Republic v Mutua (Criminal Case E068 of 2023) [2025] KEMC 177 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEMC 177 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CRIMINAL CASE E068 OF 2023

YA SHIKANDA, SPM

JULY 31, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

LINET MUTHEU MUTUA ..... ACCUSED

RULING

The Charge

1. Linet Mutheu Mutua (hereinafter referred to as the accused person) is charged with the offence of obtaining goods (ought to have been money) by false pretence contrary to section 313 of the *Penal Code*. The particulars of the offence are that on 17/12/2022 at Kibwezi township in Kibwezi Sub-county within Makueni County, the accused person with another not before court, with intent to defraud, obtained Ksh. 120,000/= from Juma Kangutu by falsely pretending to purchase anti-venom medicine, a fact she knew was false. When the plea was taken, the accused person pleaded not guilty. The matter was then set down for hearing.

The Evidence

2. The prosecution case was substantially heard by another Magistrate who was subsequently transferred. When the matter was placed before me for directions, the parties agreed to proceed from where the matter had reached. I then heard the evidence of the last witness on the part of the prosecution. At the close of the prosecution case, three (3) witnesses had testified. PW 1 Juma Kangutu (hereinafter referred to as the complainant) testified that he knew the accused person very well. That the two met whereupon the accused person informed the complainant that she dealt in anti-venom medicine and requested the complainant to fund her. On 17/12/2022 the accused person called the complainant and met him later while in the company of another person.

3. The accused person introduced the other person as the supplier of anti-venom. The accused person borrowed Ksh. 120,000/= from the complainant but requested the complainant to send the money

directly to the person who was introduced as the supplier. The accused person promised to refund the money the following day together with an extra Ksh. 36,000/= from her profit. The following day, the complainant could not reach the accused person and alleged supplier on phone. The complainant reported the matter at Kibwezi Police station where after the accused person was arrested.

4. PW 2 Stephen Kimwele Mutisya testified that on 17/12/2022 he was with the complainant when the accused person and a man joined the complainant. That the accused person borrowed Ksh. 120,000/= from the complainant. The following day, PW 2 was informed by the complainant that the accused person had not refunded the money. PW 3 Police Corporal Amos Makori testified that he was the investigating officer herein. According to the investigating officer, the complainant was to be supplied with anti-venom. That the anti-venom was never supplied. Later, the investigating officer arrested the accused person at Kiundwani area.

Main Issue for Determination

5. The main issue for determination at this stage is whether the prosecution has established a prima facie case to warrant the accused person to be placed on her defence in respect of the offence.

Submissions by the Defence

6. Counsel for the accused person filed written submissions at the close of the prosecution case. It was submitted that if at all any money was obtained from the complainant, then the same was obtained by one Stanley Mwanzia David. The defence argued that there was no proof of a loan agreement between the complainant and the accused person. The defence further argued that a representation as to the future does not amount to obtaining by false pretence. That the promise by the accused person to buy anti-venom for the complainant was a future representation. The defence contended that the transaction between the complainant and the accused person disclose a civil dispute. The defence pointed out that the prosecution evidence was contradictory and not truthful. The defence submitted that no prima facie case had been established and urged the court to acquit the accused person under section 210 of the *Criminal Procedure Code*.

Analysis And Determination

7. I have carefully considered the evidence on record as well as the law applicable. I have further considered the submissions filed by the defence. A prima facie case is defined in the *Mozley and Whiteley's Law Dictionary* 11th Edition as:

> "A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side." Emphasis added

8. The locus classicus on what constitutes a prima facie case is to be found in the celebrated case of *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 at 334 and 335, where the court stated as follows:

> "Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to

answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence..... It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."(Underlining mine)

9. In the authority of *Ronald Nyaga Kiura v Republic* [2018] eKLR, the court observed that a prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. In my considered view, for the court to find that a prima facie case has been made out against an accused person, the prosecution must have established the following:

    a. That the offence complained of was indeed committed; and

    b. That the evidence links the accused person to the offence complained of.

10. It is my further opinion that in order to show that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. A prima facie case is an early screen for a court to determine whether the prosecution can go forward to try the accused person fully for the crime. As such, the standard of proof that the prosecution must satisfy at the prima facie case stage is lower than that for proof that the accused is guilty, that is, lower than proof beyond reasonable doubt. In order to establish a prima facie case, a prosecutor need only offer credible evidence in support of each element of a crime.

The Law

11. 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."

12. From the above provision, I gather that the ingredients of the offence of obtaining by false pretence and which the prosecution must establish or prove are as follows:

    a. The accused person must have acted under a false pretence;

    b. The accused person must have intended to defraud;

    c. The accused person must have obtained from any person anything capable of being stolen or induced any other person to deliver to any person anything capable of being stolen.

13. My view is buttressed by the authority of *Joseph Wanyonyi Wafukho v Republic* [2014] eKLR, wherein the court held as follows:

> "....the following essential elements of the offence of obtaining through false pretences are discernible: that the person;
>
> a) Obtained something capable of being stolen;
>
> b) Obtained it through a false pretence; and

b) With the intention to defraud."

14. The phrase "False pretence" has been defined under section 312 of the *Penal Code* 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."

15. For purposes of clarity, a false pretence bears the following elements:

i. There must be a representation;

ii. The representation must be by words or writing or conduct;

iii. The representation must be of a matter of fact;

iv The matter of fact must be either past or present;

v The representation must be false;

vi. The person making the representation must know it to be false or must not believe it to be true.

16. In a decision rendered by the High court of Botswana in the case of Lesholo & Another v The State quoted with approval by Mativo J (as he then was) in the case of *Gerald Ndoho Munjuga v Republic* [2016] eKLR, the court observed as follows:

> " 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."

17. Basically, 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 person 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 person to culpability for the offence. I must emphasize that the offence of obtaining by false pretence does not relate to future events. Section 312 of the Penal code proclaims that the representation should be of either a past or present fact, not a future fact.

18. Case law as well confirms the same position. Devlin J in the case of *R v Dent* [1955] 2 QB at pp 594/5 observed that:

> ‘’...a long course of authorities in criminal cases has laid down 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”.

19. In *Mathlida Akinyi Oware v Republic* [1989] eKLR, the Court of Appeal observed thus:

> “ Devlin, Jin the case of *R v Dent*, [1975] 2 All ER 806 at page 807 letter H said that
>
> 'to constitute a false pretence the false statement must be of an existing fact.'
>
> At page 808 letter A he said 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'.

20. Law, JA in the case of *Abdallah v Republic*, [1970] EA 657 at page 658 letter 1 said that a representation as to a future event cannot support a charge of obtaining money by false pretences."

Analysis

21. Having laid down the law with regard to the offence, I wish to consider the evidence in support of the charge. The particulars of the charge indicate that the accused person obtained the money from the complainant by falsely pretending to purchase anti-venom medicine, a fact she knew to be false. The evidence of the investigating officer was that the accused person approached the complainant with a business deal where they would purchase anti-venom. According to the investigating officer, the complainant and accused person were to contribute Ksh. 120,000/= each for purposes of buying the anti-venom.

22. However, according to the complainant and PW 2, the accused person borrowed the money from the complainant and was to refund the same the following day, together with what appeared to be interest. There is a clear contradiction between the testimony of the investigating officer and that of the other prosecution witnesses.

23. Nevertheless, the complaint by the complainant was that the accused person borrowed money from him to fund her business but failed to refund as agreed. It was not a joint business venture as was stated by the investigating officer. The complainant had no interest in the anti-venom but a refund of his money. To my mind, this is clearly a loan agreement which turned sour. The accused person could have used falsehoods to obtain the loan but whatever reason she gave was none of the complainant’s concern. What is clear is that it was a friendly loan. In my view, where a person defaults in repaying a loan, the recourse is to institute criminal proceedings for recovery of the money and not criminal proceedings as was done in this case. The foregoing clearly indicates that the complaint involved breach of a loan agreement.

24. The question that I wish to pose at this juncture is this; was it proper for the accused to be charged with a criminal offence in a bid to enforce the loan agreement? To answer this pertinent question, I will consider some authorities. In the case of *Peter Macharia Ruchachu v Director of Public Prosecution & another* [2014] eKLR, the criminal case against the applicant stemmed from a dispute between him and the complainant in the criminal trial over performance of a contract. One of the issues for

determination was whether a dispute over performance of a contract could form a basis to prosecute one of the parties to the dispute. Ngaah J held as follows:

> "Upholding criminal justice through a criminal prosecution as opposed to misusing the prosecution as an instrument to bring pressure to bear upon a party to settle a civil dispute is a question that has engaged the minds of learned judges in our courts on numerous occasions. Apparently, whenever such a question has arisen in cases before them, the learned judges have been consistent and are in agreement in their decisions that the institution of a criminal case for a purpose other than upholding the criminal justice is an abuse of the criminal process and it is upon the courts, whenever such scenario emerges, to rise to the occasion and halt such criminal proceedings.....When I consider totality of the circumstances comprising the background of the dispute between the complainant and the applicant, the manner of the applicant's arrest and finally the charge which was preferred against him, I am persuaded that the prosecution of the applicant was influenced by ulterior motives; in other words, the criminal case against him was for a purpose other than upholding the criminal law. It is meant to bring pressure to bear upon the applicant to settle a civil dispute. Such a trial cannot be allowed to proceed."

25. In *Republic v Director of Public Prosecutions & Chief Magistrate's Court, Milimani* [2017] eKLR, it was alleged that the issues in the criminal case were purely civil in nature, and it was evident that the complainant in the criminal case intended to settle a civil claim using Criminal avenue. The court found that the dispute between the parties therein rested on the breach of a sale agreement between the applicant and the complainant in the criminal case. Odunga J (as he then was) observed that the dispute between the applicant therein and the complainant in the criminal case arose from the breach of the terms of the agreement between the two parties and was thus purely a civil matter. The court further observed that the institution of the criminal proceedings was meant to compel the applicant to settle a civil debt. That it was an abuse of power and was not for the purpose of criminal proceedings.

26. Similarly, in *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69, the court held thus:

> "The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.....The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely to bear pressure on the applicants in order to settle the civil dispute".

27. In *Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* [2002] 2 KLR 703, the court held that it was not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal

proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public.

28. When a prosecution is being used to further a civil case, the same cannot be condoned by the court. When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. In the case of *Andrew Mcghie v Catherine Wembridge Baumgarten & 5 others* [2016] eKLR, Chitembwe J observed that:

> "It is my view that where the dispute is purely civil in nature, creating an offence out of a civil arrangement is tantamount to an abuse of the legal process. The 1st respondent's first action was to file a civil suit. The suit was to be fast tracked. By the end of the day the court will be called upon to quantify what was done under the terms of the contract against what was paid. That connotes a civil dispute. It cannot be an intention to obtain money by false pretence."

29. The dispute herein is clearly of a civil nature and any remedy for wrongdoing on the part of the accused person lies in a civil court. In as much as the court may be sympathetic to the complainant for what might have befallen him, this is not his place to complain.

30. The test in determining a prima facie case was laid down in *Republic v Galbraith* [1981] WLR 1039, in the following words:

    1. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case;

    2. The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence;

        (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

        (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

31. It is the duty of the prosecution to prove the charge against the accused person. To this end, the prosecution must satisfy the ingredients of the offence at a prima facie level before the accused person is called upon to offer an explanation. In my view, before the court places an accused person on their defence, there must be credible evidence to show that the offence complained of was committed and that the evidence links the accused person to the offence. I think I have said enough to show that the charge is untenable. If I were to place the accused person on her defence and she opted to remain silent in defence, this court would not convict her. It is not the duty of the accused person to fill in the gaps or tie up the loose ends in the prosecution case.

32. In the circumstances, I have no difficulty in stopping the case at this juncture. I agree with the observation made by the High Court of Malaysia in Criminal Appeal No. 41LB-202-08/2013 – *Public*

Prosecution v Zainal Abidin B. Maidin & Another that the defence ought not to be called merely to clear or clarify doubts. In the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, Sharma J held:

> It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence, to rule that there is a case for the accused to answer."

33. I may be curious to know what the accused person has to say about the allegations but curiosity is not a reason enough to place the accused person on her defence.

Disposition

34. In view of the foregoing, I find that the prosecution has failed to establish a prima facie case to warrant the accused person to be placed on her defence. Consequently, I find and hold that the accused person has No Case To Answer and I proceed to Acquit her accordingly under section 210 of the *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 31ST DAY OF JULY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.