



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 52 OF 2018

(CONSOLIDATED WITH HCCRA 37 OF 2018)

CHRIS MUKILYA MUNYAO..... 1ST APPELLANT

FAITH WAYUA MUINDE.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. E. Muiru (SRM) in Kilungu Senior Resident Magistrate's Court Criminal Case No. 420 of 2017 delivered on 17th April 2018)

JUDGEMENT

Introduction:

1. The appellants were jointly charged with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the offence were that on the 8th day of June 2016 at Malili market, Mukaa sub-county within Makueni County jointly with others not before Court, with intent to defraud, obtained from Dennix Mayabi kshs 56,000/= by falsely pretending that they would supply and buy Nirma Shudh salt from Dennix Mayabi.
2. On the 2nd count, they were charged with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the offence were that on the 18th day of July 2017 at Salama market in Mukaa sub-county within Makueni County jointly with others not before Court, with intent to defraud, obtained from Stephen Mau Masaku Kshs 29,000/= by false pretence.
3. On the 3rd count, they were charged with stealing contrary to section 275 of the Penal Code. The particulars of the offence were that on the 8th day of July 2017 at Kasokoni village, Kikoko location, Kilungu sub-county within Makueni County jointly with others not before Court, stole Kshs 73,800/= from Florence Mutulu Kitumba.
4. The appellants were convicted on the 1st and 2nd counts. On the 3rd count, despite the charge being stealing, the 1st appellant was convicted for obtaining through false pretences and the 2nd appellant acquitted. The 1st appellant was sentenced to 4 years imprisonment on counts 1 and 2. On the 3rd count, he was sentenced to 3 years in prison.
5. The 2nd appellant was sentenced to 3 years imprisonment for both count 1 and 2. All the sentences were to run concurrently.
6. Aggrieved by the decision, the appellants filed separate appeals which were consolidated by the order of Court on 20/11/2018.

The Appeal:

7. The 1st appellant raised the following 6 amended grounds of appeal;

a) That he pleaded not guilty to the charges.

b) That the corroboration of evidence as held was not met.

c) That the prosecution's case was riddled with lots of malice, contradiction and inconsistency.

d) That trial Court failed to give his defense adequate consideration.

e) That the trial Court erred in both law and fact by failing to observe, analyze and evaluate the entire evidence and make a finding that it did not reach the threshold to base a conviction.

f) That the sentence imposed was harsh and excessive.

8. The 2nd appellant raised the following 6 grounds of appeal;

a) That she pleaded not guilty to the charges.

b) That the prosecution's case was riddled with lots of malice, contradiction and inconsistency.

c) That trial Court erred in law and fact by failing to give her defense adequate consideration.

d) That trial Court erred in law and fact by failing to observe, analyze and evaluate the entire evidence and find that there was no evidence to convict.

e) That the trial Court did not adequately consider the issues raised in mitigation.

f) That the sentence imposed was harsh and excessive.

9. On the basis of the above grounds, the appellants prayed that the appeal be allowed, conviction quashed and sentence set aside. Pursuant to the Court directions, they canvassed the appeal by way of written submissions which were filed together with their grounds of appeal. The learned prosecution Counsel elected to rely on the evidence on record to oppose the appeal.

Duty of Court:

10. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

11. Having looked at the grounds of appeal, the appellants' submissions and the evidence on record, the only issues for determination are;

a) Whether the prosecution proved its case beyond reasonable doubt.

b) Whether the sentences imposed were harsh and excessive.

Whether the prosecution proved its case beyond reasonable doubt

Count one:

12. With regard to count one, the 1st appellant submits that the trial Court erred by relying on Safaricom data that was not produced in Court. He also submits that his identification was not proper and as such, his conviction was unsafe. It was also his submission that the evidence of the investigating officers was contradictory and the trial Court should not have believed them.

13. The 2nd appellant submits that the complainant's evidence did not match the particulars of the charge sheet. She contends that there was no concrete evidence to prove that there was Kshs 28,000/= in the cash box. She also submits that the said amount did not feature in the report made to the police.

14. **PW5**, the complainant in count one testified that on 08/06/2016 at around 8.30am he opened his shop called Dreamworks Communication Centre at Malili. He deals with consumables but has an Mpesa outlet and his agent number is [xxxx].

15. He then narrated how on the material day, a lady by the name Esther Muteti went to his shop and withdrew Kshs 2,500/=. She then told PW5 that she was his new neighbour and required some assistance. Apparently, her mother had been involved in an accident in Machakos and her legs were broken. Now that she was proceeding to Machakos, she wanted PW5 to collect some diabetic salt from her supplier, Faith Muinde, for onward transmission to a Doctor by the name Geoffrey Kilului. She gave PW5 Faith's number and left. Shortly thereafter, she called PW5 to tell him that Faith had arrived and she (*Esther*) had directed her to his shop.

16. The said Faith arrived at PW5's shop and introduced herself. She gave him a product wrapped in a black paper bag and PW5 told her to open it whereupon he saw a whitish product in a blue reddish package. The product was marked as MFI. After about 30-40 minutes, a black vehicle make G-Touring parked in front of his shop in a way that he could not see the number plates. A man alighted, went to his shop and introduced himself as Dr. Geoffrey Kilului. He said that he dealt with diabetic conditions and Esther was his supplier. PW5 identified the said Doctor as the 1st appellant.

17. The Doctor deposited Kshs 2,000/= and the name which appeared was Geoffrey Kilului. The product was still on the counter but Geoffrey did not touch it. A boy who arrived to buy bread was told by Geoffrey to take the product to his vehicle. Before leaving, Geoffrey

gave PW5 Faith's number but PW5 said he had it.

18. Shortly thereafter, Geoffrey called PW5 and told him that he had been arrested by NTSA for speeding and needed Kshs 20,000/=. PW5 declined to send. Faith returned to his shop at around midday and told him that the doctor had been arrested. She then told him to deposit Kshs 56,000/= which would be refunded by the doctor upon collecting the products. PW5 did not have float and therefore sent Kshs 28,000/= in Faith's name and then counted another Kshs 28,000/= which he left on the counter as he took Faith's friend, a lady who allegedly had diarrhea, to the washroom.

19. To access the toilet, the lady had to go round the building and PW5 had to go to the back of his shop to open the gate. According to PW5, he did not find the lady when he got to the gate and when he returned to the shop, he did not find Faith. The money on the counter was also missing but the products were still there. He was shocked by the turn of events and surprised by the confusion.

20. PW5 called Esther to enquire as to why she had sent thieves but she pretended not to know. She however seemed to enquire if the deal had gone through. He then called Geoffrey who assured him that he would avail the money. The doctor asked the amount that had been sent and was told. PW5 then called Faith who became rude, abusive and eventually switched off her phone.

21. PW5 reported the matter at Salama Police station the following day and after about a month, he was informed by the DCIO that a lady had been arrested at Malili with the same scandal of salt. He went to the station and found that it was Esther who had been arrested. According to PW5, Esther was charged in Court but absconded after being granted bond. Later on, PW5 learnt that the doctor and Faith had also been arrested.

22. Section 313 of the Penal Code provides as follows;

313 Obtaining through false pretences

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.

23. From the above definition, the following ingredients of the offence are discernible;

- a) *That the person obtained something capable of being stolen;*
- b) *That the person obtained it through a false pretence;*
- c) *That the person had the intention to defraud.*

24. It is against the above evidence that the trial magistrate convicted the appellants on count one. Firstly, the date of the offence as per the charge sheet and the evidence of PW5 was 08/06/2016 but the Mpesa statements produced as exhibits 3(a) & (b) were for the month of July 2017. Further, the agent number given by PW5 did not feature anywhere on the statements.

25. PW5's evidence was very detailed and he was very specific about the phone numbers used to transact, the transaction codes and amounts involved but as rightly submitted by the 1st appellant, the relevant data from Safaricom was not availed. I am therefore not certain that Kshs 28,000/= was deposited by PW5 into the 2nd appellant's number. The data would also have shown that indeed there was a deposit of Kshs 2,000/= to 0724444728 and the name which appeared was Geoffrey Kilului.

26. PW7, Cpl Fred Wanjala, was the investigating officer in PW5's case but his testimony did not corroborate that of PW5. For instance, he said that Esther Muteti deposited Kshs 300/= to send to her sick mother in Machakos whereas PW5 said that she withdrew Kshs 2,500/=. Further, PW7 testified that the doctor was to bring medicine for Esther's sick mother whereas according to PW5, the diabetic salt would be brought by Esther's supplier known as Faith, for onward transmission to the doctor.

27. According to PW7, the doctor wanted more drugs and therefore told PW5 to ask Faith to increase the quantity and he would buy at Kshs 9,200/=. On the other hand, PW5 testified that it was the doctor who was proposing to sell the product to him at Kshs 9,200/= but PW5 told him that he was not interested. This was yet another notable contradiction. Finally, PW7 testified that the lady who requested to go to the toilet was Esther Muteti but in his testimony, PW5 did not seem to recognize the lady he was taking to the toilet. This was awkward because Esther Muteti had been to his shop earlier in the day. It was also clear from PW7 testimony that he did not obtain any Mpesa statements in the course of his investigations.

28. It is my considered view that in the absence of the relevant Mpesa data from Safaricom, the irreducible minimum should have been corroboration of PW5's evidence by PW7. There was no proof that Kshs 56,000/= was actually obtained from PW5. Accordingly, the first ingredient of the offence was not proved and as such, the conviction of the appellants on count one was not safe.

Count Two:

29. With regard to count two, the 1st appellant submits that the evidence of the witnesses was mere say which lacked corroboration.

30. The 2nd appellant submits that she is Faith Muinde and not Celestine Ndunge. She also submits that the evidence of PW2 could not be believed and that the learned trial magistrate rejected her defense without giving cogent reasons.

31. **PW2** was the complainant in count two. He testified that on 18/07/2017 at about 11am, the 2nd appellant went to his shop and bought a file and 2 pencils. She said she would collect them later. PW2 knew the 2nd appellant as Ndunge because she was a customer at his shop. The 2nd appellant told her that a lady known as Faith would deliver a parcel and that he should give the said lady Kshs 20,000. She left him with Faith and Chris's number.

32. Faith delivered the parcel, PW2 gave her Kshs 20,000/= in cash and was told that the 1st appellant (*Chris*) would refund. Chris never went to the shop. Later, he called Faith who told him to send Kshs 4,000/= and he did. Upon depositing the money, the name which appeared was 'Faith Muriuki'. Later PW2 called Chris who told him to send Kshs 5,000/= so that he would refund 25,000/=. The money was never refunded and all the lines went off. The 2nd appellant called him in the evening and assured him that she would pay up but never did.

33. **PW3**, Jacinta Wayua, is the employer of PW2. She testified that on 18/07/2017, she passed by the shop and took breakfast with PW2. She found the 2nd appellant at the shop and there was a spring file and two pencils on the table. The 2nd appellant was negotiating the price of the items with PW2. PW3 was then informed about the request made by the 2nd appellant. She testified that PW2 gave out a total of Kshs 29,000/=.

34. **PW7** was the Investigating officer in the matter. He narrated the report made to him by the complainant. On cross examination, he admitted not having proof of the transactions and agreed that he did not have Mpesa statements in Court.

35. In his defence, the 1st appellant said that PW2 was unknown to him and had never transacted with him.

36. In her defence, the 2nd appellant testified that on 17/07/2017, she was at Salama where she went to a shop and bought a file, rubber and pencil as she was headed to visit her child in school. She left with her belongings and after a few steps; she met with a man in the company of a lady who was carrying a black paper bag. She was later arrested while at the stage.

37. I am satisfied that the 2nd appellant was known to PW2 as a customer and that she was indeed found at the shop by PW3. In fact, she admitted having bought the stationery that PW2 and PW3 talked about. Despite the non-production of Mpesa statements, the evidence was corroborative and I am satisfied that Kshs 20,000/= was given to a lady who introduced herself as Faith as per the instructions of the 2nd appellant. The 2nd appellant obtained the money through proxy by falsely pretending that it would be refunded but she had no such intention. It was clearly meant to defraud.

38. As for the 1st appellant, there was no evidence to link him with this count. PW2 agreed that the 1st appellant never went to the shop and the 1st appellant denied ever transacting with him. There was no evidence to show that money was sent to him by PW2 or that he communicated with PW2. In my view, it was possible to erase all doubt from the mind of the Court by availing the relevant data from safaricom.

39. In a nutshell, count two was proved to the required standard against the 2nd appellant but not the 1st appellant.

Count Three:

40. The trial magistrate opined that the evidence adduced supported the offence of obtaining by false pretences and not stealing.

41. With regard to count 3, the 1st appellant submits that the complainant had no documents to prove that she operates an Mpesa shop and that there was a contradiction in her evidence as to how much was deposited in the account of Gregory Munywoki. He also submits that the Kshs 8,400/= which was apparently given in cash was an afterthought as it was only raised in cross examination.

42. **PW1**, Florence Matulu Kitumba, was the complainant in count 3, she testified that on 08/07/2017 at about 10.00am, the 1st appellant and his friend Gregory Munyoki went to her shop with 6 packets of salt. They left the salt and told her to deposit Kshs 30,000/= into Gregory's account. They told her to deposit Kshs 50,000/= which she would get from someone who would pick the salt.

43. Later, a lady went to the shop and introduced herself as Faith but he then learnt that she was Nancy. She arrived in a grey pro box and enquired about the salt. Nancy left to pick other products and said that she would return but she didn't. PW1 called them severally until 2.00pm when the 1st appellant told her that Nancy had been involved in a motorcycle accident and needed money to take her to hospital.

44. PW1 did not have float and therefore requested his friend Muteti to assist him. Muteti sent Kshs 10,000/=, 5,000/=, 4,200/= & another 4,200/= to the 1st appellant. They did not show up and PW1 decided to report the matter at Kilome police station.

45. On cross examination by the 1st appellant, she said that she deposited Kshs 50,000/= to Gregory Munyoki's phone and gave Kshs 8,400/= in cash to the 1st appellant. That in her statement, she indicated Kshs 65,400/= plus the amount in cash totaling to Kshs 73,800/=

46. **PW4**, was Martin Musyoka Muteti. He testified that PW1 was his cousin and business mate. That on 08/07/2017 PW1 requested him to send some money to a certain number. He sent Kshs 10,000/= and the recipient was the 1st appellant. He then sent Kshs 5,000/= to the same number. He then sent Kshs 4,000/= to another number and the recipient was Faith Muriuki. On 09/07/2017, he was requested to send Kshs 4,200/= to the 1st appellant again. The total sent to the 1st appellant was Kshs 19,200/= and Kshs 4,000/= to Faith. He did not know either the 1st appellant or Faith.

47. **PW6**, Cpl Edward Njeru, was the investigating officer. He testified that Kshs 30,000/= was deposited into the 1st appellant's phone. He said that upon being assigned the matter by his boss, he traced the suspects using the numbers which the complainant had given him and finally found them in Makindu. He produced the 6 packets of salt as exhibit 2,

Mpesa statements as exhibits 3(a) & (b) and the investigation diary as exhibit 4.

48. According to PW6, the total amount stolen was Kshs 64,000/= . Kshs 30,000/= was sent to Geoffrey Munyoki and the balance sent to the 1st appellant at different intervals.

49. Exhibit 3(a) shows that indeed PW4 sent the various amounts to the 1st appellant and another. I am satisfied that PW4 sent the amounts as per the instructions of PW1 because the 1st appellant was not known to him. Exhibit 3(b) shows that there was a deposit of Kshs 30,000/= to Gregory Munyoki as per the evidence of PW1. The 1st appellants was evidently working in cahoots with another and obtained the amounts by falsely pretending that someone would collect the salt and refund the money. Their intention was defraud. I agree with the learned trial magistrate that indeed the said Munyoki was used to set bait for the complainant and to deceive her into believing that someone would return to pick the salt.

50. I agree with the trial magistrate that indeed, the evidence adduced supported a charge of obtaining by false pretences and the 1st appellant was properly convicted for having committed the offence.

Sentencing:

51. It was erroneous for the trial magistrate to impose a sentence of 4 years imprisonment for a charge of obtaining through false pretences. The maximum sentence provided under section 313 of the Penal Code is three years.

Conclusion:

The appeal succeeds partially. Thus court makes the following orders;

- i. -Count one was not proved to the required standard thus dismissed.**
- ii. -In count 2, conviction of the 2nd Appellant is hereby upheld and that of the 1st appellant quashed.**
- iii. -In count 3, conviction of the 1st appellant is hereby upheld.**
- iv. -In the circumstances of the case, imposition of the maximum sentence will not be excessive thus sentence reduced to maximum of 3 years imprisonment to run from the day of conviction.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE