



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDAMA RAVINE**

**(SUB-REGISTRY)**

**CRIMINAL APPEAL NO. E002 OF 2024**

PETER NJAGAGUA MWANGI.....APPELLANT

**=VERSUS=**

REPUBLIC.....RESPONDENT

**(Being an appeal from the conviction by Hon. Alice Chemosop Towett (PM) delivered on 15.03.2024)**

**JUDGMENT**

1. The appellant **PETER NJAGAGUA MWANGI** was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code Cap (Cap 63 Laws of Kenya). Particulars are that on 21.11.2021 at Timboroa trading centre in Koibatek sub-county within Baringo county with intent to defraud, obtained from HILLARY KIPROTICH KORIR kshs.270,000/= by false pretending that you will sell him a bar business namely Airport View bar located at Timboroa.

2. The appellant denied the charge and upon hearing 3 prosecution witnesses, the appellant was placed on his defence and on his defence, he gave sworn statement.
3. By judgment delivered on 15.3.2024, the trial court found the appellant guilty, convicted him and subsequently sentenced him to two (2) years imprisonment.
4. Being aggrieved and dissatisfied by the trial court's decision, the appellant filed this appeal dated 28.3.2024, against his conviction citing (9) grounds.

### **APPELLANT'S SUBMISSIONS**

5. The Appellant submits that two (2) broad issues fall for determination to which: -
  - a) Whether there was a competent charge that was preferred against the appellant before the trial court?
  - b) Whether the charge preferred against the appellant was, nevertheless, established?
6. They submit that the answer to each of these two (2) issues were in the negative and cited the case of Kenneth Njiru Njagi v Republic [2021] eKLR.
7. Further that the offence is created by Section 313 of the Penal Code which states 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 misdemeanor and is liable to imprisonment for three years."

8. That from the above provision, it is clear that for the offence to be proved to the required legal standard, the prosecution must prove that the person accused had done the following:
  - i. Obtained anything capable of being stolen;
  - ii. By false pretences; and
  - iii. With an intention to defraud.
9. That in *Anne Njambi Kiragu V Republic*, [2021] eKLR, the court held that all the above three ingredients must be proved together in order to establish the offence. Proving one or either of them cannot suffice.
10. That though money is obviously something that is capable of being stolen, it is not the receipt of money that constitutes the offence. What establishes the offence is the taking of money or anything capable of being stolen with an intention to defraud.
11. Further that Section 312 of the Penal Code defines a false pretence as:

"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."

12. They submit that from the above definition, it is evident that false pretences consist of the following:
  - i. A representation of fact by word, writing or conduct;
  - ii. The representation must be past or present;
  - iii. The representation must be false; and
  - iv. The person making the representation should have made it knowing it to be false or did not believe it to be true.
13. Further that there is no contest that the appellant was the owner of the business that he was selling and which he actually sold as agreed and relied on the case of High Court in Kenneth Njagi held that the offence that the appellant faced cannot be proved merely by proving that an accused has not fulfilled his part of the bargain; this is how the prosecution all along pursued its case by trying to show that the appellant allegedly took back the business sometimes later.
14. Even the alleged taking back of the business by the appellant was not proved since P.Exh5 and D.Exh1 clearly

show that the case in the tribunal was instituted at the behest of the complainant where PW2's is evident at P.Exh5 as some of the people appearing as witnesses in the inventory and urged this court to allow the appeal.

### **RESPONDENT'S SUBMISSIONS**

15. In response, the prosecution counsel filed submissions dated 30<sup>th</sup> July 2025. she submitted that the issues for determination were whether there was a competent charge preferred against the appellant and whether the charge was proved to the required standard. She submitted that there was a competent charge against accused and all the ingredients of the offence of obtaining by false pretences was proved beyond reasonable doubt. She submitted that section 313 creates the offence of false pretences and section 312 provides the elements as
  - a. Representation by words, writing, or conduct
  - b. A representation in either past or present
  - c. A representation that is false
  - d. A representation made knowing it to be false or believed not to be true
  
16. She submitted that it is true that the appellant was the owner of the business that he was selling however at the time of selling the business, he had already been served with a notice to vacate the business premises a fact he did not disclose to the complainant. The caretaker that the appellant

introduced to the complainant was also not the real caretaker as established by the complainant subsequently.

17. The complainant only managed to run the business for one week before learning that the appellant had been issued eviction notice before he sold the business to him. That the appellant was well aware of the eviction notice but he went ahead to obtain money from the complainant yet he had no capacity to lease out the premises and after selling the business, he relocated from Timboroa.

18. She further submitted that it is not true that the prosecution only sought to establish that the appellant did not fulfill his part of the bargain but even in his defence, the appellant admitted that he had been served with eviction notice at the time he sold the business. She submitted that the prosecution tendered evidence to prove all ingredients of the offence of obtaining money by false pretences.

### **ANALYSIS AND DETERMINATION**

19. This being a first appeal, this court is duty bound to re-evaluate, re-analyze and reconsider the evidence adduced before the trial court and arrive at its own independent conclusion while bearing in mind that it did not have the advantage of seeing the witnesses testify and observing their demeanor. (See *Okeno v Republic* [1972] EA 32).

20. In view of the above, I have carefully considered the grounds of appeal, the proceedings before the trial court, the judgment, and the rival submissions. This being a first appeal, this Court is enjoined to re-evaluate and analyze the evidence afresh and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, as set out in *Okeno v Republic [1972] EA 32*.
21. The appellant was convicted of obtaining money by false pretences contrary to section 313 of the Penal Code. The issue for determination is whether the prosecution proved all the elements of the offence beyond reasonable doubt and whether sentence imposed was harsh and excessive.
22. Section 313 of the Penal Code criminalizes obtaining by false pretences and provides for a maximum sentence of three years' imprisonment.  
Section 312 defines a false pretence as:  
"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."
23. The ingredients that must be proved are therefore:

- a. representation of an existing or past fact;
- b. The representation was false and known by the maker to be false;
- c. The representation induced the complainant to part with property; and
- d. There was intent to defraud.

**(i)Whether the ingredients of the offence were proved**

24. The evidence on record shows that the appellant represented to the complainant that he was selling a running bar business known as *Airport View Bar* at Timboroa. Acting on that representation, the complainant paid a total of Kshs. 270,000 to the appellant and took possession of the business premises.
25. It later emerged that at the time the appellant sold the business, he had already been served with a notice to vacate the premises by the landlord. He did not disclose this fact to the complainant. The complainant was consequently evicted barely a week after taking possession, and the appellant could neither reinstate him nor refund the purchase price.
26. The appellant's non-disclosure of the eviction notice was a deliberate concealment of a material fact affecting the ownership and viability of the business he purported to sell. By presenting the business as available and lawfully in his control, he made a false representation of an existing fact,

which he knew to be false, given that he was fully aware of the pending eviction.

### **Whether There Was Obtaining and Intent to Defraud**

27. The complainant's testimony, corroborated by PW2 and the Mpesa and bank statements produced by PW3, established that the appellant received the full amount of Kshs. 270,000. The appellant himself admitted receiving Kshs. 170,000 though he disputed the balance; however, the documentary evidence confirmed the total payment.
28. The appellant's explanation that he had challenged the eviction before the Business Premises Rent Tribunal and later obtained a favourable ruling does not negate the fact that at the time of sale he had no right to dispose of the business or transfer possession to the complainant. His failure to refund the complainant even after the alleged favourable ruling further demonstrates an intention to permanently deprive the complainant of his money.
29. Intent to defraud can be inferred from conduct. The appellant knew that he was under notice to vacate, failed to disclose that fact, accepted full payment, and disappeared after the eviction. These actions clearly show deceit and an intention to defraud.

**(ii) Whether sentence imposed was harsh and excessive**

30. From the totality of the evidence, I find that the trial court correctly held that the appellant's conduct amounted to obtaining money by false pretences. The prosecution proved beyond reasonable doubt that the appellant knowingly made a false representation that induced the complainant to part with his money.

31. The sentence of two (2) years' imprisonment was within the statutory limit and proportionate to the circumstances of the case. The trial court considered mitigation and the loss occasioned to the complainant. I find no basis for interference with the sentence.

32. From the foregoing, I am satisfied that the conviction was safe and the sentence lawful.

33. **FINAL ORDERS: -**

a) This appeal **lacks merit** and is hereby **dismissed in its entirety**.

b) The conviction and sentence imposed by the trial court are **upheld**.

**Judgment** delivered, dated and signed Virtually at Kabarnet  
this **13<sup>th</sup>** of **November** 2025.



.....  
**RACHEL NGETICH**  
**JUDGE**

**In the presence of:**

- CA, Karanja.
- Ms. Omari for state.
- Ms. Wachira H/b for Malamga for Appellant.
- Appellant.

ORIGINAL