



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 34 OF 2015

BETWEEN

GEORGE OWUOR ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 367 of 2011 at the Chief Magistrate's Court at Migori, Hon. D. K. Kemei, CM dated on 8th May 2015)

JUDGMENT

1. The appellant was charged with the offence of obtaining money by false pretences contrary to **section 313** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence were that on 13th July 2011 at the National Cereals and Produce Board (NCPB) Depot in Migori Township, Migori County jointly with another not before the court, with intent to defraud **JANE ADHIAMBO OMONDI** obtained Kshs. 300,000/- by falsely pretending that they would sell her 100 bags of maize a fact they knew to be false.
2. The appellant pleaded not guilty and after the trial he was convicted and sentenced to three years imprisonment. He now appeals against conviction and sentence on the grounds set out in the petition of appeal dated 19th May 2015 which may be summarized as follows; that the learned magistrate erred in ignoring conflicting evidence, that no independent witness was called, that no identification parade was conducted to identify the appellant and the prosecution did not prove its case. He also filed written submissions to support the grounds of appeal. Ms Owenga, learned Senior Prosecution Counsel, appearing for the respondent supported the conviction and sentence on the ground that there was overwhelming evidence.
3. In considering the appellant's grounds of appeal this court is enjoined to follow the principle established in ***Okeno v Republic [1972] EA 32*** where the Court of Appeal held that the first appellate court is duty bound to conduct an independent evaluation of all the evidence and reach a conclusion as to whether to uphold the conviction taking into account that it neither heard nor saw the witnesses testify.
4. The facts proved at the trial were as follows. Jane Odhiambo Omondi (PW 1) testified that on 12th July 2011, she met her relative Timothy Ongeche Pondi (PW 2) who informed her that a person in Migori had 50 bags of maize to sell. They came to Migori where they met the 2nd accused, Nancy Owuor Otieno, who led them to the appellant who was inside the NCPB Depot. The appellant showed her the maize and confirmed that he had received her request through PW 2 and had

- prepared the same. They went aside and she handed over to him Kshs. 3,000,000/- for 100 bags of maize. The appellant then left them to go and organize for the release of the maize but he disappeared. The 2nd accused went to look for him and she too disappeared. They later discovered that the appellant never worked at NCPB and that they had been duped.
5. PW 2 testified that he was PW 1's brother in law and that he had received a call from the 2nd accused to look for a market to sell maize. He relayed the information to PW 1 and they came to Migori to meet the 2nd accused. They went to the NCPB Depot where they were introduced to the appellant who was smartly dressed. He witnessed PW 1 and the appellant negotiate the price and PW 1 give the appellant Kshs. 300,000/- in cash in a brown envelope. The appellant then left to go and supervise the removal of the maize but he disappeared. The 2nd accused later gave PW 2 the appellant's telephone number but when he called the appellant, he claimed that he was in a meeting and would meet them at 3 pm. When they realized they had been conned, PW 1 and PW 2 proceeded to report the matter to the police.
 6. Leah Okello Obura (PW 3), a secretary from Lela Secondary School, testified that she had given PW 1 Kshs 371,000/- to buy maize from Sirare. On 13th July 2011, she received a phone call from PW 1 informing her that she had lost the sum of Kshs. 300,000/-. When cross-examined by counsel for the 2nd accused, she stated that she was not the one who handed to her the money and that the money did not belong to PW 1 but that she had been sent to buy the maize. PW 4, John Kabanya, recalled that on 12th July 2011, he had been informed by a friend that PW 1 was coming to buy maize from Sirare where he was a businessman. He waited for her to come but she did not come. He was later informed that she had been swindled.
 7. PC Irene Chelimo (PW 5), the investigating officer recalled that on 13th July 2011, she received PW 1 and PW 2 in the office claiming that they had been defrauded of Kshs. 300,000/-. They narrated to her how the incident took place. When cross-examined by the appellant, PW 5 stated that the appellant was summons to come to CID Office. She was directed to call him by the DCIO through the phone number given by the complainant. The appellant responded to the call and came to the CID offices.
 8. The appellant gave sworn testimony when called upon to make his defence. He denied that he had committed the offence. He stated that he was a hawker and that on 12th July 2011, he had gone to Nairobi to collect his supplies. He stayed there for 3 days and on 15th July 2011, he received a call from the 2nd accused who told her she had been arrested. He went to see her on 17th July 2011 at the police station where he was informed that he was a suspect, arrested and later charged.
 9. The main issue raised by the appellant is whether there was sufficient evidence connecting him to the offence. I have considered the evidence and I find that the prosecution proved the elements of the offence. First, that PW 1 had in her possession Kshs. 300,000/- with which she went to purchase maize. Like the learned magistrate, I hold that it was not necessary for the prosecution to prove that the money was hers. PW 3 testified that she was the one who had been sent with the money to purchase maize hence for all intents and purposes the money belonged to her.
 10. The testimony of PW 1 and PW 2 was clear as to how they were defrauded by the appellant. Their testimony was clear and consistent and indeed they reported the matter to the police so soon after the incident happened. Although the appellant pointed to some inconsistencies in the testimony of PW 1 and PW 2, I do not consider such inconsistencies material or significant enough to detract from the entire evidence. The appellant accepted the money to sell the maize which he did not have.
 11. The learned magistrate who heard the matter was convinced that their testimony was credible and unshaken on cross-examination. As appellate court, I accept this assessment of the evidence. Moreover, there is no suggestion in the entire proceedings that PW 1 and PW 2 were lying to

frame the appellant or had an ulterior motive in implicating the appellant after all he was not known to them before the incident.

12. As regards the identity of the appellant, the testimony of PW 1 and PW 2 is that they reported the matter to the police. When cross-examined by the appellant, PW 5 stated that the appellant went to the police station after he had been called on the number given to the DCIO by the complainant. PW 2 testified that the appellant's co-accused, who was his step mother, is the one who gave her appellant's number. The issue of mistaken identity could not arise in this case as the accused presented himself to the police station. He had engaged in a transaction in broad daylight with PW 1 and PW 2. In the circumstances, the identity of the appellant was never in doubt and an identification parade would not have been served any purpose.
13. Furthermore, his defence that he came to the police station to come and see his co-accused cannot stand scrutiny as no such suggestion was put to PW 5 when she was being cross-examined. When considered with the prosecution evidence, his alibi defence is a sham and is dismissed.
14. **Section 143** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* states, "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact." Hence it is not necessary to call all or any particular witness. The witnesses called by the prosecution were sufficient and were believed hence the conviction was safe. On the other hand there is no basis for finding that had any other witnesses been called they would have given exculpatory testimony.
15. The appellant has raised procedural issues relating to the proceedings. After the close of the prosecution case and after the appellant had been called to make his defence, the learned magistrate upon application of the prosecution allowed the charges against the 2nd accused to be withdrawn as the 2nd accused had jumped bail. The charges were substituted by removing the 2nd accused and the fresh charge read to the accused. He pleaded not guilty and indicated that he wished to recall the witnesses for cross-examination. However, the witnesses did not turn up and court directed the appellant to proceed with his defence. As a result that the appellant complains that he was denied the opportunity to cross-examine the witnesses whom the court directed be recalled.
16. I find that the learned magistrate erred in allowing substitution of the charge as **section 214** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* is clear that this can only happen before the close of the prosecution case. The relevant part of the statute provides;

214(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: [Emphasis mine]
17. As the order of the learned magistrate was not permitted, the direction by the learned magistrate was unnecessary and the case against the appellant proceeded along its ordinary course in accordance with the procedure. In the circumstances no prejudice was occasioned to the appellant as he had cross-examined all the witnesses and had been put on his defence.
18. The appellant further submitted that his rights to a fair trial were violated as he was denied the benefit of an advocate. The appellant was represented by counsel at the start of the trial. When the matter came up for hearing on 5th March 2012, the matter was adjourned because his advocate was absent. He requested for the matter to be rescheduled which the learned magistrate accepted. On 30th April 2012, the appellant once again requested for an adjournment as his advocate was absent. The court ruled thus;

Since prosecution and 2nd accused are ready, I order the matter to proceed and counsel for 1st accused shall be at liberty to recall witnesses for further cross examination if need be since it is the interest of all parties for a speedy trial and the matter has been adjourned severally in the past at the instance of the prosecution and 1st accused's side.

19. The matter proceeded and from that date the appellant did not raise the issue of his advocate. His advocate did not turn up to request the court to re-call the witnesses. The appellant fully participated in the proceedings and I find that he did not suffer any prejudice.

20. The appellant further submitted that his trial was unfair because he did not have witness statements. The appellant did not raise the issue at any stage during the trial. On 1st August 2011, the court directed the prosecution to supply the defence with witness statements. This issue was never raised by the appellant thereafter and the trial court would not have been in a position to know that the appellant did not have statements. As the appellant continued to participate in the proceedings, I find that this ground lacks merit.

21. For all the reasons I have set out above, I affirm the conviction. I do not find any error in the sentence imposed.

22. The appeal is dismissed.

DATED and DELIVERED at MIGORI this day of 24th July 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.