



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 144 OF 2017

PETER LODINYO KINGETICH Alias KATIKIT NGOLOKENY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by F. M. Nyakundi, RM,

in Mumias SPMC Criminal Case No. 1074 of 2016 dated 30/11/17)

JUDGEMENT

1. The appellant herein was convicted of the offence of cheating contrary to Section 315 of the Penal Code and sentenced to serve three years imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal are:-

- a) That the learned trial magistrate gravely erred or misdirected himself in law and facts in convicting on the basis of a defective charge sheet which disclosed a different offence.*
- b) That the learned trial magistrate gravely erred in law and fact in convicting the appellant against the weight of evidence.*
- c) That the learned trial magistrate gravely erred in law and fact in placing inordinate weight on a purported agreement without observing that the same was fake, suspicious, full of glaring inconsistencies and omissions, doubtful, and in which all the listed parties did not testify thereby occasioning prejudice and malice.*
- d) That the learned trial magistrate gravely erred in law and fact in presuming and finding that the charged person was the same as the convicted person without observing and considering that the appellant had proved the difference.*
- e) That the learned trial magistrate gravely demonstrated bias in law when he gave unlawful orders relating the motor vehicle in question in question when the charge was not of the nature to warrant that.*
- f) That the learned trial magistrate gravely erred in law and facts in failing to observe that the Safaricom print out evidence did not relate to the appellant as alleged.*
- g) That the learned trial magistrate heavily misdirected himself in law in narrowing his findings to the offence of obtaining by false pretence without amendments to the charge.*
- h) That the learned trial magistrate gravely erred in law and facts in failing to discover discrepancies, contradiction, inconsistencies, doubts and variance on the alleged agreement and more so on the entire prosecution's evidence thereby shifting the burden of proof on the appellant.*
- i) That in all manner, the sentence imposed was harsh and excessive in the circumstances and non-considerate of the period spent in remand custody.*
- j) That the learned trial magistrate gravely erred in law and fact in rejecting the appellant's defence in convicting based on bias and opinion.*

2. The particulars of the charge against the appellant were that on diverse dates between 13th April, 2016 and 25th May, 2016 at Siribo area

village Marachi East Location Lukongo Sub-location within Kakamega County by means of fraudulent tricks obtained cash Kenya Shillings 319,620/= from Cornel Omondi Okwach (hereinafter referred to as the complainant) by falsely pretending that he was in a position to sell to him motor vehicle registration number KBL 381E make Toyota Caldina white in colour, a fact he knew to be false.

3. The State opposed the appeal.

Prosecution Case

4. The case for the prosecution was that the complainant was introduced to the appellant by a neighbour called Henry Kweyu who told him that the appellant was selling a motor vehicle. They met the appellant at Eldoret town on the 10/4/2016. He was with a motor vehicle registration No. KBL 381E Toyota Caldina. They parted ways and agreed to meet on a later date. That on 13/4/16 the appellant and Henry went with the vehicle to the school where the complainant was working. They went to the complainant's home. The complainant sent the appellant Ksh. 20,000/= through his M-pesa Account No. [xxxx]. He paid another Kshs. 50,000/= through M-pesa. They agreed that he would pay the decretal sum in instalments. The complainant's wife PW2 paid the appellant Ksh. 50,000/= in cash. On 25/5/2016 they wrote a sale agreement that was witnessed by the complainant's wife and Henry Kweyu. The appellant handed over the vehicle to the complainant together with copies of the log book and identity card. The log book indicated the registered owner of the vehicle to be one James Muturi Ngige. When the complainant inquired about it the appellant told him that he had not changed the name in the log book. The name in the appellant's identity card was Katikit Ng'olekeny – No. 20942891. The name the appellant used in the agreement was Peter Lodinyo Kingetich of identity card No. 20821999 and mobile phone number 0718391751. The appellant however did not ask him why the names were different. The appellant promised to bring the complainant the original log book. Later the appellant called him and told him they meet at Luanda market for him to give him the log book. The complainant went there in the vehicle but the appellant never turned up. On the way back home he was stopped by policemen who were in the company of a man a woman. He was shown a photocopy of a log book of the said vehicle in the name of Jane Mongina Onyando. The police detained the vehicle. By then the complainant had paid a total of Ksh. 319,620/=. Some of the money was paid through M-pesa into the appellant's M-pesa account.

4. On the 4/7/2016 the complainant reported at Mumias Police Station. PC Rubia PW3 took the report. The complainant handed over to him the copy of the log book that was given to him by the appellant, P. Ex.2. The officer did not trace the appellant.

5. That on the 21/9/2016 C. I. Abdalla PW4 arrested the appellant while in possession of the said vehicle at Mutomo in Kitui County. He received a report that the vehicle had a case at Mumias Police Station. PC Rubia PW3 of Mumias Police Station received the report. He went to Mutomo Police Station and picked the appellant and brought him to Mumias. He found that the appellant was at the time in remand at GK Prison Kitui under the name of Katikit Ngolekeny. He obtained the appellant's original identity card No. 20942891, P. Ex.9. The identity card number used in the agreement was 20821999. The officer wrote a letter, P.Exh.10, to the Registrar of Persons to provide him with the details of the holders of the two identification cards. He received a report P.Ex.11 that indicated that identity card No. 20821999 belonged to Peter Kingetich Lodinyo while identity card No. 20942891 belonged to Katikit Ng'olekeny.

6. The M-pesa statements for the mobile phone number 0718391751 and identity card No. 20821999 and the complainant's phone number [xxxx] and identity card No. [xxxx] were obtained from Safaricom mobile phone provider whose report was prepared by Quinto Odeke, PW5. PW5 found that the former account number is registered in the name of Peter Lodinyo Kingetich while the latter was in the name of the complainant. PW5 extracted M-pesa statement for the account of Peter Lodinyo Kingetich, P.Ex.1. He extracted the registration form for the complainant's mobile phone number, P.Ex.13. The statement of Peter Lodinyo Kingetich indicated that Peter Lodinyo Kingetich had received cash transfers from the account of the complainant between 13/4/16 and 30/6/16 to the total of Ksh. 126,380/=.

The appellant was then charged with the offence.

Defence Case

7. When placed to his defence the appellant gave a sworn statement in which he stated that his name is Katikit Ngolekeny of identity card No. 20942891. That he comes from Baringo East and is married to a woman called Sharon. That on 2/9/2016 he was at Mutomo where he was arrested by the police and charged at Mutomo over a certain case. He was then told that he was involved with another case at Mumias. He was brought to Mumias where he was charged over the present case where it was alleged that he had sold a vehicle. He denied it. He said that he is not called Peter Lodinyo Kingetich. He denied that he was involved in any sale agreement over the vehicle. He denied knowing a woman by name Jane Mongina. He denied that he received any money through M-pesa as claimed in the case. He denied that he was found in possession of the motor vehicle.

Submissions

8. The appellant made written submissions. He faulted the learned trial magistrate for failing to analyze the evidence carefully and thereby arriving at the wrong decision. He also faulted the magistrate for rejecting his defence.

9. In opposing the appeal the prosecution counsel **Mr. Ng'etich** submitted that the sale transaction between the appellant and the complainant took a period of time. That the two made several meetings. That a sale agreement was signed between them. That later the vehicle was re-possessed by its owner after it was discovered that the appellant had no capacity to sell it. The appellant did not displace the evidence adduced by the prosecution.

Analysis and Determination

10. This is a first appeal and as such the court is guided by the principles set out in the case **David Njuguna Wairimu -Vs- Republic [2010] eKLR** and drawn from **Okeno -Vs- Republic (1972) E.A. 32** where the court of appeal stated:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

11. The appellant stated in his petition of appeal that the charge sheet was defective in that it disclosed an offence of obtaining by false pretence but the charge was not amended.

12. Section 134 of the Criminal Procedure Code provides the manner in which charges have to be framed. It provides that:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

13. The question as to what amounts to a defective charge was addressed by M. Ngugi J. in **B.N.D –Vs- Republic (2017) eKLR**, where she stated that:

“.....Hence, here, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given crucial pointers. Two cases are pertinent: the case of Yosefa v. Uganda [1969] E.A. 236 – a decision of the Court of Appeals – and Sigilani v. Republic [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. Sigilani v. Republic [2004] 2 KLR held:

‘The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.’

‘.....The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective’.

14. The appellant was charged under Section 315 of the Penal Code that provides that:-

“Any person who by means of any fraudulent trick or device 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 or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years.”

15. The ingredients of the offence under the said section are proof of:-

- (i) fraudulent trick or device
- (ii) obtaining of something capable of being stolen

16. The facts of the case were that a certain person convinced the complainant that he was the owner of the motor vehicle which was the subject of this case. He persuaded the complainant to buy the vehicle and he would deliver to him the original log book. After he was paid some initial amount he left the motor vehicle to the complainant promising him to deliver the log book. After being paid some substantial amount he conspired with some other people who repossessed the motor vehicle from the complainant. He was later found with the motor vehicle in Kitui County which meant that he was somehow connected with the repossession of the motor vehicle.

17. The act of the person of selling the motor vehicle to the complainant and thereafter repossessing it through some other people only for him to be found with it thereafter amounted to obtaining money from the complainant by a fraudulent trick or device. The facts proved the ingredients of a fraudulent trick and obtaining of money. There was thereby no defect in the charge.

18. The question before the court was whether the appellant was the person who sold the motor vehicle to the complainant. The trial court found that the appellant is the person known as Peter Lodinyo Kingetich alias Katikit Ngolekeny. That though the appellant indicated his name on top of the agreement as Peter Lodinyo Kingetich of ID. No. 20821999 and Tel. 0718391751/072235493, he put his name at the bottom of the agreement as Peter Lodinyo Kingetich. On the place for signature he inserted “Kakikit Ngolekeny of ID. No. 2092891.”

19. The complainant met the appellant on several occasions before they struck the deal. They met at Eldoret town. They met at the complainant’s work place. The complainant travelled with him to his home. The complainant had ample time to know the physical appearance of the appellant. That the appellant was found with the same vehicle that he had sold to the complainant put more weight to the complainant’s evidence that the appellant is the person who had sold the vehicle to him. He is therefore the one who had entered into an agreement with the complainant for the sale of the motor vehicle.

20. The appellant put two names in the agreement – Peter Lodinyo Kingetich and Kakikit Ngolekeny. The accused then is the person who was using the two names. He is the one who received the complainant's money through M-pesa.

21. The appellant contended that some crucial witnesses who were involved in the making of the agreement did not testify in the case. In my assessment there was sufficient evidence even without the evidence of those other witnesses to prove the charge against the appellant. That the witnesses were not called was not fatal to the prosecution case.

22. In the foregoing the charge against the appellant was proved beyond all reasonable doubt. There was no truth in his denials. The appellant was rightly convicted of the offence.

23. The sentence for the offence of cheating contrary to Section 315 of the Penal Code is three years imprisonment. The appellant stole from the complainant a sum of Ksh. 319,620/=. The complainant paid the money to the appellant in instalments. It is apparent that he struggled to raise the money. I am of the considered view that the sentence befitted the offence committed.

24. The upshot is that the appeal is bereft of merit and is accordingly dismissed.

Delivered, dated and signed in open court at Kakamega this 30th day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma for State

Appellant - present

Court Assistant - George

14 days right of appeal.