



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 20 OF 2018**

**DAVID MAINA KIAMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court*

*Criminal Case No. 865 of 2017 delivered by R. Kefa Senior Magistrate on 12<sup>th</sup> day of July 2018.*

**JUDGMENT**

1. **David Maina Kiama** alias Mburu the Appellant herein was charged with two counts of Conspiracy to defraud contrary to section 317 of the Penal Code.

2. He was also charged with two counts of obtaining money by false pretences contrary to section 313 of the Penal Code. The complainants in the four counts are Eunice Wanjiru and Lydia Muthoni.

3. After a full hearing the trial court found the Appellant guilty and convicted him on all counts and fined him as follows:

- C1 Kshs 50,000/- i/d one year imprisonment
- C2 Kshs 50,000/- i/d one year imprisonment
- C3 Kshs 250,000/- i/d three years imprisonment
- C4 Kshs 250,000/- i/d three years imprisonment

4. He was dissatisfied with the whole judgment and filed this appeal citing the following grounds:

*(i) That the learned trial magistrate erred both in law and facts by convicting him relying on unreliable evidence from PW1 and PW2 who had given undocumented Safaricom Mpesa transactions data which revealed the sender as Patrick Ngugi and not David Maina(Appellant) thus a case of mistaken identity sufficed.*

*(ii) That the learned trial magistrate erred both in law and facts convicting and sentencing the Appellant yet disregarded the fact that the said exhibit (diamond) which was taken to the government chemist but when examined the results revealed it was not genuine diamond but natural beans and therefore the Appellant was not culpable.*

*(iii) That the learned trial magistrate erred both in law and facts by convicting and sentencing the Appellant by relying on shoddy investigations from the (I.O) investigation officer who had arrested the Appellant and booked him at the police cells as indicated in the O.B.*

*(iv) That the learned trial magistrate erred both in law and facts by convicting and sentencing the Appellant by relying on contradicting, inconsistent and untruthful evidence where PW1 greatly differ with PW2 on the amount of money allegedly defrauded by the Appellant.*

*(v) That the learned trial magistrate erred both in law and facts by convicting and sentencing the Appellant yet dismissed his*

*unsworn defence without giving cogent reasons for doing so as enshrine in law vide section 212 of criminal Procedure Code of laws of Kenya.*

5. The prosecution case is that PW1 **Lydia Muthoni** and PW2 **Eunice Wanjiru Ngari** are business women. It was their evidence that on 24<sup>th</sup> July 2017 noon PW1 received a call from an unknown person who told her of a tender to supply onions in Nanyuki. He told her that those offering the tender were coming to Nyeri and she should be in attendance. She informed her friend PW2 of the call. The caller identified himself as Mburu and is the Appellant.
6. The following day PW1, PW2, the Appellant, David Maina and Theuri met at Batian hotel. They discussed after introductions. Another person called Steve Kama was introduced as the Financier of the business they were getting in. He agreed to give them Kshs 1000,000/- He also told them of diamond he was selling in order to assist orphans. They followed the Appellant upto where the diamond was said to be at Kungumaito.
7. They all examined the “diamond” which was valued at kshs 2,400,000/. This ‘diamond’ was never opened for them to see or feel it. They were made to sign for it not to be opened. Peter Muga & Ngige committed themselves to buy the “diamond”.
8. Their good friends all left and they agreed to meet the next day 7.30 a.m. PW1, PW2 and another returned the “diamond” to Steve Kama at Batian hotel and he told them he needed Kshs 30,000/- for accommodation and the two ladies give it to him.
9. The next day they met despite a few delays but the supposed to be buyers left because of the delays. The Appellant then arrived with Steve Kama and informed them that Steve needed Kshs 200,000 before leaving them with the diamond, and Kshs 240,000/- for the licence.
10. They discussed and agreed to get the Kshs 440,000/-. PW1 sent Kshs 250,000/- to Peter Muga via Mpesa (0712496755). She identified her Mpesa transaction (**EXB1**) showing how she had sent money to Eric Maina, Eric Macharia, Peter Njege ,Leah Njogu, Michael Gachoya, Steve Kama (cash Kshs 13,500/. She paid a total of Kshs 200,000/-. By September 2017 there was no tender and that’s when she became suspicious. They reported to Ruringu and later to Nyeri Police Station. She said they had met the Appellant thrice during the transaction.
11. PW2 who gave similar evidence to that of PW1 stated that she had sent a total of Kshs 210,000 to various people in connection to this business. Her Mpesa transaction statement was produced as EXB3. She identified the “diamond” as EXB2. PW2 testified that whenever they wanted to meet prospective buyers for the “diamond” (EXB2) they were hindered by the Appellant and team.
12. PW3 **Joram Wambua Gatweu** is a Chief Geologist who examined the specimen in an envelop. One match box contained soil while the other contained bean seeds. Upon analysis he found that one box contained silcon sand while the other contained normal beans. He produced his report as EXB5.
13. PW4 **Cpl Leftin Kibowen** received the complaint by PW1 and PW2 and carried out investigations. The Appellant was finally arrested on 13<sup>th</sup> September 2017. When the substance supposed to be diamond was opened it was found to have 2 matchboxes one of which contained a mixture of sand and cement while the other contained bean seeds. The substance was examined and found not to be diamond. He confirmed that the lines used to receive money were not registered under the Appellant’s official name. The numbers had been given to PW1 and PW2 by the Appellant.
14. The Appellant gave an unsworn statement of defence. He said he was a mechanic in Nyeri and was arrested while in the process of paying his electricity bill at KPLC. He gave details on how he had been arrested. He was taken to the CID offices and he produced his national ID card which showed he was not the Patrick Mburu the witnesses had complained about. That the numbers the complainants alleged to have received from him were 0710854882 and 0723847123 which actually belonged to CID officer Leftin Kibawen and IP Alfred Wesonga respectively.
15. PW1 and PW2 told the court that all along they had known the Appellant as Patrick Mburu as those were the names he gave them. They only got to know his real names of David Maina Kiama upon his arrest when he produced his ID card.
16. When the Appeal came up for hearing the Appellant relied on his written submissions. He has asked this court to disregard the evidence of PW1 and PW2 saying it was full of contradictions. Further that it was not clear how much money the two ladies had sent using the Mpesa. Thirdly that none of the Mpesa transactions reflected his name.
17. Mr Njue for the State opposed the Appeal and agreed that no money was sent to the Appellant’s mobile number as it was to different numbers. He submitted that the numbers that money was sent to were given to the complainants by the Appellants’ conspirators. The ladies paid for the “diamond” which they never got.
18. Counsel submitted that the Appellant became culpable for the commission of his co-conspirators who were not arrested. They presented something as diamond which was not. It was all but a fraud. He admitted that there contradictions on money lost as there were several transactions to different persons.
19. He submitted that the Appellant in his defence gave a different account on his arrest and the court never believed it. He asked that the Appeal be dismissed.
20. This is a first Appeal and this court is enjoined to reconsider and re- evaluate the evidence on record and arrive at its own conclusion. It should bear in mind that it did not see or hear the witnesses and give an allowance for it. In the case of **Patrick & Anor v Republic [2005] 2 KLR 162.**

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions.”**

21. I have considered the evidence on record, grounds of appeal and the submissions tendered. I find the issues falling for determination to be

(i) Whether the complainants lost any money.

(ii) Whether the Appellant has been identified as one of those who defrauded the complainants.

**Issue No (i)**

**Whether the complainants lost any money**

22. The evidence of PW1 and PW2 is very detailed. PW1 and PW2 have confirmed that **Steve Kama** demanded for money for accommodation, licence etc and they gave him (cash) and money through Mpesa transactions. The Mpesa transaction statements (EXB 1& 3) confirm that both ladies sent money to various mobile numbers none of which was registered under the Appellant’s official names.

23. What the prosecution did not establish was the identity of the registered owners of those Mpesa accounts. My finding on issue no (i) is that indeed the complainants lost money in the desire to buy diamonds and resell them.

**Issue No (ii)**

**Whether the Appellant has been identified as one of those who defrauded the complainants**

24. PW1 and PW2 identified the Appellant as the person who introduced them to the people who swindled them. He operated under the name of Patrick Mburu and they only came to know his real name of David Maina Kama upon his arrest.

25. Apparently none of the complainants knew the Appellant prior to this

incident. They had met him at Batian Hotel, Co -op Bank both in Nyeri and finally at KPLC offices Nyeri on the day of his arrest. Even after being swindled they kept communicating on phone and that’s how he was arrested.

26. In his defence he explained how he was arrested from KPLC offices, while paying his electricity bills and denied ever dealing with PW1 and PW2 saying the telephone numbers they gave belong to police officers. There was however no evidence to prove that allegation.

27. I am satisfied that PW1 and PW2 were not mistaken about the identity

of the person they were dealing with. Their several meetings had taken place in broad daylight and they identified him to the police on the day of his arrest. Having answered the two issues in the affirmative, I now go back to the charges.

28. The 1<sup>st</sup> and 2<sup>nd</sup> counts relate to the offence of conspiracy to defraud. The evidence of PW1 and PW2 confirms that there was such a conspiracy to defraud, perpetrated by the Appellant and his cronies. The way they were clandestinely operating by calling each other in turns; others pretending to be impatient and leaving without “buying” the “diamonds”; others pretending to leave with the Kshs.300,000/- alleged to be for down payment and the Appellant hanging around the two ladies pretending to be the good one all confirm the conspiracy. The item they said was “diamond” was proved by the Geologist (PW3) not to be what they said it was. All this was a conspiracy to defraud.

29. Counts 3 and 4 relate to obtaining money by false presences. It is true the said money was received directly by the Appellant’s conspirators. It is not exactly clear what his benefit was.

30. The investigating officer ought to have gone further to confirm from the service provider who the registered owners of those accounts were. What is however clear is that the mpesa numbers were given to PW1 and PW2 by the Appellant’s cronies.

31. All in all its clear that having conspired with them to hook up with PW1 and PW2 it follows that he too had a share in the loot they got. I find that the Appellant was properly convicted on all these counts. However from what I have stated above in respect to the 3<sup>rd</sup> and 4<sup>th</sup> counts, I find that the sentence was too harsh. In conclusion I find that the Appeal partially succeeds and I make the following orders.

i. Appeal on conviction on all counts is dismissed.

ii. The sentences on all counts are set aside and substituted with the following sentences:-

Count 1 Kshs 50,000/- i/d six(6) months imprisonment

Count 2 Kshs 50,000/- i/d six(6) months imprisonment

Count 3 Kshs 100,000/- i/d one(1) year imprisonment

Count 4 Kshs 100,000/- i/d one(1) year imprisonment

Sentences to run consecutively.

Orders accordingly.

**Dated, signed and delivered this 26<sup>th</sup> day of November 2018 in open court at Nyeri.**

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**HEDWIG I. ONG'UDI**

**JUDGE**