Republic v Musau (Criminal Case 161 of 2020)
[2024] KEMC 42 (KLR) (10 June 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CRIMINAL CASE 161 OF 2020

CN ONDIEKI, PM

JUNE 10, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

SHADRACK MUUO MUSAU ..... ACCUSED

JUDGMENT

Part i: Background

1. On 11th March 2020, the Accused was arraigned in Court and charged with two counts of offences.

2. Under Count I, the accused was charged with the offence of conspiracy to commit a misdemeanor contrary to section 394 as read with section 36 of the Penal Code. The particulars of this charge, were that between 23rd November 2017 and 22nd November 2019, at Machakos township in Machakos Sub-County within Machakos County, jointly with another not before court, the accused conspired to obtain Kshs. 930,000 by a false pretence from Joel Muendo Kitavi.

3. Under Count II, the accused was charged with the offence of the offence of obtaining money by a false pretence contrary to section 313 of the Penal Code. The particulars of this charge were that between 23rd November 2017 and 22nd November 2019, at Machakos township in Machakos Sub-County within Machakos County, jointly with another not before court and with intent to defraud, the accused obtained a sum of Kshs. 930,000 from Joel Muendo Kitavi, pretending that he was in a position to sell to him a motor vehicle registration number KCN 578L Toyota Sienta, a fact he knew to be false.

4. When the substance of the charge was stated to the Accused and ingredients thereof explained by the Court, the accused denied the truth of both charges.

Part ii: The Prosecution's Case

5. The state called four witnesses.

6. The complainant, PW1, Joel Muendo Kitavi, informed this court that he is businessman venturing in taxi business. He recalled that on 23rd November 2017, he was desirous of purchasing a car to use in his taxi business. He testified that with Daniel Ngugi Ndirangu and the accused, Shadrack Muuo Musau, they entered into a Sale Agreement dated 23rd November 2017, for the sale and purchase of a car registration number KCN 578L, Toyota Sienta, at a purchase price of Kshs. 930,000. He testified that he had on 14th November 2017 deposited a sum of Kshs. 500,000 into the bank account (number 00111xxxx094300) held at Co-operative Bank by the accused (before the Sale Agreement was signed), part of which was a loan of Kshs. 400,000 from K-Rep Bank Ltd. He testified that the Sale Agreement was signed on the date the accused availed the car. The Sale Agreement was marked PMFI 1. He testified that the balance of the purchase price, a sum of Kshs. 430,000, was to be settled in 10 monthly installments as follows: (i) Kshs. 50,000 for the initial 3 months; and (ii) Kshs. 40,000 for the final 7 months. He testified that in the agreement, the car registration certificate was to be released to the complainant after full settlement. He testified that despite that agreement, he assured the accused that he was capable of settling the said balance within 3 months. He testified that the accused gave him both an M-pesa account and a bank account (number 085000xxxx36) held at Family Bank, belonging to Daniel Ngugi Ndirangu and directed him to be depositing the balance there. He testified that his first installment of Kshs. 50,000 was deposited on 19th July 2018 in the said Daniel's bank account by his father, Obadiah. The deposit slip was marked PMFI 2. He testified that the other installments were deposited in the said Daniel's M-pesa account by the complainant's brother, one Josiah Kitavi, who deposited a cumulative sum of Kshs. 310,000 directly from his bank account held at KCB Bank account (number 11xxxx1508). He identified the statement of the said Josiah and it was marked PMFI 3. Further, he stated that he gave the accused Kshs. 20,000 in cash on a date he could not recall. He testified that the balance was Kshs. 50,000. He testified that he reached out the accused and Daniel to avail the motor vehicle registration certificate in exchange of the last payment and that they promised they will avail the certificate. He testified that on 3rd November 2018, auctioneers who had been instructed by Moiz Motors Ltd located in Mombasa came to Masii town and claimed that he was in default of installment payments and they repossessed the car. He testified that he tried to reach the said Daniel on phone but he was unreachable. He testified that he reached the accused on phone and the accused did not offer a solution. He testified that on 3rd December 2018, the accused returned the car to the complainant and promised to process the motor vehicle registration certificate. He testified that on 23rd November 2019, the car was repossessed again by auctioneers acting on instructions of Moiz Motors Ltd on grounds that he had not cleared the balance and it has never been returned.

7. In cross-examination, PW1 stated that the Accused informed him that he deals in motor vehicles. He stated that the agreement was not signed by him. He asserted that the agreement was signed by the accused. He stated that the agreement does not reflect the fact that the accused received Kshs. 500,000. He stated that although the agreement does not reflect the person who was to receive the installments, the accused directed him to pay the installments to the said Daniel. He stated that he did accompany the accused to Moiz motors Mombasa to return the car. He stated that at Mombasa, he was given an agreement to sign and he did sign it. He stated that the new agreement (hire purchase agreement) was between him and Moiz Motors Ltd to settle the balance of the purchase price being Kshs. 529,000 within a specified period. He stated that while at the said Moiz Motors, the accused gave them Kshs. 150,000 and he promised him that he will settle the balance. He stated that Moiz Motors transferred ownership from the said Daniel to the name of the complainant. He stated that the agreement between him and Moiz Motors was not signed by the accused. He stated that the balance was to be settled by

monthly installments of Kshs. 31,550 for a period of 12 months. He stated that he had already paid the 930,000 fully through the accused and the said Daniel. He stated that he did not pay the installments in the second hire purchase agreement and this led to repossession again. He stated that there was an agreement at the police station where the accused agreed to give Kshs. 50,000 and that they will try to trace Daniel to pay the balance of Kshs. 350,000 but the agreement was breached by the accused. He stated that after the car was repossessed a second time, he did not bother to pursue Moiz Motors and he instead reported the matter to the police which then led to these charges.

8. PW2, Josiah Matei Kitavi, informed this court that he is the complainant's brother. He testified that his brother used to give him money for onward remittal to the said Daniel Ndirangu M-pesa account of the said Daniel (number 0715 x99517). He testified that he sent a total of Kshs. 320,250 through his KCB bank account (number 11xxxx1508)). He testified that his brother used the car for taxi business for about one year after which it was repossessed.

9. In cross-examination of PW2, he stated that he never remitted any amount to the Accused. He stated that his brother (the complainant) used the car for taxi business. He stated that he did not see the Sale Agreement. When he was shown the agreement, he stated that the seller indicated in the agreement was the said Daniel. PW2 (the complainant's brother) stated that the amount of monthly installments he used to receive for onward remittal were inconsistent and varied from month to month. PW2 stated that he could sometimes receive Khs. 50,000, other times Kshs. 30,000, and yet other times he could receive Kshs. 70,000. He stated that he did accompany his brother and the accused's father to Mombasa where his brother received the car back after the accused's father paid Moiz Motors Ltd Kshs. 150,000 and his brother entered into a fresh agreement with Moiz Motors Ltd.

10. PW3, Reverend Pastor Obadiah Kitavi Kula, informed this court that he is the complainant's father and that the accused's father is his friend and fellow clergy. He recalled that on 19th July 2018, he was asked by his son to deposit on his behalf Kshs. 50,000 in a bank account held in Family bank (number 085000xxxx36) in the name of Daniel Ngugi Ndirangu and he complied. He identified the deposit slip (PMFI 2). He testified that his son did receive the motor vehicle which was delivered by the accused. He stated that his son paid an initial deposit of Kshs. 500,000 and he received the car and the balance was paid in installments through PW2 and PW3. He stated that the seller was the accused.

11. In cross-examination of PW3, he stated that his son first paid a down payment of Kshs. 500,000 to the accused. When he was asked to read the seller indicated in the agreement (the prosecution Exhibit 1) he stated that the name indicated was that of Daniel Ngugi Ndirangu. He conceded that the name of the accused was indicated as the seller. He stated that he deposited the Kshs. 50,000 in the account held by the said Daniel. He stated that he did not travel to Moiz Motors Ltd Mombasa. He stated that the accused paid Kshs. 150,000 to Moiz Motors Ltd and the car was returned to the complainant and after a new hire purchase agreement was signed between the complainant and Moiz Motors Ltd that the complainant to pay installments of Kshs. 31,583 monthly.

12. PW4, Police Constable Pius Ngila was the Investigating Officer. He recalled that on 24th November 2019, he was allocated this matter to investigate. He testified he called the complainant and the accused they entered into an agreement to settle out of court but when the accused failed to meet his part of the bargain and upon investigating, he was satisfied that the evidence was sufficient to charge the accused with the two counts. He stated that they were unable to trace the said Daniel Ngugi Ndirangu. He stated that he travelled to Mombasa Moiz Motors Ltd and he recorded a statement of the director. He testified that upon investigating, the director of Moiz Motors Ltd indicated that the vehicle was sold to the said Daniel on hire purchase terms on 17th November 2017 and that only Kshs. 541,000 had been paid and the balance of Kshs. 379,000 was due and defaulted. He produced the Sale Agreement dated 23rd November 2017, between Daniel Ngugi Ndirangu and the complainant as the prosecution

Exhibit 1a; the agreement dated 23rd November 2018 as the prosecution exhibit 1b; the Family Bank deposit slip as the prosecution Exhibit 2a; the Family Bank Statement of account as Exhibit 2b; the KCB statement of account as Exhibit 3; the K-Rep statement exhibit 6.

13. In cross-examination, PW4 stated that the complainant paid the accused Kshs. 500,000. He stated that the seller was Daniel Ngugi Ndirangu. He stated that the complainant was introduced to the said Daniel by the accused. He stated that the complainant did receive the car from the accused but it was repossessed by Moiz Motors Ltd.

14. The prosecution elected to rely on the evidence on record and thus filed no written submissions.

Part iii: The Defence

15. The defence called two witnesses.

16. In his sworn statement, the Accused (DW1) informed this court that he is a nurse who runs a private clinic in Ngong town. He denied committing the offence. He recalled that on 24th October 2017, his father, Bishop Julius Mutisya reached him on phone and informed his that his friend, Reverend Pastor Kula (PW3 herein) was looking for car for taxi business. He testified the inquiry by Reverend Pastor Kula followed their past knowledge that the accused had assisted his father and brother to purchase their cars. He narrated that Reverend Pastor Kula reached him on phone on 25th October 2017 and he described the kind of motor vehicle he required. The accused testified that he promised Reverend Pastor Kula that he will get in touch with his friends who deal in motor vehicles and revert. He narrated that using the specifications he had been given inter alia that the car must be a 7-seater, he got in touch with several friends and finally got a Toyota Sienta 7-seater from his friend Daniel Ngugi Ndirangu of Moiz Motors Ltd. He narrated that he asked Reverend Pastor Kula whether he was ready to go to Mombasa to view the car but he informed him that he needed time to secure a loan facility. He narrated that he gave Reverend Pastor Kula Daniel's phone number and after that he went silent till 4th November 2017 when the complainant, Reverend Pastor Kula's son, informed him that he was now ready with the deposit of Kshs. 500,000 and requested if hire purchase terms were acceptable and that the accused reverted conforming that they were acceptable. He narrated that he proceeded to share an agreement for his signature which he availed together with the car. He narrated that the complainant inquired whether he can deposit money in his bank account for onward transmission to Daniel and he conceded to the request, after which the complainant deposited Kshs. 500,000 on 22nd November 2017 and he remitted the total amount to Daniel on the same day, who in turn handed the car over to the accused in Nairobi for delivery to the complainant on 23rd November 2017 at Masii, which the accused did. The accused exhibited the Sale Agreement executed between the said Daniel and the complainant as Defence Exhibit 1. He narrated that on 22nd November 2018, he was summoned by the OCS to Machakos police station and he complied. He narrated that at the station, he met the complainant and his father and that the accused's father was present. He narrated that he was forced to sign an agreement at the police station that he will assist the complainant to get the car back and that he will trace Daniel. The agreement was exhibited as Defence Exhibit 2. He narrated that he facilitated and the car was returned to the complainant by Moiz Motors Ltd after they entered into a fresh agreement dated 3rd December 2018, between the complainant and Moiz Motors Ltd. The agreement was exhibited as the Defence Exhibit 3. He narrated that the car was repossessed again after the complainant breached the terms of the new agreement. He narrated that his family raised Kshs. 150,000 which they paid Moiz Motors Ltd and it released the car on conditions set out in the new agreement. The receipt for Kshs. 150,000 was exhibited as Defence Exhibit 4. He narrated that he reported the said Daniel at Eldoret, OB No. 58/10/11/2018. He narrated that after the car was repossessed a second time, he was arrested and charged with the offences on record.

17. In cross-examination of the accused, he stated the complainant used the car for a cumulative period of two years for his taxi business. He stated that initially, there was a default of payment of Kshs. 390,000 and a subsequent deal based on the second agreement between the complainant and Moiz Motors Ltd. He stated that his family paid Kshs. 150,000 to facilitate restoration of the car to the complainant. He stated that he knew Daniel since he was his friend. He stated that when he received Kshs. 500,000, he transmitted it to Daniel. He stated that the logbook was not availed to the complainant because he defaulted payments.

18. DW2, Bishop Julius Musau Mutunga, informed this court that the accused is his son. He recalled that sometimes in 2017, he received a call from his longtime friend and fellow clergy, Reverend Pastor Kula who was desirous of a buying a car for his son to use in taxi business. He narrated that Reverend Pastor Kula requested him to inquire from his son, the accused, whether he can assist. He narrated that he asked the accused and he obliged to assist Reverend Pastor Kula. He narrated that he gave Reverend Pastor Kula the accused's contact for further communication. He narrated that on 22nd November 2017, Reverend Pastor Kula requested him to request his son, the accused, to drive the car from Nairobi to Masii and the accused obliged to the request and delivered the car to Masii. He narrated that much later on 22nd November 2018, he was summoned by the OCS Machakos police station and interrogated after which they found it better as longtime family friends to settle the matter out of court. He narrated that they thus entered into an agreement to handle the matter out of court and this led him to travel to Mombasa together with the complainant on 2nd December 2018 and he facilitated restoration of the car to the complainant after he paid Moiz Motors Ltd Kshs. 150,000. He narrated that the complainant signed a fresh agreement with Moiz Motors Ltd dated 3rd December 2018 (Defence Exhibit 3) to be paying monthly installments of Kshs. 31,583, until 4th December 2019. He narrated that the complainant breached the terms by failure to pay the installments and the car was again repossessed for a second time and the accused was arrested thereafter.

19. In cross-examination of DW2, he stated that the accused used to help them secure cars and he thus introduced him to Reverend Pastor Kula. He stated that it was the accused who introduced Daniel to the complainant.

20. In his written submissions dated 16th April 2024 and filed on even date, learned Counsel representing the accused submits that the prosecution has failed to prove beyond reasonable doubt that the accused obtained money by a false pretence with intent to defraud. In this regard, reliance is placed upon Lord Viscount's rendition on the burden of proof which was laid down in H.L. (E) Woolington vs. DPP [1935] A.C. 462, at page 481. In the same breathe, further reliance is placed upon *Timothy Muthama Nzioki vs. Republic, Criminal Appeal No. 23 of 2017*; JOO vs. Republic [2015] eKLR; and Miller vs. Ministry of Pensions [1947] 2 AC 372.

21. For the accused, it is submitted that the prosecution failed to lead an iota of evidence to prove to the required standard that there was conspiracy, by demonstrating the key elements that the accused and another planned to commit an offence and that he knew the plan intended to break the law. In this regard, the holding in Christopher Wafula Makokha vs. Republic [2014] eKLR was cited to buttress this argument. It is urged that there was no evidence of an agreement to commit an offence, citing the ratio in Ann Wangechi Mugo & 6 others vs. Republic [2022] eKLR; and Kivunira vs. Republic (Criminal Appeal E008 of 2022) [2023] KEHC 23659 (KLR) (Crim) (27 Sept 2023) (Judgment). It is further submitted that there is no evidence to prove intent, citing Ann Wangechi Mugo & 6 others vs. Republic [2022] eKLR. It is further submitted that there is no evidence that the accused and another took steps (covert acts) to actualize the intent and in this regard, the ratio in John Mburu Kinyanjui vs. Republic [1988] eKLR is cited to buttress this position.

22. It is submitted that the transaction was initiated by Reverend Pastor Kula, the complainant's father and that the two families of the complainant and accused have been longtime friends.

23. It is submitted that if the accused had intent to defraud the complainant, he would not have delivered the car and he would not have facilitated the restoration of the car to the complainant. It is submitted that the basis of this charge was a breach of contract by the complainant in the subsequent agreement dated 3rd December 2018.

24. It is submitted that the following facts do not paint any intention to obtain money by a false pretence with intent to defraud: (i) the transaction was not initiated by the accused as he was called to scout for a car; (ii) the accused dutifully and swiftly remitted the down payment to the seller of the car; (iii) there is no evidence on record that the seller was not the owner of the subject motor vehicle; (iv) there is no evidence that the accused received and shared in the sale proceeds; (v) the accused has never denied that he received Kshs. 500,000 from the complainant even when he was summoned to Machakos Police Station; (vi) that in good faith, the accused assisted the complainant to pay some of the sums demanded by Moiz Motors Ltd to facilitate release of the car to the complainant to continue with business; (vii) the accused assisted the complainant to renegotiate a new agreement with Moiz Motors to enable him secure the car; and (viii) the car was repossessed a second time because of breach of the second agreement by the complainant.

25. Using the above facts, it is submitted that the charge has failed to meet the threshold of a false pretence as defined by section 312 of the Penal Code and expounded in Gerald Ndolo Munyuga vs. Republic [2018] eKLR.

26. Finally, it is submitted that having signed a second hire purchase agreement which he breached leading to repossession of the car, the complainant cannot be permitted to benefit from his own illegality, placing reliance in *Patrick Thoiti Kanyura vs. Kenya Airports Authority, Court of Appeal No. 308 of 2014*.

Part iv: Points for Determination

27. For reasons to become apparent hereinafter, this court will analyze Count II first.

28. The offence carried under Count II, is anchored on three ingredients. The first ingredient is obtaining property. The second ingredient is identification of the person who obtained the property in question. And third ingredient is whether the property was obtained by a false pretence with intention to defraud.

29. It follows, ordinarily, that there are three standard questions to determine in such cases. First, whether property – in this case, money - was obtained. Second, whether the money was obtained by the accused. And third, whether the accused obtained the money by a false pretence with intention to defraud.

30. In regard to the first and second questions, it was abundantly established in evidence by the prosecution to a threshold which lies way beyond reasonable doubt that money exchanged hands and that some of the money was actually received by the accused herein and the balance the person named as the seller of the motor vehicle in the Sale Agreement. Precisely and beyond reasonable doubt, it was established that a sum of Kshs. 870,250 was obtained, constituting of Kshs. 500,000 which was remitted by the complainant to the accused; Kshs. 50,000 which was remitted to Daniel Ngugi Ndirangu through the complainant's father (PW2); and Kshs. 320,250, which was remitted to Daniel Ngugi Ndirangu through the complainant's brother (PW3). Finally, it is not in dispute that whereas the accused received Kshs. 500,000, the said Daniel Ngugi Ndirangu received the balance. The first and second questions are thus settled.

31. It follows that limited to Count II, the only question left for analysis and determination is whether the prosecution has proved beyond reasonable doubt that the accused obtained the money by a false pretence with intention to defraud.

32. Regarding Count I, the only question for determination is whether the prosecution has proved beyond reasonable doubt that the accused conspired with Daniel Ngugi Ndirangu to obtain money from the complainant by a false pretence.

Part v: Analysis of The Law; Examination of facts; Evaluation of Evidence; and Determination

33. The legal burden of proof (onus probandi incumbit ei qui dicit, non ei qui negat) is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position taken. In criminal cases, this duty (otherwise originally known as brocard ei incumbit probatio qui dicit, non qui negat) is on the shoulders of the prosecution. It essentially means that the legal burden of proof rests on who asserts, not on who denies. This said legal burden draws impetus from a fair hearing principle now enshrined in Article 50(2)(a) of *the Constitution* that a person Accused of an offence ought to be presumed innocent until proven guilty. See sections 107, 108 and 109 of the *Evidence Act*.

34. What then amounts to proof? In the Australian case of Britestone Pte Ltd vs. Smith & Associates Far East Ltd [2007] 4 SLR 855, which has been adopted in Kenya in inter alia Paul Thiga Ngamenya v Republic [2018] eKLR, V.K. Rajah, JA expressed a view that "The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved and not proved are statutory definitions contained in the *Evidence Act*. The term proof whenever it appears in the *Evidence Act* and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact."

35. The legal burden of proof in criminal cases never leaves the prosecution's backyard, except in very rare occasions. In fact, acts or conduct or even legislation which has attempted to do has been sternly frowned upon. In Senator Johnstone Muthama vs. Director of Public Prosecutions & 3 Others [2020] eKLR, J. Lesiit, L. Kimaru & J. M. Mativo, JJ frowned upon section 96(a) of the Penal Code for shifting the burden of proof to the Accused and consequently declared it as offending the fair trial principle of being presumed innocent until proven guilty as enshrined under Article 50(2)(a) of *the Constitution* and the Constitutional guarantee against self-incrimination as enshrined under Article 49(1)(a)(ii), which act is further in flagrant violation of *the Constitution* which exempts, under Article 25 thereof, from limitation contemplated under Article 24 thereof of inter alia the fair trial principles enshrined under Article 50 thereof. The Court explained that the right to a fair trial was a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which were the right to life and liberty of the person. It was guaranteed under article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of the right to fair trial was illustrated not only by the extensive body of interpretation it had generated worldwide but, by the fact that under article 25(c) of *the Constitution*, it was among the fundamental rights and freedoms that could not be limited or abridged.

36. Before I invoke an old English decision, it's instructive to observe that our criminal justice system did not start on a clean slate. Kenya built its legal system on the English common law system. In Peter Wafula Juma & 2 Others vs. Republic [2014] eKLR, F. Gikonyo and A. Mabeya, JJ, had this to say about the legal burden of proof in criminal cases: "Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the

prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the Constitutional right of the Accused; presumption of innocence, not to give incriminating evidence and to remain silent..."

37. In the English cause celebre decision in Woolmington vs. DPP [1935] A.C 462, Lords Viscount Sankey, Hewart, Atkin, Tomlin and Wright laid the golden thread (presumption of innocence) principle in criminal cases. Reginald Woolmington had shot his wife after falling out and was therefore charged with murder of his wife. Wilmington's defence was that he did not intend to kill his wife and thus lacked the requisite mens rea. He told the jury that he had planned to scare her by threatening to kill himself if she refused to return and reunite with him and in the process, he had attempted to show her the gun which discharged accidentally, killing her instantly. Swift, J. ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental. He was convicted and sentenced to hang. It was upheld on appeal to the Court of Criminal Appeal on the premise of the statement of law in Foster's Crown Law that if a death occurred, it is presumed to be murder unless proved otherwise. He appealed to the House of Lords. The issue brought to the House of Lords was whether the statement of law in Foster's Crown Law, which the Court of Criminal Appeal applied, was correct when it said that if a death occurred, it is presumed to be murder unless proved otherwise. Viscount Sankey made a statement which was unanimously adopted by the rest in what has now come to be known as the 'Golden Thread' speech. At page 481, Viscount Sankey L.C. enunciated the law on legal burden of proof in criminal matters as follows: "Juries are always told that if conviction there is to be the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in R. v. Davies (8 C.A.R. 211) the head-note of which correctly states that where intent is an ingredient of a crime there is no onus on the Defendant to prove that the act alleged was accidental. Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

38. It bears underscoring that this golden thread principle is now enshrined in our Constitution of Kenya 2010, under Article 50(2)(a) thereof, as part of the wider package of fair trial principles and in that regard, the holding in that decision holds true in Kenya. In Mkendeshwo vs. Republic [2002] 1 KLR 46, the Court of Appeal enunciated thus: "In criminal cases the burden is always on the prosecution to establish the guilt of the Accused beyond any reasonable doubt and generally, the Accused assumes no legal burden of establishing his innocence."

39. However, in considerably limited instances, once the onus of proof placed on the shoulders of the prosecution by dint of sections 107, 109 and 110 of the *Evidence Act* and the incidence of burden contemplated by section 108 thereof, is discharged, the evidential burden of proof shifts to the Accused Courtesy of and the limited circumstances outlined under section 111 of the said Act. Section 111 of the *Evidence Act* provides thus: "When a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court

is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence. (2) Nothing in this section shall - (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person Accused is charged; or (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or (c) affect the burden placed upon an Accused person to prove a defence of intoxication or insanity."

40. What is the standard of proof in criminal cases? In English cases of Re H (minors) sexual abuse; standard of proof {1996} AC 563 and 505 for the Home Department vs. Rehman {2003} 1 AC 153, which was adopted in Kenya in inter alia Paul Thiga Ngamenya vs. Republic [2018] eKLR, the House of Lords laid down a series of guiding principles on standards of proof for civil and criminal cases and their purport as follows: "(1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. (2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred. (3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than others."

41. The standard required to prove a criminal case is evidence which convinces the Court beyond reasonable doubt. The doubt referred to in this standard is the doubt that can be given or a reason assigned as opposed to speculation. A person Accused of an offence is the most favourite child of the law. Adverting to the standard of proof in criminal cases, Mativo, J. says in Philip Muiruri Ndaruga vs. Republic [2016] eKLR that "To give an Accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an Accused is sufficient. The Accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An Accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

42. The purport of the words 'beyond reasonable doubt' which define the standard for proof of a criminal offence, has been attempted in manifold decisions of the superior Courts, locally and beyond. The locus classicus English case in this regard is the decision in Miller vs. Minister of Pensions [1947] 2 All ER 372, where Denning J. who holds that "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt . . . If the evidence is so strong as to leave only a remote possibility in the defendant's 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 would suffice."

43. Also, in Walters vs. R [1969] 2 AC 26, approved in R vs. Gray 58 Cr. App. R. 177 at 183, Lord Diplock attempted to define 'reasonable doubt' as follows: "A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow you to influence you one way or the other."

44. What is the entry point in criminal trials? When hearing of the matter begins, the Court begins from a tabula rasa which is that the Accused is innocent and this state of affairs perpetuates itself throughout the trial proceedings until such time as the prosecution has put on the table evidence which satisfies the Court beyond reasonable doubt that the Accused is guilty. In 1997, the Supreme Court of Canada in R vs. Lifchus [1997] 3 SCR 320, suggested the following explanation: "The Accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case

until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the Accused is guilty. .....the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the Accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the Accused and acquit because the crown has failed to satisfy you of the guilty of the Accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the Court, you are sure that the Accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

45. The standard is such that, in William Blackstone's formulation (in his seminal work, Commentaries on the Laws of England, published in the 1765) states that "It is better that ten guilty persons escape than that one innocent suffer." Blackstone holds a thesis that "All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer." Benjamin Franklin (in Benjamin Franklin, Works 293 (1970), Letter from Benjamin Franklin to Benjamin Vaughan [14 March 1785]), subscribes to the same school of thought (and thus echoes Blackstone's jurisprudence) and states that "It is better 100 guilty Persons should escape than that one innocent Person should suffer."

46. While defending British Soldiers who were charged with murder for their role in the Boston Massacre, John Adams also expanded upon the rationale behind Blackstone's Formulation when he stated that "It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished.... when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this were to take hold in the mind of the subject that would be the end of all security whatsoever."

47. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? S.C. Sarkar in Hints of Modern Advocacy and Cross-examination (7th Edition, 1954, at page 16) reasons that evidence is weighed and not numbered. He argues that it is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. Save for the requirement of corroboration under section 124 of the *Evidence Act*, this position ties well with section 143 of the *Evidence Act* which provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." Section 124 of the Evidence requires that before an Accused is convicted, the Court satisfies itself that the evidence of the victim is corroborated but in sexual offences, a window and exception to the general rule has been provided to take care of situations where the only evidence available is that of the alleged victim of the offence, in which case the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. The text of section 124 of the *Evidence Act* reads as follows: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and

proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

48. The standard of proof, as I discern it, is that though be some doubt, it should be of such measure that it cannot affect a reasonable person's belief regarding whether or not the Accused is guilty. It does not therefore mean that the proof must be beyond a shadow of a doubt. If it were so, it would be so high a standard as to be practically unattainable. It certainly does not mean that every peripheral fact has to be established up to this standard.

49. Having discussed the broad framework within which this case will be determined, it's now time to embark on analysis of the law, examination and interrogation of facts and evaluation of evidence on each of the two counts, in turn. As indicated above, this court will first determine the one and only remaining question under Count II and close with the one and only question under Count I.

Whether the prosecution has proved beyond reasonable doubt that the accused obtained the money by a false pretence with intention to defraud

50. Section 313 of the Penal Code provides that "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."

51. Regarding the amount obtained, although it was alleged in the Charge Sheet that a sum of Kshs. 930,000 was obtained, it was established in evidence – which left no reasonable doubt in my mind – that the said sum of Kshs. 930,000 was the purchase price and not the actual sum which was obtained. It was established in evidence beyond reasonable doubt that a sum of Kshs. 870,250, was obtained from Joel Muendo Kitavi. It was abundantly established in evidence by the prosecution - to a threshold which lies way beyond reasonable doubt - that money exchanged hands and that some of the money was actually received by the accused herein and the balance the person named as the seller of the motor vehicle in the Sale Agreement. Precisely and beyond reasonable doubt, it was established that a sum of Kshs. 870,250 was obtained, constituting of Kshs. 500,000 which was remitted by the complainant to the accused; Kshs. 50,000 which was remitted to Daniel Ngugi Ndirangu through the complainant's father (PW2); and Kshs. 320,250, which was remitted to Daniel Ngugi Ndirangu through the complainant's brother (PW3). Finally, it is not in dispute that whereas the accused received Kshs. 500,000, the said Daniel Ngugi Ndirangu received the balance. The first and second questions are thus settled.

52. That said and done, the only contestable issue deserving an in-depth analysis by this Court is whether, the said sum of money, was obtained by a false pretence and with intent to defraud.

53. Section 312 of the Penal Code defines a "false pretence" to mean "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."

54. Is there evidence - beyond reasonable doubt – that the accused was driven with intent to defraud? Section 268 (2) outlines pointers to fraudulent intent. It is fraudulent where the Court infers presence of any of the following intents: (a) an intent permanently to deprive the general or special owner of the thing of it; and/or (b) an intent to use the thing as a pledge or security; and/or (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform; and/or (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion; and/or (e) in the case of money, an intent to use

it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

55. Sight should not be lost of the fact that resting on the shoulders of the prosecution is the veritable onus to prove that the said conduct of the Accused crosses the red Rubicon, from a mere civil wrong (breach of contract) to a criminal conduct driven by a false pretence and intent to defraud.

56. Recognizing that there is a faint line between mere breach of contract and the offence of obtaining by a false pretence - which is distinguishable only by the intention of the Accused at the time of inducement – and emerging from decisional law, is a cautionary principle that in circumstances where the acts complained lie on the borderline as to possibly constitute both a criminal and civil wrong, a Court should thread with abundance of caution to inhibit a possibility of unwittingly aiding and abetting abuse of the criminal justice system to enforce a purely private right. In this connection, superior Courts have often voiced a warning that the national police service should not be conscripted as debt collectors.

57. What are the ingredients of this offence? Guidelines have therefore been enunciated to distinguish obtaining money by a false pretence which amounts to a criminal offence, from obtaining money but failing to meet your part of the bargain which merely constitutes a civil wrong (whether breach of contract or a tort). In one of the oldest decision in this regard in Blasius vs. Republic [1973] 1 EA 510, Mfalila, Ag. J., (as he then was) had this to say about the ingredients of cheating which in substance are similar to the ingredients of the offence of obtaining money by a false pretence: "Here then lies the difficulty of attempting to distinguish between the offence of cheating contrary to s. 304 of the Penal Code and obtaining money by false pretences contrary to s. 302 of the Penal Code. One has only to compare the decisions in these two cases to conclude that such a distinction is non-existent or if there is, is of no consequence. In both cases a trick or strategem or device was used. (In one case a tin of sand in the other a tin of turbid water), in both cases a layer of the actual substance (sugar in one case and oil in the other) was spread over the top to give the impression that the tin contained sugar or oil and finally in both cases the appellants falsely represented to the Complainants that the tins contained sugar or oil. These false representations deceived the Complainants in both cases. Yet in one case the transaction was said to amount to cheating and in another to obtaining money by false pretences. In my view, the problem underlying the distinction between these two offences is that in every cheating situation there is involved a false pretence for in order to succeed, the trick, device or strategem must be accompanied by false description of it, which therefore is a false statement, leading to the offence of obtaining whatever that is obtained by false pretences. Therefore I think that both the above cases could quite properly have been charged as obtaining by false pretences. The result of this analysis is that all cheating situations contain elements of obtaining by false pretences, although certainly the converse is not true. If this is so, then, no prosecutor can go wrong by always preferring charges under s. 302 and relegating the offence under s. 304 to the background until such time as it is either removed from the statute book or suitably merged with s. 302. Coming back now to the present case, it is clearly a case of obtaining money by false pretences. The appellant, if he did, obtained this money by falsely pretending that he had fish to sell. In saying so he did not use any trick, strategem or device. He simply made a false statement of an existing fact. The charge under s. 304 in these circumstances was therefore misconceived. There is however power under s. 187 (2A) Criminal Procedure Code to substitute a conviction under s. 302, but before doing so I will deal with another aspect of the case regarding the identity of the appellant." {Emphasis supplied}

58. The offence of obtaining money by a false pretence –and this can be discerned from the definition of a false pretence under section 312 of the Penal Code - does not cover future events and in this respect, the representation should be about either a past or present fact but not a future event. See Joseph

Wanyonyi Wafukho vs. Republic [2014] eKLR, per Gikonyo J.; and Nabil Adamjee vs. Republic [2010] eKLR, per Odero J, et alia. This position was adopted from one of the oldest English decisions on this subject, Edgington vs. Fitzmaurice [1885] 29 Ch D 459, Bowen, L.J. reasoned that "There must be a misstatement of an existing fact..." Further illumination on what constitutes an existing fact can be drawn from the words of Devlin, J., in R vs. Dent 1955 2 Q.B., pages 594-595 where he stated 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."

59. In Joseph Wanyonyi Wafukho vs. Republic [2014] eKLR (hereinafter "the Wafukho case"), the Appellant made a representation of fact in writing to the Complainant through an agreement dated 23rd July 2010 for sale of one and half acres of land in Maeni/Kimilili/139. He received a sum of Kshs. 252,000, leaving a balance of Kshs. 18,000, which was to be paid by the Complainant upon transfer of the land. The suit land was surveyed, and a boundary demarcated. But the Complainant was not able to enter the suit land because he was prevented from doing so by the relatives of the Appellant. The Appellant did not also deliver vacant possession of the land to the Complainant because he had not obtained the consent of the relevant Land Control Board (hereafter LCB). Gikonyo J. in his dictum, remarks as follows: "A cursory treatment of the above facts may create a feeling that there could be some criminal liability on the part of the Appellant for failing to deliver the land; after he had sold it and received the sum of Kshs. 252,000-which is not a small sum in the circumstances of this case. But such is just but a false feeling which, if not careful, might blur the mind of the Court. However, Courts of law are experienced at unraveling such assumed dilemmas by carefully considering the facts of the case and the law applicable. The facts of this case reveal that the suit land existed; had been surveyed and a boundary delineated. Also, although there was no formal document to show that the Appellant was the registered proprietor of the suit land, there was no doubt, [and that was not contested], that he owned or had proprietary interest in the suit land. The only problem is that family members did not support or approve of the sale. He was selling was real land, and not what I would call 'air'. There was nothing false or untrue about the agreement for sale of the land or the land itself. Therefore, it cannot be said, in the circumstances of this case, that the Appellant made a false representation of fact about the land. I am not persuaded at all by the argument by the learned state counsel that the Appellant did not have any authority to enter into the Sale Agreement with the Complainant. The fact that the wife and other family members did not support or objected to the sale does not take away the power and authority of an owner of land to enter into a sale or any other legal transaction on the suit land. I however, reckon that this was a controlled transaction covered by section 6 of the *Land Control Act*, Cap 302 of the Laws of Kenya and as a matter of law, it needed consent from the relevant LCB in order to complete and validate the sale of the suit land. Under section 8 of the said Act, the Appellant ought to have applied for consent from LCB within six months of the making of the agreement for sale or within such period of time as shall have been extended by the High Court."

60. In the Wafukho case, Gikonyo J. was of the view that the offence of obtaining money by a false pretence cannot succeeded unless it is proved beyond reasonable doubt that the subject matter was actually non-existent. His Lordship had this to say: "The above recapitulation of the facts of this case and the law applicable brings me to the point where I must state that, the legal framework which governed the transaction in controversy; makes the transaction a purely civil action, thus removing it from the realm of criminal law except where section 22 of Cap 302 has been called into play; and provides for a complete mechanism for and the relief in the event the transaction becomes void. Section 7 should be read together with the conditions of sale in the agreement, especially the clause dealing with default, which should offer relief to the Complainant's gravamen. Guided by the relevant law attending this case, the transaction herein does not constitute a false pretence or intention to defraud for purposes of

the offence of obtaining through false pretence under section 313 of the Penal Code. And, note that the charge before the trial Court was not a charge under section 22 of Cap 302... After taking all legal considerations into account, it is clear the direction the law is taking the Court. But before I close, hear this, all those to whom these presents may come greeting; that criminal process is never a substitute for criminal remedy or to be used as a means to settle a civil claim or to avail a party in a commercial transaction undue or collateral advantage over the other. That kind of practice is fraudulent, demented and abuse of the Court process; should always be avoided by parties, resisted and forcefully suppressed by Courts of law whenever it manifests itself before Court. ...The upshot is that the trial Court erred in law and fact in convicting the Appellant on a charge which was not supported by evidence. Indeed, had the trial magistrate considered the submissions by the defence- which I admit pointed out in no uncertain terms that the matter in issue was civil in nature- I am sure would have come to the correct decision? The points for determination by the trial Court lay in the plain eye-sight of the trial Court. But there was, the omission which is glaring in the judgment by the trial magistrate and, with tremendous respect, the judgment fell short of compliance with Section 169 of the Criminal Procedure Code. It did not, inter alia, contain the point(s) for determination; the evaluation of the defence; the decision arrived at; and reasons for that decision. Ultimately, I find that the charge of obtaining money through false pretence was not proved at all. For those reasons, I allow the appeal; quash the conviction and set aside the sentence. The Appellant shall be set to liberty forthwith unless he is lawfully held in custody."

61. While faced with a situation bearing similar circumstances in Nabil Adamjee vs. Republic [2010] eKLR, Odero J. sounded the following caution: "I do therefore agree with the Appellant that this was a civil complaint. If the two witnesses wanted to be refunded the money they had given the Appellant then they ought to have filed a civil suit against him. Time and again the police have been warned that they are not debt collectors. Why do they involve themselves in arresting citizens on the basis of civil claims? This is entirely wrong. Surely the police have enough work to do in containing crime and ensuring the security of citizens. Why add the unnecessary and illegal task of being debt-collectors? Why should a police officer oversee or be involved in a promise by a debtor to refund his creditor? That is the work of lawyers not the police. The arrest and trial of the Appellant was totally unnecessary..."

62. Even in India, a similar judicial view has been taken, complete with a similar judicial cautionary principle. While cautioning against use of public enforcement mechanisms as an instrument in the hands of the private Complainants driven with vendetta to harass the person needlessly, the Supreme Court of India in Punjab National Bank & Ors. vs. Surendra Prasad Sinha [1993] Supp. (1) SCC 499 had this to say at paragraph *6*: "It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the magistracy to find whether the concerned Accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the Court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint "against the appellants without any prima facie case to harass them from vendetta." See also the Supreme Court of India decision in Madhavrao Jiwajirao Scindia & Ors. vs. Sambhajirao Chandrojirao Angre & Ors [1988] 1 SCC 692, where similar observation were made.

63. And since the acts complained of in this case conceivably constitute both a civil and criminal wrong, under the said judicial cautionary principle, it follows that this Court bears a duty to exercise abundance of caution to shun a possibility of unwittingly aiding and abetting abuse of the criminal justice system to enforce a purely private right namely breach of contract.

64. One of the practical guiding rays in determining whether the conduct is fraudulent is to comb the surrounding tell-tale signs and circumstances (circumstantial evidence) in line with the guidelines in the Wafukho case.

65. And so, in this case, the prosecution bears the plausibly heavy burden to prove that the false pretence and intent to defraud complained of, existed at the time of making the payment. In other words, there was a current or pre-existing dishonest or fraudulent intention of the Accused herein from the onset, as opposed to being futuristic or promisory. Most importantly, the prosecution bears the burden of proving that the subject matter was non-existent.

66. Upon subjecting the prosecution evidence to the defence, the following are the findings and conclusions of this court.

67. PW1, PW2 and PW3, all asserted that the seller of the subject motor vehicle was the accused. However, at the close of both cases, it can be discerned from the Sale Agreement dated 23rd November 2017 (exhibited as the prosecution exhibit 1) that the seller is indicated as one Daniel Ngugi Ndirangu. Gleaning from this, it then seems to this court and I concur with DW2 and PW4, that the accused was an agent and not the seller thereof, as asserted by PW1, PW2 and PW3. This position was vindicated by PW4 – the investigating officer - who testified that upon investigating, the director of Moiz Motors Ltd indicated that the vehicle was sold to the said Daniel on hire purchase terms on 17th November 2017 and that only Kshs. 541,000 had been paid and the balance of Kshs. 379,000 was due and defaulted.

68. The following tell-tale signs do not paint the accused's mind as that hell-bent on obtaining money by a false pretence, with intent to defraud. They instead paint a picture of a usual contract gone haywire, occasioned by breach thereof.

69. In this case, the first tell-tale sign, gleaning from the evidence presented by both the prosecution and defence witnesses (including the complainant, Joel Muendo Kitavi) it became abundantly clear that motor vehicle registration number KCN 578L, Toyota Sienta, existed. In other words, the subject matter was real. It was not a fantom. The vehicle was delivered to the complainant on 23rd November 2017 by the accused, and the complainant put it into the intended use (as a taxi business) for a cumulative period of about two years. The repossession was based on breach of contract and not on basis of a false pretence and intent to defraud. It follows that at no point did the prosecution evidence point to the direction that the subject motor vehicle was a fantom and thus non-existent. In the contrary, all prosecution witnesses including the Complainant attested to existence of the vehicle. In this connection, the prosecution evidence did little to underline that the promise which was made by the Accused to deliver possession of the subject motor vehicle was driven by a fraudulent or dishonest intent (which existed at the material time of making the promise) as opposed to being futuristic or promisory.

70. The second tell-tale sign is that when the car was repossessed by Moiz Motors Ltd, the Accused and his father facilitated reversion of the car to the complainant, who put it into use for another one year, until it was repossessed for a second time on basis of breach of contract by the complainant.

71. The third tell-tale sign discernible from the evidence on record is that there was no claim and evidence in support of that claim that the accused did not transmit the down payment of Kshs. 500,000 on 22nd

November 2017. Evidence was adduced by the Accused – and it was not displaced – upon receipt of the down payment on 22nd November 2017, he dutifully and swiftly remitted it to Daniel on the same day, which led to the release of the car to him for delivery on 23rd November 2017.

72. The fourth tell-tale sign which points more to breach of contract than the offence carried under Count II, is that while under cross-examination, PW2 (the complainant's brother) stated that the amount of monthly installments he used to receive for onward remittal were inconsistent and varied from month to month (as opposed to uniform amounts stated in the agreement). PW2 stated that he could sometimes receive Khs. 50,000, other times Kshs. 30,000, and yet other times he could receive Kshs. 70,000. Looking at the statement exhibited by the prosecution as Exhibit 3, this position is vindicated.

73. The fifth tell-tale sign is that the subsequent agreement between the complainant and Moiz Motors Ltd (the prosecution Exhibit 3) which was clearly breached by the complainant.

74. The sixth tell-tale sign are the circumstances under which the transaction was initiated. Evidence, which was not displaced by the prosecution, pointed to the direction that the accused was approached by his own father (DW2) after the complainant's father (PW3) had reached out to the accused's father, seeking assistance by the accused to scout for a car for the complainant to use in his taxi business, using his prior affirmed exploits and experience in similar transactions, which exploits the complainant's father appreciated and desired to exploit.

75. Seventh, it became abundantly clear that the subject motor vehicle was repossessed by Moiz Motors Ltd, on grounds that the balance of the purchase price had not been paid. It became abundantly clear that the full purchase price was supposed to be paid through the Accused and one Daniel Ngugi Ndirangu, named in the motor vehicle Sale Agreement as the seller of the subject motor vehicle.

76. The eighth tell-tale sign is that there is no evidence on record that the seller of the car was not the owner of the subject motor vehicle.

77. The ninth tell-tale sign is that there is no evidence on record that the accused received and shared in part of the sale proceeds which were unremitted by Daniel to Moiz Motors Ltd.

78. The tenth tell-tale sign is that the accused has never denied that he received Kshs. 500,000 from the complainant even when he was summoned to Machakos Police Station.

79. The eleventh tell-tale sign is that together with his father, the accused assisted the complainant to pay some of the sums demanded by Moiz Motors Ltd to facilitate release of the car to the complainant to continue with business, after it was repossessed on 22nd November 2018.

80. It is on basis of the foregoing eleven reasons that the evidence and facts presented by the prosecution have failed to generate persuasion in my mind that the conduct of the accused constitute a false pretence, driven with intent to defraud.

81. The evidence available cannot thus place the conduct of the Accused within the realm of criminal conduct, beyond merely suggesting a conduct which may found a cause of action in contract for breach thereof, specifically the equitable action of money had and received against the person who received the money for onward transmission to the owner of the vehicle. In the circumstances, this Court is of the firm persuasion that the said facts and evidence place the conduct of the Accused squarely within the realm of a civil wrong, which ought to attract civil remedies.

82. Reasons wherefore this court reaches a conclusion that the evidence presented by the prosecution has failed to meet the standard of proof beyond reasonable doubt that the accused obtained the money by a false pretence, driven with intention to defraud.

Whether the prosecution has proved beyond reasonable doubt that the accused conspired with Daniel Ngugi Ndirangu to obtain money from the complainant by a false pretence

83. Section 394 of the Penal Code provides that "Any person who conspires with another to commit a misdemeanour, or to do any act in any part of the world which if done in Kenya would be a misdemeanour, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanour."

84. Section 36 of the Penal Code prescribes the general punishment for misedeamour. It states as follows: When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both."

85. For this too, the prosecution bears the plausibly heavy burden to prove that the intention to agree to commit an offence existed before the offence of obtaining money by a false pretence and with intent to defraud, was committed. In other words, it was a precursor to the offence carried in Count II.

86. Drawing an inference from above eleven reasons and the conclusion, and principally, since the charge under Count II is a derivative of the charge under Count I, if the derivative charge under Count II fails, it follows that the precursor charge under Count I must fail.

Part vi: Disposition

87. Consequent upon this Court finds the Accused not guilty of the offence known as:

    i. conspiracy to commit a misdemeanor contrary to section 394 as read with section 36 of the Penal Code (under Count I).

    ii. obtaining money by a false pretence contrary to section 313 of the Penal Code (under Count II).

88. Accordingly, the accused is acquitted therefrom under section 215 of the Criminal Procedure Code.

89. Unless otherwise legally held, this court that the accused be set at liberty forthwith.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 10TH DAY OF JUNE, 2024

.....

C.N. Ondieki

Principal Magistrate

In the presence of:

Prosecution Counsel:.....

The Accused:.....

Court Assistant:.....