REPUBLIC OF KENYA

IN THE HIGH COURT

AT GARISSA

CRIMINAL APPEAL NO. 1 OF 2020

ABDIFATAH MOHAMED IBRAHIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal against the entire judgment of Hon. A.K Areri(Principal Magistrate) delivered Mandera Principal Magistrate's Court on 16th December, 2019)

JUDGEMENT

1. The appellant was charged with the offence of obtaining money by false pretence contrary to Section 3*13* of the *Penal Code*. The particulars of the offence are that on diverse dates between February 2018 and February 2019 at Mandera East Sub County with intent to defraud obtained from SHEIKH MOHAMED BALE a sum of Kshs. 1,271,778/= by falsely pretending that he will assist the said SHEIKH MOHAMED BALE'S disabled daughter. The matter proceeded to hearing and the appellant was convicted for the offence of obtaining money by false pretense contrary to *Section 313* of the *Penal Code* and was convicted to serve 3 years' imprisonment and to refund to the complainant the sum of Kshs 1,271,778/= failure of which the same would be recovered from the appellant as if it were a civil debt owing.

2. The appellant dissatisfied with the judgment and sentence of the lower court preferred an appeal citing the following grounds:

1. 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.

2. The learned trial magistrate erred both in fact in law in imposing an excessive sentence with regard to the alleged offence committed and the circumstance surrounding it.

3. The learned trial magistrate erred both in fact and in law in compelling the appellant to refund by order of restitution the alleged sum of Kenya Shillings One Million Two Hundred and Seventy-One Thousand Seven Hundred and Seventy Eight (Kshs. 1,271,778) to the complainant.

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

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

6. 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.

7. 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.

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

9. The learned trial magistrate confused and misapplied the evidence in favour of acquittal of the appellant to convict him.

10. The learned trial magistrate erred both in fact and law in failing to find that the prosecution`s evidence was contradictory in material facts.

11. The learned trial magistrate erred in law and in fact when he made a partial evaluation of the evidence and finding in favour of the prosecution instead of awarding the benefit of doubt to the defence.

12. 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 instead it is civil in nature as it should have been a debt recovery matter.

13. The learned trial magistrate erred both in fact and in law by failing to find that the failure to call crucial witnesses fatally weakened the prosecution's case.

14. The learned trial magistrate relied on speculation, probabilities and possibilities to convict the appellant.

15. The learned trial magistrate erred both in fact and in law when he failed to find that the prosecution did not prove the ingredients of the offence of obtaining by false pretenses.

3. Reasons wherefore the appellant prays for the orders: -

a) **The appeal be allowed.**

b) The Conviction and the sentence be set aside and quashed.

c) That order for restitution by the appellant to the complainant be set aside and quashed.

d) The appellant be set at liberty forthwith unless otherwise lawfully held.

e) In the alternative the sentence be varied.

EVIDENCE

4. PW1 Qanar Sheikh Mohamed testified that she resides at Bulla Power in Mandera Town and that the appellant is his aunt's son and that he had promised to organize for her to be given money by an organization for disability, where he could get donors for her. She told the court that she informed her father Sheikh Ibrahim, who sent money to the appellant. However, the appellant never assisted her. She doesn't know the much her father sent.

5. PW2 Sheikh Mohamed Bale testified that he is a resident of Elwak and previously resided at Mandera and that he is a businessman. He told the court that PW1 is his daughter and that she is disabled as she is paralyzed on one side, which problem started over 20 years ago. Additionally, he told the court that he had known the appellant from birth and he is a neighbor near his plot at Mandera where his family lives. It was his testimony that the appellant told him that the government assist the disabled and in the case of his daughter the assistance could come from the UN through Human Rights, this was after the appellant had assisted his daughter at some point by taking her to hospital and reporting the matter to the police after an assault. He told the court that the appellant requested for his daughter's disability report and also his photographs and promised to get her assistance from the UN where they would buy her a plot and build her a house and also give her money. He added that out of trust and believe that the UN helps people, he believed the appellant and even gave him a copy of his ID which was to be used to open an account. Thereafter he told the court that he sent the appellant money for the said assistance for over a year and in total he sent him the sum of Kshs. 1,271,778/=. He sent a total of Kshs. 665,049/- vide his Mobile Number 0722972047 and the rest through one Hassan Mohammed Adan a businessman at Elwak, all which were sent to the appellant Mobile Number 0720723219.

6. It was his further testimony that after over a year the appellant became evasive and started declining his calls and that is when he knew he had been conned as the alleged assistance to his daughter was not forthcoming, this forced him to go into hiding in Mandera as he was in debts as a results. He later on 11/2/2020 opted to report the matter at Mandera police station.

7. PW3 Ifra Sheikh Mohamed testified that PW1 is her sister and PW2 her father, and told the court that she knew from her father that there was someone who had promised to assist PW1, who is disabled through some Non-Governmental Organization. And that although she didn't know the appellant, she knew her family and that in the period between 15th February 2018 to 4th February 2019 she personally sent the appellant the sum of Kshs 118,690/= from her mobile number 0723813233 to the appellant number 0720723218, this was on request of her father, and which money was meant to be used to assist PW1. It was her testimony that the assist never materialized and the appellant caused them financial ruin and mental anguish as some of the money's were being borrowed.

8. PW4 Hassan Mohammed Adan testified that he is an Mpesa agent and operator based in Elwak and a neighbor of PW2. It was his testimony that between February 2018 to February 2019 he had been sending money on instructions of PW2 to Mobile number 0720723219 owned by Abdifatah Mohamed the appellant. He told the court that since PW2 did not know how to use MPesa he could load money into his account and assist him to send the same to the intended recipient who happened to be the appellant. He stated that he doesn't know the accused in person but only facilitated the transfer of the said money, which on his part totals Kshs 488,039/=.

9. PW5 Ngore Kirinya testified that he was the investigating officer herein and that on 17/2/2019 the complaint made a report against the appellant on account of obtaining money with the intention of assisting his disabled daughter. It was his testimony that upon conducting investigations he found that the appellant had defrauded the complainant to tune of Kshs. 1,271,778/= money which were sent vide PW2,

PW3 and PW4 mobile numbers and that the money were being sent to one Abdifatah. He produced the respective Mpesa statements proving the same. It was also his testimony that the appellant refused to give him his ID card, however he admitted that he was Abdifatah. It was his testimony that after concluding his investigation he recommended the appellant to be charged with the offence of obtaining money by false pretense.

10. At the close of the prosecution case, the appellant was placed on his defence and he opted to give sworn testimony and called one witness. He testified as DW1 where he admitted receiving money from the complainant, however it was his testimony that the money was for business purposes alleging that they were bringing beans from Ethiopia and selling them at Elwak and that the claim herein is because they suffered losses and the complainant doesn't want to bear it. On cross examination he insisted that he was a broker and used to send beans to the complainant, however he has no evidence to back the same or show any payments made.

11. DW2 Mohamed Hassan Ibrahim told the court that he is a resident of Dollo Ethiopia and did not produce any identity, however it was his testimony that he drives a donkey cart and that the appellant had hired him to transport goods from suftu, these were beans, honey and cloves. This was from the time of campaigns to November 2018.

12. At the hearing of the appeal the appellant was represented by Counsel Mr. Duwane while Mr. Mulati learned State Counsel appeared for the State. The appellant Counsel relied on their filed written submissions. They canvassed the following grounds in their Memorandum of Appeal. The first ground addressed is the allegation that the learned trial magistrate erred in compelling the appellant to refund by order of restitution the alleged sum of Kshs. 1,271,778/= to the complainant. It is their submissions in this regard that the appellant never denied receipt of the money in question, however it was his case that the same was meant for supply of beans and honey from Ethiopia and was paid as a facilitation fee, thus indicating that the complainant and the appellant were business partners. Additionally, it is their submission that the elements of the offence of obtaining by false pretence were not sufficiently proved, as there was no evidence tendered to prove that the appellant refused to pick the complainant calls. They relied in the case **of Lesholo & Another vs The State High court of Botswana as quoted in Criminal Appeal No 213 of 2011 Gerald Ndoho Munjungavs-Republic** and the case of **Ali Salim Awadhi alias Majid vs Republic [2015] eKLR.**

13. The second ground addressed by the appellant is the allegation that the learned trial magistrate erred by shifting the burden of proof to the appellant contrary to the law and established principles. In this regard they submitted that the trial magistrate at Pg 43 of the record of appeal in finding that the appellant never tendered any prove of the alleged beans business amounts to the trial court shifting the burden of proof to the appellant contrary to Article 50(2) of the Constitution and section 107(1) of the Evidence Act. They relied in the case of **Woolmington vs DPP (1935) AC 462.**

14. The third ground submitted on by the appellant is the allegation that the learned trial magistrate confused and misapplied the evidence in favour of acquittal of the appellant to convict him. They submitted that the testimony of PW2, who is the father to PW1 clearly stated that the appellant said he will assist PW1 in getting a UN assistant but did not say whether the money was for securing assistance from the UN or a payment as an agent or middleman for work done. This they submit does not amount to obtaining by false pretense hence the trial court misapplied the facts to arrive the wrong judgement.

15. The fourth ground addressed by the appellant is the allegation that the learned trial magistrate erred in failing to find that no tangible evidence was formed or presented to the court linking the appellant to the commission of the offence instead it is civil in nature as it should have been a debt recovery matter. They submit that the testimony of PW1 states that she was aware that money was paid to the appellant but did not know as to why he was paid and the intention and PW2 himself could not provide evidence with regard to the appellant refusing to pick calls. This they argue was a mistake on the part of the trial court and should have set the appellant free as there was no tangible evidence to convict him. Additionally, they submitted that the court on 13th September, 2019 unfairly proceeded despite the appellant seeking an adjournment on allegation of being sick and further that the court upon allowing the amendment of the charge sheet after taking the evidence of PW1 used the said testimony to convict the appellant yet she was not recalled to testify after the amendment of the charge sheet.

16. The final ground addressed by the appellant is the allegation that the learned trial magistrate erred in imposing an excessive sentence with regard to the alleged offence committed and the circumstance surrounding it. In this regard, they submitted that the 3-year sentence meted on the appellant is harsh and excessive in the circumstance surrounding the case. They submit that this is a simple case of civil debt that can be recovered in a normal suit as the appellant did not dispute the existence of the said amount. Moreover, the he did not have a counsel on record to advise him appropriately and present his case. This is seen on how the trial court forced him to stand trial while he was sick. This should be considered a miscarriage of justice and gross negligence on the part of learned magistrate. This they argue the appellate court can remedy such injustices by setting aside the sentence and or varying the excessive sentence meted on the appellant. This court has all the powers to vary the sentence in light of these new circumstances surrounding the trial of the appellant.

17. They submitted that the maximum sentence provided herein cannot be binding as was held in **A. O. O. & 6 Others vs Attorney General & another [2017] eKLR.**

18. Counsel for the state Mr. Mulati submitted orally, where he opposed the appellant appeal. In respect to the sentence, he submitted that the law provides for a maximum imprisonment of 3 years, but under section 354 of the Criminal Procedure Code, the court can reduce the sentence and in this case the appellant is a first offender and therefore the court can reduce the 3 years' sentence meted.

19. In regard to the conviction, Counsel supported the trial court finding submitting that the offence was proved. And on restitution, they submitted that section 175(1) of the Criminal Procedure Code allows the trial court to order restitution.

20. On the claim of mistrial as a result of the failure to recall PW1 after the charge sheet was withdrawn after PW1 had testified and another one reintroduced, Counsel submitted no prejudice was suffered by the appellant, and in any event if the court finds so they urged the court to order retrial as it is a 2019 matter.

DETERMINATION

21. This is the first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. This was laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."**

22. In my view the following are the main critical issues for my consideration in the instant appeal: -

a) What are the essential elements of an offence of obtaining money through false pretences?

(b) Whether a charge of obtaining money through false pretences has been proved beyond any reasonable doubt?

(c) Whether appellant's defence was considered?

What are the essential elements of an offence of obtaining money through false pretences?

23. Section 313 of the Penal Code provided as follows: -

> **"Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years."**

24. It is evident from the above Section that the essential elements of the offence of obtaining through false pretences can be summarized as o*btaining something capable of being stolen, obtaining the money through a false pretence and Obtaining the money with intention to defraud.*

25. Additionally, the Penal Code defines "false pretence" under **Section 312** as;

> **"Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."**

26. The operative word under the said Section is "representation." which is applicable in the following circumstances:

(a) A representation by words, writing or conduct

(b) A representation in either past or present.

(c) A representation that is false.

(d) A representation made knowing it to be false or believed not to be true.

27. Therefore, the operative words in the instant case is a representation by words or conduct made knowingly to be false or believed not to be true. This is clearly the basis of the prosecution case herein.

Whether a charge of obtaining money through false pretences has been proved beyond any reasonable doubt?

28. The next question is as to whether the prosecution proved the charge of obtaining money through false pretense as to the required standard? The prosecution in the instant case needed to demonstrate that the appellant received the money and had no intention of helping the complainant disabled daughter as alleged or did not believe that the same was true.

29. I have carefully considered the evidence tendered herein and it is clear to me that the appellant represented himself to be in a position to help PW1 who is the complainant disabled daughter, a position he clearly knew to be false. He continued demanding money from the complainant based on false insinuations, and in his defence he latched of nonexistent beans business which only arose at his defence and therefore in my view the same is an afterthought. I therefore find that the prosecution proved its case beyond reasonable doubt.

Of Appellants grounds of Appeal:

30. The appellant in this instant appeal has argued that the issues raised herein are civil in nature and that complainant ought to have filed a civil claim instead of pursuing criminal proceedings. Based on my above finding, it is apparent that the facts in this case reveals some criminal elements and therefore this ground of appeal has no basis**.**

31. Additionally, the appellant has attacked the restitution orders made in favour of the Complainant herein. The trial court ordered the appellant to refund the sum of Kshs. 1,271,778/=. I have looked at section 175 of the Criminal Procedure Code and in my view the Trial Court orders in this regard are proper and I find no reason to set aside the same. There is no complication, as what is to be restituted is money which the appellant did not deny receiving.

32. In respect to the appellant claim that the trial court convicted him based on the evidence of PW1 who was not recalled despite the prosecution substituting the charges. I agree with the prosecution Counsel that no prejudice was occasioned to the appellant, and even if we are to dismiss PW1 evidence, the evidence of the complainant PW2 as corroborated by the other witnesses is still compelling against the appellant, and thus this ground of appeal also fails.

33. In regard to the appellant ground that the trial court shifted the burden of proof to him contrary to the established principle that the burden of proof at all times lies with the prosecution. I have critically considered the trial court decision and in my view the appellant allegations herein find no basis whatsoever, as what he was called upon to do upon being put on his defence was to answer to the compelling evidence before the court, and in this regard his answer to the charges herein did not dispel the prosecution evidence and therefore this ground fails.

34. In regard to the sentence, I agree with the appellant that the trial court under our current dispensation is not bound by the set minimum and maximum. The question therefore is whether there is sufficient ground for this court to interfere with the trial court exercise of its discretion. In **Bernard Kimani Gacheru vs Republic [2002] eKLR** The court in holding that sentence given was well deserved and found absolutely no reason to interfere with it stated;

> **"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."**

35. I have considered the mitigation of the appellant that he was a first offender. On the other hand, I have taken into account that the appellant defrauded the complainants of huge sums of money amounting to over 1.2 million. After taking into account all the circumstances of this case and in the light of the statutory penal provisions, I find that the sentences of 2 years would suffice.

CONCLUSION

36. It is my considered view that the instant appeal on conviction lacks merit. However, on sentence, the court is inclined to lower the same in view of the order of restitution and the fact that the appellant is a first offender.

37. Thus, the court makes the following orders;

i. The appeal on conviction fails and lower court decision is upheld.

ii. The sentence is reduced to the period served as by date of this judgement however the order of recovery of the money as ordered by the trial court remains intact.

iii. Thus, appellant shall be released forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JULY, 2020.

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C. KARIUKI

JUDGE