



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 189 OF 2012

REPUBLIC.....APPELLANT

VERSUS

MARTIN MWOLOLO ITHIA RESPONDENT

(Being an appeal from the Ruling of Hon. H. Nyakweba Senior Resident Magistrate delivered on 27/9/2011 in Kilungu Senior Resident Magistrate Criminal Case No. 313 of 2008)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant in this appeal is the Office of the Director of Public Prosecutions.
2. The grounds of appeal are as follows:-
 1. **That the learned trial magistrate erred in law in acquitting the Respondent against the weight of evidence adduced.**
 2. **That the trial court erred in finding that the Respondent was not an agent of DECI despite the evidence adduced.**
3. The Respondent, **Martin Mwololo Ithia**, was charged with several counts of obtaining money by false pretences contrary to **section 313** of the **Penal Code**. The particulars of the offences were that the Respondent on diverse dates during the months of March and April 2007 jointly with others not before court, with intent to defraud obtained cash from the complainants by falsely pretending that they were agents of **Development Entrepreneurship and Community Initiative (DECI)** which they purported to be a legally registered financial institution, a fact they knew to be false.
4. There was a total of 30 counts spread out in three files. That is in **RM's Criminal Case No.177/09; RM's Criminal Case No. 178/09 and SRM's Criminal Case No. 313/08**. The amounts of money ranged from Kshs.2,000/= to Kshs.25,000/= for each count. In a ruling delivered in **SRM's Cr. 313/08**, the Respondent was acquitted under **section 210** of the **Criminal Procedure Code**. The said ruling applied to the other two files.
5. Briefly stated, the case for the prosecution was that the accused who was the **Chairman of Nunguni Market** informed the members of public about the activities of DECI, an investment scheme through which members could save and multiply their money. During the meeting held at **Nunguni Market** by people who purported to be officials of DECI from **Mombasa**, the complainants were registered as members of DECI at a fee of Kshs.100/= each. The registered members then proceeded to elect the Respondent as the **DECI Chairman, Nunguni**. One **Peter Kithuka** was also elected as the Promoter of DECI activities, **Kalongo** area. The Respondent's

furniture workshop doubled up as the DECI offices, **Nunguni**. Thereafter the registered members proceeded to make their deposits at the workshop through the Respondent's employees at the workshop. The members were issued with receipts purported to be from DECI. However, the pyramid scheme collapsed and the majority of the members lost their savings. The matter was reported to the police. After investigations the Respondent was charged.

6. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
7. The prosecutions right of appeal where an accused has been acquitted is provided under **section 348** of the **Criminal Procedure Code** as follows:-

“When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney-General may appeal to the High Court from the acquittal or order on a matter of law.”

8. On whether the acquittal was against the weight of the evidence, I have perused the evidence of twenty six (26) witnesses who testified on the prosecution's side. It is noted that the prosecution's case was closed prematurely without the calling of crucial witnesses. The evidence adduced by the complainants failed to establish that the Respondent was an agent of DECI. The evidence on record only established that the Respondent informed the area residents of the activities of DECI and became elected as the DECI **Chairman, Nunguni**.
9. The persons named as employees of the Respondent who collected money from the complainants and also issued receipts were not called to testify. These were crucial witnesses who could have shed light on who they handed over the money to. The Investigating Officer was not called to testify. This was also a crucial witness who could have shed light on whether DECI existed or not. It appears that the receipts identified by the complainants as having been issued to them for the money collected were not produced as exhibits.
10. There was no evidence upon which the trial court could have arrived at the finding that the Respondent was an agent of DECI.
11. With the foregoing, I find no merits in the appeal and dismiss the same.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of July 2015

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B. THURANIRA JADEN

JUDGE