



REPUBLIC OF KENYA



**Director of Public Prosecutions v Otieno (Criminal Case E040 of 2020)
[2023] KEMC 268 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEMC 268 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E040 OF 2020
ZK KAGENYO, RM
NOVEMBER 1, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

CALEB OCHIENG OTIENO ACCUSED

JUDGMENT

1. The accused person was to be arraigned on the 24th day of November 2020 when this case was instituted but was said to be held in detention for another case but was finally arraigned on the 12th day of January 2021 for an indictment of obtaining money by false pretence contrary to section 313 of the Penal Code. The particulars were that on the diverse dates between 5/11/2018 to 16/11/2018 at Ukunda in Msambweni sub-county in Kwale county within Coast region with intent to defraud obtained Kshs. 1, 350, 000/= from Armstrong Mugambi Murungi pretending that you were in a position to sell him a motor vehicle make Toyota Prado TX a fact you knew to be false.
2. The accused denied the charges and a trial ensued.
3. The DPP's case was conducted by learned Principal Prosecution Counsel Ms. Mwaura while the accused person was not represented by counsel and conducted his case while in remand custody although he had been granted a personal bond of Ksh. 200, 000/= with one surety of similar amount. At all times of the trial, the accused person was present in court. The matter was conducted in both Kiswahili and English languages, the languages of choice by the accused. The matter was presided over by 2 Judicial Officers, Hon. Omido, SPM, and myself taking over after Hon. Omido was transferred to Shanzu Law Courts effective 23rd January 2023.

Prosecution's case

4. To prove the guilt of the accused, the Prosecution marshalled a total of 5 witnesses.



5. PW 1, Armstrong Mugambi Muriungi, an accountant at D.M Tours based at Diani, informed this Court that in November 2018, he had the desire to purchase a car and he approached Mr. Otekera, a mechanic and sought for his advise or any connections. He specified to Mr. Otekera that he wanted a Prado TX and, on his part, Mr. Otekera linked PW 1 with the accused, by giving him the accused's phone number. PW 1 called the accused person and a deal was struck over a phone call whereby the accused agreed to sell and PW 1 agreed to purchase a Toyota TX at a price of Ksh. 1, 350, 000/= . To effect the transaction, by way of WhatsApp communication messenger, PW 1 sent the accused a copy of his national identification card and a copy of his Kenya Revenue Authority Personal Identification Number and in exchange, the accused sent him photographs of an unregistered maroon motor vehicle. Through bank and M-pesa mobile money transactions, PW 1, at different times, credited the accounts of the accused with Ksh. 1, 350, 000/= . After making the full payment, the accused advised PW 1 to meet him at the gate of KPA Mombasa Port on 16th November 2018, at 0800 hours to collect the motor vehicle but what had appeared to be the ideal business relationship came to an abrupt end as the accused switched off his phone and cut off any communications. The vehicle was never delivered neither was there a refund of the monies sent.
6. On cross examination, PW confirmed that he had never met the accused physically, but they only communicated through WhatsApp messenger. He further confirmed that the two did not have any written agreement for the purchase of the motor vehicle but all along, his intention was to purchase a motor vehicle.
7. PW 2, Jospheh Otekera Abuoria mechanic and taekwondo trainer, who worked at the D.M Tours and Safaris as the in-charge of the workshop, informed the court that the accused person had approached him and requested him to be marketing motor vehicles for him at a commission, a business opportunity that PW 2 took up. The complainant, who was an accountant at the company PW 2 worked for approached pw 2 and enquired about purchasing a car and PW 2 gave the complainant the phone number of the accused and linked up the two. He informed the court that he sent to the complainant the photographs of the motor vehicles the accused had sent him into his phone, the accused informing PW 2 that those vehicles were a subject of destruction due to Port charges but luckily, those few motor vehicles had been saved for backdoor selling.
8. On cross examination, PW 2 informed the court that the accused had informed him that he works with the KRA a fact PW 2 later learnt to be false.
9. PW 3, Patrick Lundi, the Co-operative Bank, Likoni Branch, Branch Manager produced evidence to the effect of how Ksh. 1, 190, 000/= had been deposited in their bank by Armstrong Mugambi in favour of Caleb Ochieng Otieno. He also produced the account opening documents as evidence.
10. In cross examination, he informed the court that he was acting on an Order of the Court and that he did not know the purpose of the deposits made. He also confirmed that some deposits did not indicate the depositor.
11. PW 4, NPS officer Service No. 86707 PC Ian Nahashon Mulamba who is seconded to Safaricom PLC Coast Region as a Law Enforcement Liaison Officer produced M-Pesa details relevant to the parties herein and transactions made by the complainant in this matter in favour of the accused.
12. PW 5, NPS officer Service No. 111467 PC Abraham Kiplagat testified in his capacity as the investigating officer. He proffered evidence on how, after the investigations, he arrived at a figure of Ksh. 1, 350, 000/= as the money sent by the complainant to the accused person for the purchase of the motor vehicle.



Defence case

13. The accused person was placed on his defence under section 210 of the Criminal Procedure Code, and section 211 of the Criminal Procedure Code and Article 50 (2) (i) of the Constitution having been explained to the accused person, he, in person, elected to defend himself by way of tendering sworn evidence without calling any witness.
14. DW 1, the accused, vehemently denied the accusations against him. His defence was that the charges against him were a mistaken move by the state as, whereas there were transactions between him and one Armstrong Mugambi, they were of a different business affair, being the sale of his then bedridden sister's household items and that the sale was brokered by Armstrong's employee, servant or junior namely Dan.
15. He told the court that on 27th October 2018, his late sister requested him to help her sell her household items as she was admitted at Coast General Hospital and that she needed money to be transferred to another hospital. He said that on hearing that, he called one of his friends namely John Muturi alias Jemo who after viewing the items, the following day, brought in one Dan who informed DW 1 that he was buying the items for his boss who lived in Ukunda. Dan took photographs of the items and DW 1 informed him that regarding the price of the items, it was only DW 1's sister who would set the prices and there and then the trio went to Coast General Hospital and Dan and DW 1's sister agreed on the prices. On 4th November 2018, the items were ferried to Ukunda by one Jimmy, and it was DW 1 who was to cater for the Ksh. 20, 000/= transportation charges. The following day after the arrival of the items at Ukunda, Dan informed DW 1 that his boss needed to know how DW 1 wanted the purchase price paid and it is at that juncture that DW 1 gave out his account number and at different times, Dan's boss deposited cash in favour of DW 1. Noting his complacency on footing Jimmy's transportation outstanding bill, Dan prompted DW 1 and contemporaneously gave him Jimmy's phone number 0720 XXX 312 and DW 1 credited the said number with Ksh. 20, 000/= on 14th November 2018 at 1745 hours and it reflected the name Joseph Oteka as per the transaction details and later Dan called DW 1 confirming to him that Jimmy the driver had received the cash. Later on 19th December 2018, he learnt that he was a person of interest to the police when one police officer summoned him to the police station. Finally, when he got at the police station, the police officers interrogated him and he denied knowledge of any person namely Armstrong but on being questioned whether he had received any monies from such person, he responded that he had transported items to Ukunda, paid by Dan for the items and the name that appeared after such payment was the name in issue, Armstrong.
16. On cross examination, he informed the court that her then sick sister has since passed on and he did not have any documentation to show of her illness or demise. He denied ever knowing one Otekelle and that the said Otekelle lied before court when he said that he was DW 1's taekwondo instructor. He admitted that he received money from one Armstrong but contested the purpose of such monies in which, according to him, it was for the payment of the household items. According to him, the total money he received was Ksh. 1, 150, 000/= which was the sumtotal of the itemized household items.
17. After the testimony of DW 1, the Accused closed his case.
18. Having heard both parties at their full lengths, and parties having invited court to make its judgment as the record stands, the court retired to make its finding.



Analysis and Determination

19. The accused has been charged with the offence of obtaining money by false pretences. Section 313 of the Penal Code states 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.

20. The prosecution had the duty to prove that the accused defrauded the complainant of his Ksh. 1, 350, 000/= by falsely pretending that he would sell him the said motor vehicle Prado TX.
21. On his part, the accused was at no duty to prove his innocence.
22. It is not in dispute that money moved from the account of Armstrong to the account of the accused person. According to the evidence produced by the state, the total amount sent to the accused by the complainant was;



Date	Depositor	Account	Amount (Ksh.)
5 th November 2018	Armstrong	01109XXXXXX500 Co-operative Bank	200, 000/=
7 th November 2018	Armstrong Mugambi	01109XXXXXX500 Co-operative Bank	600, 000/=
7 th November 2018	Unnamed Code provided	01109XXXXXX500 Co-operative Bank	200, 000/=
8 th November 2018	Armstrong	01109XXXXXX500 Co-operative Bank	40, 000/=
12 th November 2018	Armstrong	01109XXXXXX500 Co-operative Bank	150, 000/=
8 th November 2018 13:37:08	Armstrong Mugambi Murungi 254729XXXX76	254704XXXX13 Caleb Ochieng Otieno	70, 000/=
8 th November 2018 13:38:13	Armstrong Mugambi Murungi 254729XXXX76	254704XXXX13 Caleb Ochieng Otieno	15, 000/=
8 th November 2018 15:56:29	Armstrong Mugambi Murungi 254729XXXX76	254704XXXX13 Caleb Ochieng Otieno	25, 000/=
16 th November 2018 10:48:59	Armstrong Mugambi Murungi 254729XXXX76	254704XXXX13 Caleb Ochieng Otieno	50, 000/=
Total			1, 350, 000/=

23. According to the accused person, he received Ksh. 1, 150, 000/= only and not the Ksh. 1, 350, 000/= there being a difference of Ksh. 200, 000/=. It would appear that the disputed amount of Ksh. 200, 000/= is the one said to have been deposited on 7th November 2018, which the accused omitted in his evidence and therefore amounting to a denial. I have looked at the transaction code cited at the bank statement being 83110XXXX056/ POSAGOXXX48 and it tallies with the deposit slip held by the complainant and produced as P. Exh 2, the POSAGOXXX48 being the Agent number and the 83110XXXX056 being the transaction reference for the transaction of 7th November 2018. As such, I make a finding that the Ksh. 200, 000/= deposited on 7th November 2018 was made by the complainant in favour of the accused.



24. The produced account opening details demonstrated that the account, held at Co-operative Bank was opened by Caleb Ochieng Otieno on the 12th day of July 2018. As such, such monies in the account were deposited in favour of the said Caleb Ochieng Otieno, the accused herein. I am therefore satisfied that the complainant herein, Armstrong Mugambi Muriungi credited the accounts of the accused with the money amounting to Ksh. 1, 350, 000/=.
25. The next issue for determination was the reason for such deposit.
26. The complainant stated that the money was deposited as such being the payment of the purchase price for the motor vehicle Toyota TX. There was no written agreement as to the purchase/ sale of the said motor vehicle and the complainant resorted to the oral evidence.
27. I have looked at the nature of the complainant and the PW 2, as witnesses.
28. The accused attacked the character of PW 2 as a liar and as a person who lied to court. He said that PW 2 was a total stranger and the assertion that he was his taekwondo trainer was baseless and misleading.
29. I have looked at the evidence of PW 2 and I noted that he told this court that at one point, he borrowed some money from the accused when he had a sick child and the accused sent him Ksh. 20, 000/=. To discredit this, the accused informed the court that indeed he sent Ksh. 20, 000/= to a number that showed the name of the recipient as Joseph Oteka but he was actually sending the money to Jimmy the Canter lorry driver. I have looked at the document produced as P. Exh 9 (a) and indeed the transaction of 14th November 2018 at 17:08:32 is indicated as a credit of Ksh. 20, 000/= from Caleb Ochieng Otieno in favour of Joseph Otekera Abwori. That was the witness presented by the state as PW 2.
30. Just how convenient and coincidental that the driver said to be James happened to receive the money under the name of PW 2, yet PW 2 happened to be a stranger to the accused? it is my view that the accused was feigning ignorance, and this must have been an extension of the false pretences to court. By so finding, I rely on section 6 of the Evidence Act to find that it was not by accident that the accused sent the cash to a Joseph Otekera Abwori and thereafter the prosecution presented the said Joseph Otekera Abwori as a witness to confirm that the latter linked the complainant to the accused, but it was actually the course of nature, as it was the correct position. Further, it is to be noted that the said Otekera was a mechanic at the company that the complainant worked and he said that the complainant approached him in need of a car, and he showed him the cars that the accused had been sending images of to him to market.
31. I make a finding that indeed Joseph Otekera Abwori was the link between the complainant and the accused at first instance.
32. Further, it is to be noted that PW 2 raised the issue of having been lent the Ksh. 20, 000/= while giving his direct evidence and when called to cross examine him, the accused did remain silent on the same. At the time PW 2 was testifying, P.Exh 9 (a) had not been introduced and it was introduced later and in my view, denying knowledge of PW 2 by the accused person was just but an afterthought.
33. Having assessed the evidence of PW 1 and PW 2, I find them to be truthful witnesses who gave evidence that this court should rely on. I further find no basis to form any wild opinion that the complainant and Otekera were at a scheme to fabricate a charge against the accused person.
34. Turning on to the defence of the accused person, I not that he told the court that,

Dan called me and said that his boss had deposited Ksh. 200, 000/= into my account and the balance would be deposited the next day.



However, when asked by PC Julius if he knew Armstrong Mugambi, he said that he did not know him saying,

He asked me if I had received any money from him (Armstrong Mugambi).

.....I told him Dan had sent me cash and the name that appeared in the transaction was Armstrong Mugambi.....

35. In my view, the conduct of the accused as a witness was calling for reception of his evidence cautiously as he is one who was economical with truth and gave minimal information and that which suited a certain scenario to get him out of the fix. For instance, didn't he know that it was "Dan's boss" who had sent the money by the time he was with the PC Julius and yet after being cornered by PC Julius states that it was Dan who sent him the money but indicated a different name?
36. The accused informed the court that Dan paid him a total of Ksh. 1, 150, 000/= being the payment for the purchase of the said household items. Somewhere else in this judgment, I made a finding that the accused indeed received Ksh. 1, 350, 000/= from the complainant and the Ksh. 200, 000/= seeming to be contested was actually received by the accused. However, assuming that the Ksh. 200, 000/= is to be ignored for the sake of finding that indeed the accused was genuinely receiving the ksh. 1, 150, 000/= as a trustee of his ailing sister, did he account for the Ksh. 1, 150, 000/=. I am sorry to report to him that his math was not adding up as per his hatched plan to confuse this court. He told the court that the items were sold as follows;

Item (s)	Price (Ksh)
6-Seater Fabric Sofa Seater	200, 000/=
1 TV Set, Samsung 65"	75, 000/=
1 Queen Bed+ 2 Stands + Dresser Mirror	90, 000/=
7 Piece Dining Set+TV Cabinet+Coffee Table	150, 000/=
1 Refrigerator	40, 000/=
Automatic Generator Power	390, 000/=
1 Home Theatre Music System	40, 000/=
Double-Decker Bed	20, 000/=
Grand Total	1, 005, 000/=

37. It is my finding that the accused's attempt to mislead the court flopped and his attempt to itemize other items for sale apart from the Prado TX as his figures ended up disfiguring the frame of his scheme thus extinguishing the flames of his defence.
38. From the foregoing, it is my finding that the accused person posed to one Joseph Otekera Abwori as a person who was in a position to sell motor vehicles to potential car buyers, the said Joseph Otekera Abwori referred the complainant to the accused person who posed as a person who was in



a position to sell to the complainant a maroon Toyota TX and the complainant not only believed the accused person but also paid for the purchase price and handed over the documents that would facilitate the completion of the transaction and the registration of the unregistered maroon Toyota TX, unbeknownst to the complainant that the said Toyota TX was a non-existent merchandise. This was a clear scheme to defraud the complainant who was just eager to have a machine roaring on the road and dropped his guard over his hard-earned money unceremoniously postponing his cravings of driving the voiture.

Disposition

39. The sumtotal of the foregoing is that, I make a finding that the Prosecution has furnished evidence before this court proving beyond reasonable doubt that indeed the accused person obtained Ksh. 1,350,000/= from the complainant Armstrong Mugambi Murungi by falsely pretending that he would sell to him a motor vehicle make Toyota TX whereas he knew that all that was false. Consequently, I find him guilty under section 215 of the Criminal Procedure Code for the offence of obtaining money by false pretences which is proscribed under section 313 of the Penal Code.

40. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court within 14 days from today's date if dissatisfied with this court's finding.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 1ST DAY OF NOVEMBER, 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Judgment has been Delivered in Open Court at Kwale on this 9th day of January 2024, by Hon C.K Auka in accordance with the provisions of section 200 (1) (a) of the Criminal Procedure Code, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

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In the presence of:

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

Accused

