



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 31 OF 2014**

**BETWEEN**

**LAWRENCE ADEK KASUKU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 1263 of 2012 of the Chief Magistrates Court at Homa Bay, Hon. N. Kariuki, RM dated 13<sup>th</sup> June 2014)***

**JUDGMENT**

1. The appellant was charged with one count of obtaining by false pretence contrary to **section 313** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It was alleged that on diverse dates between 21<sup>st</sup> and 26<sup>th</sup> November 2012 at Homa Bay Township, with intent defraud, he obtained from Elida Owuor the sum of Kshs. 9,500/- by falsely pretending he would secure the release of Elida Owuor's son from Homa Bay GK Prison. He was convicted and sentenced to 2 years imprisonment.
2. The prosecution case was that was the complainant's son, RO, had been remanded at the Homa Bay GK Prison, after he was granted bond of Kshs. 100,000/- with one surety. The complainant then went to the prison to seek assistance was introduced to the appellant by a prison warden, PW 2 as a lawyer who would be able to assist her. The appellant informed her that he was a lawyer and that he was in a position to assist her secure her son's release. PW 1, testified that appellant demanded Kshs. 16,000/- to get someone who would supply a title deed. She gave him Kshs. 5,500/- which she had. She later gave him Kshs. 4,000/- on 27<sup>th</sup> November 2012 making a total of Kshs. 9,500/-. After her son was not released, she demanded her money back but the appellant offered a motorbike instead. She however got someone to stand as a surety for her son.
3. PW 2, a prison warden, testified that on 21<sup>st</sup> November 2012, PW 1 came to the prison where he was working as the visitor's clerk and was seeking assistance for bail for her son. He referred her to the appellant. He knew him as a person who was always around the prison. He said PW 1 and the appellant left together. PW 3, a son to PW 1, testified that on 15<sup>th</sup> November 2012, he had been to prison with PW 1. He said they met PW 2 who told them he could find someone to assist them. They returned on 21<sup>st</sup> November 2012 and met the appellant. He confirmed that PW 1 gave the appellant Kshs. 5,500/- as they approached the Homa Bay Law Courts. He testified that PW 2 told them that the appellant was an advocate. On 27<sup>th</sup> November 2012, the met at Salama Hotel where they gave the appellant Kshs. 4,000/- so that he could do valuation of a title deed. The

appellant told them that he would secure the appellant release on 27<sup>th</sup> November 2012 at 3pm but this did not happen. They later realized he was not an advocate and when they requested for a refund of their money, the appellant offered to give them his motorbike.

4. PW 4, the investigating officer, testified that he was instructed to investigate a case of obtaining by false pretence. He recorded the complaint of PW 1 on 27<sup>th</sup> November 2012 and summoned the appellant who was also at the police station on that date. Upon interrogation, the appellant admitted the offence and offered to give PW 1 his motorcycle which was parked outside the police station courtyard. He took statement from the other witnesses and caused him to be charged.
5. The appellant was put on his defence and elected to give an unsworn statement. He stated that on 26<sup>th</sup> November 2012, he was in Homa Bay town and he decided to go to Mega Bar. He further stated that PW 4 and another police officer were sitting at a table next to them. The person he was with knocked the table occupied by PW 4 and the other officer while going out to take a call. He stated that PW 4 got annoyed and grabbed his friend and threatened to beat him. He however intervened. The officers then insisted that he pay for the drinks but he refused. After a shortwhile, a police vehicle came and he was arrested and taken to the police station. He denied that he had anything to do with the offence.
6. The grounds upon which the appellant appeals are set out in the petition filed on 25<sup>th</sup> June 2014 in which he states that his constitutional rights were violated in that he was not given witness statement despite the fact making the request. That there was no documentary proof of the financial transaction that took place between the prosecution witnesses and there was an error in the charge sheet which showed that he was arrested on 26<sup>th</sup> November 2012 yet the evidence showed that he was arrested on 27<sup>th</sup> November 2012.
7. Mr Oluoch, learned counsel for the respondent, opposed the appeal and submitted that the prosecution had established the essential elements of the offence. He submitted that the prosecution demonstrated that the representation made by the appellant was that of an existing fact and the fact was false. He contended that the appellant represented that he could secure release of PW 1's son which was false and he received money on that account.
8. As this is a first appeal, I am called upon to evaluate and appraise the evidence before the subordinate court before reaching an independent conclusion as to whether or not to uphold the conviction. In doing so, I have to make allowance for the fact that I did not see or hear any of the witnesses testifying.
9. I am satisfied from the testimony of PW 1, PW 2 and PW 3 that the appellant represented to PW 1 that he could secure the release of the complainant's son from prison. This is a fact he knew was false as he could not do so. For making this representation he was paid the sum of Kshs. 9,500/- in two instalments. This fact is proved by the testimony PW 1 and PW 3. Their testimony was consistent and remained unshaken by cross-examination. It was not necessary for the witnesses to prove the transaction by documentary evidence as the appellant, who initiated the transaction, did not intend it to be documented. The fact of payment and receipt of the money by the appellant was proved by the credible testimony of PW 1 and PW 3.
10. The appellant complains that witness statements were not issued to him despite several requests. According to the proceedings, the court ordered the accused to be supplied with witness statements on the date he was arraigned in court. The hearing commenced on 23<sup>rd</sup> October 2013 and after PW 1 had given her evidence in chief, the appellant's counsel, informed the court as follows, "*We wish to state that we are proceeding without witness statements of this witness and the available witness. We can proceed if the court allows.*" The court ordered the matter to proceed in light of the fact that counsel had indicated that he was ready to proceed. Counsel proceeded to cross-examine PW 1.

11. On 2<sup>nd</sup> January 2014, the accused requested for witness statements and the court ordered that the same be provided together with typed copies of proceedings. Thereafter, the matter proceeded for hearing without any objection being raised by the appellant.
12. In light of what I have outlined I do not find any merit in the ground that the appellant was denied witness statements. He did not raise the issue after the second order was made by the court and from the record he was able to follow the proceedings and cross-examine the witnesses and I find that he was not prejudiced in any way.
13. The appellant contention regarding the date of his arrest is to buttress the fact that he was arrested as a result of a grudge between himself and PW 4 at Mega Bar on 26<sup>th</sup> November 2012. When this was suggested to PW 4 in cross-examination, he denied the same. PW 4 stated that according to the police records he was arrested on 27<sup>th</sup> November 2012 and not 26<sup>th</sup> November. He stated that the date of 26<sup>th</sup> November 2012 reflected in the charge sheet was an error.
14. I find that in light of the clear testimony of PW 1 and PW 3, that the appellant was introduced to them by PW 2 and that he received the money in order to secure release of PW 1's son, a fact he knew was false. I find that the appellant's defence was a sham. The date of the arrest did not go to the heart of the charge against the appellant. I therefore affirm the conviction.
15. In his submissions, the appellant has raised other issues which are not set out in the petition of appeal. Such issues include the issue whether the learned magistrate was biased, whether the court ought to have allowed the complainant to withdraw the case and whether other witnesses who were present in court ought to have testified. Under **section 350(2)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, "*the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal.*" I therefore decline to deal with those issues.
16. The appellant was sentenced to serve 2 years imprisonment. By the time he was sentenced, he was serving another sentence in respect of a similar offence. The learned magistrate took that into account and the fact that the offence had to do with the administration of justice. I do not find any error in the sentence imposed.
17. I affirm the conviction and sentence.
18. The appeal is dismissed.

**DATED and DELIVERED** and at **HOMA BAY** this 28<sup>th</sup> day of April 2015

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.