



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 18 OF 2018

MUIA KIVINDYO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgement delivered by Hon A. Lorot, Senior Principal Magistrate in Machakos Chief Magistrates Criminal Case No 1022 of 2014)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence. He was convicted and sentenced to 3 years imprisonment in respect of obtaining money by false pretenses contrary to section 313 of the Penal Code (Cap 63 Laws of Kenya).
2. The state supported both the conviction and sentence.
3. The appellant was convicted on the evidence of 4 witnesses who testified as follows. Pw1, the complainant's daughter **Sarah Ngina Damaris** testified that her mother informed her to send her CV to an email address in order to secure a job with the UNDP. She promptly did so and on 16th January, 2014 she was scheduled for an interview and was chauffeured by the appellant who conducted the interview in his car. She was later informed that she had succeeded and got the job and was given a contract to sign by the appellant on 23.1.14 whereupon she resigned from her teaching job at Machakos Girls Secondary School in preparation for the reporting date and on 22.2.2014 her mother received a call to send a quarter of Kshs 485,970 in relation to the job. The appellant told Pw1's mother to pay the money and he then told her that the new reporting date was 10.3.14. On 7.3.14 Pw1 received a call to send money for an induction training in Mombasa and the appellant advised the complainant to send the money and when she did so, from 10.3.2014 the appellant's phone was off. She testified that she saw the appellant on 23.6.2014 at the bus park and informed her mother who called the CID Officers who in turn arrested him.
4. Pw2, was Pw1's grandfather **Geoffrey Muasa Wambua** and he testified of how his granddaughter was promised a job with the UNDP and therefore he was given a number to forward money to and he duly complied and listed to court the phone numbers and the dates on which he made the deposits totaling to Kshs 537,489/-. He testified that he became suspicious and one day he attempted to contact the appellant whose phone was off. He testified that on 23.6.2014 he was with Pw1 at a pharmacy who pointed out the appellant and informed a police officer who arrested the appellant.
5. Pw3 was **Damaris Mwikali Muasa** and she testified that she knew the appellant who was once her co- worker at Kaewa Secondary School and she had once assisted him to get a job. She testified that she contacted him to assist her daughter get a job and he gave her an email address to send the application. The appellant later asked her to pay certain amounts of money that she sent at different intervals totalling to Kshs 537,489/-. After she indicated lack of interest in the job, the appellant began threatening her and she reported the matter to Machakos Police Station and the police could not trace the appellant, however Pw1 called her one day that she had seen the appellant and after the police were informed, they swung into action and arrested the appellant. Pw3 went to Machakos police station and the appellant indicated remorse and after he was released on bond he disappeared but was rearrested
6. Pw4 was **Pc Dennis Ntoika**, who testified that he was tasked to investigate a case of obtaining money by false presences reported by Pw3 and after being told that the act was committed by a person known to the complainant and being informed of the numbers that were used to supply the money totaling to Kshs 537,487/-, he proceeded to track the numbers and after the appellant was arrested he was arraigned in court on 25.6.14. On re-examination he testified that the lines that received the money were in phones that were found with the appellant.
7. The defence of the appellant was a bare denial. He denied meeting any of the witnesses and receiving money from the complainant.
8. The appellant has raised 5 grounds in his petition of appeal to this court.
9. He has faulted the trial magistrate for convicting him on insufficient evidence and for meting out an excessive sentence. The prosecution

has submitted that from the evidence on record, all the ingredients of the offence as provided under section 313 of the Penal Code have been satisfied as there is evidence that the complainant testified that she knew the appellant quite well and therefore he had been positively identified. The false promise to give the complainant's daughter a job was proved from the account of the complainant and corroborated by the evidence of Pw1 and Pw2. The sums of money received by the Appellant was proved by the account of the complainant and corroborated by the evidence of Pw1, 2 and 4.

10. From the evidence on record as led by all the witnesses, the exhibits tendered, there is no indication that the appellant controverts the same. The complainant had given her account of how she knew the appellant and because no evidence was given to challenge it, it is probably true. The complainant had positively identified the appellant as the perpetrator; the exhibits by the Pw4 had identified what was used to transmit the monies through phones and M-pesa statements and the account of Pw2 and Pw3 are in sync with the fact that indeed the appellant received money from the complainant, I find that there is ample evidence to support the conviction recorded against the appellant.

11. In **R. vs. Turnbull & Others [1973] 3 AllER 549**, it was held that:

"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation" At what distance: In what light: Was the observation impeded in any way" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance"

12. In line with the above case, not having seen the witnesses testify, I am satisfied with the finding of the trial court and the conviction was quite safe because when I look at the proceedings, the complainant seems truthful in her account of what the appellant did, so is the evidence of Pw1, Pw2 and Pw4 believable. Therefore the charge of obtaining money by false presences was proved beyond reasonable doubt.

13. The appellant has faulted the trial court for imposing a sentence that according to him was manifestly excessive. In this regard, the law provides that the maximum sentence provided for in respect of the offence of obtaining money by false presences is 3 years imprisonment. I have considered the mitigation of the appellant that he presented to the trial court. On the other hand I have taken into account that the appellant defrauded the complainant, took advantage of every opportunity to deceive them and this was rightly pointed out by the trial magistrate. After taking into account all the circumstances of this case and in the light of the statutory penal provisions, I find that the sentence imposed was merited.

14. This is a first appeal. As a first appeal court, according to **Okeno v. R. (1972) EA 32**, I am required to scrutinize the evidence upon which the conviction was based. I have done so as herein above analyzed and I find that the appellant was convicted on sound evidence. I therefore affirm both the conviction and the sentence by the trial court.

15. The upshot of the foregoing is that the appellant's appeal lacks merit and is hereby dismissed in its entirety.

It is so ordered.

Date and Delivered at Machakos this 30th day of April, 2019.

D. K. KEMEI

JUDGE