



Case Number:	Criminal Appeal 64 of 2017
Date Delivered:	29 Nov 2018
Case Class:	Criminal
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	Hedwig Imbosa Ong'udi
Citation:	Stephen Mwaniki Muriuki v Republic [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	W. Kagendo Chief Magistrat
County:	Nyeri
Docket Number:	-
History Docket Number:	Criminal Case No 53 of 2015
Case Outcome:	-
History County:	Nyeri
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 64 OF 2017**

**STEPHEN MWANIKI MURIUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising from conviction and sentence in Chief Magistrate's Court (Nyeri) in Criminal Case No 53 of 2015 by Hon W. Kagendo Chief Magistrate dated 15<sup>th</sup> August 2017.*

**JUDGMENT**

1. The Appellant herein **Stephen Mwaniki Muriuki** was the accused at the Chief Magistrates Court at Nyeri Criminal Case No. 53 of 2015. He was charged with Obtaining Money by False Pretences Contrary to Section 313 of the Penal Code. The particulars of the charge are that on diverse dates between 14<sup>th</sup> September 2014 and 28<sup>th</sup> November 2014 at Nyeri Township within Nyeri County jointly with others not before court with intent to defraud obtained a sum of Kshs. 3.1 million from Erastus Waweru Muchiri by falsely pretending that he was in a position to import a Toyota Prado 2007 model from Japan for the said Erastus Waweru Muchiri a fact he knew to be false.

2 He pleaded not guilty and a trial ensued. He was found guilty, convicted and sentenced to serve 3 years imprisonment. Being aggrieved he filed a Petition of Appeal dated 10<sup>th</sup> October 2017 through the firm of M/s Gori, Ombongi & Company Advocates citing the following grounds.

*(i) That the learned trial magistrate erred in law and in fact by convicting and sentencing the Appellant under Criminal law while there were other suitable channels to resolve the matter between the complainant and Appellant.*

*(ii) That the learned trial magistrate erred in law and in fact in failing to find that the relationship between the Complainant and the Appellant was purely contractual and as such cannot be dealt with under criminal law.*

*(iii) That the learned trial magistrate erred in law and in fact in failing to find that the Appellant was keen to perform the contract but the same was frustrated by exterior factors beyond his control.*

*(iv) That the learned trial magistrate erred in law and fact in failing to take into consideration the Appellant's evidence in arriving at her decision.*

*(v) That the learned trial magistrate erred in matter of law and fact by failing to take into consideration the mitigation of the Appellant.*

3 The evidence on record was as follows: PW1 the complainant herein Erastus Waweru Muchiri recalled that in March 2014 his niece one Muthoni Muchiri introduced him to the Appellant as the person who had sold to her a vehicle. He then inquired from the Appellant the price of a Prado and the Appellant told him it would cost about 3.2 million.

4 In May 2014, PW1 spoke to the Appellant and got to know that he was trading under the name and style of Autotech. He then visited his offices in Nyeri at Mwathithi house 2<sup>nd</sup> Floor, opposite Tetu Trading Company near Consolidated bank. He confirmed from the Appellant that the price of a Prado had not changed and the Appellant assured him that the moment he paid upfront, it would not take long before he got the vehicle.

5 On 15<sup>th</sup> September 2014, he paid through money transfer 2.5 million from Kenya Commercial Bank, University Way to Autotechs account at Co-operative Bank. After payment, he called the Appellant who in turn confirmed receipt(PEXB. 1) and emailed him. Appellant then told him to relax and wait for the car to arrive in Mombasa.

6 In early November 2014, he called the Appellant since he wanted to use the car for Christmas. The Appellant assured him that the car would arrive end of November 2014 and advised him to prepare the balance so as to hasten its processing and release at the port.

7 On 28<sup>th</sup> November 2014, he made another bank transfer of Kshs 600,000/- from his account in KCB to Autotechs Bank account at Co-operative Bank Branch Nyeri(PEXB. 2). At this point, he had developed a friendship with the Appellant and he even trusted him. Apparently the Appellant went to his home in Nairobi and assured him that he would deliver the vehicle there. By then he had already paid the Appellant a total of Kshs. 3.1 million.

8 Towards the end of the first week of December, 2014 the Appellant called him and told him that some ships had not been allocated bays and that the ship carrying his Prado would be allocated a dock the second week of December 2014. Towards the end of the second week of December 2014, the Appellant told him that the problem was now registration as there were so many vehicles. The Appellant assured him that he would travel to Mombasa personally and sort out the issue of number plates within 3 days.

9 During Christmas time, he was unable to reach the Appellant on phone but he managed to reach him, the Appellant informed him that he was in hospital and one Andrew Waweru was handling his matter in Mombasa. It was at this point that he sensed that something was amiss.

10 He called Waweru who assured him that all was well and that the Prado had been cleared and registered as KCB 494Q. He also gave him the other details as follows:-

- Make -Toyota Land Cruiser
- Body Type-Station Wagon
- Colour-Black
- Year-2007
- Engine Capacity-2700 cc
- Engine number-ZTR/057526
- Chassis number-TRJ1205087306.

11 He proceeded to arrange for insurance at Kshs. 160,000/= from APA and the car was registered in his names. APA Mombasa also confirmed that the car had been picked by Andrew Waweru and was awaiting delivery to him. He however failed to reach Waweru or the Appellant.

12 He got in touch with his niece Muthoni who managed to get hold of the Appellant and even got to see the Prado. He travelled to Nyeri with his wife at about 4:00p.m but he was unable to reach the Appellant through his phone or office line. He also missed him at his office which was locked. His niece Muthoni informed him that they had been conned and the Appellant had vanished. He immediately, went to Nyeri Police Station and made his report and recorded a statement.

13 He confirmed that he did not sign any agreement though the Appellant had only sent him an undated soft copy agreement(PEXB.3) on email. They had however, agreed through a sequence of emails(PEXB 4a) about the vehicle (PEXB4b)and the price which was Kshs. 3,370,000(PEXB.5) out of which he had already paid Kshs. 3.1 Million to the Appellant. He had been ready and willing to pay the balance. He confirmed that to date he had neither received the car nor the refund of the payment made.

14 PW2 **Gaston Maina** is a motor vehicle seller and Managing Director of Kenyatti Motor Vehicles with offices in Kerugoya, Sagana, Nairobi and Mombasa. He told the court that he had known the Appellant since 2013 after being introduced to him by the Chairman of Nyeri Golf Club. The Appellant told him that he sells motor vehicles.

15 On 30<sup>th</sup> December 2014, the Appellant had called him and inquired from him whether he had imported a black Prado. He informed him they had none in the yard but one was on the way. By that time, the vehicle was in Mombasa and they were clearing it at the port.

16 When the Prado finally arrived in Kerugoya, he informed the Appellant, who told him that he had a ready buyer who had deposited with him Kshs. 2,500,000/-. He therefore wanted the customer to see the vehicle. PW2 told him to sell the car for whatever price but he was to pay him Kshs. 3,200,000/- for it.

17 He sent the Appellant some photographs of the vehicle through Whatsapp. He confirmed that the Prado was registered as KCB 494Q though they did not have the log book. They only had an import declaration form(EXB.6) which gave the details of the Prado as one awaiting the log book which takes about a month or two to be ready. The particulars of the Prado were:-

- Make used-Toyota Land cruiser Prado
- Chassis No.- CRJI20-5104319
- Colour – Black
- Engine No. 2TR-0576226
- Year-2007
- CC-2690
- Imports -Nyati Motor Limited.

18 He confirmed that they had bought the Prado from Quality Traders Limited Japan. The Appellant had called him on Friday 9<sup>th</sup> January 2015 and he agreed to bring the car to Nyeri the following day. On 10<sup>th</sup> January 2015, he sent his sales man one James Waweru Munio on the agreement that once the Appellant saw the Prado, he was to deposit Kshs. 3.2 million and James would release the Prado to the Appellant.

19 Later, the Appellant called him and told him the vehicle had arrived and requested him to instruct the sales man to give him the keys and then proceed to the bank. However, after waiting until 5:00p.m, he told his driver to return to Kerugoya.

20 On Monday 12<sup>th</sup> January 2015, the Appellant called him and asked him whether he had the log book. When he told him that they were yet to receive the log book, the Appellant informed him that he would be pausing the deal until they got the log book from KRA.

21 On 15<sup>th</sup> January 2015, some officers from CID Nyeri came to the yard and requested to talk to him over the Prado. The officers took down his statement. At that time he still did not have the log book but the officers came with the copy of records (EXB.7) from KRA which showed that the owner of the vehicle was Kenyatti Motors.

22 PW5 is **Waweru Mumo** working for Kenyatti Motors. He confirmed that PW2 had called him and asked him to pick the Prado from Kerugoya and take it to Nyeri Town.

23 On arrival at Nyeri, he contacted the Appellant through his mobile number and they met at the National Oil Petrol Station Junction. The appellant then told him to follow him to his offices at Nawaidha house and instructed him to park the vehicle behind the office and wait for the purchasers.

24 In the course of waiting, the Appellant took the vehicle for a road test and even offered to give him Kshs. 2,000/= so that he could go back to Kerugoya. He however, remained firm on the fact that he had clear instructions from PW2 to only leave the Prado after a deposit of Kshs. 3,200,000 had been made.

25 Later, the Appellant told him that the purchaser wanted to see the vehicle at Nyeri Golf Club and PW2 authorised him to give the Appellant the key. He left and returned the vehicle at 1.00pm. At about 5:00p.m, he told the Appellant that he had to go back to Kerugoya and the latter released him promising to meet him on Monday.

26 PW4 **Chief Inspector Daniel Gutu** a forensic document examiner confirmed receiving documents from Sgt Diken Haben from DCIO Nyeri on 28<sup>th</sup> July 2015. They were accompanied by an exhibit memo and marked as follows:-

- A1- the invoice from Real Tech
- A2- Receipt
- A3- Application to open an account.
- A1-A3 MF1-6 AB&C
- B1-B5 specimen signatures of Stephen Muriuki Mwaniki - Appellant

27 There was a request for examination and he was to examine the signatures circled red on the questioned documents A1-A2 MFI-6, and confirm if they were made by the same person.

28 Upon examining them, he formed the opinion that the signatures were made by the same person i.e the Appellant as he had signed the questioned documents (A1-A3). His opinion was based on the following individual characteristics:-

- Signature initiation and terminal strokes
- Signature constructive and alignment
- Pen lift and natural variations
- Pen pressure and ink flow
- Signature spacing and line alignment.

He prepared the report (EXB.9) on 28<sup>th</sup> July 2015, signed it and stamped it.

29 PW5 **Muthoni Muchiri Ndungu** is PW1's niece. She gave similar evidence to that of PW1 whom she had introduced to the Appellant a Car dealer.

30 PW6 is **P.C Nikira Abel** the investigating officer in this case. On 10<sup>th</sup> January 2015 he was in the office when he received a complaint from PW1 in respect of money (Kshs 3.1 Million) which he had paid to the Appellant for importation of a Prado reg no KCD 494Q

31 He wrote to KRA -Registrar of Motor vehicles in a letter dated 14<sup>th</sup> January 2015 requesting for all particulars of the said vehicle. Later, he received the search results (PEXB.9A and B) dated 14<sup>th</sup> January 2015, which established that the Prado belonged to Kenyatti Motors .

32 Thereafter, he recorded statements from PW2 and Pw5. On the 15<sup>th</sup> of January 2015, he swore an affidavit and moved to court. Pw1 gave him the account details of the Appellant where he had deposited money into. Afterwards, he moved to court and obtained

an order to access the bank statement.

- The bank account number is 1148511484600,

- Account name was Real tech Auto Limited

- The directors of the company were

a) Stephen Mwaniki Muriuki ID No. 21375076

b) Tabitha Wangari Ng'ang'a ID No. 20041790

33 He also established from the bank records(PEXB 2) that Kshs. 2.5 million had been deposited on 15/9/2014 and Kshs.600,000/= on 28/11/14.

34 Later, he summoned the Appellant to his office and questioned him about the Kshs. 3.1 million. He then took the Appellant's specimen signature as he wanted to confirm that it was infact the Appellant who had signed the invoices.

35 He prepared a memo form and forwarded account opening documents(EXB 7abc & d)bearing the signature of the Appellant and specimen vouchers, invoices (PEXB 6a & b) given to him by Pw1 containing a signature from the Appellant circled in red and a copy of an agreement(PEXB.4) which had neither a date nor execution between the Appellant and Pw1 for the sale of a Toyota Landcruiser Prado at a consideration of Kshs 3.3 million.

36 He later got a report from Pw3 confirming that the signatures on the invoice belonged to the Appellant whom he decided to charge. He also stated that Kenyatti Motors gave him a copy of the report declaration form(PEXB.1) which contained the following:-

- Engine -2TR-0576526

- Model-2007

- TRJ1205104319

- Engine number TR-0576526- Model-2007

Lastly, he testified that PW1 did not get the vehicle nor his money back and neither was he shown anything confirming that the Prado belonged to the Appellant.

37 When placed on his defence, the Appellant chose to give sworn evidence with no witnesses to call. He testified that PW1 had been referred to their company by PW5 to source for a vehicle and he (PW1) deposited the required amount. That they communicated through email and phone, and he explained to him the difficulties they had in delivering the vehicle and the alternatives they had made. When the alternative did not work he was summoned by the police.

38 It was his evidence that there were still ongoing discussions on how to settle the matter. He further stated that his company Real Tech has been importing vehicles since 2010 and they had 3 new vehicles in the high seas. He produced a letter from Sidian Bank (DEXB1), delivery note to Kenyatti Motors(DEXB.2), letter from Co-operative Bank (DEXB.3)showing their transactions for that month, a copy of tax compliant certificate from KRA(DEXB.4), business licence (PEXB.5), document showing Real Tech is still in business(DEXB.6), document showing Real Tech have logs for vehicles DEXB.7), email discussions with PW1(DEXB.8).

39 He confirmed that he has not refunded any part of the Kshs.3.1 million given to him by PW1 but was quick to add that the charges against him were affecting the finances of his company.

40 When the Appeal came for hearing, Mr. Gori counsel for the Appellant submitted that there was a contract for sale, money was deposited and the Appellant had a genuine business. Furthermore that there was a default clause in the contract which ought to have been resorted to instead of the criminal charges. Counsel further submitted that the Appellant informed the trial court of this from the word go and argued that the court cannot rewrite a contract and neither can it be a debt collector.

41 On grounds 3, 4 & 5 counsel submitted that the Appellant's defence was clear that he needed time to perform his part of the contract and that he was still ready to pay. Counsel submitted that the prosecution had been served with an agreement but the same was ignored by the trial court. He thus prayed that the conviction be quashed and the sentence set aside.

42 Mr. Njue for the State opposed the Appeal and submitted that in as much as there was a contract between the Appellant and Pw1, the Appellant had an intention of defrauding Pw1 hence the prosecution. He relied on section 193A of the CPC and submitted that even if an issue is subject to civil proceedings, it can be criminal if there is a criminal nature in it and the two proceedings can run concurrently.

43 He submitted that all along the Appellant kept on cheating PW1 and asking for more money. To him, the only issue is whether the charge was proper as the Appellant was charged with obtaining Kshs.3.1 Million by false pretences.

44 He argued that at first, the undertaking was in the future but later the Appellant made current undertakings e.g by saying he had imported the vehicle which was not true. That he asked for Kshs. 600,000, an insurance payment; he lied that the motor vehicle was in Nyeri and that the motor vehicle seen by PW5 was genuine. Counsel thus submitted that the Appellant just wanted to con PW1.

45 On the contention that the Appellant intended to pay, counsel submitted that this was never the intention as he was given the opportunity but he never delivered the vehicle nor refunded the money. To him being given time to pay did not amount to concession.

46 Mr. Gori for the Appellant in a rejoinder contended that section 193A CPC is not applicable here as the proposal they gave was after the conviction. Further that he had no time to make arrangements to pay as the Appellant was in prison while PW1 is not willing to take another car.

47 This is a first Appeal and this Court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. See **Okeno v Republic E.A. 32, Kariuki Karanja v Republic [1986] KLR 190, Kiilu & Anor v Republic (2005) 1KLR 174.**

48 I have considered the evidence on record, the grounds of appeal, the submissions by counsel and the cited authorities. Having done so I find the issues falling for determination to be as follows:

(i) *What are the essential elements of an offence of obtaining money through false pretences.*

(ii) *Whether a charge of obtaining money through false pretences has been proved beyond any reasonable doubt.*

(iii) *Whether PW1's claim was Civil or Criminal in nature and whether it was proper for PW1 to invoke the criminal justice system in pursuance of their claim.*

(iv) *Whether appellant's defence was considered*

**Issue no (i) & (ii)**

**What are the essential elements of an offence of obtaining money through false pretences & Whether a charge of obtaining money through false pretences has been proved beyond any reasonable doubt.**

49 The appellant faced one count of obtaining money by *false pretences* under **Section 313 of the Penal Code** which 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.”*

50 It is evident from the above Section that the essential elements of the offence of obtaining by false pretences can be summed up as follows:-

*(a) Obtaining something capable of being stolen.*

*(b) Obtaining the thing through a false pretence.*

*(c) Obtaining the thing with intention to defraud.*

51 Before proceeding to deal with each of the essential elements of obtaining by false pretences it is important to state what the Penal Code defines “false pretence” to be. Under **Section 312 of the Penal Code** “*false pretence*” is defined 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.”*

52 The operative word under the said section is “representation.” which is applicable in the following circumstances:

*(a) 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 not believed to be true.*

53 From the above definitions it is clear that the offence of obtaining by false pretences does not relate to future events. This section provides that the representation should be of either a past or present fact but not a future fact. In the case of **Oware V. Republic (1984) KLR 2001** the Court of Appeal sitting at Nairobi addressed itself thus:-

*“A representation as to a future event cannot support a charge of obtaining money by false pretences.*

*In the above mentioned the case of **R. V. Dent (1955) 2. Q.B. PP 594/5** was referred to and in which case Devlin, J. stated;*

*“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.”*

54. In the instant case PW1, & PW5 have explained to the court what the Appellant has taken the latter through in respect to the issue of this vehicle. There is no instruction given by the Appellant that PW1 did not comply with. In spite of such compliance he has not received the vehicle he was buying nor a refund of the money paid. The appellant would even avoid his calls at times. He even showed PW5 a vehicle he was well aware he had not bought for PW1.

55 The Appellant does not deny receiving money for the purchase of a Prado motor vehicle for PW1. PW4 an employee of PW2 of Kenyatti Motors was instructed by the latter to drive a Prado motor vehicle to Nyeri for the Appellant to see and purchase. The said Prado fitted what PW1 wanted but for reasons best known to the Appellant he did not buy it.

56 The facts of this case reveal that the Appellant indeed received money from PW1, but he had no clear intention of delivering the vehicle to him. It has been shown that the Appellant made a lot of misrepresentation to PW1 which made him try to clear the balance and pay for insurance for the nonexistent motor vehicle. All along the Appellant knew he was lying to PW1.



57 The Appellant therefore made a false representation of the fact that he was able to or was going to import a vehicle for the Appellant. The totality of evidence shows he was paid (PEXB 2, 6a&b). He did not deliver the vehicle that was to be purchased. There has been no reasonable explanation given for the Appellant's conduct in this matter.

**Issue no (iii)**

**Whether PW1's claim was Civil or Criminal in nature and whether it was proper for PW1 to invoke the criminal justice system in pursuance of their claim**

58 The evidence on record shows that the transaction between the Appellant and PW1 was initially a civil one. However, the 'criminal' aspect of it is actually deduced from the conduct of the Appellant. There is no doubt that there was a consensus between the Appellant and PW1 that the former would import a Toyota Prado for him. PW1 acting in good faith and fulfilling part of the agreement deposited money in the Appellant's account. However, the Appellant even after receiving Kshs.2.5M which I must say is a colossal sum misrepresented to PW1 the fact that the vehicle was still in the 'high seas' yet he had not even made an attempt to import any vehicle. He received a further Kshs600,000/- under the pretext that the vehicle had now arrived.

59 The truth of the matter is that the Appellant only made an attempt to inquire about the Prado from PW2 in December 2014 yet he had received the deposit in September 2014! Even after Pw2 confirmed to him that he had a Prado for sale, the Appellant misrepresented to PW5 the Prado belonging to PW2 as the one he had imported. He even informed PW1 to pick the Prado as he cleared his balance. Furthermore, he refused to pay PW2 any amount of money and PW2 took back his vehicle. Thereafter the Appellant switched off his phone. The conduct of the Appellant left PW1 with no choice but to report the matter to the police.

**Issue no (iv)**

**Whether appellant's defence was considered**

60 I note that even after the Appellant was convicted, the trial court gave him about one month for him to organize himself to compensate PW1 before sentence. He did not do anything in that direction and was sentenced. There is no dispute as to the fact that the Appellant still owes PW1 money. He has however given the court the impression that he is and has always been willing to refund the money he received from PW1. PW1 would be glad to receive his money back.

61 From the above it is my considered view that indeed the matter between PW1 and the appellant was initially civil but turned out to be criminal. I hereby find that the trial court was right in convicting him of the offence of obtaining by false pretences. I confirm the conviction.

62 It is in sentencing that I will consider the sentiments expressed by the Appellant in his willingness to refund the money. If he is placed behind bars the complainant may never see his money.

63 Section 175 CPC provides

**(1) A court which**

**(a) on convicting a person of an offence, imposes a fine, or a sentence of which a fine forms part; or**

**(b) on appeal, revision or otherwise, confirms such a sentence, may, when passing judgment, order the whole or any part of the fine recovered to be applied in defraying expenses properly incurred in the prosecution of the offence**

**(2) A court which—**

**(a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and**

**(b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil**

liability to the complainant or another person (in either case referred to in this section as the “injured party”), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned

(6) An order under this section that has taken effect is enforceable in the same manner as a judgment in civil proceedings for the amount awarded by the order.

(7) An award by order under this section in respect of a civil liability is, to the extent of the amount awarded, a defence in any subsequent proceedings instituted in respect of that liability.

64 Based on the circumstances of the case I find this to be a case where section 175 CPC is applicable.

65 In conclusion I find that the Appeal partially succeeds and I issue the following orders:

(i) Appeal against conviction is dismissed.

(ii) Appeal against sentence is allowed and sentence set aside. The same is substituted with a fine of Kshs. 100,000 in default six(6) months from the date of conviction. Any days the Appellant served before being released on bond pending appeal to be taken into account when computing the fine due.

(iii) In addition to the fine the Appellant shall pay PW1 Erastus Waweru Muchiri the sum of Kshs. 3.5 Million within the next **90** days of today’s date. In default of payment PW1 shall enforce this order as a judgment in civil proceedings.

Orders accordingly.

**Signed, dated and delivered this 29<sup>th</sup> day of November 2018 in open Court in Nyeri.**

**HEDWIG I. ONG’UDI**

**JUDGE**



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