REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 40 OF 2018

JINARO NAMU NJAMUMO.....APPELLANT

– VS –

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of Honourable E. O Wambo Senior Resident Magistrate

by a Judgment delivered on 14th June, 2018 in Kerugoya Chief Magistrate's Court Criminal Case No. 454 of 2016).

1. The appellant Jinaro Namu Njamumo was charged with the offence of Obtaining by false pretences Contrary to **Section 313 of the Penal Code**. The particulars of the offence were that on the 31/3/2016 at Kerugoya Township within Kirinyaga County, with intent to defraud, obtained from James Kinyua Mwobe the sum of Two hundred and Eighty Thousand shillings (Kshs. 280,000/-) by falsely pretending that he will give him a tender of supplying water pipes of Kshs 2.8 Million.

2. He pleaded not guilty. At the close of the case, the trial Magistrate found him guilty of the offence, convicted and sentenced him to serve one (1) year on probation.

3. The appellant was dissatisfied with both the conviction and sentence. He filed the petition of appeal on eleven grounds.

4. To urge the appeal, the appellant by his Advocate Mr. Mutembei of Wesonga Mutembei & Kigen Advocates filed submissions on the 2/12/2019 and summarized the grounds of Appeal into four as hereunder:

(1) That the Learned Magistrate erred in finding that a prima facie case was established against the appellant.

(2) That the learned Magistrate grossly and fundamentally erred in finding that the prosecution had discharged the burden of proof against the appellant to the required standards of proof.

(3) That the conviction was against the weight of evidence.

(4) That the trial Magistrate erred grossly by ignoring the appellant's evidence in defence.

5. In response to the appellant's submissions and highlights, the learned Assistant Director of Prosecutions, Mr. Ashimosi tendered oral submissions.

6. The duty of a first appellate court has been stated in numerous court decisions. In **Okeno –v- Republic (1973) EA 32,** the duty was stated as to re-examine the evidence as a whole and subject it to fresh and exhaustive examination and come up with own decision based on the evidence.

7. Further in **Pandya –v- Republic (1957) EA 336** and **Shantilah M. Ruwala –v- Republic (1957) EA 570**, the courts rendered that it is not the function of an appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions but it must make its own findings and conclusions, and only then can it decide whether the Magistrate's findings should be supported, making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses testify.

8. The offence of obtaining by false pretence is stated under **Section 313 of the Penal Code** as:-

> ***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 person anything being stolen, is guilty of misdemeanor and is liable to imprisonment for three years***.

9. Thus the basic principles and ingredients of the offence as stated in the case **Francis Mwangi & James Ndungu –v- Republic (2012),** and reiterated in **Josphat Kariuki Kariuki –v- Republic (2017) eKLR** are:

> **(1) The act of obtaining something capable of being stolen.**
>
> **(2) Obtaining the thing by false pretences.**
>
> **(3) Obtaining the thing with intent to defraud.**

10. **Section 312 of the Penal Code** gives a definition of false presence as,

> ***Any representation, made by words, writing of 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.***

11. Under common law, a representation must be capable of being expressed as a statement of the past or present. A statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence - **Joseph Amunga Ochieng –v- Republic (2016) eKLR.**

12. It is trite that a mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. A prima facie case must be made out against an accused person for the offence to be proved to the required standard of proof, beyond reasonable doubt – **Ramanlal T. Bhatt –v- Republic (1957) EA 332.**

13. **Prosecution Case.**

Five witnesses testified. The complainant testified as PW-1-. He is a Member of the County Assembly (MCA)and a businessman within Kerugoya. His testimony was that the appellant was his good friend for over ten years, and that on the 31/3/2016, he called him to seek for financial assistance of Kshs 300,000/- which he promised to pay back. He testified that he withdrew some Five hundred Thousand Shillings (Kshs 500,000/-) out of which he gave him Two hundred Eighty Thousand Shillings (280,000/-). A withdrawal slip from the bank was produced and P Ext1. He further testified that as the appellant told him he was unable to refund, he would instead, give him some work of supplying pipes.

14. It was his evidence that when he gave the appellant the money in an envelope there were two of his employees present, one being his wife (PW-2-) and one Peter Waweru. The complainant further testified that the appellant failed to refund the money upon which he reported to the police, for his arrest and prosecution. He denied having being involved in any business with the appellant.

15. Upon cross-examination, the complainant testified that the appellant did not give him any tender, nor did he know of any tender, but also that the County Government had awarded him a tender for works construction of roads, on the 16/2/2015 which works was completed in July 2015.

16. **PW-2-** was Florence Wanjiru who stated to have been operating a hardware store at Kerugoya. Her testimony was that she witnessed the complaint give the appellant Kshs 280,000/- while both in her shop on the 31/3/2016, and that the appellant never refunded the same. Under cross examination, PW2 stated that the money was a loan for a tender for supply of pipes.

17. **PW3's** Joseph Waweru testified that he was present, at the shop, witnessed the appellant and the complainant counting money in the office. He did not know how much the money was, nor the purpose. **PW4's** evidence was hearsay, having not been present when the money was exchanged.

18. **PW5** CPL Carolyne was the Investigating Officer from Kerugoya Police station. Her brief was to investigate an allegation by the complainant that he had given a personal loan of Kshs 280,000/- to the appellant but had failed to repay, plus a tender of supplying water pipes. It was her evidence that she saw a withdrawal bank slip of Kshs 500,000/- by the complainant. It was her evidence that the report of the offence was made at the police station on the 31/3/2016, and again that it was made on the 14/5/2016 by one Jeremiah Nyaga. It is upon the above evidence that the appellant was called upon to defend himself.

19. **Defence Case**

In his sworn statement of defence, the appellant testified that the complainant and his wife (PW2) were trading as Chalin and Jimflo Enterprises and that on 20/4/2015 a tender was given to the said company and on the 20/4/2015, by a letter, it accepted the tender – Dext 1 and 2 – from the County Government of Kirinyaga.

20. The appellant's testified that the complainant's company failed to perform and complete the works it was given necessitating him to raise the failure with the County Government's Transport and Infrastructure Committee around end of 2017. He testified that at the time the alleged offence was committed, he was not a member of the tender committee but in Trade, Tourism, Cooperative and Enterprise

Development Committee, therefore, was not involved in tender issues. He testified that he never received any money from the complainant nor did he promise the complainant any tender award.

Analysis of the evidence, Judgment, submissions and determination.

21. As very well captured by the trial Magistrate in his Judgment, the Issue that fell for determination was whether or not the accused (appellant) obtained Kshs 280,000/- from the complainant by false pretences. This, in my view, is the gravamen in this appeal:

Whether or not the appellant obtained money in the sum of Kshs 280,000/- or any other sum or at all from the complainant on the material date, the 31/3/2016. If the answer to the above is in the affirmative, then, I am called upon to determine whether the money was obtained by false pretences.

22. There is no doubt that the complainant withdrew a sum of Kshs 500,000/- from his KCB Bank Account, as demonstrated by the withdrawal slip- P ext 1, the same date when the alleged offence is said to have been committed.

23. By **PW5's** evidence (Investigating Officer), a report of the commission of the offence by the appellant was made at the police station on the same date – 31/3/2016. Yet again, the Investigating Officer testified of a report having been made on the 14/5/2016 by one Jeremiah Ngaga. The evidence further shows that a friend Jeremiah had been sent to talk to the appellant. It is not clear whether the report made on the 14/5/2016 refer to the report by the said Jeremiah or by the complainant on the 31/3/2016. The withdrawal slip, though certified as a true copy by the bank, does not show time of withdrawal of the said money, nor the purpose for the withdrawal. This man, Jeremiah was not called as a witness.

24. **PW-2-** wife of the complainant and PW3, an employee of the complainant testified that the appellant was in the complainant's office around 10.30 am to 11.00 am. The appellant by his evidence denied ever receiving any money or at all from the complainant, either at his offices or elsewhere. PWI never mentioned PW3, Joseph Waweru as having been present at the shop where it is alleged the money was exchanged.

25. **PW-1**- talked of a call from the appellant while at his offence about 10.00 Am. He did not state what time he went to withdraw the money and came back to meet the appellant, after 10 minutes. PW-2- testified that the appellant went to the office at around 11.00 Am and witnessed the exchange of Kshs 280,000/-.

26. The money is alleged to have been in an envelope which was given to the appellant. PW-2- did not state whether or not she was involved in the counting of the money and placing it in the envelope as to be sure that it was Kshs 280,000/-, nor did PW3 see the said money as his testimony was that the complainant came to the office carrying an envelope. His testimony that he saw the complainant and the appellant counting a lot of money and hearing the complainant conversing with PW2 of the cash is but hearsay. He confirmed that he did not know how much cash was given. An envelope perse, by any standard cannot be translated to be money. An envelope can contain anything that may fit, including money. Unless the envelope is opened and the contents therein certified, it is a very wrong assumption that the envelope contained money.

27. In his evidence in Chief, the complainant testified that one of his employees named Peter Waweru was present and saw the money being exchanged. He testified that he counted the money Kshs 280,000/- put it in the envelop and gave it to the appellant who then left.

28. However, this employee Peter Waweru who allegedly saw the complainant and the appellant counting a lot of money was not called to testify as to what he saw, if indeed he saw any money being counted and exchanged. The complainant did not testify to have counted the money together with the appellant, contrary to evidence of PW3

PW-2- wife of the complainant did not testify to the said Joseph Waweru (PW-3-) having been present and saw the two counting and exchange of the money. She however spoke of one John Waweru to have been present. This John Waweru was not called to testify.

29. Further, no mention by the complainant that PW-2- his wife also was involved in counting of the Kshs 280,000/- cash money, so that when PW2 testified that she confirmed the money and witnessed the counting of the money, and giving it to the appellant yet the complainant did not mention PW2 to having counted it to confirm.

30. It is quite evident from the evidence of the three key prosecution witnesses, PW1, PW2 and PW3 that they had family relationship. Their testimonies were riddled with inconsistences and contradictions. In such relationships, the evidence by the witnesses ought to be taken with extra caution.

31. **PW-2**- was wife to the complainant, while PW-3- was a relative and an employee of the complainant. They all differed on the time when the alleged envelope, apparently containing money took place and the manner of the exchange, as well as who between them participated in the counting of the money before it was placed in an envelope and handed to the appellant.

32. **PW-2-** did not testify as to how she confirmed the amount to be Kshs 280,000/- as she did not count it, as PW1 testifying that he is the one who counted and put it in an envelope. PW3 differed with PWI and PW2 when he stated that he saw both the appellant and the complainant counting the money. Had PW2 been present counting the money, he would have testified to that fact.

33. In the case **Daniel Mulinge Nthenge –v- Republic (2012) eKLR**, the court rendered on the matter of relationships between key witnesses and contradictions in their testimonies thus,

"It is instructive that key witnesses were all related to the complainant and despite staying together, sharing business premises,

safe and banking services they could not give straight forward answers. Their contradictions should point to the fact that this trial was only an attempt to frame the appellant ----"

34. Mr. Ashimosi Learned Assistant Director of Prosecutions in response to the appellant's submissions adopted the trial court's judgment, and added that PW1-s evidence was collaborated by PW2's evidence.

35. In my considered opinion, the contradictions and inconsistences coming from the key witnesses are not minor as they go to the root of the case **Republic –vs- Albert Seth Ifire & Another (2018) eKLR.** I have combed through, the entire evidence. There is doubt in the court's mind as to whether the appellant received any money in the sum of Kshs 280,000/- or any other amount from the complainant on the material date or at all.

When reasonable doubt is created in the court's mind, and taking into account that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, it cannot be said that a prima facie case is made out. The benefit of doubt would then be in favour of the accused person – **R. T. Bhatt –v- Republic (1957) E.A 332.**

36. In the case **Joseph Ayunge Kimeu –v- Republic (2014) eKLR,** the court held that the moment doubt is created in the mind of the court it is sufficient for it to find that the threshold to convict a suspect has not been met. I therefore find and hold that there is no sufficient evidence that the appellant indeed received the sum of Kshs 280,000/- or any other sum or at all from the complainant on the material date.

37. **Obtaining by false pretences as stated** in **Section 313 of the Penal Code?**. The money allegedly received was a thing capable of being stolen. In the matter of obtaining by false pretences of the thing (money), and in line with **Section 313 of the Penal Code** the representation of facts must either be past or present, and not future, it does not relate to future events.

38. The above was extensively discussed in the case **Joseph Wanyonyi Wafuko –v- Republic (2012) eKLR and Joseph Amunga Ochieng (Supra).**

PW-1- (complainant) and PW2 testified that the appellant obtained the money by falsely pretending that he would give PWI a tender to supply pipes worth Kshs 2.8 Million. No tender documents were produced to demonstrate the existence of any such tenders being given. Indeed, the complainant never mentioned that the tender was by the County Government, but just a tender, nor whether it was existing at the time of the promise. PW1 spoke of a tender. PW2 spoke of a personal friendly loan. Nothing was produced in evidence to demonstrate the existence of such tender.

39. By his evidence, PW1 testified that the appellant promised to reimburse the money and if he was unable, the appellant would give him the tender to supply pipes. This promise was futuristic not present or past.

Section 312 Penal Code cited above verbatim is clear that the promise or representation of a matter of fact must be past or present, and must be false, and the person making it knows it to be false or does not believe it to be true.

40. As stated in case **Joseph Amunga Ochieng –v- Republic (supra)** a statement of intention about future conduct, as is the case of the alleged promise by the appellant, is not a statement that would amount to a false presence. The appellant's alleged promise does not therefore fall within the armpit of **Section 312 of the Penal Code.**

Defence Evidence Ignored?

41. The appellant testified to tenders awarded by the County Government to the appellant's company during the period 16/4/2015 which the complainant admitted to have accepted and performed, and that at the time of the alleged offence we had no tender.

He further testified of having raised questions and complained as to the manner the tender to the appellant's company was performed. In the month of April, 2016 he testified that he believed that the complainant lead to the framing him, his arrest and prosecution.

In his Judgment, the trial Magistrate stated:

"This court would not dwell on Chalin and Jimflo Enterprises on Rukunga Road and proceedings at the County Assembly."

42. The matter of the tender awards by the County Government to the complainants two companies named above, and the complainant having admitted in his cross-examination to have had tender transactions in respect of road construction with the County Government, the trial Magistrate erred in fact and law in failing to consider the business relationship between the complainant and the County Government, and the appellant's complaints, as an MCA over the manner the said road Construction was done, that could possibly have contributed to bad blood between the appellant and the complainant. This was a material factor that the trial Magistrate failed to take into account and thus failed in his duty to consider all relevant factors as to come to a finding based on all material factors as stated in the case.

43. The basic principle applicable in criminal trial is that, any doubts in the prosecution case, at the end of the trial will lead to an acquittal of the accused. A prima facie case must be established by the prosecution before the accused is called upon to answer to the charges **Republic –v- Cosmans Mwaniki Mwaura H.C. CR. C. No. 11 of 2005, and cited in the case Republic –v- John Gichamba Mwangi (2006) eKLR .**

44. The court proceeded to render that:

> **"------- without such prima facie case, there is no legal basis for putting an accused person through the trouble of having to defend himself. The responsibility of the court to determine, upon a careful assessment of the evidence, whether to conclude the proceedings by early judgment, or to proceed to the motions of hearing both sides before pronouncing Judgment."**

In the instant matter, I find and hold that the trial Magistrate erred in finding that the prosecution had established a prima facie case against the appellant as without a prima facie case, there was no legal basis for putting the accused through the trouble of having to defend himself.

45. Nevertheless, I found it my duty to consider the defence evidence and weigh it against the prosecution evidence to arrive at a well informed finding. See Par. 41-42 above.

46. **Conclusion.**

I find merit in the appeal. The appellant's conviction and sentence by the trial court are hereby set aside.

Orders accordingly.

Dated, Signed and Delivered at Kerugoya this 22nd day of October 2020

J. N. MULWA

JUDGE