



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E003 OF 2021

LEAH WAMBOI WAITATHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. C.A. Ogweno Resident Magistrate,

delivered on 18th day of January 2021 in Mombasa Chief Magistrate Court

Criminal Case No. 1046 of 2019).

J U D G M E N T

1. The Appellant was charged with offence of obtaining money by false pretences contrary to Section 313 of the penal code.
2. The particulars are that Leah Wamboi Waitathu on the 12th day of June 2019 in Mombasa town- Mombasa County with others not before the court, with intent to defraud obtained the sum of Kshs.1,000,000/= from Paul Maina Kangara by falsely pretending that you were in a position to sell a Toyota Hiace to him a fact you knew to be false or untrue.
3. The complainant and the investigating officer testified as prosecution witnesses & Appellant was placed on her defence.

Grounds

4. The Appellant was aggrieved by the conviction and sentence and he filed appeal herein on the grounds that:-

i. The learned trial Magistrate erred both in fact and in law by convicting the appellant when the prosecution had not proved their case against the appellant beyond reasonable doubt.

ii. The learned trial Magistrate erred both in fact and in law by failing to resolve the apparent doubts in the prosecution case in favour of the Appellant.

iii. The learned trial Magistrate erred both in fact and in law when she disregarded the solid defence by the appellant while relying on very weak reasons to convict the appellant.

iv. The learned trial Magistrate erred both in fact and in law by failing to scrutinize and evaluate the prosecution's evidence thereby arriving at an erroneous decision.

v. The learned trial Magistrate erred both in fact and in law by failing to hold that burden of proof at all times rested with the prosecution and could not shift to the Appellant.

vi. The learned trial Magistrate failed to consider the prosecution's evidence that exonerated the accused person herein against the offence.

vii. The learned trial Magistrate confused and misapplied the evidence in favour of acquittal of the appellant to convict her.

viii. The learned trial Magistrate erred both in fact and in law in failing to find that the prosecution's evidence was

contradictory in material facts.

ix. The learned trial Magistrate erred both in law and in fact when she made a partial evaluation of the evidence and finding in favour of the prosecution instead of awarding the benefit of doubt to the defence.

x. The learned trial Magistrate erred both in fact and in law in failing to find that no tangible evidence was formed or presented to the court linking the appellant to the commission of the offence.

xi. The learned trial Magistrate relied on speculation, probabilities and possibilities to convict the appellant.

xii. The learned trial Magistrate erred both in fact and in law when she failed to find that the prosecution did not prove the ingredients of the offence of defilement.

xiii. The learned trial Magistrate erred both in law in failing to allow the appellant her constitutional right to be represented by an advocate as provided under Article 50(2) (h) of the Constitution of Kenya, 2010.

xiv. The learned trial Magistrate erred in law in proceeding on wrong principle and thereby arriving at a wrong decision.

xv. The learned trial Magistrate erred in law in failing to give reasons for her decision on each point.

5. The prosecution's case was that the Appellant presented to complainant that she knew an Asian who was selling her vehicles in Mombasa at fair prices. Appellant accompanied the complainant to Mombasa where she introduced him to one Pato as her business partner and together they went to Cush Motors Bazaar where they introduced him to a person they called the Manager. He was asked to choose a vehicle and when he did he was told it was going for Kshs.2.3 million. They agreed that he would pay a deposit of Kshs.1 million and the balance to be paid over 3 years.

6. That the alleged Manager asked that they should meet at Equity Bank Moi Avenue when they met he gave the alleged Manager the deposit of Kshs.1,000,000/= and he was asked to wait outside the bank and Appellant went inside with the alleged Manager. That when the Appellant and the alleged Manager came out of the bank they agreed to go to a hotel and wait for the manager to service the vehicle.

7. That Pato the Appellant's business partner excused himself to go and bank his share of the money and he gave the Appellant something under the table which she put in her bag. That the Appellant then excused herself to go back to Nairobi claiming she had a sick child. That the Appellant assured the complainant that Pato would be with him until the deal was concluded. That Pato returned before the Appellant left. That Appellant asked for some money from him and he gave her Kshs.5000/= by Mpesa. That Pato, took him to a hotel to freshen up. That when he had freshened up he called the Appellant to tell Pato to meet him at the car yard but the Appellant told him her phone was going off.

8. That when he went back to the car yard he found the car he wanted to buy was still in same position and same condition and he was informed that the Manager's office was in town and not at the car yard. He was told the man he met earlier was not the Manager and that the car he was shown was not on sale as it was defective. That when he called Appellant and he was unavailable he was advised to report to the police. He reported the matter at Central Police Station Mombasa and he was given a letter to take to Kiambu Police Station.

9. That back in Kiambu, he called the Appellant who asked that they meet at Quickmat Supermarket where she sent a lady to confirm that PW 1 was alone. However, the police knew the Appellant and they arrested her and he went to identify at the police station where she promised to pay the money and offered Kshs.50,000/= which he declined to take.

10. PW 2 P.C. Abraham Kichungu conducted investigations and preferred charge against the Appellant. When placed on defence the Appellant identified herself as an insurance agent, motor vehicle and land agent. She produced certificate of Registration of her company known as Lewit Insurance Agency.

11. The Appellant testified that she was introduced to the complainant by one Francis when they sold to him 33 seater bus Reg. KCS & she also sold to him insurance for the bus. That they kept in touch and she also sourced for a probox vehicle. 3 weeks later the complainant asked her for a Toyota Hiace.

12. That she travelled to Mombasa with the complainant on 12th June 2019 where she called her contact Pato who took them to Cush Motors and thereafter she accompanied the complainant to Family Bank to withdraw money. After withdrawing money she took him to Equity Bank where they complainant entered the Bank with Pato while she remained outside. That she was later called that her child was sick and Paul paid her Kshs.5000/= while Pato paid her Kshs.30,000/= commission and she travelled back home.

13. That 3 days later the complainant called to, inquire about a logbook for probox and went to where he was with 6 police officers who arrested her. She denied knowledge of what happened after she left Mombasa.

14. This appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 7th November 2021. It was submitted that there was no indication from evidence that Appellant received the amount of Kshs.1,000,00/= from the Complainant. That the person who received the money from the Complainant was not charged and the prosecution failed to prove the charge beyond reasonable doubt.

15. It was submitted that Appellant didn't represent herself as a car seller but instead Clarity told the Complainant that she knew someone

who sold cars in Mombasa. It was submitted she was a go between.

16. It was further submitted that there was not mis-statement as the Complainant knew the Appellant was an agent and did not sell cars. That Complainant gave the Appellant Kshs.5000/= as commission. It was further submitted that the prosecution failed to prove charge of obtaining by false pretenses and that the court relied on insufficient evidence of withdrawal sleeps to find a conviction. This court was therefore urged to allow the appeal.

17. On the other hand the Respondent submitted that the Appellant in Company of others not before court obtained Kshs.1,000,000/= from PW 1 with intention to defraud. That he ingredients of the offence under Section 312 and 313 of the penal code had been proved beyond reasonable doubt. It was submitted that cogent, corroborative and uncontroverted evidence was adduced as to how Appellant led the Complainant to a person who sells vehicles and who turned out to be a fake manager.

18. The Respondent counsel supported the conviction and sentence and urged the court to uphold the same. Having weighed the evidence for the prosecution and the defence and having re-evaluated the trial Magistrate record (Evidence, Judgment & Sentence) the issue for determination is whether prosecution proved its case beyond all reasonable doubt.

19. The Appellants defence confers all the facts that the Complainant narrated to court. Her entry defence is that the money was not given to her. However she introduced one Pato as her business partner and didn't even give his full name or even contact. The Appellant together with the and Pato and fake Manager took the Complainant round and round until they made sure he had been defrauded before disappearing within air.

20. The Appellants allegations that she left the Complainant with Pato on allegations her child was sick was all made up. She did not produce any documents to confirm that she had to leave because her child was sick if indeed the Complainants vehicle was to be released the same day it didn't make sense that she choose to travel by public means instead of accompanying the complainant back to Nairobi. The switching off of her phone was further evidence that her intention was to defraud the complainant.

21. This court finds that the prosecution's case was straight forward and the Appellant confirmed what the Complainant said in his testimony. There is no contradiction pointed out by the Appellant in prosecution's evidence to warrant the determination of the trial court to be unsettled. There is no doubt identified by the Appellant in the prosecution's case and the trial Magistrate to find that the prosecution had proved its case beyond all reasonable doubt.

22. In conclusion this court finds that the appeal lacks merit and conviction is upheld. Section 313 of the penal code provides that a person found guilty of the offence of obtaining by false imprisonment is liable to imprisonment for 3 years. The Appellant was sentenced to serve 2 years which was within the law. The sentence is also upheld.

23. Right of Appeal – 14 days explained. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF NOVEMBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Turuku – Court assistant

Ms. Kambaga for Respondent/State

Ms. Jamal Bake & Associates Advocate for Appellant – No appearance

Appellant – Present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE