

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CORAM: R. MWONGO, J.
CRIMINAL APPEAL NO. E055 OF 2024

SYLVANO MURITHIAPPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

*(Appeal arising from the decision of Hon. S. Ngii in the Siakago Magistrate's Court
Criminal Case No. 851 of 2021 delivered on 10th July 2024)*

JUDGMENT

The Charges in the trial Court

1. The appellant and another were jointly charged with 2 counts as follows:
 - 1) The 1st count was obtaining money by false pretenses contrary to section 313 of the Penal Code. Particulars are that on 16th December 2019, at Siakago Town in Embu County, with the intent to defraud, the appellant and his accomplice obtained from Dominic Njeru Ngari Kshs.320,000/= by falsely pretending to be in a position to offer employment to Henry Kirimi Njeru at KenGen Company, a fact he knew not to be true.
 - 2) The 2nd count was conspiracy to commit a felony contrary to section 393 of the Penal Code. Particulars are that on 16th December 2019, at Siakago Town in Embu County, the appellant and another conspired together to commit a felony namely stealing from Dominic Njeru Njagi the sum of Kshs.320,000/=.
2. After he pleaded not guilty to all the charges, and the matter went to full hearing. Ultimately, he was convicted on the 1st count only and sentenced to pay a fine of Kshs.200,000/= or in default, serve a 1-year imprisonment.

The Appeal

3. Aggrieved by the Judgment, the appellant filed this appeal dated 23rd July 2024 seeking that:
 - 1) A. The appeal be allowed;

- 2) The Conviction and the sentence of the lower court be set aside and quashed together on with the consequential orders; and
 - 3) Any other order that the court may deem fit.
4. The grounds of appeal are that:
- 1) The Learned Trial Magistrate misdirected himself in law in finding and holding against the weight of evidence that the charges of obtaining money by false pretense contrary to section 313 of the Penal Code under count 1 of the charge sheet had been proved as against the appellant to the required standard;
 - 2) The learned trial magistrate erred both in fact and in law by failing to hold that burden of proof at all times rested with the prosecution and could not shift to the Appellant;
 - 3) The Learned Trial Magistrate erred in law in convicting the appellant without evaluating the evidence adduced by the prosecution which evidence otherwise does not support the charges upon which the conviction was founded;
 - 4) The learned Trial Magistrate erred in law and fact by failing to hold that the particulars of the charge did not disclose the offence committed by the Appellant;
 - 5) The learned trial magistrate erred both in fact and in law when he disregarded the solid defence and submissions by the Appellant while relying on very weak reasons to convict the appellant;
 - 6) The learned trial magistrate erred both in fact and in law by failing to scrutinize and evaluate the prosecution' s evidence thereby arriving at an erroneous decision;
 - 7) The learned trial magistrate failed to consider the prosecution's evidence that exonerated the accused person herein against the offence;
 - 8) The learned trial magistrate confused and misapplied the evidence in favour of acquittal of the appellant to convict him;
 - 9) The learned trial magistrate erred in law and in fact when he made a partial evaluation of the evidence and finding in favour of the prosecution instead of awarding the benefit of doubt to the defence;

- 10) The learned trial magistrate relied on speculation, probabilities and possibilities to convict the appellant; and
- 11) The learned trial magistrate erred both in fact and in law when he failed to find that the prosecution did not prove the ingredients of the offence of obtaining by false pretenses.

Summary of the Evidence at the trial court

5. PW1 was Dominic Njeru Ngari. He testified that the appellant was his neighbor, and had approached him claiming that he knew the Manager of KenGen. That the company was offering employment opportunities and he was willing to help his son to get a job there. He told him to look for Kshs.300,000/= since his son was a graduate. In December 2019, he sourced the money from a Sacco through a loan, and the appellant advised on an account where the money should be transferred. The appellant took him to Kerugoya to meet his accomplice, Ndungu, who confirmed receipt of the money and requested for the applicant's school documents.
6. He sent the said documents to Ndungu on WhatsApp, who confirmed that they were in order. Ndungu told him that his son should report to work at Olkaria Geothermal Station on 14th January 2020 after collecting an appointment letter from Stima House reception in Nairobi. After he had informed his son that he would be going to olkaria, there was a delay and Ndungu called to tell him that his son was going to Ethiopia and would need a passport. Because the time was too short, Ndungu asked him to give his son Kshs.20,000/= which he would use to process a passport quickly.
7. At the end of January, he paid Ndungu another Kshs.5,000/= towards the passport processing. His son returned with a passport as he couldn't travel because of the covid-19 pandemic. From that time, the appellant and his accomplice Ndungu became elusive and uncooperative. He refused to return the money they had given him. He concluded that he had been duped by the appellant and his accomplice. In cross-examination, he stated that he did not know how KenGen advertised their jobs and he did not see any advertisement in the dailies.
8. He was persuaded that in January 2020, his son would get an appointment letter for the job. That the money he paid was to facilitate training for 6 months before his son started the job. He gave the money to the appellant's accomplice who was his co-accused and it was a total of Kshs.305,000/=. Later he paid another Kshs.20,000/=

through his son and a further Kshs.5,000/= on M-pesa. He did not get a receipt for the money he paid and he also did not know what job his son was going to get.

9. PW2 was Henry Kirimi Njeru, PW1's son. He testified that he was introduced to the appellant by his father. The appellant promised to get him employment at KenGen and in 2019, Ndungu visited the appellant's home. Ndungu was introduced as an engineer at KenGen and a former student of the appellant. In January 2020, his father gave him Kshs.20,000/= and advised him to go and meet Ndungu in Nairobi so that he could help him to get a passport. He met Ndungu and he waited for the passport for 2 weeks in anticipation of traveling abroad.
10. In early February 2020 PW2 collected the passport and gave it to Ndungu allegedly for processing a visa. However, one week later, he never called him after returning the passport. On cross-examination, he stated that he was introduced to Ndungu by the appellant and he did not show him any identification to prove that he was an employee of KenGen. He said that he found out from the KenGen website that there was an ongoing KenGen project in Ethiopia and that Ndungu was in charge of the project. The Kshs.25,000/= given to Ndungu was for processing of the passport.
11. PW3 was Justa Muthoni, PW1's wife. She stated that the appellant, who was their neighbor, visited them in December 2019 and enquired whether PW2 had obtained employment. When he learned that PW2 had not, he offered to help but he asked for Kshs.300,000/= to facilitate PW2's training for the available vacancy. PW1 borrowed the money from a sacco and the appellant introduced them to Ndungu who received the money. In cross-examination, she stated that the appellant approached them with nothing more than word of mouth and he did not present any papers to them. He accompanied them to the bank to deposit the money into the specified bank account which they learned belonged to Ndungu.
12. PW4 was PC Henry Yegon of DCI Mbeere North who was the investigating officer in the case. He stated that he was assigned this case. It had been reported that the appellant and his accomplice had taken Kshs.320,000/= from PW1 in the name of getting employment for PW2. He stated that he took over investigation of the case from his colleague. On cross-examination, he stated that the appellant did not receive any money according to his investigation. The appellant did not pose as an employee of KenGen. He did not know that the appellant accompanied PW1 and

PW3 to the sacco to transfer the money to Ndungu. He was not sure if the appellant's co-accused indeed worked at KenGen because he did not visit the offices of the said parastatal.

13. The prosecution closed its case and the appellant was placed on his defense.
14. In his defense as DW2, the appellant stated that he is a neighbor to PW1 with whom he does not relate cordially. That between them, there is a boundary dispute arising from PW1's continuous felling of trees which mark the boundary. He said that while the case was ongoing before the trial court, PW1 had trespassed onto his land. He denied knowing his co-accused Ndungu and said that he had seen him for the first time in court. He denied all the facts and stated that he was never involved in the allegations stated. He stated that in early 2020, he started constructing a house and it was then that PW1 began questioning his source of funds and started spreading rumours that he was a thief.
15. In 2021, he was arrested. He argued that there was no evidence that he was communicating with PW1 or his son. He denied having benefited from any money that they gave to his co-accused. In cross-examination he stated that he couldn't tell whether PW2 was his student at Nyangwa Secondary School. Since 2019, he has not sued PW1 for defamation but he is still building his case against him. He stated that the conflict he has with PW1 began when PW1 tried to move their common boundary.
16. DW3 was Edward Njagi Nyaga, a neighbor to both PW1 and DW2 (the appellant). He is also the appellant's brother. He stated that PW1 has never had cordial relations with his neighbours. That PW1 has always cut down trees which mark the boundary between his land and the appellant's land. He stated that he was also among the people who were helping the appellant to build his house, and PW1 used to call the appellant's brother a thief. In cross-examination, he stated that PW1 had cut down his brother's trees and the matter was reported to the area chief. Even before the appellant was arrested, he said he heard PW1 saying that he was a thief.

Parties' Submissions

17. The parties to the appeal were directed to file their written submissions and they both complied.

18. The appellant submitted that the charge sheet was defective since it did not link the appellant with the offence. He relied on the cases of **Jason Akumu Yongo v Republic [1983] KECA 79 (KLR)**, **Akolon v Republic [2024] KEHC 7987 (KLR)**, **Mukunga v Republic [2024] KEHC 5506 (KLR)** and **Abdullahi Ali Koricha v Republic [2000] KEHC 243 (KLR)**. He submitted that he did not defraud the complainant neither did he promise his son any job. He urged the court to find that the offence of obtaining money by false pretenses was not proved beyond reasonable doubt and that the pleadings amount to mere allegations. He placed further reliance on the cases of **Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] KEHC 7276 (KLR)** and **Dinkarrhai Pandya v Republic (1957) EA 336**.

19. In its submissions, the respondent relied on sections 312 and 313 of the Penal Code and the case of **Charles Mutua Mutemi v Republic [2022] KEHC 1138 (KLR)**. It argued that according to the evidence, the appellant and his co-accused had the common intent to commit the offence in the first count. For this argument, it relied on section 21 of the Penal Code and the case of **Republic v Francis Muturi Munene & another [2021] KEHC 3055 (KLR)**. It urged the court to uphold the conviction and apply its discretion to adjust the sentence accordingly, in terms of section 354(3)(b) of the Criminal Procedure Code. It also relied on the case of **Wilson Waitegei v Republic [2021] KEHC 1458 (KLR)**.

Issues for Determination

20. The issues for determination are the following:

- 1) Whether the 1st count against the appellant was proved beyond reasonable doubt; and
- 2) Whether the sentence imposed is appropriate.

Analysis and Determination

21. This court is well aware of its obligations as a first appellate court and it endeavors to review the evidence recorded at trial and to reach its own conclusion. In the case of **Okeno v Republic (1972) EA 32**, the court held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own

conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

22. Section 313 of the Penal Code provides:

"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." [Emphasis added]

23. The key ingredients that the prosecution should prove are: false pretence by the accused; an intent to defraud; obtaining anything capable of being stolen; or inducing or persuading another to deliver to someone anything capable of being stolen.

24. These elements constituting the offence were discussed in the case of **Gerald Ndoho Munjuga v Republic [2016] KEHC 6508 (KLR)**, where the High Court stated:

"The offence of obtaining by false pretence means knowingly obtaining another person's property by means of a misrepresentation of fact with intent to defraud. For the offence of obtaining by false pretences to be committed, the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen. An inducement on the part of an accused to make his victim part with a thing capable of being stolen or to make his victim deliver a thing capable of being stolen will expose the accused to imprisonment for the offence."

25. PW1's testimony was that the appellant introduced his co-accused to him after finding out that PW2 was not employed. The appellant told PW1 that for PW2 to get a job at KenGen, he should pay Kshs.300,000/= to the appellant's co-accused. PW1 said that he indeed paid the money to a bank account belonging to the appellant's

co-accused. Later, he paid some more money for processing of a passport for PW2, part of which money was delivered to the appellant's co-accused by PW2 as cash. The remaining money was sent to the appellant's co-accused via M-pesa. PW3 testified that she witnessed all these transactions between PW1, PW2 and the appellant's co-accused.

26. For the charge of obtaining by false pretenses to stand, it must be proved that the appellant had the intention to defraud the complainant before he went on to actually obtain the money. The Supreme Court of Nigeria in **Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria SC 41/2003** stated as follows:

“In order to succeed in a charge of obtaining by false pretences, the prosecution must prove:

- i. that there is a pretence;***
- ii. that the pretence emanated from the accused person;***
- iii. that it was false;***
- iv. that the accused person knew of its falsity or did not believe in its truth;***
- v. that there was an intention to defraud;***
- vi. that the thing is capable of being stolen;***
- vii. that the accused person induced the owner to transfer his whole interest in the property.***

The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest believe in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence. The above adequately presents the law as in the Penal Code.” (see also the case of **Republic v Nyakundi [2023] KEHC 26867 (KLR)**)

27. In his defense, the appellant denied knowing his co-accused. He said that he only saw him for the first time before the trial court. He denied having anything to do with the case and stated that PW1 had implicated him because of a long-standing land dispute between them.

28. From careful perusal of the testimony of the appellant's co-accused, he also stated that he did not know the appellant before they met in court. The trial court declined

to convict the accused persons for conspiracy to commit a felony and so it acquitted them. That means that the court did not believe that the two co-accused worked together with a common intent.

29. As to whether the prosecution proved the 1st count of obtaining against the appellant, the evidence adduced appears to point to guilt of the appellant's co-accused and not the appellant as there was no proof that the appellant obtained anything. The only question remaining was whether the appellant persuaded the victims including PW1, to deliver to the 1st accused the moneys paid to him.
30. The appellant as DW1 denied introducing the 1st accused to the complainant but admitted that he and the complainant were neighbours, with a poor relationship because of a boundary dispute leading to the complainant felling trees at the boundary. Beyond this, he denied any other involvement with the 1st accused or promoting the idea of a job to the complainant. All the exhibits produced show that complainant made the payments to the 1st accused, but there is nothing linking the appellant to the actions taken by the complainant.

Conclusions and Disposition

31. Ultimately, it is evident that the proof availed does not implicate the appellant to the level of proof required of beyond reasonable doubt. The M-pesa and bank statements produced as evidence merely prove that it was the appellant's co-accused who received the money obtained from PW1.
32. In the result, it follows that the conviction by the learned magistrate was unsafe and the conviction and sentence must therefore be set aside.
33. Accordingly, the appeal succeeds and conviction is hereby quashed and sentence is hereby set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.
34. Orders accordingly.

Delivered, dated and signed at Embu High Court this 29th day of October, 2025.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Appellant Present in Court
2. Ms. Amemba for the Appellant
3. Ms. Nyika for the Respondent
4. Francis Munyao - Court Assistant