



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.83 & 62 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. J. Gandani (Mrs.) – CM delivered on 2nd June 2017 in Nairobi CM. CR. Case No.171 of 2013)

CYRUS NDONYE KAHURA.....1ST APPELLANT

MUNYIVA MUTIE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Cyrus Ndongye Kahura and Munyiva Mutie alias Joyce were charged with the **offence of obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 12th April 2010 at Alfurqan Auto K. Ltd along Mbagathi Road in Nairobi, the Appellants, jointly with others not before court, with the intent to defraud, obtained from Biutha Manwa Mosomi (the complainant) Kshs.810,000/- by falsely pretending that they were in a position to sell him a motor vehicle registration Number KBJ 679H Toyota Hiace, a fact they knew to be false. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged. They were sentenced to serve two (2) years imprisonment. The Appellants were aggrieved by their conviction and sentence. They have separately appealed to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction. They were aggrieved that they had been convicted on the basis of evidence that was insufficient, inconsistent and incapable of sustaining a conviction. They were aggrieved that they had been convicted yet the evidence disclosed that the money was received by another person other than by the complainants. In particular, they faulted the trial magistrate for failing to consider that the Appellants had been charged on the basis that they were associates of one Alex Muriithi, who was the actual person who entered the agreement for the sale of the motor vehicle, and who was the one that was paid the sum in question. They faulted the trial magistrate for relying on extraneous considerations and ignoring the evidence that was adduced in reaching the erroneous verdict that they were guilty as charged. The Appellants were aggrieved that the trial magistrate failed to take into consideration their respective defences before arriving at the decision to convict them. In essence, the thrust of the Appellants' appeal is that the prosecution had failed to adduce evidence to establish their guilt to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside their respective custodial sentences.

During the hearing of the appeal, this court heard oral submission made by Mr. Irungu for the 1st Appellant, Mr. Mwilu for the 2nd Appellant and by Ms. Nyauncho for the State. Mr. Irungu submitted that the 1st Appellant was employed as a driver of the complainant. One day, he saw an advert by one Alex Muriithi who was advertising a motor vehicle for sale. The complainant met with Alex Muriithi. He saw the motor vehicle. After negotiations, an agreement was reached. The said Alex Muriithi agreed to sell motor vehicle registration number KBJ 679H Toyota Hiace to the complainant. The agreed purchase consideration was Kshs.910,000/-. The complainant paid the sum of Kshs.810,000/- to Alex Muriithi. The 1st Appellant did not participate in the agreement other than introduce the complainant to the said Alex Muriithi. Mr. Irungu submitted that the fact that Alex Muriithi was not charged meant that the case against the 1st Appellant could not be sustained. He was a critical witness who ought to have been called to testify in the case. His absence meant that the prosecution's case was weakened and had gaps which could not be filled by any other evidence. He submitted that the prosecution had thus failed to establish a nexus between the sums that were allegedly obtained by false pretences and the 1st Appellant.

On his part, Mr. Mwilu for the 2nd Appellant submitted that the 2nd Appellant was an employee of Alfurqan Auto K. Ltd where the motor vehicle was sold. She was not party to the agreement that was entered between the complainant and the said Alex Muriithi. The company she worked for only got commission upon the sale of a motor vehicle and was not involved in the actual sale transaction. Just like the 1st Appellant, the 2nd Appellant submitted that the fact that Alex Muriithi was not charged rendered the charge brought against her unsustainable. She did not receive the money that was paid by the complainant. The money was paid to the said Alex Muriithi. She complained that she was enjoined in the charge by the mere fact that she worked for the company where the motor vehicle was sold by the said Alex Muriithi.

Ms. Nyauncho for the State submitted that the Appellants colluded with one Alex Muriithi who received the sum of Kshs.810,000/- on the pretext that he was in a position to sell a motor vehicle to the complainant. She explained that after receiving the money, the said Alex Muriithi went underground and by the time the charges were laid against the Appellants, he had not been found. She submitted that the 1st Appellant was arrested while driving the motor vehicle. He refused to release the motor vehicle to the complainant. The 2nd Appellant was in the office when the motor vehicle was sold to the complainant. Learned State Counsel conceded that since the Appellants did not actually receive the money, they ought to have been charged with the offence of conspiracy contrary to **Section 317** of the **Penal Code**. She urged the court to invoke its jurisdiction and substitute the charge to reflect the disclosed offence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

The issue for determination by this court is whether the prosecution established to the required standard of proof the charge that was brought against the Appellants.

There are certain facts that are not in dispute in this appeal. It is not disputed that the complainant entered into an agreement with one Alex Muriithi for the purchase of motor vehicle registration number KBJ 679H Toyota Hiace. The agreed purchase consideration was Kshs.910,000/- out of which the sum of Kshs.810,000/- was paid. From the evidence, it was apparent that the complainant did not take possession of the motor vehicle upon making the said deposit. The investigating officer testified that he was unable to trace the whereabouts of the said Alex Muriithi during his investigations. It is further not disputed that

both Appellants, other than being associated with the said Alex Muriithi, did not sign the agreement nor did they receive the purchase consideration. It was the prosecution's case that the Appellant's were part of a syndicate that enabled the complainant to be duped and conned of his money. The 1st Appellant was the one who directed the complainant to the said Alex Muriithi after he saw an advert in the Newspapers. The 2nd Appellant worked at the sales yard where the motor vehicle was kept pending its sale. According to the complainant, the 2nd Appellant was present when he paid the money to the said Alex Muriithi.

The thrust of the prosecution's case was that the Appellants acted in cahoots with the said Alex Muriithi to defraud the complainant of the said sum of Kshs.810,000/- knowing that they were not in a position to deliver the motor vehicle. Upon evaluation of the evidence adduced before the trial court, this court is of the considered opinion that the evidence adduced by the prosecution did not sufficiently connect the Appellants with the offence. Uncontroverted evidence was adduced to the effect that it was one Alex Muriithi who entered an agreement with the complainant. He was the one who was paid the said sum of Kshs.810,000/-. The Appellants neither signed the agreement nor received the money. There is no evidence that the Appellants gave representation to the complainant as to the particulars of the motor vehicle or that they received part of the money that was paid to the said Alex Muriithi. This court holds that the strength of the prosecution's case against the Appellants hinged on the availability of Alex Muriithi in court either as a co-accused of the Appellants or as a witness. In his absence, the prosecution's case against the Appellants could not be sustained. Reasonable doubt was raised by the absence of Alex Muriithi as a party in the proceedings. The explanation offered by the investigating officer to the effect that the said Alex Muriithi went underground and could not be traced to be presented to court meant that the prosecution's case against the Appellants was severely weakened.

In the premises therefore, the assertion by the Appellants that they were innocent and were not involved in the fraud may well be true. The Appellants' appeal against conviction is hereby allowed and as a result of which their respective convictions are quashed and the sentences imposed upon them set aside. The Appellants are ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF JANUARY 2018

L. KIMARU

JUDGE