



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 55 OF 2017

ANTONY KARIUKI MUKERE..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the judgment in Nyeri CMCRC. No. 427 of 2017 delivered on 30/08/2017 by Hon. Victor Chianda SRM)

JUDGMENT

FACTS

1. The Appellant, **Antony Kariuki Mukere**, was charged with the offence of obtaining by false pretences contrary to **Section 313** of the **Penal Code**;
2. The particulars of the charge are that on diverse dates between 23rd March, 2013 and 13th April, 2013 within Gaikundo Sub-Location, Gaikindu-ini Location within Nyeri County with intent to defraud Power Technology Solutions Limited obtained Kshs.172,550/- by pretending that the said money would be paid to workers for execution of penstock at Gikara Small Hydro Power Plant who had been hired by the said Power Technology Solutions Ltd.
3. *The prosecution called a total of five witnesses in support its case; the appellant was found guilty, was convicted and sentenced to a term of three (3) years imprisonment.*
4. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal and listed the Grounds of Appeal as are summarized hereunder:-
 - (i) The elements of the offence had not been adequately proved to the desired threshold;
 - (ii) The trial magistrate failed to consider all the evidence on record and the submissions by the defence; and failed to appreciate that the issues raised were purely a civil claim that could not be entertained as criminal proceedings;
 - (iii) The sentence was manifestly oppressive and excessive.
5. At the hearing of the Appeal the appellant was represented by learned counsel Mr.Kioni and Mrs. Gicheha appeared as the Prosecuting Counsel for the State; and both counsel made oral submissions; hereunder is a summary of the respective presentations;

APPELLANT'S SUBMISSIONS

6. The appellant submitted that the appellant was convicted and sentenced for obtaining by false pretences; that he had obtained Kshs.172,550/- meant to be paid to workers; it was simply a commercial dispute and as it was a contractual obligation then no offence was committed and therefore there was no need to have brought criminal charges against the appellant;
7. The prosecution proceeded on a defective charge as the amount on the Charge Sheet was not commensurate with the evidence on the amounts lost; the complainant admitted that the amount in dispute was approximately Kshs.70,000/-; and also admitted that all the work was done and therefore there was no issue of falsehood;
8. Counsel urged the court to allow the appeal; to quash the conviction and to set aside the sentence.

RESPONDENTS SUBMISSIONS

9. In response Prosecuting Counsel for the State concurred with the submissions of the appellants' counsel that the evidence did not actually meet the threshold for the offence charged; that it was more of a contractual obligation and redress should have been sought in a commercial court; and therefore conceded the appeal.

ISSUES FOR DETERMINATION

10. After considering the submissions made by both counsel these are the issues the court has framed for determination;

- (i) Whether the prosecution proved its case to the desired threshold;
- (ii) Whether the subject matter invites civil proceedings as opposed to criminal proceedings;

ANALYSIS

11. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the prosecution proved its case to the desired threshold;

12. The offence of obtaining by false pretenses has three key ingredients which the prosecution must prove; which are as set out hereunder;

- (i) Obtains property capable of being stolen;
- (ii) Fraud through false pretense;
- (iii) With the intention of permanently depriving;

Obtains property capable of being stolen;

13. The evidence of **Francis Ngunjiri Maina (PW1)** who was a director of the complainant company was that they were undertaking a construction project and had given the appellant excavation work and paid out Kshs.120,000/- to cover the work;

14. The trial court in its judgment stated that there was;

'.....no doubt that the appellant had indeed received part payment totaling Kshs.172,550/- as documented by "PEXh.1" a copy of cheque in his favour';

15. This court is satisfied that indeed monies exchanged hands and finds that the prosecution proved this ingredient that the appellant obtained something that was capable of being stolen;

Fraud through false pretense; With the intention of permanently depriving;

16. For these two remaining ingredients, the evidence of **PW1** was that the initial project was for levelling of the road and that this was completed in March, 2013; the subsequent project was for excavation and was not completed to satisfaction; he later learnt that there were issues relating to unpaid youth workers, whom the appellant had not paid despite having received the dues and that the money did not go to the intended recipients;

17. In cross-examination he acknowledged that there was no agreement signed between the appellant and the company; there were also no invoices; that there were various payments made by him to the appellant through Mpesa;

18. The evidence of **PW3** one of the youth workers was that the company gave the appellant two projects which entailed trench digging; that they completed the job and that the only outstanding issue was that the appellant despite having received payment from the company had refused to pay them for the work they had done; **PW3** and **PW4** corroborated the evidence of **PW1** and **PW2** on non-payment;

19. Undoubtedly, there may have been irregularities over the payment of the youth contracted as labourers; but the gap in the prosecution's case arises from the absence of any agreement made between the company and the appellant or invoices to ascertain whether the monies paid out was solely for the labourers or for the works that were to be carried out or for a mixture of both; the facts may give rise to suspicion against the appellant but falls far short of certainty that there was false pretence which this court can then draw an inference that there was an intention to defraud and to deprive the complainant of its monies permanently;

20. This court is far from satisfied that the prosecution evidence proved these two ingredients to the desired threshold; and concurs with the prosecuting counsel for the state that the conviction cannot be sustained;

Whether the subject matter invites civil proceedings as opposed to criminal proceedings:

21. The prosecution witnesses all testified and confirmed that the work was indeed carried out by the appellant; the only problem is that the appellant did not pay the persons hired to execute the works; or as stated by **PW1** the work may not have been completed to the company's satisfaction;

22. It is this court's considered view that the very nature of the case invites civil proceedings by the workers for breach of contract due to the appellant's failure to pay them; the company too can file a civil claim against the appellant for non-performance or satisfactory performance;

23. This court finds that the payments of the workers and the level of satisfaction of the works carried out are issues to be canvassed in civil proceedings as opposed to criminal proceedings;

FINDINGS

24. In the light of the forgoing this court makes the following findings;

- (i) The prosecution failed to prove its case to the desired threshold;
- (ii) The subject matter invites civil proceedings as opposed to criminal proceedings.

DETERMINATION

25. The appeal is found to be meritorious and it is hereby allowed;

26. The conviction is hereby quashed and the sentence is hereby set aside; the appellant to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 31st day of July, 2019.

HON.A.MSHILA

JUDGE