



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 28 OF 2018
IDD ETYANG.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from judgment delivered on 9th April 2018 by Hon. E.K. Makori Chief Magistrate in Mombasa Chief Magistrate's Court Criminal Case No. 2310 of 2011).

J U D G M E N T

1. Idd Etyang the Appellant herein was jointly charged with the offence of conspiracy to defraud contrary to Section 317 of the penal code jointly with 4 others in Count I.
2. The particulars to Count I were that Solomon Karuri Thuo, Patrick Angaine, Salim Omar, Abdalla Abdullrahim and Idd Etyang on the 19th day of July 2011 at Mombasa Municipality in Mombasa District within Coast Province, jointly with others not before the court conspired by deceit to defraud Evans Njoroge Njuguna of cash Kshs.4.25m by falsely pretending that they had a tipper lorry make Mercedes that was genuine and valid for sale.
3. In the 2nd Count Idd Etyang was jointly charged with the offence of obtaining by false pretenses contrary to Section 313 of the penal code. The particulars to Count II were that the appellant and his co-accused persons on the 19th day of July 2011 at Mombasa Municipality in Mombasa District within Coast Province jointly with others already in court and with intent to defraud or deceive, obtained Kshs.4,250,000/= from Evans Njoroge Njuguna by falsely pretending that they were in a position to sell to him a Tipper Motor Vehicle Chassis No. WBD 9536432K837185 a fact they knew to be false.
4. Upon the trial Magistrate considering the evidence of the 4 prosecution witnesses and the defence by the Appellant and his co-accused, Accused 2 and Accused 5(the Appellant) herein were found guilty and convicted for the offence of conspiracy to defraud the complainant and fined Kshs.1,000,000/= each in default to serve 12 months imprisonment.
5. The 5th Accused Appellant herein was aggrieved by the conviction and sentence and he filed amended petition of appeal on 16/9/2019 on the following grounds:-
 - i. That the learned Magistrate erred in fact and in law in failing to note that the Appellant was guilty of the charges before court.
 - ii. That the learned Magistrate erred in fact and in law in failing to note that the charge sheet before court was defective and proceeded to convict and sentence the Appellant based on defective charge sheet.
 - iii. That the learned Magistrate erred in fact and in law in failing to note that the main witnesses testified in the absence of the Appellant thus prejudicing the Appellant's case.
 - iv. That the learned Magistrate erred in fact and law in arriving at a conviction when no single exhibit against the Appellant or any other party had been produced before court in evidence.
 - v. That the learned Magistrate erred in fact and law in arriving at a conviction despite the overwhelming contradictory evidence by the prosecution witnesses.
 - vi. That the learned Magistrate erred in fact and in law in failing to note that the state had not established the nexus and/or conspiracy

between the Appellant and his co-accused if any.

vii. That the learned Magistrate erred in fact and in law in relying on the evidence of the appellant's accusers without the input of the investigating officer who refused to testify.

viii. That the learned Magistrate erred in fact and in law in failing to note that no identification parade had been conducted for the Appellant or no identification report had been produced in evidence.

ix. That the learned Magistrate erred in fact and in law in failing to consider the testimony and submissions by the Appellant.

x. That the learned Magistrate erred in fact and in law in failing to give reasons for his conviction of the Appellant.

6. The Appellant proposed that his appeal be allowed, conviction quashed and sentence set aside.

7. According to the Complainant when he was led by 2nd Accused to go and buy a truck at the 5th yard and it is also 2nd Accused who told him to pay in cash. Initially the money was supposed to be deposited in the Appellants Bank Account at Equity Bank and deposit forms were duly filled but A2 told the Complainant that he had received a call in which the owner of the lorry told him that he needed cash and that the money should not be transferred to an account. The transaction was called off until the following day on 19th July 2011 when the Complainant met with A2 and together with A1, the complainants wife and driver went to the bank where he withdraw Kshs.4,300,000/= and gave Kshs.4,250,000/= to the Manager who was in-company of the Appellant herein.

8. That the said Manager and Appellant herein then left to go and bank the money as the complainant together with his wife driver and A2 went to the office along Moi Avenue to write an agreement. That they met the 7th Accused person who told them to wait for him as he went to hospital but never came back. That when he called the Manager and he sounded inaudible he decided to go back to the yard where he had seen the truck he wanted to buy and it was not there and the door was closed.

9. That he realized he had been conned and he send for a panga to kill 2nd Accused but the driver told him the shops were already closed. That 2nd Accused called A1 who came and said that the lorry may have been taken for service. That A1 and 2nd Accused suggested that they go to police station and when they got to Urban Police the 2 introduced him to an officer known as Wanjohi in DCIO's office and Accused 1 and Accused 2 were placed in cells. That another officer accompanied him to where they found Accused 8 and they also went back to the yard where they found the lorry had been returned.

10. That he went to PCIO's office and reported and when he went back to Nairobi he wrote a letter to the commissioner of police that on 26th July 2013 he received a call from Commissioner of Police and he was told to report to DCIO's office Mombasa and subsequently he went upto Mtwaapa with police and Faki Mwinyi was arrested.

11. In cross examination PW 2 said that he met A1 near Coast bus area and that together with 2nd Accused he accompanied them to all the 5 yards. He said that he didn't talk to A1 as he didn't know him and A1 didn't give quotation for the price of truck the Complainant wanted. PW 1 said he was only following the 2nd Accused. He said that the 1st Accused followed transfer form at the instance of Rajab-formerly the 8th Accused and Faki Mwingi – formerly A4.

12. He said he trusted 2nd Accused - Patrick Angaine – and that is why he accepted to pay case. He said it is the 2nd Accused who led him to paper torn. PW 1 said that the 1st Accused suggested that they go to the 5th yard where they found it was locked but same people came from inside and one of them was introduced as the manager. He said he never met the person indicated in the customs documents as the owner of the motor vehicle-one Juma Said Mustafa.

13. He said that Rajab Faki Mwinyi and Idd Etyang took the money at the bank. He also said sale agreement was never signed as A7 – Salim Omar – (A3 currently) said he was going to hospital. When the complainant testified Idd Etyang the appellant herein and Rajab the ones he alleged he gave money were not in court. He said he didn't check to see who was the owner of the yard near Mombasa polytechnic.

14. He also said that Idd Etyang the appellant herein was not named in the import documents and he didn't check the name of the importer. He said A7 was introduced as the Manager of the yard. He said A8 didn't accompany him to the bank. He said he gave the money to Rajab A7 and Iddi (formerly A6) and Accused 5 in the current lower court file. PW 1 said that A7 – Rajab told him he was going to hospital 1st before he could come and write the agreement.

15. PW 2 said that A7 gave her husband – PW 1 the documents for the vehicle to be sold. She said A7 told PW 1 to give money to the person who was said to be the manager who was called Rajab. That she was in the banking hall with their driver Njuguna, A2 Angaine and one Karuri while PW 1 went into the Managers office with Rajab and when they came from the Managers office Rajab had 2 envelopes which he gave one to someone who had been waiting and they went away after Rajab instructed them to go and wait at the office.

16. That A1 went after Rajab and the 2nd person. That when they went to the office they found it was locked. That they wanted and whenever PW 1 called they were told to continue waiting but eventually the people who took the money switched off their phones. That when PW 1 realized he had been coned they took tuktuk to go to the yard and the lorry was not there. That they met A1 near the yard and together with A2 they went to the police station to report the A1 and Accused 2 were put in the cells.

17. On 27/4/2012, they received a phone call that a suspect had been arrested and together with PW 1 they travelled to Mombasa to attend identification parade but they were not able to identify any member of the parade. She said the withdrawal slip was shown to her by PW 1.

18. In cross examination, she said that PW 1 operated account on his own. She said it is Rajab who vehemently opposed payment of purchase price by telegraphic transfer as their money would be held by the bank if it goes through the account. She said A2 assumed them he knew the people they were dealing with and that he should just pay cash. She said it is A1 who advised they go to police station. She said A8 Abdalla Abdullahim was the last to join them and that he banged the door to the yard and it was opened and that he started the lorry.

19. She said A7 didn't accompany them to the showrooms/yard and didn't accompany them to go and start the lorry. She said she didn't know names of A7 and A8. She said it was Rajab-light skinned and another blackman who actually went with the money. She said police called them to identify the blackman who went with the money in company of Rajab. She said that it was not true that A4, A5 and A6 promised to pay their money and cases against them were withdrawn. PW 2 said that PW 1 sued 3 plaintiffs in a Civil Suit to recover his money.

20. When A5 – Idd Etyang attended court on 15th April 2014, the proceedings taken in his absence were read to him and he was invited to cross examine PW 1 and PW 2. PW 1 told A5 the Appellant herein that he was present when the deal for payment was made and he was present in the bank and he gave out his account for the money to be deposited and that the appellant - A5 was with Rajab when he gave them the cash after Rajab received a call that made them not to deposit the cash in the account.

22. He said that he gave money to Rajab who in turn gave the money to A5 the Appellant herein and that was the last time he saw him. He said he was seeing him again in court. He said that after about 2 or 3 days of the incident he met A5 at Coast Bus. He said A5 was not in the parade where he was called to identify suspects. He said A5 was present when deposit slip was filled for deposit of purchase price into his account.

23. PW 2 also said she saw A5 when they went to see the lorry and at the bank. She said A5 was given money at the bank. She said A5 carried one envelop while his accomplice carried the 2nd envelop. She said she had been with A5 since 9.00am but she didn't see him at the identification parade. She said A1 helped PW 1 fill terms because he was illiterate.

24. PW 3 Jane Kaviti Nzioka said she was dealing with sale of motor vehicles from Japan and Singapore and her company was known as Coast Sales Auto Dealers. She said that on 18/7/2011 she was working at Kilindini Auto Dealers where she was a Director. She said that the other Directors were Joshua Musembi and Eddy Etyang – A5. She said she was incharge of salesmen while A5 dealt with documents. She said on the material day Rajab Faki who was known to her came in company of A2 and another Rajab to their office.

25. That Rajab Faki asked if she had an account with Equity Bank and she told him that she didn't have but Eddy had one. That she gave Rajab Faki the Appellant account number as he wanted to deposit clients' money for purposes of clearing a vehicle. That when she called the Appellant and told him about it he said that if money is deposited in his account, it would not be paid as he had an outstanding loan which the bank would deduct. She said the 4 men were with Karuri- A1 who was a broker. That the men left and later she was arrested by police from her office and she learnt Rajab Faki conned PW 1 of some money.

26. She said she was charged for colluding with Rajab to steal from PW 1. She said while in custody she met A4 who was working at a yard where she had also worked previously before she moved to Kilindini Auto Dealers. She said she also met A3 who also worked in another yard where she worked with A4. She said she had not met A2 before 8/7/2011.

27. In cross examination she said that A1 was with 4 other men when she saw him at Kilindini Auto Dealers but he was not talking. She said the 1st Accused was a broker and that A2 stood with Rajab Faki at the entrance of the yard and she assumed he was Rajab's client. She said she didn't see A3 and A4 on 18/7/2011. She said she was told Rajab used their office to steal. She said she didn't know where Rajab was as he was not in court.

28. She said A5 declined to have his account used and that she didn't know where the 5 men went to after leaving their premises. She said their company had no connections to Saba Star. She said none of their directors was involved in the sale of a lorry to PW 1. She said Rajab Faki left with A1, A 2, PW 1 and another Rajab. She said A5 didn't come to the office on the material day and that when she spoke to him on phone he said he was sick. She said that there was no sale agreement involving their company.

29. PW 4 testified that A3 and A4 were his employees and that on 18/7/2011 A4 asked for the key to his yard at Tudor to go and show a client a lorry that was parked there and he came in company of Rajab Faki and another person. That he waited for the customers to come the next day but they didn't come instead police officers came and arrested A3 and A4. He said that documents for the tipper were in custody of A3 who gave copies to one Mustafa and later to Rajab Kaki.

30. He said A1 was a broker and A5 his fellow car dealer. He said he didn't see Accused 1 on 18/7/2011 and had never had any adverse report about him. He said A2 never went to his showroom. He said it is Accused 4 who told him that A2 and the buyer were driven to the yard by a tuk tuk. He said he authorized Abdalla – A4 to go and open yard for clients to see the tipper and he gave out the key. He said it is Rajab who came out of the Noah vehicle. He said A3 was at work and that nobody mentioned him. He said PW 1 was taken to his office by a boy who works at PW 3's office. He said he didn't know the name of that boy and he was not in court.

31. PW 4 testified on 14/1/2015 and upto 24/8/2017 when the prosecution was unable to secure the attendance of the investigating officer the court ordered their case to be closed and A2, A3, A4 and A5 (Appellant) placed on their defence. A2 testified that he was not involved in the fraud as PW 1 looked for brokers and when he went to make payments they entered the bank manager's office. A3 – Salim Omar gave sworn statement and said that Rajab went to their Car Bazaar Yard and wanted a lorry and he referred him to his brother Abdalla.

32. That Rajab came back and wanted KRA documentations to know if the car was properly imported and he never came back. He said he was not involved in the fraud and he was never paid any money. He said he was working at Saba Star Bazaar with Abdalla and a customer called Rajab came and not Njoroge. He said he didn't know A2. He also said he never saw Karuri – A1.

33. A4 – Abdalla Abdullahim Salia testified that Salim told him there was a customer who wanted to check the vehicles. He said it is Rajab who raised Salim. He said that there was another person in the vehicle that took them to Tudor where the said vehicle was parked.

33. He said there were about 9 to 10 people who wanted to view the vehicle. He said after the vehicle was viewed he was given 100/= to go back to Kizingo. He said he was not at the bank when Kshs.4 million was given. He said he saw somebody with his wife among the people who came to view the lorry. He said PW 1 went to Tudor in a tuktuk and he was with his wife. He said his role was to take customers to the yard to view the vehicle as he had no authority to sell.

34. A5 Iddi Etyang (the Appellant) testified that he used to own a showroom called Kilindini Auto Dealers. He said that on 19/7/2011 at 4.00pm after he went to see the doctor a police officer called Wanjohi from Urban Police called him. He went to the station and found an old man and a lady and the old man said he had given Iddi Etyang money. That the old man said it was not him he had given the money. However he was remanded as it was alleged the old man was confused after being conned of Kshs.4,250,000/=. He said that he met A1, A2, A3 and A4 at the police station and PW 1 said that he dealt with Karuri and one Faki.

35. That he told them Rajab was a clearing agent. That he was released on cashbail and told to trace Rajab. That he traced Rajab and he was arrested while he continued reporting. He said he never participated in the fraud and no money was deposited in his account because he had declined. He said that when ID parade was done in September 2013 he was in the parade and PW 1 never picked him as the one who took his money and he was still charged.

36. This appeal was canvassed by way of written submissions. The Appellant submitted that the prosecution did not prove that the transaction alleged by the Complainant took place as exhibits supporting the transaction were not produced. It was also submitted that the evidence against the appellant was the Complainants word against the Appellants word.

37. It was further argued that there was no proof that the appellants account was used on that he received any money. The appellant contended that failure to produce exhibits that had been marked meant that the prosecution's case had not been proved beyond all reasonable doubt.

38. The Appellant also argued that grave miscarriage of justice was occasioned when PW 1 and PW 2 testified in his absence and he was only allowed to cross examine them and as such he didn't have a chance to examine their demeanor and prepare for cross examination.

39. It was further submitted that the witnesses did not point out the appellant during examination in chief. He said the witnesses did not have prior knowledge of him and it was a total disregard to his rights when he was brought to court and asked to cross examine witnesses who testified in his absence.

40. The appellant further submitted that he was in an identification parade where PW 1 & PW 2 were to identify a black short man who went with the money but he was not identified as that man. That the results of the identification parade were also not produced in court and yet they were in favour of the appellant.

41. On the charge of conspiracy the appellant submitted that there was no evidence linking him to the alleged conspiracy between him and the co-accused persons. He argued that the complainants having failed to identify even among the other suspects it was wrong to link him to the offence merely because it was alleged that he was at the bank when money was withdrawn and that he went away with one envelop. As earlier submitted the appellant argued that the blackman who went with the envelope in company of Rajab was not identified at the parade.

42. The Respondents in their submissions opposed the appeal and argued that flowing from the principles annunciated in the cases of Christopher Wafula Makokha – **CR. Appeal No. 92 of 2010 [2014] eKLR** and **Moses Kathiari Rukunga vs Republic [2018] eKLR** the evidence on record shows that the appellant was present at the yard when the Complainant went to view the motor vehicle. That he was at the bank where the money was paid and he indeed took custody of one envelope that had the money. Thus his role was not peripheral but took active steps with others to hack and actuate the plan to defraud the Complainant. It was therefore contended that there was ample evidence to warrant the conviction and sentence of the appellant.

43. While relying on the holding in **Sigilani vs Republic [2014] 2 KLR** the Respondent argued that the law governing charge sheets is that an accused person should be charged with an offence known in law. **Mombasa CR. Appeal No. 121 of 2017 – Talal Omar vs Republic** was also relied upon to argue that the charge against the appellant was not defective and that the charge was clear and particulars well spelt out. It was also argued that the issue of defect was never raised at trial. That the appellant participated in the trial and defended himself well aware of the charge he was facing and the ground that charge was defective is without merit.

44. On the issue that main witnesses testified in the absence of the appellant, it was submitted that the appellant exercised his right to have PW 1 & PW 2 recalled for purposes of cross examination and it was erroneous to claim that Key witness testified in his absence.

45. On the issue of contradiction of the prosecution evidence it was submitted by the Respondent that no specific contradiction was pointed out and that ground should fail. It was submitted and holdings in **Joseph Maina Mwangi vs Republic CR. Appl. No. 73 of 1993, Kimeu vs Republic (2002) 1 KAR 757** and **Willis Ochieng Odero vs Republic [2006] eKLR** and **John Nyaga Njuki & 4 Others vs Republic CR. Appeal No. 160 of 2000** relied on to the effect that the critical question is always whether the discrepancies are minor and in consequential or whether they are material so as vitiate the prosecution case.

46. On failure to call the investigating officer, it was submitted that Section 143 of the Evidence Act provides that there is no particular number of witnesses who shall be required for the proof of any fact. It was argued that the investigating officer would only come to repeat the evidence of the other witnesses in the matter and that it had not been shown that the appellant suffered by failure to call the investigating officer.

47. The Respondent urged that the appeal be dismissed as it is devoid of any merit. Having perused the Record of Appeal, the grounds of appeal and the submissions by the appellant and Respondent herein and having considered the same it is the finding of this court that there was no sufficient evidence to find the appellant guilty.

48. PW 3 said she was at the office when Rajab Faki a clearing agent went with a customer to their office together with A1 and A2. That Rajab Faki asked if she had an account with Equity Bank and she told him it is Iddi Ebu who had an account. That Rajab Faki asked her to give him the account number and she gave him a deposit slip that had already been filled with the Appellant's account number. PW 3 said when she informed the Appellant about it he cautioned that if any money was put into his account it would not be paid as he had an outstanding loan with the bank.

49. PW 3 said she was director of Kilindini Auto Dealers together with the Appellant and one Joshua Musembi and that they were not involved in the sale of truck from Saba Star Bazaar to the Complainant. According to PW 3 Rajab Faki went to their company with A1, A2, PW 1 and another Rajab. She said the Appellant didn't go to the office that day. The deposit slip with the Appellants account number was not used to deposit any money for the sale of a truck.

50. A3 and A4 who were at the yard where the truck was to be brought didn't say if they saw the appellant with Rajab Faki, A1 & A2 together with the Complainant and his wife. PW 1 & PW 2 said that the appellant was together with the person whom they gave the purchase price but when an identification parade was conducted where the appellant was one of the members of the parade they were not able to identify him.

51. PW 1 said that he gave the purchase price to Rajab Faki in the bank manager's office and the said Rajab Faki gave one of the 2 envelopes containing money to a black short guy who was in his company and they left the bank to go and bank the money in a Meru bank if they knew the appellant as Iddi Etyang it is questionable why they described him as a short black man, could it be that the deposit slip with the appellants name made them to assume that the person who was with Rajab Faki was the appellant?

52. PW 3 having absolved the appellant of any involvement and PW 1 and PW 2 having failed to identify the appellant in the parade as one of the 2 people they gave money for the purchase of the truck the court should have found that there was no sufficient evidence to warrant the appellant being convicted since the charge herein was based on the identification of the culprits by the complainant.

53. It is the new of this court that the failure of the investigating officers and the identification parade officer to attend and testify was fatal to the prosecution's case because the documents that were identified were not produced and the claim that account number and appellants names were in a certain deposit slip cannot be verified.

54. PW 1 said it is the appellant who gave him the account number and that the same was filed by A1 in the deposit slip while they were at the bank and on the other hand PW 3 another prosecution witness 1 said he gave out a deposit slip with the appellants account number. This is material contradiction that affects the prosecution's case.

55. The upshot of the above is that the appeal has merit and is allowed. The conviction of the Appellant is quashed and the sentence set aside.

DATED, SIGNED AND DELIVERED THROUGH EMAIL THIS 24TH DAY OF MARCH 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE