



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.3 OF 2020

PETER ODHIAMBO OJIJO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Boke

SPM delivered on 2nd August 2019 in Kibera CM Cr. Case No. 3104 of 2013)

JUDGMENT

The Appellant was charged with the offence of obtaining goods by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence were that on diverse dates between 14th January 2013 and 20th June 2013 at Marula Lane in Karen within Nairobi County, the Appellant, with intent to defraud, obtained from Getrude Nyaboke Omwanda, 500 bags of brown sugar weighing 50 kgs, which he falsely pretended that he will pay Ksh.3.25 million. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged. He was sentenced to pay a fine of Ksh.300,000/- or in default serve one (1) year imprisonment. In addition, the Appellant was ordered to pay the complainant the sum of Ksh.3,250,000/- as compensation, and in default of the same, serve a custodial sentence of one year.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for reopening the case *suo moto* for further proceedings after the court had already rendered its judgment and sentence. He was aggrieved that the trial court failed to appreciate that the issues raised in this case were civil and not criminal in nature. He took issue with the fact that the trial court allowed admission into evidence documents which were not original or certified copies, and which were not produced by the makers. He was of the view that none of the evidence adduced by the prosecution incriminated him, and that the same was insufficient to support a conviction. He faulted the trial court for performing a civil cause by ordering him to compensate the complainant Kshs.3.2 million within two months. He opined that the sentence meted by the trial court was harsh and excessive in the circumstances.

The Appellant was further aggrieved that the trial magistrate showed open bias in his interpretation of the law and facts in arriving at his decision. He took issue with the fact that the trial court failed to appreciate that the prosecution's case was inconsistent and full of contradictions. He was of the view that the trial court failed to properly evaluate the Appellant's defence in arriving at its decision. He faulted the trial magistrate for his conviction stating that the parties in the alleged transaction were limited liability companies and the role of the Appellant in the said transaction was not disclosed by the prosecution. He opined that the prosecution failed to call crucial witnesses necessary to prove its case against the Appellant. He was aggrieved that the trial court in convicting him, relied on illegally obtained evidence, hearsay evidence and untested theories. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the court heard oral submission made by Mr. Kiche for the Appellant and Mr. Momanyi for the State. Counsel for the Appellant stated that the trial court convicted the Appellant under the wrong section of the law being Section 312 of the Penal Code instead of Section 313 of the said statute. He submitted that the trial court ordered the Appellant to compensate the complainant Kshs.3.25 million without any explanation as to how the said amount was arrived at. He opined that the Appellant owed the complainant Kshs.498,000/-, which sum was already paid to the complainant. He averred that the complainant failed to produce in court documents to prove the amount she claimed was owed to her. He faulted the trial court for relying on an email sent to the company by the complainant claiming an amount of Kshs.3.25 million. He asserted that the said email address did not exist and that the email was not sent to the Appellant's company. He maintained that the figure of Kshs.3.25 million was not justified by the complainant.

Counsel for the Appellant further argued that the contract entered into was between a limited liability company and the complainant. The Appellant was one of the directors of the said company. He stated that no charges had been brought against any of the other two directors of the company. He was of the view that this case was civil in nature and the trial magistrate should not have entertained the same. He opined

that the issues raised in the present case did not fall under the ambit of Section 313 of the Penal Code. He submitted that the trial court improperly admitted into evidence documents which were not original or even certified copies. The said documents were also not produced by the makers. He stated that the electronic evidence failed to meet the standard set under Sections 67, 68, 81 and 107B of the Evidence Act.

Counsel for the Appellant further submitted that the prosecution failed to establish the elements of the offence of obtaining goods by false pretences. He stated that the complainant failed to justify the amount claimed of Kshs.3.25 million. He faulted the prosecution for failing to call as witnesses the authors of the documents produced into evidence as well as the other directors of the company. He asserted that the delivery note adduced in evidence was not signed, stamped or even acknowledged by the Appellant's company. He was of the opinion that the sentence meted by the trial court was harsh and excessive in the circumstances. He stated that the trial court did not consider the Appellant's mitigation when sentencing him.

Counsel for the Appellant asserted that the trial court acted *ultra vires* in issuing further orders of compensation, after releasing the Appellant. He stated that the Appellant paid the fine imposed by the trial court of Kshs.300,000/-. He was released by the trial court. The trial court however issued further orders that he pay the complainant Kshs.3.25 million being compensation within two weeks, and in default of the same serve one (1) year in prison. He pointed out that the court failed to consider the provisions of Section 175 of the Criminal Procedure Code in awarding the compensation. He added that the trial court also failed to consider the fact that the complainant's claim was time barred with regard to the Limitations of Actions Act. In the premises, Counsel for the Appellant urged this court to allow the Appellant's appeal.

Ms. Momanyi for the State opposed the appeal. He made oral submission to the effect that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. He stated that the Appellant falsely represented that he would pay the complainant Kshs.3.25 million being purchase price for 500 bags of sugar supplied to him by the complainant. The complainant narrated to court how she was introduced to the Appellant's company which had advertised for a tender to supply 500 bags of sugar. The complainant complied with all the requirements of the tendered quantity. She produced in evidence a receipt of Kshs.5,000/- which amount was paid during the tender application process. After she was awarded the tender, she delivered 500 bags of sugar at the cost of Kshs.6,500/- per bag to the Appellant's company.

Learned State Counsel further submitted that the bags of sugar were received by DW2 who was employed by the Appellant. He was acquitted by the trial court. Mr. Momanyi averred that DW2 acknowledged receipt of the said bags of sugar. He added that there was also documentary evidence to the effect that the complainant delivered 500 bags of sugar. He asserted that the complainant was however not paid for the supply of the sugar, despite several attempts to follow up on the payment. He stated that the Appellant's company moved offices and the complainant could not locate them. She reported the matter to the police. This led to the Appellant's arrest. He maintained that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. He therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, Getrude Nyaboke Omwanda, stated that she was a business lady who supplied dried foods and animal feeds for a living. Sometime between 13th January 2013 and 20th June 2013, a person by the name Wesley informed her that a company he worked for in Karen known as Samillis International Ltd was looking for a supplier of sugar. Wesley took her to their offices. She met the Appellant who was one of the directors. The Appellant informed her that she was required to pay a non-refundable fee Kshs.5,000/- to apply for a tender. She paid the said fees. The Appellant told her that he would get back to her after board deliberations on the same.

The Appellant called her a few days later and asked her for a quotation. After negotiations, they agreed on a purchase consideration of Kshs.6,500/- for each bag of sugar. She was required to supply 500 bags. The total purchase price was therefore Kshs.3.25 million. The bags of sugar were to be delivered to a go-down located at Kikuyu town. PW1 delivered the bags of sugar at the said go-down. The Appellant and Raymond (DW2) took the delivery of the same at the go-down. The Appellant told her to go to their offices the next day, which was a Friday, to sign some documents. He however called her that Friday and informed her that there was no one at the office and that she should instead go on Monday. On Monday, the Appellant asked PW1 to meet him in town instead of the office premises.

She met the Appellant at a hotel in town. He told her that she would get payment for the bags of sugar after twenty (21) days working days. This was despite being promised that she would be paid the money on delivery. The Appellant informed her that his then boss who was in London would be by then be back in the country. Twenty-one days lapsed and PW1 didn't receive the funds. Her calls to the Appellant went unanswered. She went to the company offices but discovered that they had moved. She called the receptionist who would hang up the phone once PW1 introduced herself. PW1 reported the matter to the police. She gave the police the phone numbers belonging to the Appellant and the receptionist. Later the police called her and informed her that they had located the premises where the company had relocated. The Appellant, the receptionist and Raymond who was the accountant were arrested. PW1 told the court that the Appellant claimed to have paid her Kshs.500,000. She stated that the said payment was repayment of a loan that she had lent the Appellant and was not payment for supply of the bags of sugar.

PW2, Cpl. Richard Cheruiyot, investigated this case. He was assigned the case on 9th August 2013. On that date, PW1 came to the police station and reported that she had supplied bags of brown sugar to Samillis International Ltd, who were at the time based in Karen. She was however yet to receive any payment for supply of the goods. PW2 and his colleague Cpl. Khaemba (PW3) discovered that the said company had vacated their premises at Marula Lane in Karen and were now based at Hardy, along Kipevu Road. They raided the offices where they managed to arrest DW2 and DW3. The Appellant escaped through a back door.

PW2 conducted a search at the Registrar of Companies with regard to Samillis International Ltd. The directors of the said company included the Appellant, Milel Oreta, and Catherine Wambui Kimonyi. He produced the CR12 dated 31st August 2015 in evidence. He also produced into evidence a receipt issued to PW1 for Kshs.5,000/- being payment for application of the tender, a request for a quotation from the company addressed to PW1 and signed by the Appellant in his capacity as a managing director, a pre-qualification document for supplies signed by the Appellant, a copy of an email written by the complainant addressed to the company, delivery notes from Morkas Wholesalers where PW1 purchased the sugar from, a receipt signed by DW2 acknowledging deliver of the bags of sugar by PW1 dated 20th June 2013, and the complainant's bank statement showing deposit of Kshs.500,000 by the Appellant, which the complainant explained was payment for

a loan she had given the Appellant and was not payment for supply of sugar. PW3, Cpl. Martin Khaemba, also investigated this case. He took over the case from PW2 who had been transferred. He was present when DW2 and DW3 were arrested. The Appellant managed to escape and went missing. He eventually arrested the Appellant on 27th March 2017 at Kibera Law Courts where the Appellant was attending a different case.

The Appellant was put on his defence. He gave a sworn statement. He admitted that he was one of the directors of Samillis International Ltd. He was in charge of operations. He stated that the complainant was contracted by the company to supply 89 bags of sugar each weighing 50 kgs. The cost per bag was Kshs.5,600/- and therefore the total cost payable to the complainant amounted to Kshs.498,000/-. The Appellant stated that he paid the complainant a total of Kshs.500,000/- in two equal installments. He asserted that he did not deal or have any contact with Morkas Wholesalers Ltd and that the delivery note from the said company produced into evidence was a foreign document to him. He averred that if the delivery note had been received by his company, the same would contain a signature to acknowledge receipt and stamped using the company seal.

The Appellant denied receiving any loan from the complainant stating that he did not have any personal relationship with her. He also denied receiving the bags of sugar at the warehouse. He told the court that goods were received by the warehouse manager (DW2) who then informed the procurement department upon receipt of the goods. His only role was to approve the payment for goods delivered. He stated that he had never received any demand letter from the complainant claiming any balance of payment for the goods delivered. He explained that the company changed offices since the building they were occupying at the time was being sold off. He also pointed out that no charges had been brought against the other two directors. He was of the view that the issues in this case was of a civil nature since the nature of their transaction was contractual. He denied the charge brought against him.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the said court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified. (See *Njoroge vs Republic* [1987] eKLR 19). In the present appeal, the issue for determination by this court is whether the prosecution established the Appellant's guilt with regards to the charge preferred against him to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. It has also re-evaluated the rival submissions made by parties to this appeal. Section 313 of the Penal Code provides that;

“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 misdemeanour and is liable to imprisonment for three years.”

The prosecution is required to establish that the Appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud. In the present appeal, it was the complainant's case that she was awarded a tender by Samillis International Ltd to supply 500 bags of sugar weighing 50 kilograms each. She met and dealt with the Appellant who was a director of the said company. She stated that the Appellant requested her for a quotation and they agreed on a cost of Kshs.6,500/- per bag. The Appellant directed her to deliver the sugar to a warehouse in Kikuyu. The payment was supposed to be made on delivery of the goods. She delivered the bags of sugar which were received by the warehouse manager, Raymond (DW2).

The Appellant asked her to visit their office the next day which was a Friday. That Friday however, he called her and asked her to meet him in town on Monday. They met at a hotel. The Appellant promised to pay her the full amount in twenty-one (21) working days. That period lapsed. The complainant is yet to receive any payment. Her calls to the Appellant went unanswered. She visited their offices and was surprised to discover that they had vacated the premises. That's when she reported the matter to the police.

The Appellant on his part denies receiving 500 bags of sugar from the complainant. He stated that the complainant only delivered 89 bags of sugar. From the evidence adduced, there is no doubt that the complainant delivered 500 bags of sugar to the Appellant's company. The prosecution produced into evidence a copy of a delivery note from Morkas Wholesalers where the complainant purchased the sugar which indicated that 500 bags of sugar weighing 50 kilograms each were delivered to Samillis International Ltd. The delivery note (**prosecution exhibit no.7**) contained a stamp from Samillis International Ltd confirming receipt of the same. It was also signed by Ray O. Walala (DW2) who was an employee of Samillis International Ltd.

DW2, who was acquitted by the trial court, stated that his duties were to receive goods at the warehouse, confirm that the goods delivered corresponded to the tender agreement, and to ensure that goods delivered were in good order. He admitted that he received 500 bags of sugar from the complainant. He also did not deny signing the delivery note adduced into evidence. Therefore, the Appellant's assertion that the complainant delivered 89 bags as opposed to 500 bags of sugar is displaced by the evidence on record.

The Appellant in his grounds of appeal contended that the copy of delivery note (**prosecution exhibit no.7**) was improperly admitted into evidence since it was not an original document. The complainant testified that when she delivered the bags of sugar, she was given a copy of the delivery note and the company retained the original delivery note. **Section 68** of the **Evidence Act** allows for the admission into evidence of copies of documents where the original is shown to be in the possession of the adverse party. In addition, DW2 admitted to signing the delivery note produced into evidence. The 500 bags of sugar delivered by the complainant **is something that is capable of being stolen under law.**

Were the bags of sugar obtained in false pretence and with intention to defraud the complainant? **Section 312** of the **Penal code** defines the term false pretence 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.”

The complainant stated that the Appellant indicated that he would pay her a total of Kshs.3.25 million for the delivered 500 bags of sugar. She told the court that the Appellant requested her for a quotation. They agreed on a cost of Kshs.6,500/- per bag of sugar. The payment was supposed to be made on delivery of the goods. She however did not receive any payment after the delivery of the goods to the Appellant. The complainant produced into evidence a copy of an email (**prosecution exhibit no.4**) that she sent to the Appellant's company which indicated a quotation of Kshs.6,500/- per bag of sugar.

The Appellant denied receiving the said email from the complainant. He stated that the email address quoted on the said email did not belong to the company. He also contended that the copy of the email was improperly admitted into evidence in contravention of the provisions of the Evidence Act with regard to admissibility of electronic evidence. However, this court notes that the email address quoted by the complainant (samillisinternational@gmail.com) is the same email address contained in the Appellant's company's letter head (**prosecution exhibit no.2 and 3**). With regard to the email's admissibility, Section 106 I of the Evidence Act provides as follows:

“A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission but the court shall not make any presumption as to the person by whom such a message was sent.”

The presumption allowed under **Section 106 I** of the **Evidence Act** is therefore to the effect that the law deems the email message as having left the address of the originator and having been received at the address of the recipient in the same form and content. The only presumption that the law does not make is that the message was indeed created by the owner of the originating address. In the present appeal, the complainant testified that she sent the email to the Appellant's company as instructed by the Appellant in response to his request for a quotation. This court is therefore of the view that the prosecution adduced sufficient evidence that established that the agreed price per bag of sugar was Kshs.6,500/-.

The Appellant's contention in this appeal is that the complainant delivered 89 bags of sugar and not 500 bags of sugar. He testified that the agreed price per bag was Kshs.5,600/-. This court notes that the Appellant did not avail any documentary evidence to establish the same, despite being the director of the company, and having access to documents held by the company. He stated that the total amount that was due to the complainant was therefore Kshs.498,000/-. He told the court that he paid the said amount to the complainant in two installments of Kshs.250,000/- each. The complainant's bank statements produced in evidence show that the complainant received Kshs.500,000/- from the Appellant which was paid in two equal installments. The amounts were paid in the months of July and August 2016.

The complainant admits to having received Kshs.500,000/- from the Appellant. She however contends that the said amount was repayment of a loan that she had lent the Appellant. The Appellant denied receiving any loan from the complainant. He told the court that he and the complainant did not have any personal relationship. The complainant did not produce any evidence to show that she gave the Appellant Kshs.500,000/-. Without any evidence of the same, this court can only assume that the amounts were paid by the Appellant as part payment for the delivery of the bags of sugar which the complainant had delivered in June 2016.

That being said, as was held earlier in this judgment, the Appellant was required to pay the complainant a total of Kshs.3.25 million which the complainant was yet to receive in full. This fact is not in doubt. The Appellant made a false representation that he was in a position to pay the complainant the said amount for delivery of 500 bags of sugar. His conduct after the complainant delivered the bags sugar goes to show his guilt. He was to pay the complainant the cost of the sugar on delivery of the same. He however did not fulfil his obligation and made a promise to pay the amount in 21 working days. That period lapsed and the complainant is yet to receive the payment.

The Appellant then stopped picking the complainant's calls. DW3, who was the receptionist, told the court that the Appellant instructed her not forward any calls from the complainant to him. To add salt to injury, the company vacated its premises and moved to a new address. The complainant was not able to locate the Appellant as he refused to give her their new address. The Appellant was later arrested after the complainant reported the matter to the police. Even at the time of his arrest in 2017, he still had not paid the complainant the balance for the bags of sugar. The Appellant had therefore defrauded the complainant.

The defence of the Appellant did not dent the otherwise strong culpatory evidence adduced by the prosecution witnesses. It was properly dismissed as being of no evidential value. **His guilt was established to the required standard of proof beyond any reasonable doubt.** This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. His appeal against conviction is hereby dismissed.

With regard to sentence, the Appellant was sentenced to pay a fine of Kshs.300,000/- or in default serve one (1) year imprisonment. In addition, the Appellant was ordered to pay the complainant the sum of Kshs.3,250,000/- as compensation, and in default of the same serve a custodial sentence of one year. The compensation amount was required to be paid within two months of the date of sentencing. The Appellant paid the fine of Kshs.300,000/- and was released by the trial court. The trial court set a mention date on 9th October 2019 for purposes of confirming whether the Appellant compensated the complainant as directed in his sentence. The Appellant applied for orders to stay the proceedings before the trial court and filed his appeal before this court.

During the entire period from the time the appeal was filed to the time the appeal was heard and concluded, the Appellant made no effort to compensate the complainant. This court formed the firm view that the effort by the trial court to promote justice between the Appellant and the complainant was in vain due to the Appellant's reluctance to pay the complainant for the goods that he received but failed to pay for.

In the premises therefore, this court formed the opinion that the order of compensation will not serve the ends of justice. That order is consequently set aside and substituted by a sentence of this court. This court on several occasions requested the Appellant to be present before court during the delivery of this judgment which has been pending for some time now. The Appellant has given one excuse or the other for his failure to attend court. This court issued a warrant for his arrest. He is yet to be found. Meanwhile, the court is on transfer. In the circumstances therefore, this court decided to deliver this judgment in the absence of the Appellant but in the presence of his counsel. The order of compensation made by the trial court is set aside and substituted by a sentence of this court sentencing the Appellant to serve eighteen (18) months imprisonment. This is in addition to the fine of Kshs.300,000 that he has already paid. The sentence shall take effect

from the date the Appellant shall surrender himself to the court or upon his arrest in execution of the pending warrant of arrest.

It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF DECEMBER 2020

L. KIMARU

JUDGE