



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 62 OF 2011

APPELLATE SIDE

WILFRED OIRERE OISOSA.....APPELLANT

VERSUS

STATE.....RESPONDENT

(An Appeal against the conviction and sentence by Hon. Kamau- DM II in Criminal Case No.950 of 2010 on 17th March 2011 at Ogembo Law Courts)

JUDGMENT

This is a criminal appeal by Wilfred Oirere Oisosa, the appellant herein. He was charged with obtaining money by false pretences, contrary to section 313 of the Penal Code. The particulars thereof were that on the diverse dates between 7th and 11th May, 2010 at Itumbe market in District within Nyanza Province, with intent to defraud obtained from Pauline Nyabari the sum of **Ksh. 5,800/00** by falsely pretending that he could secure the release of one Isaac Ongeru who was remanded at Naivasha Prison.

The appeal originates, as it were from Ogembo Law Courts before District Magistrate DM-II Hon. Mr. Kamau in Criminal Case No. 950 of 2010 on the 17th March, 2011.

After the trial, the accused was found guilty on evidence, convicted and sentenced to 18 months imprisonment.

The appellant has appealed and sets out nine (9) grounds of appeal as follows:

1. That the learned Magistrate erred in law and fact in failing to appreciate that whereas the charge against the accused person was that he had purportedly obtained Ksh. 5,800/= by false pretence, from the entirety of the evidence, no evidence was provided or given in the lower court whatsoever indicating that the Appellant herein had obtained the subject Ksh. 5,800/- as alleged and charged thereof.

2. That the learned magistrate erred in law and in fact in relying on the prosecution evidence which was contradictory, incongruous, unconvincing and incredible.

3. That the learned erred in law and in fact in failing to appreciate the prosecution evidence was unreliable.

4. That the learned magistrate erred in law and in fact in disregarding the Appellant's defence in

the Lower Court.

5. That the learned magistrate erred in Law and fact in failing to appreciate that the complainant had failed to credibly arrest to how he came to know and acquaint himself with the appellant.

6. That the learned magistrate erred in Law and Fact in failing to appreciate that no M-Pesa records or any documentary records thereof of payment were adduced in court against the Appellant to show any amount adduced thereof.

7. The learned magistrate erred in law and fact in convicting the Appellant.

8. That the learned magistrate erred in law and fact in meting a sentence which was excessive in the circumstances.

9. That the learned magistrate erred in law and fact in failing to invoke the provisions of Article 159(2) of the Constitution to effectively determine the proceedings herein: !

By the firm of Ayiema Mbicha & Company advocates filed on 22nd March, 2011. However, another counsel came on record, M/s Nyaingiri & Co. Advocates who filed a supplementary grounds of appeal to the petition. These were six grounds set as follows:

1. That the learned trial magistrate erred in law and fact for failure to disclose the language of trial proceedings.

2. That the learned trial Magistrate erred in law and fact when not objecting the M-pesa money transfer evidence in court.

3. That the learned trial Magistrate erred in law and fact for failure to give consideration to the evidence of DW2 as that of an accomplice and no acknowledgement of the money was before court.

4. That the learned trial magistrate erred in law and fact there was no evidence that the appellant had received Ksh. 5,800/=

5. That the learned trial magistrate erred in law and fact whenI the prosecution's witness failed to dislodge the Alibi of th Appellant

6. That the learned trial magistrate erred in law and fact when witness with adverse evidence never testified and that issue was not addressed by the court.

The Appellant's Challenges the conviction and sentence principally on various reasons:

i) That the learned trial magistrate erred in law and fact for failure to disclose the language of the trial proceedings,

ii) That the learned trial magistrate erred in law and fact for not subjecting the M-pesa money transfer evidence in court,

iii) That the learned trial magistrate erred in law and fact for failure to give consideration to DW2's evidence as that of accomplice and no acknowledgement of money was before court.

iv) That the learned trial magistrate erred in law and fact that there was no evidence that the appellant had received Ksh. 5,800/=.

v) That the learned trial magistrate erred in law and fact when the prosecution's witness

failed to dislodge the defence of alibi.

vi) That the learned trial magistrate erred in law and fact when witness with adverse evidence never testified and that the issue was not addressed by the Court.

The learned State Counsel opposed the appeal. She submitted that the evidence adduced at the trial was sufficient and was able to prove the case beyond reasonable doubt.

The prosecution marshaled three witnesses to prove its case. **Pauline Nyabera, PW1**, met the appellant in the company of one Sagini Thomas, PW2, at Itumbe at a hotel, whereby she explained her predicament regarding her child in Naivasha Prison and the need to raise bail/bond for him. The appellant said he could help by providing a title deed. He needed Ksh.5000/=, however. She gave Ksh.5000/= in which PW2 was a witness. They were to travel to Naivasha together the following day. The pastor, Peter Marani, a confidant of the complainant talked to the appellant and the appellant assured him that all was well. The pastor gave some money (it is not disclosed) to the appellant for fare to Naivasha for both he and the complainant. The two were to meet on the following Monday. They met but they did not go. On the third day, they did not go. Instead the appellant insulted PW1 and switched off his phone. She reported the matter to the area chief and then to the police, Ogembo Police station and she recorded a statement. The appellant was arrested and charged.

PW2- Thomas Sagini Kerosi- testified how he was in a hotel, Panafric at Itumbe when the complainant walked in, both were taking shelter at the hotel as it was raining. She explained to him about the plight of her son in Naivasha Prison. His efforts in Kilgoris to get a title deed to have him released on bond were futile. The appellant also walked into the hotel, first sat on his own but later, joined their table as he was known to the appellant. As the complainant's story was narrated, the appellant said he would help. He would give his title deed but needed Ksh.5000/=. The complainant being desperate quickly released Ksh. 5000/= to the appellant but not before giving the wad of notes to PW2 to verify before passing the same to the appellant. The complainant told her pastor, Peter Marani, about her problem and asked the pastor to talk to the appellant which he did. He also M-pesad him some money as fare to take both the appellant and the complainant to Naivasha. The money is not disclosed what is disclosed is that it was for fare. PW2 states when the appellant failed to go to Naivasha, he advised the complainant to go to the area chief, to which the appellant was called and agreed to refund the money. He did not refund. The matter ended up at Ogembo Police Station as a result of which the appellant was arrested and charged, tried and convicted against which conviction and sentence he has brought this appeal.

PW3: PC No.81362 Zakayo Kipcheum testified that the complainant reported to him at Ogembo police station. It was on 21/05/2011 when Pauline Nyabari reported the matter regarding Wilfred Oirere Oisosa having taken Ksh.5,800/= purporting to be capable of bailing out her cousin held at Naivasha G.K. Prison. PW3 investigated the matter and caused the arrest of the appellant and subsequently charged him for the offence of **obtaining money by false pretences**, contrary to **Section 313 of the Penal Code**.

At the close of prosecution's case, the appellant was put on his defence. He stated that on 1st May 2010 he went to Rigena for a funeral of his cousin. He was not at Panaric hotel in Itumbe. He met the complainant at the chief's office. She did not give the money to him.

As to whether there was sufficient evidence to support the conviction, this court, as this is the first appellate court, is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing a mind that it neither heard nor saw the witnesses testify (see *Okeno V Republic 1972 E.A. 32*).

Before I consider the evidence of the appeal before me I wish to point out the essential elements to be proved by the prosecution beyond reasonable doubt. This offence under **Section 313** is committed when:

(a) Any person who by any false pretence

(b) and with intent to defraud,

(c) obtains from any other person anything capable of being stolen or

(d) induces any other person to deliver to any person anything capable of being stolen.

In this case PW1 and PW2 both gave testimonies implicating the appellant. Their respective testimonies corroborated each other. Ms Clare submitted that the testimonies of the two were consistent and credible. PW1 and DW2 gave similar and corroborative evidence on the occurrence date between the 7th and 11th May 2010. They clearly demonstrated in their testimonies that the appellant represented himself as capable of assisting the complainant (PW1), in the process obtaining an amount of Ksh. 5, 00/= which was witnessed by PW2. The appellant's assertion that no receipt was ever produced in evidence.

This testimonies remained unshaken in cross-examination.

The appellant raised issues, he believes, vitiated the judgment of the lower court *i.e*

- 1) The charge was defective
- 2) The appellant is said to have received Ksh. 5,800/= on diverse dates. Yet the
- 3) The language used at the trial no having been indicated
- 4) No receipt of the money was ever tendered in court.

The essence of the charge was proved beyond reasonable doubt.

The issues raised are mere technicalities as since they do not vitiate the trial Court's findings on the charge, the evidence testified and corroborated. Once again P.W.1 & P.W.2's evidence is consistent and credible.

Technicalities, if any, are of no material consequences, **under Article 159 of the Constitution. Section 214 (2) of the Criminal procedure Code**, stipulates that the variance between the charge and the

Subsequent evidence adduced in support thereof, with respect to the time of which the offence was committed, is not material.

Therefore this court finds that the conviction and sentence was justified and in accordance with the provisions of the law.

Accordingly, the appeal herein is hereby dismissed and the conviction and the sentence of the trial court is hereby upheld.

It is so ordered.

Dated, signed and delivered at Nyamira this 27th day of November, 2015.

C.B. NAGILLAH

JUDGE

In the presence of:

Bwonwong'a hold brief for Momanyi Nyaingiri

Emma Okok for the State

Omayio -Court Clerk