



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 110 OF 2019

(From original conviction and sentence in Mumias SPM’s Criminal No. 1171 of 2017,

Hon. Cheruto C. Kipkorir, Senior Resident Magistrate, on 21st June, 2019)

MAKEYA ELPHAS.....1ST APPELLANT

LYDIA MUKOLI.....2ND APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The appellants are husband and wife, and were charged in Mumias PMCCRC No. 1171 of 2017 (consolidated with Mumias PMCCRC No. 1194 of 2017), on one count of obtaining credit by false pretences, contrary to section 316 (a) of the Penal Code, Cap 63, Laws of Kenya; and three counts of issuing bad cheques, contrary to section 316(1)(a)(4) of the Penal Code. The particulars for the first count were that on divers dates between 9th October 2015 and 19th November 2015, within Kakamega County, in accruing a debt to Gladys Otiso, had obtained credit from her to a tune of Kshs. 1,028,000.00, by falsely pretending that they had a contract with the County Government of Kakamega, worth Kshs. 27,000,000.00, a fact which they knew was false. The bad cheques counts were in respect of three cheques, issued on divers dates, with the knowledge that the accounts for which they were drawn did not have sufficient funds.

2. They denied the charges and a trial was conducted, where 4 witnesses testified. PW1 was the complainant, Gladys Otiso. She testified that she and the 2nd appellant became friends, whereupon the 2nd appellant informed her that she and the 1st appellant had a contract with the County Government of Kakamega, and needed money, ostensibly to execute it, and she lent them a total of Kshs. 1,075,000.00. She was given postdated cheques, which she did not deposit with the drawee bank as she was advised that the accounts against which the cheques were drawn did not have funds. She was paid a total of Kshs. 30,180.00 only, via MPesa. When the appellants stopped receiving her calls, she reported the matter to the police. PW2, No. 73368 Corporal Martin Kitai, was a document examiner. He examined the money lending agreement and cheques leaves to confirm whether the signatures on them were signed by the appellants, and he did confirm that they had been signed by them. PW3, James Mokuu, was an officer from the bank, where the accounts on which the cheques were drawn were maintained. He confirmed that the accounts belonged to the business of the 1st appellant, and that the bank accounts did not hold funds sufficient to settle the cheques in question. PW4, No. 52177 Inspector Rashid Juma, was the investigating officer.

3. After hearing the testimonies, the court found that the appellants had a case to answer, and put them on their defence. Both gave sworn statements. DW1, the 1st appellant, conceded that he held contracts with the County Government of Kakamega and had executed money lending agreements with the complainant, but insisted that the money lending agreements were not founded on the other contracts. He conceded to using the cheques, which were postdated, as he did not have the money when he issued the cheques. DW2, the 2nd appellant, conceded to signing the agreement and the cheques, and receiving the money, but said PW1 dealt with the 1st appellant, and that she did not see them exchange the money.

4. At the end of the defence hearing, the trial court convicted the appellant of the count of obtaining credit by false pretences, and one count of signing a bad cheque. They were sentenced to each pay a sum of Kshs. 100,000.00 and in default to serve one-year imprisonment on the count of obtaining credit by false pretences, but not on the second count for reasons that shall become clear later in this judgment.

5. Both were aggrieved, hence the instant appeal, vide the petition of appeal filed herein on 15th October 2019, of even date. They aver that their defence was not considered, that the court did not consider the element of *mens rea*, that no evidence was adduced to show that the false pretences were on a promise based on the contract with the County Government of Kakamega, that the moneylending contracts had nothing to do with the contract with the County Government of Kakamega, that their mitigation was not considered, and that criminality was not

established.

6. The parties agreed, on 6th May 2021, to canvass the appeal by way of written submissions. Both sides did file written submissions.

7. In the written submissions, the appellants accuse PW1 of failing to present the cheques to the bank for six months, and, therefore, rendering the same invalid, submitting that the cheques could only be pronounced bad upon being presented to the bank. The appellants have submitted only on this one issue, and I wonder whether they have abandoned the other grounds of appeal.

8. The respondent has submitted at length on the fact that the appellants had also approached the court through revision, in proceedings that have not been disclosed, and the court pronounced that the charge and conviction on the bad cheques was bad, but directed that the trial court to sentence them with respect to the charge on false pretences. It is submitted that mounting a revision and an appeal is abuse of the court process. There are also submissions that the appellants had *mens rea*, to the extent that they were aware of what they were doing, and had no intention of meeting their end of the bargain. It is further submitted that the trial court had exhaustively considered the defences by the appellants, as can be seen from paragraph 16 of the judgment. It is further submitted that the offence of obtaining by false pretences was proved, as the credit facility was obtained on the basis that the appellant had a contract with the County Government of Kakamega.

9. A copy of the ruling in the revision matter, being Kakamega HCCRREV. No. 13 of 2019 (consolidated with Kakamega HCCRREV. No. 14 of 2019) is in the original trial records in Mumias PMCCRC No. 1171 of 2017 (consolidated with Mumias PMCCRC No. 1194 of 2017). The revision cause was filed after the conviction, but before sentence was pronounced, largely dwelling on issues about the relation between the orders made by the trial court, which the appellants felt touched on a pending civil suit on the same facts, being Mumias SPMCCC No. 77 of 2018. The only complaint of relevance to the instant proceedings is that the counts on bad cheques were bad to the extent that the said cheques were never presented to the bank. In the end, the court agreed with the appellants that the charge on the bad cheques was bad, for section 316(1)(a) of the Penal Code did not apply with respect to a postdated cheque, and declared that the conviction on the count relating to the bad cheque was illegal, and set it aside, and discharged the appellants with respect to it. The court, on revision, declined to deal with the count relating to obtaining credit by false pretences, and allowed the trial court to proceed to sentence on that count.

10. The appeal herein, therefore, should relate only to the account on obtaining credit by false pretences, the appellants having been discharged of the offence in the second count, in Kakamega HCCRREV. No. 13 of 2019 (consolidated with Kakamega HCCRREV. No. 14 of 2019). I wonder why the appellants based their appeal on both counts despite the orders in Kakamega HCCRREV. No. 13 of 2019 (consolidated with Kakamega HCCRREV. No. 14 of 2019), and I would understand why the respondent is raising issues about the appeal herein being an abuse of process, at least with respect to the aspect on bad cheques. I also wonder why the appellants should have submitted exclusively on the issue of the bad cheques, when that issue is now water under the bridge, in view of Kakamega HCCRREV. No. 13 of 2019 (consolidated with Kakamega HCCRREV. No. 14 of 2019).

11. Anyhow, I shall proceed to look at the grounds of the appeal that are specific to the first count.

12. The first ground is that the trial court did not consider their defence. On the count relating to obtaining credit by false pretences, there was not much of a defence. The 1st appellant said the money lending contract was based on the contracts with County Government of Kakamega, and marked documents to be produced as proof of such contracts, but he later said that there was no relationship between the money lending contracts and the contract with the County Government. At paragraph 13 of the judgment the trial court addressed the testimony of the 1st appellant on this, and analyzed it, before concluding that the appellants used the alleged contract with the County Government to obtain credit, when they knew that they had no such contract. It cannot, therefore, be argued that the court did not consider the testimony by the appellants on that score. The 2nd appellant did not say a word about the said contract, saying that PW1 dealt exclusively with the 1st appellant. She did not even admit to the fact that it was her, the 2nd appellant, who brought PW1 and the 1st appellant together.

13. Further, the trial court recited the sworn testimonies of the 1st and 2nd appellants at paragraphs 8 and 9 of the judgment. Even if the trial court were not to analyze that evidence, fortunately it did, the very fact that the same was narrated would suffice as proof that it was considered, for it would be safe to presume that the trial court had that testimony in mind as it was making its final determination.

14. The second ground is that the *mens rea* elements of the offence were not considered. I have gone through the judgment carefully, and noted that the trial court did not specifically mention *mens rea* anywhere in it. However, the mere fact that the same is not mentioned is not proof that the court did not take into account the mental element for the offence.

15. With regard to the count on obtaining by false pretences, I note that the trial court analyzed the evidence tendered, after setting out the provisions, defining the offence, and went on, at paragraph 13, to find that there was false pretence as the appellants had no intention of repaying the money. The court noted as follows: “*I make this finding as the false pretence would be that they knew they did not have the contract and they used that as a means to obtain credit they had no intention of repaying.*” “Knowledge” and “intention” are elements of *mens rea*. It cannot then be argued that the trial court did not look for the *mens rea* elements for the first count.

16. Grounds 3 and 4 are related. The argument is that there was no evidence that the false pretence was founded on the contract with the County Government of Kakamega. PW1 told the trial court that she had been told that the appellants had a contract with the County Government and they needed money, and the 2nd appellant sought her help. PW1 did not produce any document, and she did not say whether she was given any evidence of such contract. When the 1st appellant took to the witness stand, he confirmed to the court that he indeed had such a contract with the County Government of Kakamega, and that the money lending agreement was based on the said contract, and he placed before the court documents, that were marked for production, as evidence of the contract. However, he later on went on to say that the said contracts were not the basis upon which he was seeking credit. The record shows that he was to call a public works officer from the County Government of Kakamega, but that did not materialize, as he closed his case without calling the said officer. He is recorded as saying:

“I work as a contractor ...It is true. I did have a contract I have a copy of the contract. I had at Kakamega County. It was an agreement that was based on the contract.”

17. The material above, in my view establishes a link between the two. The question is how did PW1 know of the contract between the appellants and the County Government of Kakamega, if the appellants did not raise it with her. The 1st appellant does not appear to have been close to her, and it was the 2nd appellant who has her friend, yet the 2nd appellant testified that PW1 dealt exclusively with 1st appellant, never mind that the two were strangers to each other. PW1 could only have known about that contract from the appellants, and the fact that it does not feature in the money lending agreement does not mean that it was not a basis for that agreement.

18. Overall, I am not persuaded that there is sufficient material upon which I can interfere with the conviction and sentence. I find that the appeal has no merit, and I hereby dismiss the same. The conviction is affirmed and the sentence confirmed. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF MARCH, 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Namatsi, instructed by Namatsi & Co. Advocates, for the appellant.

Ms. Omondi and Mr. Mwangi, instructed by the Director of Public Prosecutions.