Makonjiro v Republic (D.P.P) (Criminal Appeal E041 of 2021)
[2022] KEHC 11680 (KLR) (27 June 2022) (Judgment)

Neutral citation: [2022] KEHC 11680 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E041 OF 2021

PJO OTIENO, J

JUNE 27, 2022

BETWEEN

QUELICLINE MAKONJIRO ..... APPELLANT

AND

REPUBLIC (D.P.P) ..... RESPONDENT

JUDGMENT

1. The appellant was charged before the trial court with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. He denied the charge, and a trial ensued at the end of which he was convicted as charged and sentenced to pay a fine of Kshs. 100,000 and in default serve a jail term of twelve (12) months.

2. He was aggrieved and filed the current appeal by which he set out six (6) grounds of appeal all summing up the challenge on the conviction to have been based upon wrong standard of proof, shifting of the burden, taking into account inadmissible evidence as well as treating the evidence, particularly that of the appellant superficially and failing to give regard to the mitigation offered.

3. I read the grounds of appeal to fault the trial court for having convicted the appellant on insufficient evidence and for ignoring the mitigation offer. Such appreciation leads to the discernment that the appeal can be determined by seeking the answer to whether the prosecution did meet its obligation of proving the case against the appellant beyond reasonable doubt with the other issue being whether or not the mitigation was ever given the due regard.

4. Having asked parties to file and exchange submissions and they having complied with the directions, I have duly perused the submissions filed in line with the authorities cited to court and the industry by counsel is appreciated.

5. The submissions by the appellant take the view that the evidence of giving the money was insufficient because PW3 who said he witnessed the payment of Kshs. 80,000/= did not see PW2 who alleged to

have counted the money on the two occasions. The submissions is to the effect that the evidence was riddled with contradictions as disclosed by the evidence of PW2 and 3 including the allusion by the PW3 that the complainant had written a document over the transaction which document was never referred to by PW1 and 2. It was added that the finding that it was an afterthought to bring in Hillary Akhoya in the defence, was erroneous as the name cropped up very early in the prosecution's case.

6. For the respondent it was submitted that the elements of obtaining by false pretence were duly proved to the standards expected in criminal trials and that there was sufficient evidence that the appellant was paid money by the complainant on the promise that she would supply the complainant with maize. The decision in Johanes Metiko –Vs- Republic was cited for the proposition that a trial court is under an obligation to weigh the totality of evidence before coming to the conclusion of culpability or otherwise of the Accused provided always that the prosecution's duty to prove the case beyond reasonable doubt never ceases.

7. I have carried out the duty and mandate of a first appellate court and in my review of the evidence there was concurrence that some Kshs. 70,000 was received by the appellant from the complainant. The point of departure was whether that money was on account of a loan or for purchase of maize.

8. There was conflict of evidence, whether the appellant received a total of Kshs. 150,000/= from the complainant on account of sale of maize. It was important for a charge of obtaining by false pretence to establish, beyond reasonable doubt, that the appellant actually received the sum and that it was on account of purchase of maize.

9. For the prosecution, PW1 said that she was with PW2 when he gave Kshs. 70,000/= and with PW3 when he gave Kshs. 80,000/=. PW3 adverted to an agreement which was signed by PW1 but the complainant denied ever recording the transaction on the basis that she trusted the appellant being a neighbour's daughter she had known for five years.

10. PW2 said she counted the money on both occasions while PW1 was consistent that she was only with the PW2 when she gave Kshs. 80,000/= and with PW3 when she gave. The effect is that PW2 was not there on the second occasion Kshs. 70,000/= was paid. I make that conclusion because I do not consider it credible that PW2 would remember what the complainant and PW3 could not remember. I find that to be an inconsistency that raises a reasonable doubt as to whether the three witnesses were saying the truth. In *Richard Munene –vs- Republic* [2018] eKLR, the Court of Appeal held concerning contradictions in prosecution's evidence:-

> " Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

11. The doubt become more real and reasonable when the Accused defence is taken into account. The evidence by Appellant and her witness PW2 was to the effect that the matter was referred to the area Chief, DW2, for resolution and parties negotiated and reduced their agreement into writing. That the

parties met and agreed is confirmed by the complainant herself when she said in cross-examination that:-

> " Hillary Ambonya was brought to me by accused herself .....
>
> There was a time we had a case at the Chief. I saw Hillary when accused brought him to me."

12. That conceded meeting was recorded by the Chief and the document produced as D.Exh.1. In the document, D.Exh.1 the complainant, the appellant and one Hillary Akhonya all allude to a loaning agreement with interest payable. In the document, the complainant confirms that both appellant and the said Hillary Akhonya were her friends. There is no allusion to transaction over maize. In fact even the sum claimed by the complainant was Kshs. 186,000/= being Kshs. 150,000/= advance and interest of Kshs. 36,000/=. That tallies with the evidence put forth by the defence that the money was advance to Hillary Akhonya through the appellant and the money would attract interest. The question a court ought to have addressed is whether such an agreement was enforceable and if enforceable, against who between Hillary Akhonya and the Appellant. Of course that evidence negates the element of payment on promise to deliver maize.

13. One of the grounds of appeal is that the defence was never given the due regard. If true, it is an outright case to interfere with the decision arrived at. A valid ground to so interfere because Section 169 *Criminal Procedure Code* obligates the court to isolate points for determination, the decision thereon and the reasons for such determination.

14. I notice that in identifying the issues for determination, the all important question whether there was an agreement between the complainant and the Appellant, and its terms was never captured. That was an error that could have blurred the court's vision in considering the determination whether there was in fact no agreement or promise to sell maize but indeed a loaning agreement with obligation to pay interest.

15. Moreover, the defence having advanced defence supported by an agreement executed by a third party, an administrator before whom Kenyans go on routine basis to have disputes resolved, the court was duly bound to succinctly consider that evidence and give reasons in rejecting it.

16. Here the trial court having not isolated the gist of the defence as an issue did treat that evidence in the following manner:-

> " It is not in doubt that money did exchange hands between the complainant and the accused. The quagmire is that accused has denied one way or the other. In her evidence she alludes having returned the money back but there is no evidence of even returning the Kshs. 24,000/= which she said her mother was her surety. Again she mentions one Hillary who is only known to her and completely puts all blame to this anonymous person.
>
> Yet PW2 and PW3 are key prosecution witnesses who witnessed both cash transaction being given to accused.
>
> Ironically DW2 affirms that money issues between accused and another.
>
> This only lead to one confirmed issue that accused did take money from complainant either way a fact that she denies and in evidence alludes returning back. The court finds that prosecution have proved their case beyond reasonable doubt and court finds accused guilty of the offence herein and convicts her accordingly."

17. In my opinion, there was clear evidence by way of a document to demonstrate that the complainant was lending money at a cost being interest. The flip side is that the documentary evidence wholly controverted the inconsistent evidence of an agreement to sell and deliver maize.

18. I make the conclusion that the complainant was well aware of the legal prohibition to the transaction of money lending at the cost of interest hence the change of the nature of transaction to sale of maize. It is of note that while the parties were before the Chief on 17.7.2018, the charge came to court about nine months later and totally concealed to court what she had told the Chief. That was a considerable departure that the trial court ought to have taken note of but it did not. In so failing, it failed to critically analyse the evidence presented to it and thus fell short of its obligation under Section 169 of *Criminal Procedure Code*.

19. More importantly, the trial court wholly failed to comment on the document produced by the defence without protestation from the prosecution and to which no meaningful challenge was mounted by way of cross examination. I consider the cross-examination to have done more of confirming the evidence than impugning it.

20. I find that the trial court treatment of the evidence by the defence was perfunctory and rather casual. He failed to give any reason for failing to consider and believe the evidence that the transaction between the parties was one by which the appellant was lent money in consideration that she repays same with interest.

21. The nature of evidence by the appellant was such that it ought to have created a doubt in the mind of the court that there could have been no agreement for sale of maize. I have said that in proceeding the way it did, the court erred. In exercising jurisdiction of the court as on first appeal, I do find that there was reasonable doubt created by the appellant's evidence for which reason the conviction cannot stand but must be quashed.

22. I do quash the conviction, set aside the sentence and order that the appellant if in prison be released forthwith unless otherwise lawfully held. If however, she paid the fines let the fine be refunded to her forthwith.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF JUNE 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Momanyi Manyoni for the Appellant

Ms. Chala for the Respondent/ODPP

Court Assistant: Kulubi