



**Ogembo v Republic (Criminal Appeal E003 of 2025)
[2025] KEHC 15132 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E003 OF 2025
JK NG'ARNG'AR, J
OCTOBER 28, 2025**

BETWEEN

BERNARD ONDIEKI OGEMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Etago (V.M. Nyaga, PM) delivered on 5th July 2024 in Criminal Case (SO) No. E003 of 2024)

JUDGMENT

1. Bernard Ondieko Ogembo, the appellant herein, was charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the offence were that on diverse dates between November 2018 and January 2019 within Kisii County, the appellant, jointly with others not before court, with intent to defraud, obtained a sum of Kshs. 150,380.00 from one Bichang'a Omweri by falsely pretending that he was in a position to recruit his son Timothy Omweri BIchanga into a job opportunity in Qatar, a fact he knew to be false or untrue.
2. The appellant also faced an alternative count of cheating contrary to section 315 of the Penal Code. The particulars of the offence were that on diverse dates between November 2018 and January 2019 within Kisii County, jointly with others not before court and by means of a fraudulent trick, unlawfully induced Bichang'a Moweri to pay Kshs. 150,380.00 to themselves. When the appellant was arraigned before the trial court, he pleaded not guilty to both counts. After a full trial, the appellant was convicted of the main charge. He was fined Kshs. 50,000.00 and in default, sentenced to 6 months imprisonment.
3. It is those findings that have implored this appeal. The appellant filed his memorandum of appeal dated 24th October 2024. He raised five grounds disputing the findings of the trial court. Those grounds can be summarized as follows: that the conviction and sentence were unsafe on account of the fact that the



- prosecution failed to discharge its burden of proof to the required standard. In any event, its evidence was marred with contradictions; that his defence was cogent and improperly rejected; the trial court violated his rights enshrined in Article 50 (1) & (2) (c) and (k) of *the Constitution* when he failed to give the appellant ample time to adduce documentary evidence.
4. In view of the foregoing, the appellant prayed that this appeal be allowed, the conviction be quashed and the sentence be set aside. He also prayed that the trial court be ordered to reopen the trial for purposes of allowing the appellant to adduce documentary evidence.
 5. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 13th August 2025 through his Advocates M.W. Magara & Company Advocates. He summarized the evidence at trial to submit that the offence of obtaining money by false pretences was not proved beyond reasonable doubt. This is because it was not disclosed the amount that had been sent to the appellant by way of conclusive evidence. He denied that he was an agent of Elmvale Agency or pretending to do something he was not in a position to do. He propositioned that in any event, he was not in control of the interview process. He prayed that his appeal be allowed.
 6. The respondent opposed the appeal. Principal Prosecution Counsl Shabola Ahindikha filed written submissions on its behalf dated 21st August 2025. He submitted that the trial court properly convicted him of the offence on the basis of the evidence adduced before it. It prayed that the appeal be dismissed.
 7. I have considered the submissions, examined the record of appeal and analyzed the law. As a first appellate court, I am called upon to meticulously and conscientiously discharged my duty by thoroughly and exhaustively re-elevating and re-assessing the evidence before arriving at my own independent conclusions [See *Dima Denge Dima & Others v Republic* [2013] KECA 480 (KLR)].
 8. The prosecution called three witnesses in a bid to establish that the appellant committed the offence that he was charged with. PW1 the complainant testified that in 2018, he met one Ruth Matagaro, a parent to a student called Sheila Matagaro at Nduru Girls school where PW1 worked. She informed him that she was in the business of taking children to Qatar. PW1 expressed interest telling her to take his son Timothy Omweri Bichanga PW2. On 28th September 2018, PW1 enrolled his son.
 9. On that very day, Ruth called PW1 and informed him that he needed to take his son for medical examination. For that service, PW2 paid Ruth Kshs. 10,000.00. PW2 was thereafter requested to apply for the issuance of a passport in Kisumu to which it was complied with. That was when Ruth advised him to seek Kshs. 150,000.00 for fare. Upon securing the funds, PW1 was advised to send the money to mobile number 0711528337, belonging and registered in the name of the appellant, to which the complainant obeyed.
 10. PW1's evidence was that he sent Kshs. 50,000.00 on 21st December 2018, Kshs. 30,380.00 on 5th January 2019 and Kshs. 70,000.00 later on that day using his mobile number 0713438852. Thus, in total, PW1 sent Kshs. 150,380.00. The appellant acknowledged receipt of the funds via phone call affirming that it was indeed fare. Later, the appellant called PW2 and informed him that they would travel together to Nairobi on 7th October 2019 to which they did. While in Nairobi, PW2 took passport photos and came back home.
 11. On 25th April 2019, the appellant called PW2 and accompanied him to Nairobi for an interview and medical examination. Shortly thereafter, Ruth and the appellant switched off their phones. PW1 never heard from them thereafter. Ruth would then go under. He recalled that at one point, the appellant called him and asked to meet him so that he could refund the money. That never happened. PW1 thus reported the incident at Nyamarambe police station. The appellant was subsequently arrested.



- PW1 produced his Mpesa statement that was marked in evidence. He admitted that he never met the appellant until he was arrested and charged.
12. PW2 testified that it was his father PW1 who introduced him to the appellant through Ruth. The purpose of the introduction was for the appellant to take PW2 to Nairobi so that he could take him to Qatar. For that reason, he was required to go for an interview. He met the appellant on 28th September 2018. He told PW2 that he needed four people he could take to Qatar. He confirmed that he conducted a medical examination having been escorted by Ruth. He paid Kshs. 4,000.00 for the report.
 13. On 25th April 2019, PW2 took the appellant to Elimu Valley Agency. He sat for two interviews for a cleaning job and a security guard job. After the interviews, the appellant advised him to wait for his feedback. One week later, the appellant called him. He told PW2 to inform PW1 to get him the money they had agreed on with Ruth. PW1 advised his father to send Kshs. 150,980.00 to the appellant via MPESA to which it was done in installments. Upon receipt of the money, the appellant told PW2 to meet him the following day in Kisii.
 14. PW2 took a motor vehicle to Kisii. Upon his arrival, PW2 called the appellant. They met at around 8:00 a.m. The appellant took him for breakfast and asked him to wait. That was the last time PW2 saw the appellant. He never picked his calls again. He confirmed that he obtained his passport from Kisumu after Ruth made arrangements on 18th October 2018, one week after applying. He clarified that he only met the appellant after he was issued with his passport and medical examination report. Finally, he testified that he was never issued with a Visa.
 15. PW3 PC Anthony Kiragu investigated the matter. He received the report from PW1 and PW2 at Nyamarambe police station. PW3 interrogated the witnesses, recorded their statements and collected the evidence. He managed to trace the appellant at his home in Kenya on 1st September 2023. He was arrested and charged before the trial court on 5th September 2023. He produced PW2's passport copy and the MPESA statement of PW1's mobile phone number.
 16. At the close of the evidence of the prosecution, the trial court formed the opinion that the appellant had a case to answer. He was placed on his defence. His evidence was that in 2018, Ruth Kerubo Matagaro told him that she met a child schooling at Nduru High School. She informed him that one of the workers wanted to take his child to Qatar. That child was PW2. Ruth informed him that she had facilitated PW2 to undergo a mandatory medical examination.
 17. DW1, the appellant herein, testified that he went to Nairobi to commence the process. He travelled with PW2's documents and registered him. His evidence was that PW2 failed two interviews. He had attended three interviews. According to DW1, registration for each interview cost Kshs. 12,500.00. That it was PW1 who was to pay for PW2's accommodation, transport and food. He denied being given money for PW2's accommodation, transport and food. That he utilized his own money.
 18. Later on, DW1 grew worried and asked Ruth why he had not been paid. He was assured by Ruth that PW1 and PW2 were good people and would get paid eventually. DW1 recalled that when PW2 passed his interview, he was directed to undergo medical examination. DW1 was emphatic that he paid for it in the sum of Kshs. 18,000.00. In fact, he averred that he spent a total of Kshs. 160,000.00. DW1 continued with the process asking Ruth to tell PW1 to meet him so that he could be paid. However, that information was not trickled to the PW1.
 19. DW1 testified that PW2's Visa was processed. Later on, Ruth called him and told him that PW2 was no longer interested in traveling as he preferred to join the police force. PW1 then demanded for his money. DW1 confirmed that PW1 paid him Kshs. 150,000.00. In response, DW1 stated that he had expended a lot of money in the process. Since they insisted, DW1 referred them to his boss. However,



he passed on. DW1 was thereafter arrested and charged with the present offence. He recalled that he took two people to Qatar in 2018 through his agency Elmvale Agency where he served as a broker.

20. The appellant also called DW2 John Nyawaya Chanji to the stand. He confirmed that the appellant took his son to Qatar in 2018. During the process, DW2's son passed the interviews and travelled. He was then informed that the appellant was charged with the present offence. He defended DW1 by stating that PW2 pulled out of the process to join the police force after his Visa was processed. He did not witness the appellant receiving the money.
21. DW3 Enock Osoko testified that the appellant worked with their agency that organized people to travel aboard. He confirmed that he organized for him to travel to Qatar. He went and returned. That PW2 was to travel with time but changed his mind alleging that he did not want to be enslaved in a foreign country. He expended Ksh. 130,000.00 for the entire process inclusive of the air ticket. He was however not present when PW1 gave the appellant money.
22. Section 313 of the Penal Code provides as follows:

“ Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

23. Mativo, J. (as he then was) in the case of Gerald Ndoho Munjuga v Republic [2016] KEHC 6508 (KLR) wisely expounded himself in the following terms in determining this offence and this court shall wholly adopt those considerations:

“ The High Court of Botswana in *Lesholo & Another vs The State*[7] dealing with an offence of this nature held that:-

- i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intent to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.
- ii. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not a false pretence if it is made in relation to the future even if it is made fraudulently. Where however, the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false.
- iii.The representation must be made with the specific purpose of getting money from the complainant which he/she would not have given had the true facts been revealed to him.

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.

Perhaps the most explicit exposition of the ingredients of the offence of obtaining by false pretences is to be found in the decision rendered by the Nigerian Supreme Court on Friday April 2006 in the case of Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria[9] where the court stated as follows:-

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

- a. that there is a pretence;
- b. that the pretence emanated from the accused person;
- c. that it was false;
- d. that the accused person knew of its falsity or did not believe in its truth;
- e. that there was an intention to defraud;
- f. that the thing is capable of being stolen;
- g. 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.”

24. The basis of the prosecution’s complaint lies in the narrative explained by PW1. His evidence was by and large corroborated by that of PW2. His evidence, which was supported by the Mpesa statement, was that he disbursed the sum of Kshs. 150,380.00 to the appellant in the expectation that PW2 will be handed an opportunity to travel to Qatar automatically on the deposit of such money. After connected by Ruth to the appellant, PW1 and PW2 expected that since the sum of Kshs. 150,380.00 had been successfully deposited to the appellant, it was automatic that he secured a spot to Qatar. However, he did not travel.
25. This court has also had the advantage of looking at DW1, the appellant’s testimony, and that of his witnesses. This court is also alive to the fact that a delicate balance must be drawn because the onus is on the prosecution to discharge its burden of proof to the required standard. Thus, a court ought to consider the defence but be mindful not to shift the burden to the appellant.
26. DW2 and DW3 as witnesses of the appellant confirmed that he was in the business of taking desirable people to Qatar for greener pastures. They were both alleged beneficiaries. Though they claimed that PW2 backed out last minute for personal reasons, I am not persuaded that they were fully informed of the facts and circumstances existed between PW1, PW2 and the appellant. Further, they were not privy to the agreement.
27. Taking the appellant’s evidence in scrutiny, it is not denied that he was in agreement that PW2 was to travel to Qatar under his wing. He met PW1 and PW2 through Ruth. The appellant also admitted that he participated in various activities with intent to have PW2 benefit from the program. This included taking him for a medical examination and submitting his papers. According to the appellant however, PW2 failed two interviews which the appellant financed. His evidence was that he was never paid



during the course and instead spent Kshs. 160,000.00. He opined that it was his boss who was culpable and no them.

28. Looking at the evidence in totality, I am not satisfied with the evidence of the appellant. Firstly, he did not adduce evidence to support that he spent Kshs. 180,000.00. Secondly, he seemed lacklustre in handling PW2's case with his employer. If indeed it was his boss who received the money and he was tasked to handle PW2's case, why wasn't he at the forefront to ensure that PW2 got his money's worth? Thirdly, the appellant did not dispute that he received the sum of Kshs. 150,380.00 through the mobile phone number 0711528337. He also did not deny that she mobile number belonged to him. As a matter of fact, he confirmed that PW1 paid him Kshs. 150,000.00. Finally, he failed to adduce evidence regarding the interviews.
29. I am persuaded without any iota of doubt that the prosecution proved that the appellant falsely represented to PW1 and PW2 that on receipt of Kshs. 150,380.00, PW2 would travel to Qatar. He knew he was not in a position to achieve that expectation and that is why he vanished in thin air. I find that the appellant intended to defraud PW1 and PW2 and part with Kshs. 150,380.00 and had not indication or desire to return those funds to PW1. Those said funds were a thing capable of being stolen.
30. The appellant also urged this court to compel the trial court to reopen his case because he was not afforded an opportunity to raise his defence properly by adducing documentary evidence. However, I find that assertion is an afterthought as the record does not indicate that he was denied this right. In fact, he expressed that he was ready to proceed with his case. Accordingly, the conviction is merited and I see no reason to disturb those findings.
31. The appellant was fined Kshs. 50,000.00 and in default, sentenced to six months imprisonment. The trial court considered the pre-sentence bail report and the appellant's mitigation. The court however was of the view that a deterrent sentence was necessary because of the rampant nature of the offence occurring in the area. Furthermore, the trial court was not convinced that the appellant was willing to refund the sum.
32. This court notes that the trial court properly took into account the necessary considerations in balancing the pendulum. Similarly, in this appeal, the appellant has not demonstrated that he is willing to refund the complainant his funds. Accordingly, the appeal on sentence lacks merit and is hereby dismissed.
33. It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

HON JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Kipchirchir (Court Assistants)

Appellant Present

Koime for the Respondent

