



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 3 OF 2020

ABDUBA BORU WAKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction by Hon. E.Ngigi PM

in Isiolo Cr. No.125 of 2017 on 8/1/2020)

JUDGMENT

1. **Abduba Boru Wako (“the appellant”)** was charged with obtaining property by false pretences contrary to section 313 of the Penal Code. The particulars of the offense were given to be that, on 12/09/2016 at Isiolo Township in Isiolo County within Eastern Region, with intent to defraud, he obtained from Halkano Tari Ali and Dida Halake Galma 23 heads of cattle valued at Ksh.620,000 by falsely pretending that he would pay the said Halkano Tari Ali and Dida Halake Galma.

2. The appellant denied the charges and the trial ensued where the prosecution paraded 6 witnesses in support of its case while the appellant gave an unsworn statement and called one witness in support thereof. In the judgment now appealed against, the trial court determined that the case had been proved beyond reasonable doubt, convicted the appellant as charged and sentenced him to serve one year imprisonment without an option of a fine. It is that decision the appellant now seeks to be upset in this appeal.

Summary of the evidence

3. **PW1, Dida Halake Galma, the complainant,** testified that he was in the business of selling cows with Halkano Tari Ali. That they buy the cows in Moyale and sell in Isiolo and Karatina. On the material day, he bought cows and was taking them to Karatina. On the way from Moyale to Isiolo, the appellant, who had a butchery in Isiolo town close to Morning Star, was called. The appellant wanted to buy 22 heads of cows which he and his colleague Halkano agreed to sell. They agreed to sell one cow at Ksh.28,182 totalling to Ksh.620,000. Since it was at night, they agreed that the appellant would deposit the money at Equity Bank. They then offloaded the cows and in the morning handed them over to the appellant, who in turn agreed to deposit the money at the bank. They left but later realized that the appellant had not deposited the money at the bank. On 5/12/2016, they called elders including Galma Mohamed, Guyo Galgalo and Galgalo Wako to arbitrate out the issue. He was also present during the meeting which was attended by many people. They signed an agreement dated 5/12/2016 where the appellant undertook to pay by 20/12/2016. When the appellant did not pay as agreed, they went and reported to Abdi Dida, the chief Central Isiolo. The appellant was given more time to pay but he still did not and the chief advised them to report the matter to the police station. The appellant then pledged to pay by 28/2/2017 but he still did not and he was then arrested and charged. He knew the appellant prior to this incident because they had sold him cows before. Since they had transacted and knew each other before, they did not do a written agreement at the time of the sale. The various times they met with the appellant at the chief’s office, they executed agreements to that effect.

4. During cross examination, he stated that he was one of the complainants and owners of the subject cows who went to the police station and reported the matter with his colleague on 28/2/2016 and recorded their statements. He said that was claiming his money from the appellant and that he did not give the appellant the animals as a debt because the agreement was that the appellant would deposit the money but failed to do so. He admitted having sued the appellant in a civil case over the same monies and that he was entitled to pursue both cases to their conclusion. The 22 cows belonged to him and his business colleague and were offloaded at a boma of Abdi Kuche and that the whole month of December 2016, they were just going before the elders trying to settle the dispute without any success.

5. During re-examination, he stated that he had sold cows for more than 8 years to many people and it was only the appellant they had an issue with adding that he did not know how to read and write and the officer did not read to them what he had written down. He then reiterated that the appellant had acknowledged the debt in the agreement dated 5/12/2016, where he undertook to pay Ksh.620,000 on or before the 20/12/2016.

6. **PW2 Halkano Tari Ali**, the other complainant, stated that he was in the business of selling cows around Moyale and Karatina with PW1 and that on the material day, they purchased 22 cows from Moyale and on their way to Karatina, at Isiolo, they met the appellant to whom they agreed to sell the 22 cows each at Ksh.28,132 totalling to Ksh.620,000. Since it was at night, they went to sleep and in the morning, they handed over the cows to the appellant and the appellant promised to deposit the money on the same day which he did not. They came back to Isiolo to ask the appellant about the money and the appellant promised to deposit the money but he still did not. They then decided to involve the elders who included Guyo Galgalo and Mohammed Wako Boru. They sat down at Morning Star and they executed an agreement dated 5/12/2016 where the appellant agreed to pay the money by 20/12/2016 but once again he did not pay thus prompting the complainants to report the matter to Chief Abdi Dida of Isiolo Centre. The chief tried to resolve the dispute to no avail and the same was escalated to the police. They had known the appellant before the incident and they never had a dispute.

7. During cross examination, he stated that they handed the cows to the appellant on 13/9/2016 in the morning without a written agreement but Galma Mohamed and Guyo Galgalo witnessed the handing over. Upon buying the cows and taking possession the appellant sold them so that the complainants could not take them back which the witness contend to have been a design to take the goods by falsely pretending he would pay him, but he never did. During re-examination, he reiterated that he knew the appellant although he had not done any business with him before and that, ordinarily, they do not sign agreement in the course of business, since they are normally paid beforehand. The officer who recorded the report did not read it out to them.

8. **PW3, Galma Mohammed Ibrahim**, testified that he knew the appellant whom he worked with in stock business the same way he knew PW1 and PW2 as he also worked with them in the same business. He recalled that on the material day in the evening, PW1 and PW2 sold their cows to the appellant, the cows were left slept the night at the cow shed till the following day when the appellant came and took them away on the understanding that he had bought from PW1 and PW2. The cows were bought at an aggregate price of Kshs 620,000 which the appellant was supposed to pay on 13th, but he did not pay a fact that necessitated the 2 complainants to report to the elders who summoned the appellant and told him to pay the money. On 5/12/2016, the complainants, the appellant and the elders entered into an agreement where the appellant agreed to pay on 20/12/2016. They subsequently reported the matter to the chief and the appellant promised to pay but he still failed. He asserted having not had any dispute with the appellant before.

9. During cross examination, he stated that he recorded his statement at Isiolo police station, that he was present when the appellant, whom he had known for a long time, bought and took the cows and when the appellant promised to pay but on 20th he failed.

10. During re-examination, he stated that the 22 cows were bought by the appellant from PW1 and PW2 and that in the course of the business of buying and selling cows, they deal as a family and do not write agreements.

11. **PW4 Abdi Dida**, the chief central, recalled on 15/2/2017, the complainants complained to him that they had sold 22 cows to the appellant who had refused to pay them even after the matter arbitrated with the elders. He summoned the appellant, whom he knew as a resident of town, to his office and informed him of the complaint where the complainants were claiming Kshs 620,000 and that the appellant admitted that he had bought the cows and only sought for time to enable him pay the money. He said that parties met on three different occasions and in every sitting, the appellant kept on promising to pay without keeping such promises. He added that on one occasion, the appellant offered to pay with his own cows which the complainants did agree to and that he was the author of the document dated 15/2/2017 produced and marked PEx2. He did not have any past dispute with the appellant.

12. On cross examination, the witness stated the appellant had been accused before him by PW1 and that it is PW2 who was indicated as the complainant who was claiming Ksh.620,000 from the appellant. That PW2 did not mention where the money was to be paid and that if the debt had been paid, they could not have gone to his office and that throughout his interaction with the dispute the appellant did not deny the debt, only sought for time to pay, was given such time but he kept on breaking his promise.

13. Upon re-examination, he stated that the complainants were claiming Ksh. 620,000 from the appellant for supply of cows.

14. **PW5 Guyo Galgalo**, a businessman selling cows, stated that on the material day, PW2 came to complain about the appellant and alleged that the appellant had not paid him. He and PW3 asked the appellant and he admitted the complaint and promised to pay. After one week, the complainant back, alleging that he had not been paid hence on 5th December 2016, they sat down as elders and the appellant undertook to pay the money by the 20th of the same month. When they called the appellant on 20th and the complainant confirmed he still had not been paid, they forwarded the issue to the chief who then summoned the 2 in their presence but the appellant still declined to pay. The chief then forwarded the case to the police.

15. On being cross examined, the witness stated that he had known the appellant for more than 20 years and he was like his brother but was not present when the sale was conducted. He then reiterated during re-examination that the appellant had undertaken, in his presence, to pay the Kshs 620,000.

16. **PW6, Sergeant Eli Gituma** from Isiolo police station and the investigating officer, testified that on 27/2/2017, the complainant reported how the appellant had obtained 20 herds of cattle from him by false pretence and that on 28/2/2017, the appellant accompanied by elders was brought to the station and was rearrested by PC John Batista Wanjiku. He was however released on cash bail by OCS Kiptoo on condition that he would honour the agreement to pay the money. On 28/3/2017, when the appellant dishonoured the agreement made at the OCS's office, he recorded the statements and charged the appellant with the offence. The complainants had attempted to settle the matter out of court since the appellant was their customer and that the Kshs 620,000 for 22 cows had not been paid by the time the charge was preferred.

17. During cross examination, the witness stated that there were a transaction for selling cattle and the appellant promised to deposit the money the following day but did not even after making promises to pay before the elders evidenced by 3 agreements recorded. That was the debt mentioned in the OB which the appellant had agreed in all documents to pay. He confirmed that wrote the statement of PW5 who signed in his presence and that he only knew of Kshs 620,000 and not about the additional amount of Kshs 80,000.

18. During re-examination, he stated that the report was made that the appellant obtained the cows on false pretenses that he would pay, failed to pay and did not deny having taken the cows.

19. In his defence, after being put on his defense, **DW1, Abduba Boru Wako**, stated in his unsworn statement that he was a butcher operating Gamoji butchery and also sold cows. He admitted knowing both complainants since birth but denied ever doing any business of buying and selling cows with them and that on the material day, and even the day after, he did not meet the complainants anywhere and thus they did not sell to him any cows. He admitted that elders and the chief called him only on one occasion as they wanted to take away his butchery business then added that he met with the chief on three occasions in the presence of the complainants at which meetings, there were people who were claiming his butchery and others wanted money. After that, he was evicted from the hotel and butchery. On February 2017, at a meeting with the chief, the people wanted to take away his butchery and also his land with one Godana Abduba, who was in the meeting, swearing that he would spoil his name and banish him from Isiolo. He was subsequently arrested and taken to Isiolo police station but did not sign any document while he was at the chief's meeting and he did not give out his identity card or number. He said that the chief wanted him to pay some costs which he declined adding that although he was arrested by ATPU offices in Isiolo as evidenced by letter dated 26/2/2017 and produced as D Ex 1, that issue was not related to the issue of cows. He denied receipt of 22 cows from the complainant and asserted having been framed up because before he ventured into this business, he had been employed by PW5, who had become jealous of his success.

20. **DW2, P.C Fredrick Ouma**, a police officer attached to ATPU, Isiolo, testified that he had issued the appellant with a notice to compel attendance for investigation purposes and produced the document as DExh.1. He was investigating the appellant for an offence of facilitation of terrorism activities and smuggling of arms and ammunitions during which the appellant told them about the criminal case since they did not recover anything from the appellant, they discharged him.

21. During cross examination, he stated that he summoned the appellant on the issues of terrorism, and not the issue of obtaining money by false pretenses. During re-examination, he stated that the appellant is alleged from the charge sheet to have obtained 22 herds of cattle on 12/9/2016.

22. In a reserved judgment by the trial court, the appellant was convicted and sentenced to 1 year imprisonment. He was dissatisfied with the conviction and sentence, and lodged this appeal setting out 9 grounds of appeal, which I have collapsed into five as follows: -

- a) The trial court erred by giving the appellant, who is an elderly and sickly citizen, a harsh sentence despite the fact that the prosecution's case was marred with material inconsistencies.
- b) The trial court misdirected itself in finding that the appellant and the complainants made 2 written agreements for payment of Kshs 620,000, yet the appellant never signed any of the purported agreements to prove that the complainants sold him any cattle.
- c) The trial court erred by failing to analyse and consider the defence case while writing its judgement, despite the fact that the complainants had a motive to frame the appellant.
- d) The trial court erred by shifting the burden of proof to the appellant whereas the same is always on the part of the respondent, thereby convicting him against the weight of the evidence.
- e) The trial court erred by disregarding the appellant's mitigation that he was remorseful, the sole bread winner of a large family and a first offender who deserved a non-custodial sentence.

The task and submissions offered.

23. In determining this appeal, the court being a first appellate court is duty bound to re-appraise, review and re-evaluate the evidence afresh with a view of drawing its own independent conclusions and findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See **Odhiambo v R (2008) KLR 565.**

24. The appeal was directed to be canvassed by way of submissions, which were respectively filed on 27/10/2021 and 19/5/2021. In the filed submissions, the appellant alluded to various inconsistencies in PW1 and PW2's (the complainants) testimonies with regard to the date of the alleged transaction and the cost of each cow. He submitted that there was neither a written agreement for the purported sale nor a witness thereof and further that Pex.1 and Pex.2 had no evidentiary significance since they were drawn and signed by illiterate parties. He faulted the trial court for disregarding his testimony that the complainants were jealous of him, given that they were business rivals who dealt in trading of cattle. He faulted the trial court for failing to appreciate that the burden of proof is always on the prosecution, and the standard of proof in criminal cases is always beyond reasonable doubt and cited **Waithi Muniyoki v R(2018)eKLR, Re Winship 397 US 358(1970) at pages 361-364, R v Lifchus(1997)3 SCR 320, JOO v R(2015)eKLR and Elizabeth Waithiengi Gatimu v R(2015)eKLR** to support that position. He faulted the trial court for sentencing him to 1 year imprisonment without considering his mitigation and the fact that he was an elderly and sickly citizen, the sole bread winner of a large family thus deserving a non-custodial sentence. He beseeched the court to set aside his conviction or in the alternative give him a non-custodial sentence, so that he can get medication for his deteriorating health and fend for his large family.

25. For the respondent, submissions were offered to the effect that Section 193A of the Criminal Procedure Code allows the concurrent litigation of civil and criminal proceedings arising from the same issues. It cited **Annis Muhidin Nur v R High Court Criminal Appeal No. 98 of 2001(UR)** on the significance of imposing a fine first where the law provides for a fine in default for a prison term. It submitted that the section under which the appellant was charged did not fall under the aforesaid decision, as it did not provide for an option of fine and therefore the trial court lawfully exercised its discretion taking into account the value of the subject matter and mitigation. It submitted that the appellant's defence was a mere denial as his explanation was unreasonable and did not rebut the evidence adduced by the prosecution. It concluded that it had proved all the ingredients of the offence beyond reasonable doubt and prayed for the dismissal of the appeal.

Analysis and determination

26. Whether or not the prosecution's case was riddled with inconsistencies; if the defence evidence was given due regard; whether the documents produced had any probative value and the incidence of and burden of proof all boil down to whether the prosecution proved its case beyond reasonable doubt. I will thus resolve the appeal on two prongs; whether the case was proved to the requisite standards and if the sentence was too harsh and excessive.

27. The evidence led by the prosecution witnesses showed that the appellant was well known to PW1, PW2, PW3, PW4 and PW5 prior to the incident and therefore there could not have be a margin of error or the possibility of mistaken identity. PW1 and PW2 narrated how the appellant had agreed to deposit in their favour the sum of Kshs 620,000 at Equity Bank in exchange for the 22 heads of cows he had bought from them. The failure by the appellant to honour that agreement prompted them to report to the elders then to the chief, PW4, and subsequently to the police. The meetings before the elders and the chief were mediatory and must be seen in the light of alternative dispute resolution the constitution dictates as deserving promotion. In those meetings, those who were present and offered to give evidence at trial, were firm that the appellant never denied owing the debt but rather sought for time to pay but when given such time he repeatedly failed to pay.

28. Other than PW1 &2, PW3 affirmed in evidence in chief and even during cross examination that he was present when the appellant took the cows and that the report of non-payment of the money was made to the elders who summoned the appellant and asked him to pay and that he did not deny the debt at all only sought to be given time to pay. PW4 narrated how he had unsuccessfully tried to arbitrate the issue before advising the complainants to report the same to the police after the appellant failed to honour his promises to pay. PW5 stated during re-examination that, the appellant had undertaken to pay Kshs 620,000 but never made good the promise. Even after arrest followed by an agreement to pay as confirmed by PW6, the investigating officer, the appellant dishonouring the agreement made at the OCS's office to pay.

29. The appellant in his unsworn evidence in defence merely denying buying cows from the complainants or seeing them on the material day. He however admitted that he knew both complainants then alleged that he was framed by PW5, who was his former employer who had become jealous for his success in business. The testimony of DW2 was wholly unrelated to the issue at hand, and therefore of no probative value.

30. Having anxiously analyzed the evidence led, I find that the prosecution proved its case beyond reasonable doubt. It follows that the conviction of the appellant was safe and warranted. I find that the defense evidence did not controvert the otherwise cogent and consistent evidence by the prosecution witnesses. There was no evidence of bad blood or grudge as to propel all the witnesses, including clan elders and the area chief, to conspire to fix the appellant. Even the allegation of jealousy by a former employer was made halfheartedly and largely as an afterthought with very little weight towards credibility.

31. On the harshness or otherwise of the sentence imposed upon the appellant, I draw guidance from **Bernard Kimani Gacheru v Republic [2002] eKLR** where the court of Appeal held: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

32. From the evidence and judgment of the court, the appellant obtained 22 heads of cattle valued at Kshs 620,000 from the complainants which I find to be an enormous sum of money. For a sentence to meet the goal of discouraging crime, it must be commensurate with the injury occasioned to the victim of crime. Here, I find that the sentence meted out to the appellant was most lenient, noting that the maximum sentence is up to three years imprisonment, and deserve no interference by the court in the circumstances. It is however worth noting that, such would be the appropriate cases for the trial court to order restitution under section 178 of the Criminal Procedure Code.

33. Consequently, I find that this appeal is without merit and it is therefore dismissed.

DATED SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF APRIL 2022

PATRICK J.O OTIENO

JUDGE

IN PRESENCE OF

MR. KITHEKA FOR THE APPELLANT

MR MAINA FOR THE RESPONDENT

PATRICK J.O OTIENO

JUDGE