



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 60 OF 2014**

**MUSA MAWOKOTA KIDIBAKO ..... APPELLANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

*(From the Judgment and sentence in Garissa Chief Magistrates Criminal Case No. 1726 of 2013 – M. Wachira –CM)*

**JUDGMENT**

The appellant was charged in the subordinate court with obtaining by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence were that on 15 April 2011 at Bulla Sagara within Garissa Township Garissa County with intent to defraud obtained from Issack Sheikh Noor a sum of Kshs 1,700,000/= by falsely pretending that he could multiply by praying a fact he knew to be false. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 2 ½ years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. His grounds of appeal are as follows:-

1. That the learned trial magistrate erred in law and facts to convict him without considering that the prosecution case was not proved beyond reasonable doubt contrary to Section 109 of the Evidence Act.
2. The learned trial magistrate erred in law and facts to convict him without considering that the prosecution case was contradictory and inconsistent contrary to Section 163 of the Evidence Acts.
3. The learned trial magistrate erred in law and fact to convict him without considering that the prosecution did not establish identification as per the law.
4. The learned trial magistrate erred in law and facts to convict him without considering that the prosecution did not prove beyond reasonable doubts the allegations of obtaining money by false pretence.

The appellant also filed written submissions to the appeal. He relied on the written submissions filed. I have perused and considered the written submissions.

The learned prosecution counsel Mr. Orwa opposed the appeal. Counsel submitted that the appellant understood the charges and participated fully in the trial by cross examining witnesses. Counsel submitted that there was no irregularity in the proceedings. Counsel submitted also that the identification of the appellant by PW1 was without any possibility of mistake. The two were neighbours and knew each other well. In addition, PW2 the landlord testified that the appellant had introduced himself as a fortune teller. PW1 also gave graphic details of what took place. There would thus be no possibility of mistaken

identification of the appellant.

Counsel submitted that with regard to independent witnesses, PW1 stated that the offence occurred in the appellant's house when only the two of them were together. There could thus be no other witness to the incident. Though the police officer who brought the appellant from Modogashe was not called to testify in counsel's view that officer Constable Machendeche, was not the Investigating Officer and thus there was no prejudice caused to the appellant.

Counsel also submitted that though the appellant relied on his passport to support his story that he was not in Kenya in April 2011, that was not true. According to counsel the prosecution had proved its case against the appellant beyond any reasonable doubt.

In response to the prosecuting counsel's submissions, the appellant stated that he travelled out of Kenya to Uganda in March and was thus out of Kenya in April 2011. He emphasized that he was relying on the entries in the pass port. Secondly, he submitted that PW2 did not witness the incident and that he was not occupying the house of PW2 in April 2011. He also denied being arrested by Police Constable Machendeche and stated that infact they went together with the complainant to the police station.

He emphasized that the members of the public who arrested him did not come to court to testify. He also added that he was not arrested in possession of anything.

At the trial, the prosecution called 3 witnesses. PW1 was the complainant Isaac Sheik Noor. He stated that he was a casual labourer. That on 22nd of January 2011 he arrived from South Africa where he was doing business and settled in Garissa. That on 15th April 2011 he was at his house in Bula Sagara where he was a neighbour of the appellant. They knew each other before and that the appellant had described himself as a traditional doctor or fortune teller. He stated that one day the appellant called him to his office and indicated that he had a prophecy for him. The complainant feared because he had heard from neighbours that the appellant used to lock people in the house and make people hear strange voices after shaking a guard. The appellant however persuaded him to enter in that house and on that day he entered and the appellant locked the windows and doors and put off the light. Then the appellant shook the guard and strange voices started making a lot of noise. The appellant then opened the door and widows and showed the complainant 1.5 million us US dollars in a black polythene bag and said that the spirits had given the complainant money but that he needed to cleanse that money by mixing the money with other money from Kenya. He stated that the voices then shouted to him that he had Kshs 1.7 million Kenya shillings in his wall unit. He became disolliented and went to the wall unit and produced the money Kshs 1.7 million and brought it to the appellants who said he would mix the same with the 1.5 million dollars and it would stay like that overnight. At that point the complainant felt very weak and could not walk fell unconscious and was taken by the appellant to his house.

When he regained consciousness the next day, he looked for the appellant and found his house locked and when he called him on his phone he said he had left for TanaRiver. He did not see the appellant again for a long time until 12 June 2013 when he saw him in a mosque in Modogashe. When he confronted him the appellant said that he would refund Kshs 800,000/=. He said that he was staying in a lodging. When he went to the lodging the following morning to get the Kshs 800,000/=: he found that the appellant had already left but luckily some people told him that he was hiding in a school and he was found there and was taken to the police station. It was his evidence that the Kshs 1.7 million was his income from business he did in South Africa.

In cross examination he insisted that the appellant performed threatening acts in the darkness which produced strange voices. He stated that the appellant said he would double the money. He maintained that when he saw the appellant at Modogashe, he promised to repay Kshs 800,000/- and warned the complainant not to inform anybody until the next morning. He insisted that the appellant showed him 1.5 million dollars. He said that he knew the appellant for 2 months before the date of the incident.

PW2 was Ibrahim Silat Bosh. It was his evidence that he was the caretaker of his sisters rental house. He stated that in December 2010 the appellant rented one of his sister's house and also a front room for a

shop to practice traditional medicine. He stated that the appellant paid Kshs 3,000/= per month for two months and then disappeared the 3rd month without paying rent. He stated that the complainant Issac Sheik was also his tenant. In cross examination he stated that he had no case against the appellant.

PW3 was Police Constable Patrick Odera. He was attached to Garissa police station. It was his evidence that on 14th December 2013 at around 4.30 pm he received the complainant and the appellant from Modogashe police station. They were escorted by police constable Job Machendeche. He interrogated the complainant and was given the story relating to the appellant that he had cheated the complainant out of his money. He stated that the appellant promised the complainant to double his money. He carried out investigations, visited the scene, checked the passport of the appellant and charged him in court of the offence. It was his evidence that no part of the Kshs 1,700,000/= of the complainant was recovered.

In cross examination, he stated that the complainant said that he was regularly translating Somali language in the house of the appellant. He reiterated that the appellant promised to multiply the complainant's money through prayers.

When put on his defence, the appellant gave sworn testimony. He denied committing the offence. He said that he came from Uganda and that one day he met the complainant who told him to show him the person who had defrauded him. They went somewhere by the road side and because he was not able to get the person, the complainant shouted and followed him. The quarrel attracted the public and the complainant informed then in Somali language that the complainant had stolen from him and he was then taken to the police station and later to Garissa where he was charged. He stated that in April 2011, he was in Uganda. He denied doing what the complainant stated in court. He denied demanding Kshs 1.7 million from the complainant. He relied on the entries of his passport which he produced in court.

In cross examination he stated that the complainant was his neighbour and not a friend. He stated that he stayed for one month on the plot and that he arrived in Kenya in January 2011 and left on 26th March 2011 in order to extend his visa which was to expire on 9th March 2011. He stated that the offence occurred on 15th April 2011 when he was outside Kenya. He stated that his work was to sell medicine to people and that he attended people and to sort out their problems as a herbalist and a fortune teller.

Faced with the above evidence, the trial court found that the prosecution had proved its case against the appellant beyond reasonable doubt. The court thus convicted and sentenced the appellant. Therefrom arose the present appeal.

This is a first appeal, as a first appellate court I am required to re-evaluate all the evidence on record and come to my own conclusion and inferences. See the case of ***Okeno -vs- Republic (1972) EA 32.***

I have reevaluated the evidence on record. The appellant has come on appeal on several grounds. He states that the prosecution case or evidence was contradictory and inconsistent. My perusal of the evidence shows that there were no contradictions or inconsistencies in the prosecution case. The eye witness was only one person the complainant. The appellant was arrested more than two years after the incident at Modogashe and brought to Garissa and charged in court. I do not see contradictory evidence of the various prosecution witnesses. That ground has to fail.

The appellant has complained that he was not positively identified as the culprit. Indeed no identification parade was conducted. It is the complainant who was the victim and only eye witness to the incident was stated that the appellant obtained his money through false pretences. There was no other eye witness. The landlord or caretaker of the house and shop rented by the appellant PW2 testified that both the appellant and the complainant were tenants in those premises. The said care taker stated that the appellant said that he wanted a shop space in order to conduct the business of traditional medicine. The complainant stated that in the said shop, the appellant who was his neighbour obtained his money by false pretences.

There was no dispute that the caretaker of the houses and the complainant knew the appellant well before the incident. There is no suggestion that it could be somebody else who obtained money from the

complainant by false pretences. The appellant was pointed out to the members of the public in Modogashe by the complainant. In my view the identification of the appellant was in no doubt. It was positive and reliable. There was no possibility of mistaken identity. I dismiss that ground.

The main ground of the appellant in this appeal is that the prosecution did not prove its case beyond reasonable doubt. He stated in his defence that though he was in Kenya and Garissa in January 2011, that he traveled to Uganda towards the end of March in order to renew his visa and therefore was not in Kenya in April 2011 when the offence was allegedly committed. He relied on entries in his passport.

The caretaker of the houses PW2 stated that the appellant was in Garissa and paid two months rent for January and February and then disappeared and did not pay any further rent. The complainant said that they were tenants with the appellant in January, February, March and April and that it was in April that he was conned by the appellant off his Kshs 1.7 million which was the proceeds of the business he had conducted while in South Africa. He stated that the appellant operated a shop where he was practicing medicine and fortune telling. The appellant in cross examination agreed that he was doing such business.

The complainant stated that the appellant used tricks and threats to make him produce his Kshs 1.7 million which he mixed with 1.5 million dollar and said that due to his powers of prayers the money of the complainant would be doubled to Kshs 3.7 million. In that process the complainant said that he found himself dazed and unable even to walk and had to be taken to his house by the appellant and he only regained consciousness the next day when he found that the appellant had left his house. On calling the appellant on his phone the appellant stated that he had gone to Tana River and did not see him again until 2013 when he saw him in a mosque in Modogashe where the appellant was arrested.

The appellant was therefore putting up a defence of alibi. The learned magistrate considered the defence of alibi as well as the burden of proof on the prosecution when such a defence is raised. The learned magistrate also considered the entries or stamps in the appellants passport and came to the conclusion that there was no indication that the appellant left Kenya for Uganda in March. There was also no indication of his re-entry to Kenya after March. The magistrate therefore came to the conclusion that the defence of the appellant was not truthful and the passport entries did not support the said defence. The magistrate therefore dismissed the defence.

I have perused the passport. There are indeed two stamps for 26<sup>th</sup> March 2011. They are not indicated whether they are exits from Kenya or entries into Kenya. Besides, nobody from the Kenya or Ugandan Immigration Departments was called by the defence to testify. The entries are thus hearsay. The rule on hearsay evidence applies to oral and documentary evidence. As such though the burden of proof is always on the prosecution to prove a case against an accused person beyond reasonable doubt and to disprove a defence of alibi, in my view the learned magistrate was correct in not believing the defence of alibi – see the case of ***Kinyua –vs- Republic (2003) KLR 301.***

Having re -evaluated the evidence on record, I am of the view that there was no mis direction on the part of the trial court. I also find that the evidence of the prosecution was consistent. I find that the evidence of the complainant was believable and that the defence of the appellant was not believable.

Indeed such offences as the one complained of, are committed in private. There is usually also no documentary proof of the same. The court is thus entitled to weigh the evidence of the prosecution side and the defence side and determine which evidence is believable. In my view the evidence of the complainant is clear and believable. I thus agree with the learned magistrate that the prosecution proved its case against the appellant beyond any reasonable doubt.

Before I close this judgment, I wish to say that though the public who assisted in the arrest of the appellant at Modogashe and the Police Officer who escorted him from Modogashe to Garissa did not testify, in my view they were not crucial witnesses. The arrest of the appellant was made because the complainant, who testified in court, alleged that he defrauded him by obtaining his money through false pretences. The police officer merely escorted the appellant to Garissa Police Station. His evidence would not have thus added anything to proof of the commission of the offence or otherwise.

To conclude, I find that this appeal lacks merits, I dismiss the appeal and uphold both the conviction and the sentence of the trial court. Right of appeal explained.

Dated and delivered in Garissa this 27<sup>th</sup> July 2015.

**GEORGE DULU**

**JUDGE**