



**Republic v Sifa & another (Criminal Case E006 of 2024)
[2024] KEMC 129 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEMC 129 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
CRIMINAL CASE E006 OF 2024
AT SITATI, SPM
JULY 19, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DALMAS SIFA 1ST ACCUSED

KELVIN KINYUA 2ND ACCUSED

JUDGMENT

1. The 2 accused persons were jointly charged with the offence of obtaining credit contrary to section 316 of the [Penal Code](#). The particulars were that on 15th day of December, 2023 at Marsh Farm Restaurant – Gatimbi location within Imenti Central Sub-County within Meru County, jointly with others not before the court, in incurring a debt from Molly Mutuma obtained credit to the amount of Kshs 14, 800/= for alcoholic drinks and food from the said Molly Mutuma by falsely pretending they will pay.
2. The 2 accused persons denied the charges. the DPP’s case was conducted by Prosecution Counsel Dixon Kibiti while Mr. Muthomi Njeru and Kiruai Mukono Advocate appeared for the accused persons on a Pro Bono basis.

The DPP’S Case

3. PW1 Molly Kibobori Mutuma told the court that on she was the operator of Marsh Farm Bar. She stated that on 15th December, 2023 the 1st accused person showed up at her bar in the company of another man called Boniface Mwenda who is now deceased after being shot dead.
4. Molly told the court that the first to arrive was the deceased Boniface who placed an order for food and drinks before he was joined by the 1st accused person 2 hours later. The 2 men were also joined by others including the 2nd accused person. When the said Boniface placed his orders, he directed PW1 to ensure that the bill does not exceed Kshs 15, 000/= for it to be paid.



5. At around 10pm, the 1st accused person Dalmas asked to leave saying that he was tired. As he was leaving, the now deceased Boniface Mwenda told the 1st accused person to go to their usual place of accommodation. Thus, the 1st accused person left Boniface Mwenda (now deceased) and another tall man.
6. In her further testimony, PW1 stated that at about 11pm she asked Boniface Mwenda to clear the bill. When asked to pay the bill, he pretended that he was going out to make a phone call only for him to vanish into the night leaving behind the tall man. The tall man also pretended that he was going to fetch cash only for him to disappear into the night too.
7. When PW1 realized the pretences by Boniface and the tall man, she detained the short man from 11pm to 6am to compel the payment. At 6am she released the short man after assurances from Boniface that the bill would be cleared but he never cleared the bill.
8. She produced 2 receipts showing that Boniface incurred a bill of Kshs 6,500/= while the 1st accused incurred a bill of Kshs 8,300 which remain unpaid to date. She explained that although the receipts were reading BonLite Wines & Spirits, the real owner of the building was Marsh Farm Bar which had not changed the business name on the building. Following their refusal to pay, she alerted the police.
9. After his arrest, she picked him out in a police identification parade. In her closing testimony, she pointed out that the 1st accused person incurred the bill for pork, ugali and liquor which she personally served him – Tusker, Cider, Chrome, Rafiki and other assorted beers. She confirmed that the 2nd accused person did not show up at her bar at that time.
10. In cross-examination, the following came to light: All the liquor and beer orders were from Mwenda while for the food the 1st accused person ordered himself. When Boniface placed the orders, he openly said that the bill would be shared and split between himself and the 1st accused person Dalmas. At 10pm, the 1st accused person asked PW1 for an update on the accumulated bill and when PW1 provided the update the now deceased Mwenda shot up and said that the bill would be shared.
11. In re-examination, PW1 affirmed that when the now deceased Mwenda shot up and said that the bill would be shared, the 1st accused person kept silent and did not rebut this.
12. PW2 Judah Murega Arimi a mechanic from Kariene told the court the 1st accused person as well known to him since he regularly met him at PW2's garage for repairs of the 1st accused person's motor vehicle. PW2 added that on 14th December, 2023 he went to Marsh Farm Bar to take some 1 or 2 bottles of beer. When he got there, he first bought some cigarettes.
13. Inside the bar he saw Boniface Mwenda Kinja and his friends. He noted that their table was full of beers. Boniface offered PW2 beer. PW2 accepted the offer and took 1 bottle of Guinness and was added 2 bottle of Chrome and 1 bottle of soda. At 9pm, PW2 left the bar and went home leaving Boniface behind. Just before he stepped out, the 1st accused person showed up and was joined by a tall man called Mutembei and 2 others.
14. He retired for the night at his house but when he got up at 4am at answer a call of nature, he stumbled upon the 1st accused person, Boniface Mwenda and Mutembei struggling to untether his dairy cow with a view to steal it. He saw them from the bright electric lights that served as security lights in his compound. When the men saw him, they stopped in their tracks and fled using the 1st accused person's Sienta. They fled after he struck Boniface Mwenda using a club. The dairy cow was saved from the thieves.



15. The next morning, he learnt that Boniface had not settled the bill. He recalled that the 2nd accused person sat at a separate table.
16. In cross-examination, the following came to light: The cow had resisted the attempt to be drawn out of the compound by the thieves. This was at 4am on 15th December, 2023. He reported the theft attempt to the police at Kariene. He recalled that for the brief time that he was in the bar, it was Boniface Mwenda who was placing orders.
17. PW3 S/NO. 63117 Police Constable Anthony Changwony testified as the Investigating officer. He told the court that the report was filed on 24th December, 2023 by PW1. She named Boniface, the 1st accused person and Kelvin and handed over the unpaid bill for the drinks and food. Later, a distress call was received by the police about robbery suspects and when the police responded they arrested 2 men while one was shot dead and a fourth escaped arrest. IP Nderitu conducted an identification parade which resulted in the positive identification of the 1st and 2nd accused person. PW1 also positively identified the body of the deceased Boniface Mwenda. He confirmed that as per the receipt, the 1st accused person did not pay up his portion of the bill incurred at the bar. He produced the receipts as exhibits 1 and 2.
18. In cross-examination, the following came to light: The 2nd accused person had no pending bill receipt. PW1 was the special owner since she was a caretaker.
19. PW4 S/NO. 237329 Inspector Nderitu of Kariene Police Station produced the identification parade forms as P.Ex.3 and 4 wherein the complainant positively identified the 1st Accused person.
20. In cross-examination, the following came to light: The initial report against the accused persons was robbery with violence. There was no description of the suspects in the initial report. The 2nd accused person was not positively identified in the parades as no parade was conducted for the 2nd accused person.
21. At the end of his testimony, the DPP closed their case whereupon the court ruled that the 1st accused person had a case to answer while the 2nd accused person had no case to answer and was acquitted under section 210 of the [Criminal Procedure Code](#).

1ST Accused Person's Defence

22. DW1 Dalmas Sifa gave sworn defence. He denied the charges and told the court that he was invited by Judah Murega to Marsh Farm Bar for food and drinks. On arrival, he was instructed by the said Murega to take drinks and food. He complied but afterwards noted that Murega was so intoxicated that he could not talk. He left Murega in the bar and went home only to be arrested days later over these charges. He told the court that he only learnt of the unpaid bill when he got arrested. He told the court that the bill was incurred at Marsh Farm but the receipts in court were for BonLite Bar.
23. In cross-examination, he admitted that on the material night he went to Marsh Farm and placed orders for food only. He admitted that he met the waitress. He admitted that it was true that in his defence, he had not stated that he paid the bill before leaving the bar.
24. At the end of his evidence, he closed the defence. The duty of this Honourable Court is to determine if the DPP has proved the charges beyond any reasonable doubt.

Determination

25. The 1st accused person has been charged under section 316(a) of the [Penal Code](#) which provides as follows:-



316. Obtaining credit etc. by false pretences.

Any person who -

- (a) in incurring any debt or liability, obtains credit by any false pretence or by means of any other fraud; or
- (b) with intent to defraud his creditors or any of them, makes or causes to be made any gift, delivery or transfer of or any charge on his property; or
- (c) with intent to defraud his creditors or any of them, conceals, sells or removes any part of his property, after or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him, is guilty of a misdemeanour and is liable to imprisonment for one year.

26. The statement of the offence omitted the words by false pretences when it was drafted but the words false pretences were included in the particulars of the charge and so the defence was not misled in any way and no prejudice arose.

27. On the law, the court found guidance from the authority of *Bennalt Oinamo Versus Republic (1976)* eKLR (Platt, Sachdeva JJ.) where appellant stayed at the Impala Hotel, Parklands, between 13th August 1974 and 24th August 1974 occupying a room, and receiving board. He had telephone facilities. At the end of the period he left without paying Shs 1430/30, which included Shs 355/50 for telephone charges. He was not seen until over one year later, on 28th December 1975 when he was found to be lodging in the Hotel Ambassadeur and then arrested. where the court held as follows:

Section 316(a) is a provision stemming from section 13(1) of the Debtors Act, 1869 in England. There are a number of well known decisions in that country to which we propose to refer, as we understand that they have been received generally with approval in East Africa.

First of all, the words “obtains credit” refer to the obtaining of credit in connection with a debt or liability to be liquidated by the payment or repayment of money only; and that, by the accused himself. The principle has not been extended (for instance) to the receipt of money on a promise to render services or deliver goods in the future: *Fisher v Raven* [1963] 2 All ER 389; an opinion of the House of Lords. Here, the appellant was alleged to have promised to pay money, and a credit was obtained as will be explained later.

Secondly, if the credit be obtained by a false pretence, then it must be a pretence about an existing fact that is false. So the House of Lords in the above case approving the remarks in *R v Dent* [1955] 2 All ER 806 observed as follows (per Viscount Dilhorne LC, [1963] 2 All ER at page 395):

In *R v Dent* it was held by the Court of Criminal Appeal 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.

It must be a statement about an existing fact which is false, as a result of which deception credit is obtained.

In the present case, the false pretence alleged is that the appellant would pay Shs 1430/30 whereupon Mr Karanja gave him the run of the facilities of the hotel. That is clearly a promise to do something in the future whether or not it was then, as a matter of fact, his intention to do so. It is not clear, as a matter of fact, that the appellant made any such promise. Such evidence as there is suggests that no promise was made certainly of the final



sum of Shs 1430/30 which sum was not known at the beginning of the appellant's stay in the hotel; or even during his stay, since part of the sum was disputed. Here the appellant simply booked a room signing a form giving his personal particulars and passport number. This document is not one of those, which record whether the customer himself or his company employing him will pay. Of course, he was not being invited to stay there free. But the point made here, is that the appellant did not make any direct representation as to how payment would be made, and from such entries as he made in the document which he signed if he were travelling on business for his employer, as he seems to have indicated, it might be concluded that either himself, or his company would pay in the first place. His conduct was ambiguous in the beginning.

28. The learned Judges went to hold that:

No one can doubt that the defendant did incur a debt or liability; he ordered goods under circumstances which implied a promise to pay for them. Then did he obtain credit? We are of the opinion that he did. The prosecutor might have said that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied, but he did neither; he furnished the goods under circumstances which passed the possession and property in them, relying on the readiness and ability of the defendant to pay. It does not seem to matter that the period of credit was a short period; he trusted the defendant, and parted with his goods without insisting on prepayment or upon interchangeable payment. We think therefore that credit was obtained. That illustrates what is credit...Lord Russell CJ then went on to deal with fraud. Jones was convicted of obtaining credit by means of other fraud, because he was found to have had no intention of paying, but rather that he intended to cheat. This case established a line of authority, which could well have informed the prosecution in the present case. Food and services were dispensed on the alleged basis that the appellant would pay. He would be guilty of gaining credit by means of other fraud if he never intended to pay his debt. In *R v Wyatt* [1904] KB 188 the defendant hired furnished apartments from the prosecutrix and occupied them for three days, when he left without paying for them, or for the food supplied to him. It was held that he had incurred a debt, and that he obtained credit by means of fraud. That was the basis of the conviction if certain evidence of previous conduct was admitted. It was so admitted and it negated accident. So Wyatt was convicted.”

229 In this case, PW1's tested evidence shows that she served both Boniface and Dalmas with food and drinks totalling Kshs 6500 for Boniface and Kshs 8500/- for Dalmas. PW2 affirmed that Boniface and Dalmas were in the bar and were duly served and this corroborated PW1's testimony. Furthermore, PW1 confirmed and verified by PC Changwony that the bills were unpaid. She pointed out that the 2 accused had indicated they would pay up the split bill provided that it did not exceed Kshs 15,000/= but instead of paying they slipped out of the bar using false pretences. Boniface on his part pretended that he was stepping out to make a call while Dalmas pretended that he was so tired. The total bill was Kshs 14, 800 which did not exceed the upper ceiling that the suspects had set as they incurred the expenditure on credit.

30.. The tricks used to incur the credits were the false assurance that after taking the food and drinks the 2 would share the bill but this was not done as each suspect casually walked out of the bar without satisfying the bill. PW1 explained the business arrangement between Bonlite and Marsh Farm that led to the name of Bonlite being reflected in the receipts. This explanation was admissible under section 16 of the Evidence Act which provides that:



16. Facts showing course of business

When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is relevant.

31. Therefore, from the material placed before the court, there is direct and overwhelming evidence to show that the 1st accused person incurred the liquor and food bill but did not pay. After the now deceased Boniface had indicated that the bill would be split, the 1st accused person casually walked out of the bar under a pretext that he was so tired. He did not pay the bill yet at the time he was placing the orders he had created the impression that he was in a position to meet the bill. In the result, the DPP has proved the charge to the extent of Kshs 8500/- only which was the portion of the bill for Dalmas. In the result, the court finds the 1st accused person Dalmas guilty of the offence of obtaining credit by false pretences. He is convicted under section 215 of the *Criminal Procedure Code*. Right of appeal is 14 days.

DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 19TH DAY OF JULY, 2024.

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

Present

Dpp Kibiti

Ronnybcourt Asssitant

Accused Person

