



**Ekoit v Republic (Criminal Appeal 60 of 2023)
[2024] KEHC 3835 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 60 OF 2023
DR KAVEDZA, J
APRIL 23, 2024**

BETWEEN

AMOS EKOIT APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against original conviction and sentence delivered by Hon. A. Gandani (C.M) on 26th November 2021 at Kibera Chief Magistrate’s Court, Criminal case no. 40 of 2014 Republic vs Amos Ekoit & 2 others)

JUDGMENT

1. The appellant with another not before this court was charged and convicted for the offence of obtaining goods by false pretence contrary to section 313 of the *Penal Code*, Cap 63 Laws of Kenya. Being aggrieved he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal dated 11th May 2022, he raised 16 grounds which have been coalized as follows: He challenged the totality of the prosecution’s evidence against which he was convicted. He argued that he was not accorded a fair hearing. He contended that the trial court failed to consider his defence. He urged the court to quash the conviction and set aside the sentence.
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 four (4) witnesses in support of their case. Margaret Atieno Odongo (PW1), a proprietor of a hardware shop in Ngong, testified that Erick (PW3) approached her on 9th December 2013 and had clients interested in purchasing building materials. Insisting on meeting them, PW1 met Mary Wamboi Njihia and Amos Ekoit, the appellant the next day. They intended to purchase building



- materials and added ceramic toilets. Mary, the 1st accused before the trial court and the appellant agreed to pay the Kshs. 810,000 bill after delivery, offering a post-dated cheque for Kshs. 660,000 and promising to pay the balance later.
5. After the goods were delivered and Mary confirmed receipt, she promised to deposit Kshs. 150,000 but failed to do so, citing bank issues. A cheque from Mary bounced, prompting PW1 to contact the police. Mary, unresponsive to police calls, was traced to Mombasa, where her cousin revealed Mary's instructions to ignore calls. Mary was found in Ongata Rongai but failed to fulfil her promise to pay. PW 1 Mary identified Mary as the 1st accused and Erick as the 2nd accused to whom the goods were delivered to. During delivery, Mary was present with two others. Despite assurances, Mary never paid, leading to her arrest.
 6. John Omondi (PW2), a casual worker at Nkatha Hardware, recounted an incident on 11th December 2013 when their boss assigned them to deliver twisted bars and other hardware items to a customer. Upon contacting the customer, they were directed to a residence where they met a light-skinned lady. They offloaded the goods as instructed, and the lady confirmed receipt. PW 2, identified the light-skinned lady as the first accused. Although several others were present in the compound and assisted with the offloading, he couldn't ascertain whether the appellant was among them.
 7. Erick Okiru Sambaya testified that on 9/12/13, the appellant summoned him to their home where he found him in the company of Mary. They asked him to facilitate an introduction to someone willing to supply hardware goods on credit. Together, they met Margaret (PW1), the owner of a hardware shop, and discussed the order, totaling approximately Kshs. 840,000. Mary promised a post-dated cheque due in a week and also offered Kshs. 150,000 in cash.
 8. The goods were collected by Mary and the appellant the next day, while others were delivered to the Erick's location who was present during both collection and delivery. Despite his attempts to contact Mary and the appellant afterward, they didn't respond, and he later discovered that the cheque had bounced. When he went to the appellant's house, he found they had moved. He identified the appellant and his accomplices in court. He also verified his presence when Mary handed the cheque to the PW1.
 9. Corporal Nahashon Mwamba, the investigating officer, provided testimony stating that the case was reported to the police on 25/3/14. The complainant submitted two pieces of evidence: A cheque for Kshs. 810,500, and the bounced cheque. He took witnesses statements and charged the accused persons before the trial court.
 10. After the close of the prosecution's case, the appellant and his accomplices were found to have a case to answer and were put on their respective defences.
 11. Mary Wamboi Njihia (DW1), testified that she knew Erick (PW3) as an electrician contracted for electrical jobs in properties she managed. She denied knowing Margaret (PW1) but acknowledged that Erick approached her to facilitate a private sale of hardware goods. She obtained permission from the Erick who was her relative to use his compound for storage. The goods were delivered there as the client was unavailable. She denied ordering the goods, issuing a cheque, or making cash payments to PW1, claiming her role was solely to pose as a customer on behalf of her client.
 12. Regarding the appellant, she stated they merely lived together and were not involved in the transaction. She expressed surprise at Erick's role as a prosecution witness and denied knowing the owners of the bounced cheque.
 13. Joseph Kinyua (DW2) testified that police officers informed him about building materials delivered to his home by DW1. He denied ordering them and mentioned being arrested after failing to reach her. He



- visited the police station as instructed, where he was charged. He confronted DW1 and she confirmed that indeed she could not reach her client and delivered the goods to his compound.
14. Amos Ekoit (DW3), the appellant herein and Mary's cohabitant, denied his involvement and claimed he was arrested due to his association with Mary. He recounted Mary's explanation about posing as a customer for Erick's private sale.
 15. 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.”
 16. The prosecution is required to establish that the appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud. In the present appeal, it was the prosecution's case that the appellant presented himself together with his accomplice that he was in a position to purchase building material from the complainant. The goods were valued at Kshs. 810,000. The appellant did not dispute the transaction and maintained that he was not involved but for his association with the alleged accomplice, DWI. It is therefore not in dispute that the building materials changed hands between the complainant and the appellant and his accomplice. The goods received was therefore something capable of being stolen. All in all, the appellant maintained that there was no fraud involved.
 17. 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.
 18. 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.
 19. 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”
 20. 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.



21. 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.
22. 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.
23. 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 v 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 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 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.
25. 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 his only guilt by association to DW1. He maintained that he was not involved in the transaction. However, the evidence of PW1 and PW3 incriminated him for the fraud. In addition, the evidence that he was present from the onset of the fraudulent transaction places him squarely and his culpability cannot be challenged. I find that the defence given was highly improbable and difficult to believe given the overwhelming evidence against him.
26. 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.

27. 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.
28. On sentence, the appellant was sentenced to serve 3 years imprisonment. From the provisions of the *Penal Code*, the maximum sentence that can be imposed is 3 years imprisonment.
29. Although sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive.
30. For the above reason, I hereby set aside the sentence of 3 years imprisonment and substitute it with a sentence of one (1) year imprisonment. The sentence shall take effect from the date of the appellant's conviction.

Orders accordingly.

Judgement dated and delivered virtually this 23rd day of April 2024

D. KAVEDZA

JUDGE

In the presence of:

Ms. Okello for the Appellant

Ms. Gladys for the Respondent

Nelson Court Assistant

