The caller filled the details in a certain form bearing the Airtel logo then sent a copy to the complainant via WhatsApp. The caller then asked the complainant to send him Ksh, 50,000/=. The complainant sent the money. It was the evidence of the complainant that he received another call later and was asked to send more money. The complainant stated that he sent a total of Ksh. 116,500/=.
4. The complainant was informed that officers from Airtel, Kenya Power and NEMA would visit his land on 9/9/2018. The complainant waited but the people never showed up. He called the phone number of the person he had been communicating with and was informed that they were on the way. When he called later after they failed to turn up, the phone number could not be reached. The matter was reported to the police who tracked the phone number and managed to arrest the accused person. PW 2 Julius Mutegi Kamuya testified that he was an employee of the complainant at the material time. That on 6/9/2018 he was working on the complainant's farm when a motor vehicle stopped nearby. A man alighted from the motor vehicle then went to where the witness was and introduced himself as an Engineer from Safaricom.
5. PW 2 stated that the person informed him that he was looking for land to erect a booster mast and that the land where the witness was working was good. PW 2 gave the person the complainant's phone number. The person stated that he would call the complainant. The same day in the evening, the complainant called PW 2 and asked him whether he had seen people on his land. The complainant further stated that he had sent money to the people but they were not good. PW 2 identified the accused person as the alleged Engineer who had spoken to him. PW 3 Police Constable Felix Kinyae testified that on 20/12/2018 he was at Kitengela when he was informed that a suspect had been spotted. The police officer was taken to where the suspect was whereupon he arrested him and contacted the complainant and the investigating officer herein. PW 4 Police Constable Mungai Moses testified that he was the current investigating officer in the matter. That the initial investigating officer had been transferred. The witness did not conduct any investigations in the matter. He produced the exhibits he had received when he took over the matter.

The Defence Case

6. Upon being placed on his defence, the accused person absconded before giving his defence. Efforts to trace him were futile. On 22/1/2025 upon application by the prosecution, the court ordered for the matter to proceed in the absence of the accused person. In the circumstances, the defence case was closed.

Main Issues For Determination

7. In my view, the main issues for determination are as follows:
 - i. Whether the accused person obtained money from the complainant;
 - ii. If so, whether he obtained it with intent to defraud the complainant;
 - iii. Whether the accused person falsely pretended that he was in an Engineer with Airtel;



- 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

9. 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.”

10. 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.

11. 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.”

12. 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.”

13. 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.
14. 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."
15. 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.
16. 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".
17. 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.'
18. 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."

19. 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

20. 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.
21. 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. For a charge to be proven, the prosecution must establish beyond reasonable doubt the following:
- a. The offence complained of was committed; and
 - b. The evidence links the accused person to the offence.
22. The complainant narrated how he was duped into sending money with the hope that a mast would be erected on his land. His employee confirmed that a man had visited the land and asked for the complainant's number. The testimony of the complainant was that he sent the money via mobile money transfer and specifically Mpesa. The complainant's Mpesa statement was produced in evidence. The same indicates that the complainant sent money on various occasions to mobile phone account number 0724226473 between 6/9/2018 and 8/9/2018. The total amount sent to the number was Ksh. 116,500/=. There is no contrary evidence. The evidence of the complainant is that after paying the money, the person who was communicating to him could not be reached through the phone number provided. The mast was not erected on his land. I have no reason to doubt that the complainant was defrauded. The deal that the complainant paid the money for was clearly a sham.



23. Is there evidence to link the accused person to the offence? From the evidence on record, it is clear that the complainant never met the person he was communicating with during their conversations and transactions. The complainant saw the accused person for the first time after the latter had been arrested. PW 2 identified the accused person as the one who had visited the land and who promised to call the complainant. The complainant testified that the person he spoke to called him using phone number 0785923131. There is no evidence linking the accused person to the aforementioned phone number. The evidence on record indicates that the registered subscriber for phone number 0724226473, to which the money was sent was one Joseph Mutua Nguli.
24. There is no evidence linking the accused person to the name Joseph Mutua Nguli or the phone that was paired with the sim card for 0724226473. No evidence was adduced to link the accused person to phone number 0724226473 or to any communication that the complainant had with the person who enticed him to send the money. The only evidence linking the accused person to the offence is the testimony of PW 2 that it was the accused person who went to the complainant's farm and introduced himself as Engineer Mutua Nguli. That is not sufficient to prove that it was the accused person who called the complainant and convinced him to send money.
25. A key ingredient of the offence is that 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. In the instant case, the prosecution was duty bound to prove beyond reasonable doubt, *inter alia*, either that the accused person personally obtained the money from the complainant or that he induced the complainant to deliver the money to another person. In the latter case, it is not mandatory to prove that the accused person received the money. All that the prosecution needs to prove is that the accused person, knowingly and with intent to defraud, induced the complainant to deliver the money to another person by way of a false pretence.
26. However, the particulars of the charge indicate that the accused person obtained the money. The prosecution was therefore duty bound to prove beyond reasonable doubt that the accused person obtained the money. To this end, the prosecution was required to establish a link between the accused person and mobile phone account number 0724226473. As already indicated, there is no tangible evidence linking the accused person to the said phone number.
27. The investigating officer who conducted the investigations and caused the accused person to be charged was not called to testify. Had he been called, he would have been expected to establish the link between the accused person and the offence. Sadly, it is not the duty of the court to establish such link. Although the accused person was not charged with inducing the complainant to deliver the money to another person, I will consider whether there is sufficient evidence to prove that the accused person did so. The complainant stated that the suspect called him using phone number 0785923131. It is not clear how the complainant sent the money to phone number 0724226473. There is no testimony from the complainant to indicate that the suspect gave him that number and asked him to send the money on the account. There is also no evidence to show that apart from the Mpesa transactions, there was communication between the complainant and phone number 0724226473 at the material time.
28. 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.”

29. 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.”

30. 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)

31. Given the fact that the prosecution has failed to establish a link between the accused person and the mobile phone account that received the money, and having failed to prove that the accused person either received the money or induced the complainant to deliver the money, I find it difficult to accept the notion that it was the accused person who committed the offence. It is possible that the accused person could have benefited from the money but that remains a mere suspicion which cannot form the basis for a conviction. In the words of the Court of Appeal in the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

32. The prosecution must prove the case against the accused person beyond any reasonable doubt even where the accused person offers no evidence or statement in defence. On the sole ground that there is no evidence to prove that the accused person obtained the money, the charge must of necessity fail. It is unnecessary for me to delve into the other ingredients of the offence. Whereas the court may be sympathetic to the complainant, 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.

Disposition

33. 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 money by false pretence contrary to section 313 of the Penal code and as the glove does not fit, I proceed to ACQUIT him in absentia.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 14TH DAY OF MAY 2025.



Y.A SHIKANDA
SENIOR PRINCIPAL MAGISTRATE.

