



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 55 OF 2014

PETER OCHIENG OKUONG'A APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Kisumu

(Hon. T. Obutu PM) dated the 16th January 2014 in Kisumu PMCCR No. 61 of 2013

JUDGMENT

The appellant was charged with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars were that on diverse dates between 19th October 2010 and 10th February 2011 at Kisumu City in Kisumu East District within Nyanza Province with intent to defraud he obtained from Maurice Otieno Odongo a sum of 436,685/= by falsely pretending that he was in a position to sell him a Saloon Car a fact he knew to be false.

The appellant pleaded not guilty to the charge but after listening to three prosecution witnesses and the appellant's sworn testimony the trial Magistrate found him guilty, convicted him and sentenced him to three years imprisonment. Being aggrieved he filed this appeal. The appeal is premised on the following grounds:-

- 1. The learned Trial Magistrate erred in law and in fact by failing to appreciate that the matter/case before him a claim for break of contract under the Law of contract and therefore Civil in nature.**
- 2. The learned Trial Magistrate erred in law and in fact by failing to appreciate that he had no jurisdiction to handle the matter by way of criminal proceedings.**
- 3. The learned Trial Magistrate erred in law and in fact by failing to appreciate that the evidence on record was not sufficient enough to support the alleged offence.**
- 4. The learned Trial Magistrate erred in law and in fact by failing to adhere with Section 215 of the Criminal Procedure Act as required.**
- 5. The learned Trial Magistrate erred in law and in fact by failing to consider the appellant's defence before arriving at his judgment.**
- 6. The learned Trial Magistrate erred in law and in fact by failing to appreciate that the evidence on record did not support the particulars of the charge.**

Briefly the facts of this case were that the complainant was introduced to the appellant by a colleague who had a car he admired and which had been sold to him by the appellant. After the introductions the appellant promised to get him a similar car. Negotiations then commenced and the complainant selected a car from pictures sent to him by the appellant. They then agreed on the price and the appellant then gave him an account number to which he deposited a total of Kshs.436,685/=. Thereafter the appellant told the complainant that he could go for the vehicle but on the day he travelled to Mombasa to collect it the appellant turned up with 2 men and told him the car was parked at his home. They then went to a hotel where the appellant asked for 3,000/=. It is not clear what transpired at the hotel but according to the complainant he waited at the hotel until 4p.m. but the appellant's number went off. This despite him assuring the appellant that he had with him the balance of the price. He returned to Kisumu and could not reach the appellant for a full month.

It was not until 25/12/012 that he traced the appellant to his home in Riat. He was arrested and when he promised to refund the money they went to Siganga & Company Advocates where they entered into an agreement for the repayment. The appellant did not keep his promise to refund this amount and so he was charged with this offence.

On his part the appellant testified that he used to import vehicles through an agent known as Rafiq Motors and that he deposited Kshs.1.3 million for 3 vehicles with the agent who however disappeared only to be told he had gone to Qatar. He tried to get a refund but was not successful. He however admitted receiving money from the Complainant for a car which he did not deliver.

As the first appellate Court I have reconsidered and evaluated the evidence in the Court below in order to arrive at my own conclusion. I have done so being cautious that I did not have the benefit of seeing the witnesses testify. I have also considered the submissions by Mr. Rakewa Advocate for the appellant and Miss Wakio for the State. The appellant admits that he undertook to sell a car to the complainant; that he received the sum of money alleged and that he never delivered the car. Mr. Rakewa, learned Advocate for the appellant submitted that by dint of the agreement entered by the parties on 1st January 2012 the elements of obtaining by false pretences were vitiated and this became a civil matter and the trial Magistrate no longer had jurisdiction to handle the same by way of a criminal proceeding. He contended that the appellant was in the business of selling cars as attested by PW2 which again negated the element of fraud. He submitted that it is not the taking but the intention that constitutes the offence and that this appeal ought to be allowed.

For Miss Wakio, Learned Prosecution Counsel the appellant's conduct in switching off his phone constitutes the intention to defraud.

It is correct as submitted by Mr. Rakewa, Learned Advocate for the appellant, that in a case such as this it must be proved that there was a representation of a past or present event, the representation must be false and which the person making it knows to be false or does not believe it to be true. In other words it must be proved beyond reasonable doubt that there was a false pretence and that the false pretence was made with intent to defraud. Much as the appellant in this case was in the business of selling cars it was proved beyond reasonable doubt that on this occasion he falsely represented to the complainant that he would sell him the car. He, himself, admitted that he did not have the car. He even caused the complainant to travel all the way to Mombasa to collect the car and went ahead to make another false pretence that the car was parked at his home. If he is to be believed that it was Rafiq Motors that let him down why did he tell the complainant that the car was parked at his home? The fact is that there was no car in existence a fact which he knew all along. Despite this he even went ahead and obtained a further 3,000/= from the complainant. With due respect the agreement he entered into to refund the complainant's money does not absolve him from the criminal conduct. He had already committed this offence, and to me the agreement seems to be but only a desperate attempt by the complainant to recover his money. He clearly obtained the money knowing very well that he had no intention of delivering the car. In other words he did so with intent to defraud.

The trial Magistrate correctly analyzed the evidence and I see no good reason to upset his judgment. Accordingly this appeal is dismissed and the conviction and sentence are upheld.

Signed, dated and delivered at Kisumu this21st..... day ofJuly..... 2015

E. N. MAINA

JUDGE

In the presence of:-

Mr. Ruto for the State

The appellant in person

CC: Moses Okumu