REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 37 OF 2018

BONIFACE MWANGI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 30th October 2018 in Criminal Case No 1542 of 2015, Republic versus Boniface Mwangi Kamau)

JUDGEMENT

INTRODUCTION

1. The appellant has appealed against his conviction and sentence of two years' imprisonment in respect of cheating contrary to section 315 of the Penal Code (Cap 63) Laws of Kenya.

2. The state has conceded the appeal.

SUMMARY OF EVIDENCE

3. The appellant was convicted on the evidence of Jonathan Muntet, who was the complainant (Pw 1). The evidence of Pw 1 was that he knew the appellant before this incident. On 14th May 2015, the appellant met the complainant at Hass petrol station in Narok town. The appellant told Pw 1 that if he had money he could multiply it. As a result, the appellant showed Pw 1 shs 1,000 black notes and some drug in a bottle which he said was for cleaning purposes. He then showed Pw 1 a machine in the boot of his vehicle. Pw 1 and the appellant went to the house of the appellant. He then removed the machine and took the black notes. Thereafter he poured some liquid as a result of which the notes came out clean.

4. The appellant then gave PW 1 the four notes of one thousand each to confirm that they were genuine notes. Pw 1 deposited a one thousand note in his Mpesa account, which confirmed that this was good money. Thereafter, he also deposited another shs 2,000, which also confirmed that the money was genuine. Finally, he bought goods worth shs 1,000 at Naivas, all totaling shs 4,000.

5. The appellant and Pw1 then proceeded to Nairobi. The appellant then withdrew cash shs two million and three hundred thousand (shs 2,300,000) from his account with Chase bank, which he then gave to the appellant. In the end the appellant was unable to multiply the money. Pw 1 then reported the matter to the police, who then arrested the appellant and charged him with this offence.

6. Upon being put on is defence, the appellant testified on oath that Pw 1 was his client to whom he used to sell electrical fittings and wiring for his bulbs and sockets. It is on that basis that Pw 1 gave him shs 60,000, shs 70,000, and shs 40,000 all through mpesa, which totaled shs 180,000.

7. In his memorandum (*sic*) of appeal to this court, the appellant raised ten grounds of appeal.

8. Mr. Omwega for the respondent conceded the appeal on the basis that the computer printouts (outputs) were not certified by a responsible person from the mpesa office, being the source of the said computer output. This he contended that made them inadmissible in evidence in terms of section 106B (4) (d) of the Evidence Act (Cap 80) Laws of Kenya.

Findings in respect of the grounds of appeal.

9. In a coalesced form, the appellant has in grounds 1, 6 and 8 faulted the trial court in undertaking the proceedings when the appellant and the complainant had reconciled in terms of section of 176 of the Criminal Procedure Code (Cap 75) Laws of Kenya. The appellant is charged with the offence of cheating, which is a felony that carries a maximum sentence of three years imprisonment. Reconciliation is only allowed

for misdemeanours in terms of section 176 of the Criminal Procedure Code. The purported reconciliation between the appellant and the complainant as evidenced by the defence evidence in exhibit D EXh 2 was an exercise in futility. Furthermore, there must be an order of the court to formalize the terms of the reconciliation, which are lacking in these proceedings. It therefore follows that these grounds are without merit and are hereby dismissed.

10. In ground 2, the appellant has faulted the trial court for convicting him when the offence was not proved beyond reasonable doubt. In this regard the trial court expressed itself in the following terms: "*I am satisfied that the case against the accused is proved beyond any shadow of doubt that he committed the offence and obtained the money claimed*." Furthermore, the appellant has in a coalesced form in grounds 3, 4, 5 and 8 has similarly faulted the trial court for convicting him when the prosecution failed to prove its case beyond reasonable doubt. In this regard, the complainant's evidence is that on 20th May 2016 he sent to the appellant shs 10,000, shs 60,000, and shs 70,000. In his defence evidence the appellant admitted being sent that money by the complainant as follows. First he received shs 60,000, then shs 70,000, shs 40,000 and shs 10,000 through his mpesa account. The total amount came to shs 180,000.

11. Furthermore, the appellant in his sworn evidence testified that he agreed with the complainant to settle the matter out of court. Pursuant to that agreement, the father of the appellant paid shs 500,000 to the complainant on 18th June 2015 in order to avoid problems. According to the appellant, he did not understand why the complainant decided to revisit the case. The evidence of the complainant was that he withdrew a sum of shs 2,300,000 from his account with Chase bank in Nairobi and handed it over to the appellant.

12. This is a first appeal. Sitting as a first appeal court, I am required to re-assess the entire evidence tendered during trial and come to my own independent conclusions, I have done so. As a result, I have found that the trial court rightly believed the prosecution evidence that the complainant sent to the appellant shs 180,000 and handed over shs 2,300,000 in Nairobi. I further find that although shs 2,300,000 was handed over to the appellant in Nairobi; this was one continuous transaction, which had started in Narok. I therefore find the submission of counsel for the appellant that the charge was defective in that regard as a submission without merit. I further find that the findings of the trial are supported by evidence.

13. Finally, I am unable to agree with Mr. Omwega that the admission of electronic evidence was inadmissible as the computer print outs were not certified by a responsible person in terms of section 106B (4)(d) of the Evidence Act. I find that any defects in the admission of that evidence was cured by the admission of the appellant in his defence evidence that he received shs 180,000 from the complainant through his mpesa account. Finally, I find that the conduct of the appellant and his father of paying the complainant shs 500,000, instead of shs 180,000 to be corroborative evidence that the appellant had been given shs 2,300,000 in Nairobi in order to multiply it. In this regard, the trial court stated that: "*one cannot owe shs, 180,000 and he is condemned to pay shs 500,000 and the payment is done with all willingness."* I agree with this finding.

14. The upshot of the foregoing is that the appeal of the appellant as regards conviction is hereby confirmed with the result that it is hereby dismissed.

15. In ground 10 the appellant has faulted the trial court for imposing a manifestly harsh sentence. I find that the trial court exercised its discretion properly in imposing a custodial sentence of two years imprisonment in view of the colossal sum of money that the appellant obtained from the complainant. I therefore confirm the sentence.

16. The upshot of the foregoing is that the appeal is dismissed in its entirety.

17. Judgement dated, signed and delivered in open court at Narok this 25th day of March, 2019 in the presence of Mr. Kilele for the appellant and Mr. Omwega for the state.

J. M. Bwonwonga

Judge

25/3/2019