REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 22 OF 2016

OMAR YUSUF MWINCHUMU…….……... APPELLANT

VERSUS

REPUBLIC…….....…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 242 of 2015 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon K. I. Orenge (SRM) on 27th April 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Omar Yusuf Mwinchumu, was tried and convicted by Hon K.I. Orenge Senior Resident Magistrate on three (3) Counts of obtaining by false pretences contrary to Section 313 of the Penal Code. Count IV was in respect of being unlawfully present in Kenya contrary to Section 53(1)(j) as read with Section 52(2) of the Kenyan Citizenship and Immigration Act 2011.

2. He was sentenced to eighteen (18) months imprisonment in respect of Count I- III. These sentences were to run consecutively.He pleaded guilty to Count IV and was sentenced to thirty (30) days in prison. He was to be returned to Tanzania, his country of origin, after completion of his sentence. However, he was not repatriated to his country as his trial in respect of Counts I-III was to proceed for hearing.

3. The particulars of the Charges were as follows :-

COUNT I

"On diverse dates between 27/10/2014 and 2/12/2014 you received money from ABASS MGHENDI sent through Western Union money transfer amounting to Kshs 279,260/= via Kenya Commercial Bank situated at Voi Township within Taita Taveta County, the same having sent on reasonable believe (sic)**that you could sell as Suzuki Motor Vehicle when you knew the same to be false."**

COUNT II

"On the 18th day of December 2014 at around 2.00 pm at Taveta Town within Taita Taveta County, with intent to defraud obtained from ABASS MGHENDI the sum of Kshs 107,000/= by falsely pretending that you will sell a Suzuki Motor Vehicle to the said ABASS MGHENDI"

COUNT III

"On the 6th day of February 2015 at around 2.00 pm at Taveta Town within Taita Taveta County, with intent to defraud obtained from ABASS MGHENDI the sum of Kshs 42,900/= sent by Vodacom Money Transfer by falsely pretending that you will service the Vehicle you bought for the said ABASS MGHENDI"

COUNT IV

"On the 21st day of June 2015 at around 16.30 hours at Mkamenyi Mosque in Kishamba Location within Taita Taveta County being a Tanzanian National was found in Kenya without a valid permit"

4. Being dissatisfied with the said judgment, on 1st July 2016, the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and his Petition of Appeal deemed to have been duly filed and served. The Memorandum Grounds of Appeal were as follows:-

1. THAT the learned magistrate erred in law and fact by convicting him without putting into consideration of the loan agreement (sic)**.**

2. THAT the learned magistrate erred in law and fact to relie (sic)**on single evidence** (sic)**.**

3. THAT the learned magistrate erred in law and fact by finding that the prosecution had established him guilty beyond any reasonable doubt.

4. THAT the learned magistrate erred in law and fact by failing to consider the investigating officer failed to established (sic) **the case beyond reasonable doubt.**

5. On 5th October 2016, the Appellant'sfiled his Written Submissions together with Amended Grounds of Appeal. On 15th November 2016, he responded to the State's Written Submissions dated and filed on 8th November 2016.

6. The Amended Grounds of Appeal were as follows:-

1. THAT the learned magistrate erred in law and fact by failing to appreciate the Agreement produced in his conviction(sic)**.**

2. THAT the learned magistrate erred in law and fact by convicting him on unbelievable and contradicting evidence of the Prosecution witnesses.

3. THAT the learned magistrate erred in law and fact by convicting the Appellant on unbelievable and uncorroborated evidence of the Prosecution witnesses.

4. THAT the learned magistrate erred in law and fact by dismissing his defence.

7. When the matter came up on 20th December 2016, both the Appellant and the State asked this court to deliver its Judgment based on their respective Written Submissions as they would not highlight the same. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

9. Having looked at the said Written Submissions, it appeared to this court that the issues that had been placed before for determination were:-

a. Whether or not the Prosecution had proven its case beyond reasonable doubt.

10. All the Amended Grounds of Appeal Nos(1), (2), (3) and (4) were all related and were therefore dealt with together.

11. The Appellant submitted that the Learned Trial Magistrate failed to consider the Loan Agreement he had entered into with the Complainant herein, Abass Mghendi (hereinafter referred to as "PW 1") dated 26th September 2014 and a warning letter he had received from the Bank which was proof that he had borrowed money to loan to PW 1.

12. He pointed out that he did in fact tender in evidence the said Loan Agreement as it was marked "DMFI 1" and was alluded to by the Prosecutor who contended that the same had not been supported by any document from the Bank and PW 1 who had stated that he was a stranger to the same.

13. He contended that the Prosecutor took the said Loan Agreement to Nairobi to establish the authenticity of the same and to verify PW 1's signature and that the failure to return the same violated the law as the said Loan Agreement was genuine. He opined that the Prosecution may have failed to return the said Loan Agreement after the same was found to have been authentic. He was emphatic that it was not possible for him to have adduced the said Loan Agreement in support of his case as the same was never returned to him after it was taken to Nairobi.

14. It was his contention that his witness, Obadiah Momanyi (hereinafter referred to as "DW 2") confirmed that he gave PW 1 a sum of Tzsh 11,000,000/= which was an equivalent to Kshs 500,000/= but PW 1 did not adduce any documentary evidence to show that the monies he alleged to have sent him were intended for the purchase of a motor vehicle and not for repayment of the aforesaid loan. He questioned why PW 1 did not have a written agreement as the alleged transaction involved large sums of money.

15. He asked this court to disregard the evidence of No 63884 Senior Sgt Joshua Kimeu (hereinafter referred to as 'PW 3") who only brought certified copies of the receipts from the Bank on 31st March 2016 after his case was adjourned several times yet PW 1 had reported the incident to him on 20th June 2015 when he stated he commenced his investigations.

16. He added that PW 3's evidence was contradictory as he had stated that he arrested him on 21st June 2015 for the offence of obtaining by false pretences which was not true as per Count IV. The court was unable to understand this submission. Be that as it may, the Appellant questioned why the charges for obtaining by false pretences were preferred against him almost twenty three (23) days his first plea.

17. He contended that it was not possible for him to have come all the way from Tanzania to Kenya where PW 1 resided and not hide himself. He pointed out that he was arrested in a Mosque and that he had come to Kenya to pursue PW 1 to repay the monies he owed him.

18. On its part, the State argued that the Learned Trial Magistrate could not be blamed for having not considered or scrutinised the said Loan Agreement, which it admitted had been marked as "DMFI 1", for the reason that the Appellant never produced the same in his defence. It pointed out that at no time during the proceedings was the said Loan Agreement taken for authentication and that it was merely a cooked story by the Appellant herein which made his defence unbelievable.

19. It added that DW 2 never confirmed having witnessed the Appellant and PW 1 signing the said Loan Agreement and that it was proper for the Learned Trial Magistrate to have questioned how any reasonable man would carry such a huge amount of money unless he was of good financial means.

20. It was categorical that the Appellant failed to produce a loan application form from the microfinance to substantiate his source of such a huge amount of money and that in any event, he never produced any warning letter from the Bank where he had alleged to have borrowed the money from.

21. It was also its argument that the contents of any document can be proved either by primary and secondary evidence as stipulated in Section 64 of the Evidence Act Cap 80 (Laws of Kenya) and the Appellant did not object to production of the receipts which it said, showed him as having been the recipient of monies from PW 1. It contended that the fact that PW 1 did not have an agreement did not mean that such an agreement did not exist.

22. It submitted that since the Appellant did not have any credible defence that could diminish the strength of the Prosecution's case, the Prosecution had been proved beyond reasonable doubt and thus urged this court to dismiss his Appeal.

23. A perusal of the proceedings shows that PW 1 testified that he met the Appellant in a Mosque where the Appellant informed him that he had a motor vehicle from Dubai but needed monies to import the same for him. Pursuant to that conversation, PW 1 said that he sent the Appellant a sum of Kshs 153,960/= which was supported by a receipt dated 27th October 2014, a sum of Kshs 51,760/= that was supported by a receipt dated 29th October 2014, a sum of Kshs 36,320/= that was supported by a receipt of 8th November 2014 and a further sum of Kshs 37,200/= that was supported by a receipt of 2nd December 2014. He adduced in evidence all the four (4) receipts in support of his case.The total sum of the sums was Kshs 279,260/=.

24. No 66068 Corporal Alfred Kiprop (hereinafter referred to as "PW 2") told the Trial Court that on 21st June 2015, PW 1 found him at Mwatate Police Station and informed him that he had seen the Appellant who had falsely obtained monies at the Mosque. He accompanied PW 1 to the said Mosque where PW 1 identified the Appellant and he arrested him.

25. PW 3 told the Trial Court that he established from the Bank that the Appellant had conned PW 1 of the sum of Kshs 429,140/= which had been sent to him through Western Union. He conceded that PW 1 did not have any documentation at the time he gave the Appellant the said monies.

26. In his sworn evidence, the Appellant stated that PW 1 was his brother-in-law and that in 2013, he came to Kenya to visit his relatives. They entered into a business arrangement to open a hardware shop which required capital in the sum of Tzsh 20,000,000/=. He said that he took a loan at a Microfinance to finance the business and gave PW 1 a sum of Tzsh 11,000,000/= which was evidenced by an Islamic Agreement that they both signed.

27. He stated that PW 1 repaid the loan regularly for some time but defaulted after some time. It was his evidence that he came to Kenya on 18th June 2014 to follow up the repayment of the monies from PW 1 and a family meeting was called to resolve the issue. Thereafter, he was arrested at the Mosque.

28. On evaluating the evidence that was adduced by both the Prosecution and the Defence, this court found this case to have been one of PW 1's word against that of the Appellant. However, what was clear was that that PW 1 sent the Appellant a sum of Kshs 279,260/= but that he did not adduce any documentary evidence to demonstrate that the monies that he sent to the Appellant were in respect of importation of a motor vehicle from Dubai and not for any other purpose.

29. Although he also alluded to having sent the Appellant several other sums bringing the total to a sum of Kshs 429,140/=, he did not tender in evidence any documentary evidence to support his claim. It was also his testimony that no one witnessed him giving him the monies.

30. If as the State submitted herein that the fact that PW 1 did not submit an agreement he entered into with the Appellant herein did not mean that the said agreement did not exist, nothing would have been easier than for him to have adduced the same in evidence to make his case water tight.

31. The Prosecution's submission that the Agreement was not supported by the documents from the Bank was confusing as it was not clear which Bank it was referring to. However, as the State rightly pointed out, the Appellant did not also adduce any documentary evidence to prove that he had taken a loan from a Microfinance institution to finance the business PW 1 allegedly wanted to establish.

32. However, the Trial Court proceedings showed the Appellant adduced in evidence a Loan Agreement that was marked as "DMFI 1." The legitimate expectation was that once a document was marked for identification, it was to be retained in the Trial Court file. However, the said Loan Agreement was not in the Trial Court file.

33. This court noted that on 12th January 2016, the Prosecutor informed the Learned Trial Magistrate that he had sent some documents to Nairobi. There was no indication of what this documentation entailed. The Appellant contended that this document was the Loan Agreement that he had referred PW 1 to on 21st October 2014 when he Cross-examined him but which PW 1 denied having signed the same. Notably, these documents were never referred to again in the proceedings before the Trial Court.

34. A perusal of the Witness and Exhibit Sheet in the said Trial Court file showed that the said Loan Agreement was indeed marked as "DMFI 1." The question was that came to the mind of this court was, where did the said Loan Agreement go to as the same was not in the Trial Court file? The failure by the Prosecution to clearly state what documents it had taken Nairobi led this court to question whether indeed it was the Loan Agreement that the Appellant had contended to have been taken to Nairobi for authentication. If indeed it was the said Loan Agreement, then the Appellant would not have been expected to adduce the same in evidence.

35. This court's confusion was caused by the fact that the Learned Trial Magistrate indicated in his Judgment that the Appellant had failed to present an agreement and source of money.In his Judgment, he stated as follows:-

> **"The accused has told court in his defence that he had lent some money to the complainant and brought a witness to support this assertion. The court finds this to be an afterthought** (sic) **no agreement was presented before this court to show that the accused had entered into some agreement with the complainant nor any documents from Finca bank to show that he had obtained a loan from the said bank and withdrew Tzsh 11,000,000/=(eleven million) which he lent to Abass. These were maters which were within his knowledge as at the time he was charged of** (sic) **the present offence."**

36. While this court noted the case of **Nyambane vs Republic [1986] KLR 249** that the said Learned Trial Magistrate relied upon to support his finding that the Appellant's false representation to import a motor vehicle for PW 1 amounted to obtaining monies by false pretences, it did appear to it that the burden of proof had been shifted to the Appellant to prove his innocence.

37. The burden lay more on the PW 1 to prove that the monies he sent the Appellant were for importation of a motor vehicle from Dubai and not for any other purpose. This was not a case where the burden of proof could shift to the Appellant as envisaged in Section 111(1) of the Evidence Act. The said Section provides as follows:-

> **"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him"**

38. It was evident that the Appellant's documentary evidence was marked for identification but it was not

produced as an Exhibit in court. He was thus denied an opportunity to have his evidence weighed against that of the Prosecution and it is not clear what became of the said Loan Agreement. The Learned Trial Magistrate conclusion that the Appellant raised the issue of the said Loan Agreement an afterthought was far from the truth. This is because as the Appellant raised the issue at the first instant when he Cross-examined PW

39. Having said so, this court was of the view that as the Loan Agreement was not considered by the Learned Trial Magistrate, the best option would have been for this court to refer this dispute for Re-trial so as to give the Appellant an opportunity to present his evidence and substantiate his claims.

40. Be that as it may, a Re-trial is not to be ordered as a matter of course. Each case depends on the circumstances surrounding it. It must not be ordered where an appellant will be prejudiced. It must be ordered where the interests of justice require it.

41. In this respect, in the case of **Opicho vs Republic [2009] KLR, 369,**the Court of Appeal rendered itself as follows:-

> **"In general, a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it."**

42. Having considered the circumstances of this case, the interests of justice would strongly dissuade this court from referring this matter for a Re-trial for the reason that the Loan Agreement the Appellant tendered in evidence is not in the Trial Court file. Indeed, it would be prejudicial to send the Appellant for a fresh hearing when he has nothing to prove that he entered into an Agreement with PW 1.

43. In addition, a matter ought not to be referred to a re-trial to give any party a second bite at the cherry or where *prima facie* it appears to an appellate court that no offence had been established from the evidence that had been placed before a trial court.

44. It was indeed difficult for this court to reconcile how PW 1 could trust a stranger he had met in the Mosque and give him monies without any form of documentation that the same were in respect of importation of a motor vehicle. Indeed, PW 1 never mentioned that he was related to the Appellant by marriage as the Appellant had contended and he denied that the Appellant gave him any money as he had alleged. If he did in fact send the Appellant monies for importing the said motor vehicle, then he acted negligently by failing to safeguard his interests in case a dispute arose by having the transaction documented in writing.

45. Having considered the evidence that was adduced in the Trial Court and the submissions that were relied upon by the Appellant and the State, this court was not satisfied that the Prosecution had proven the following ingredients of the offence of obtaining through false pretences,derived from Sections 312 and 313 of the Penal Code Cap 63 (Laws of Kenya)**THAT**:-

> **a. There must be false pretence, which is any representation made by words, writing or conduct;**
>
> **b. The matter of fact must be either present or past;**
>
> **c. The misrepresentation must be false;**
>
> **d. The person making it must know or believe it to be false;**

e. The misrepresentation must be made with intent to defraud or obtain from any other person anything capable of being stolen; or

f. The inducement must lead any other person to deliver to any person anything capable of being stolen.

46. Evidently, Section 312 of the Penal Code defines false pretence as being:-

"Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

47. Section 313 of the Penal Code stipulates as follows:-

"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."

48. In the premises foregoing, this court found Amended Grounds of Appeal Nos (1) and (4) to have been merited and the same are hereby allowed.

DISPOSITION

49. For the foregoing reasons, in view of the fact that the evidence that was adduced before the Trial Court created doubt in mind of this court, that benefit of doubt leads it to quash the conviction and set aside sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same.

50. The upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 1st July 2016 was merited and the same is hereby upheld.The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason but to be repatriated to his country Tanzania forthwith as he has since served his sentence for the offence of being unlawfully in Kenya.

51. It is so ordered.

DATED and **DELIVERED** at **VOI** this **28TH** day of **FEBRUARY** 2017

J. KAMAU

JUDGE

In the presence of:-

Omar Yusuf Mwichumu..Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk