



**Githinji v Republic (Criminal Appeal 158 of 2023)  
[2024] KEHC 1723 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1723 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 158 OF 2023  
DR KAVEDZA, J  
FEBRUARY 26, 2024**

**BETWEEN**

**DOUGLAS KIBUGI GITHINJI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. R. Kitagwa (R.M) on 30th May 2023 at Kibera Chief Magistrate's  
Court Criminal Case no. 2084 of 2016 Republic vs Douglas Kibugi Githinji)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted for the offence of obtaining money by false pretence contrary to section 313 of the *Penal Code*, Cap 63 Laws of Kenya. He was sentenced to pay a fine of Kshs. 300,000 in default to serve two (2) years imprisonment. Being aggrieved he filed an appeal challenging his conviction and sentence.
2. In his appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He complained that the charge sheet was fatally defective. He contended that the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)
4. The prosecution called three (3) witnesses in support of its case during trial. Samson Olendo Owino, PW1, testified that he had a decade-long acquaintance with the appellant Douglas Githinji, through purchasing tires for his Matatu from the appellant's shop. In December 2014, the appellant proposed a



business venture involving supplying building materials contracted by his father. The appellant sought financial collaboration, promising to repay with profit. A joint business involving tire supply was also proposed. After consulting with his wife, Beatrice Kubasu PW 2, they agreed to enter into business with the appellant.

5. The appellant issued post-dated cheques, including six mentioned in court. When deposited, the cheques bounced due to insufficient funds or being stopped by the drawer. Despite a year of promises, the accused failed to repay, leading to a formal complaint. Upon cross-examination, PW1 confirmed the agreement was not documented in writing.
6. PW2, Beatrice Kubasu, testified that she was familiar with the appellant through a business relationship with her husband, Samson Olendo (PW1). On February 14, 2015, during a dinner, PW1 proposed two business ideas involving partnering with the appellant. The first proposal involved the appellant's contract to supply construction materials at a Ngara site, near Paramount Plaza, on behalf of his father. The second proposal focused on the supply of tires. They operated their joint business through account No. 2025131501 at ABSA (formerly Barclays), supported by a presented bank statement. Notable withdrawals from the account included Kshs. 400,000, Kshs. 170,000, and Kshs. 120,000 on January 9, 2015. Other transactions occurred on various dates, with amounts ranging from Kshs. 440,000 to Kshs. 280,000.
7. PW2 testified that they financed the business transferring a total of Kshs 5,700,000 to the appellant. They received post-dated cheques from the appellant, who promised to repay after supply. However, the cheques drawn by Crossforce Car Hire, owned by the appellant, were all dishonoured. Subsequently, the appellant started avoiding them. During cross-examination, she affirmed the appellant preferred cash transactions. That they would withdraw the money and give it to the appellant in cash. In re-examination, she stated that the cheques drawn by the appellant served as security.
8. PW3, Corporal John Ashika, the investigating officer, testified that the appellant, who was friends with the complainant, received Kshs. 2,240,000 for a tyre import business that never materialized. The appellant issued cheques as security to assure payment, but they were dishonoured for being stopped or due to insufficient funds. The investigator concluded that the appellant aimed to obtain money by false pretence. During cross-examination, he told the court that there was no written agreement, and they relied on a mutual understanding that the appellant would repay the complainant.
9. In his defence, the appellant gave sworn testimony. He told the court that PW1 was his friend and customer. They operated matatu businesses and engaged in a tyre supply venture from Sameer Africa to Uganda, Tanzania, and Juba. The appellant claimed to have provided extra containers on a mutual understanding, issuing post-dated cheques as security to ensure deliveries. When the promised tyres did not arrive, he discovered the cheques bounced due to insufficient funds. He told the court that he tried to inform the complainant not to bank the cheques but he was unresponsive. He also claimed that there was a breach of contract by the complainant. During cross-examination, he maintained that there was a good relationship and affirmed issuing the cheques based on container deliveries by PW1.
10. This court has re-evaluated the facts of this case. Section 313 of the *Penal Code* (Cap 63) Laws of Kenya provides 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.”



11. To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. Guilt must not only be a rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.
12. The key question that this court seeks to answer is whether or not the appellant offered any other explanation that could exonerate him from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. This calls for a close examination of the prosecution evidence and the defence offered by the accused.
13. Section 312 of the Penal Code[6] defines false pretence in the following terms:-

“ 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 ”
14. The operative word under Section 312 is "representation" which is applicable in the following circumstances:-

A representation by words, writing or conduct.

A representation in either past or present.

A representation that is false.

A representation made knowing it to be false or believed not to be true.
15. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intend 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.
16. 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.
17. 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 SC 41/2003 where the court stated as follows:-

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

that there is a pretence;

that the pretence emanated from the accused person;

that it was false;

that the accused person knew of its falsity or did not believe in its truth;

that there was an intention to defraud;



that the thing is capable of being stolen;

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 belief 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*."

18. The key question is, does the defence offered by the appellant in the lower court raise doubts as to his guilt? Does it rebut the above ingredients? Is it reasonable in the circumstances? In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt.
19. The explanation given by the appellant was in my view not reasonable nor did it rebut the clear evidence adduced by the prosecution. He claimed that he was also a victim of breach of contract by the complainant. In addition, that he attempted to inform him that the cheques drawn were likely to be dishonoured due to insufficient funds but he was unreachable. I find that highly improbable and difficult to believe given the overwhelming evidence against him.
20. After weighing the explanation offered by the appellant and the prosecution evidence, I find that the prosecution evidence is truthful, credible and probable as opposed to the highly improbable defence offered by the appellant. The appellants defence did not raise any reasonable doubts on the prosecution case.
21. Having considered the circumstances of this case, the prosecution evidence, and the defence offered by the appellant, I am persuaded that the conviction was justifiable. The explanation offered by the appellant in my view does not cast reasonable doubt on the prosecution case.
22. On sentence, the appellant was sentenced to pay a fine of Kshs. 300,000 in default to serve 2 years imprisonment. Section 28 (2) of the *Penal Code* provides that term of imprisonment in default of payment of fines, in the absence of express provisions in any written law relating thereto, cannot exceed 12 months imprisonment for any fine exceeding Kshs. 50,000/00. There are no express provisions in section 313 of the *Penal Code* under which the appellant was sentenced relating to terms of imprisonment in default of payment of a fine.
23. In the present case, the sentence of imprisonment awarded in default of payment of the fine imposed was unlawful. The default sentence could not lawfully exceed 12 months.
24. The upshot is that this appeal against the sentence is partially allowed. I hereby set aside the default sentence of two (2) years imprisonment and substitute it with a fine of Kshs. 300,000 in default to serve 12 months imprisonment.

It is so ordered.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF FEBRUARY 2024**

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**



Ms. Kamau h/b for Swaka for the Appellant

Mutuma for the Respondent

Nelson Court Assistant

