



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.184 OF 2014

CYRUS IRERI DANIEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Being an appeal from the original conviction and sentence of the Chief Magistrate's Court
at Kiambu Criminal Case No.3445 of 2012 delivered on 15/12/2014 by J. N. Onyiengo Ag. CM)**

JUDGMENT

The Appellant was charged with eight counts of obtaining money by false pretenses contrary to Section 313 of the Penal Code. The particulars of count of count I were that on the 28th day of January, 2011 at Kasarani Sports view Hotel in Kasarani District within Nairobi county, jointly with another not before the court with intent to defraud obtained cash Ksh. 170,000/= from Josephine Ngina Mwaura by falsely pretending that he was in position to sell to her electrical cables a fact which he knew to be false. The particulars in counts II to VIII were similar to those in count one save that; in count two, the date was 18th February, 2011 and the amount obtained was Ksh.145,000/=; in count three, the date was 28th February, 2011 and the amount obtained was Ksh. 270,000/=; in count four the date was 2nd march, 2011 and the amount obtained was Ksh. 366,000/=; in count five the date was 3rd March, 2011 and the amount obtained was Ksh. 756,000/=; in count six the date was 8th March, 2011 and the amount obtained was Ksh.400,000/=; in count seven the date was 14th March, 2011 and the amount obtained was Ksh.750,000/=; and in count eight the date was 19th March, 2011 and the amount obtained was Ksh.599,000/= respectively.

He was convicted in all counts and sentenced to serve two years imprisonment for each count. The sentences were to run concurrently. Being dissatisfied with both the conviction and sentence, he appealed on the grounds that;

1. The learned trial magistrate's finding was incompatible with the evidence on record.
2. There was no direct evidence linking him to the charges and that the circumstantial evidence adduced could not support the charges against him.

3. The prosecution did not prove the case beyond reasonable doubt since their case was riddled with loopholes, contradictions and inconsistencies.

4. His defence was not considered.

The Appellant's submissions were dated 19th October, 2015. On ground 3, he submitted that PW1 failed to prove the particulars in count 6 and 8. He submitted that no evidence was adduced of any communication between PW1 and the Appellant. He emphasized that there many contradictions in the evidence of PW2 and 3 in regard to the amount of money that was lost. He submitted that PW1 was not honest about the actual source of the money which she alleged to have given the Appellant and that the prosecution failed to prove that any money was given to the witnesses called. He submitted that the trial magistrate was guided by circumstantial evidence. He cited a Ugandan case of **Simoni Musoke V Republic (1985) EA 715** in which the court held "**...for our part, we think if there are other co-existing circumstances which would weaken or destroy the inference of guilt, then the case must be proven beyond any reasonable doubt and accused is entitled to an acquittal. In the present appeal, the learned trial judge does not seem to have even been aware of this additional requirement and did not consider it. So that if her view was that the case was based solely on circumstantial evidence was correct then the appeal must inevitably succeed.**"

He urged the court to set him free.

The Respondent on the other hand prayed that the appeal be dismissed. The prosecution's submissions were dated 28th October, 2015. Counsel for the prosecution submitted that the complainant's sister who was a business partner to the Appellant introduced him to her. The Appellant informed her that he had got a contract worth Ksh. 50,000,000/= to supply electrical goods to Kenya Power & Lighting Company Limited. Through the Appellant's uncle, she sent money to the Appellant which he acknowledged to have received. First, she sent him Ksh.170,000/= on 28th January, 2011. She sent another Ksh. 145,000/= on 18th February, 2011 and another Ksh. 366,000/= on 3rd February, 2011. On diverse dates, the Appellant's uncle received Ksh. 756,000/=, Ksh.750,000/= and Ksh.599,000/= on his behalf. After several payments had been made, the complainant demanded for receipts from Kenya Power and that is when the Appellant started to become evasive. PW2 affirmed that she was the one who introduced the Appellant to the complainant. She also gave the Appellant Ksh. 1,100,000/= which he requested from her because his tender had not gone through. Counsel for the prosecution referred to the Appellant's defence in which he affirmed that he knew PW2 who was his girlfriend but did not know the complainant. He submitted that through the evidence of PW1 and PW2 the prosecution proved that the Appellant intended to defraud them because he did not issue any receipts for the sums of money received. He submitted that the inconsistencies in the amounts obtained were minor since it was clear that PW1 and PW2 raised several amounts in order to raise Ksh.5,000,000/= for the Appellant's tender. It was his final submission that the prosecution proved its case to the required standard.

Being the first appeal, this court is duty bound to re-evaluate all the evidence and come up with its own independent conclusions. According to the record, the prosecution called three witnesses. The complainant Josephine Ngina Mwaura testified as PW1. She recalled that sometime in December, 2010 her sister Jane Wanjiru introduced her business partner who happened to be the Appellant. They drove to Country View Hotel from where the Appellant told her that he had got a contract worth Ksh.50,000,000/= to supply electrical goods to Kenya Power Limited but he did not have sufficient funds. He told her that he needed to raise Ksh. 5,000,000/= to secure the tender. She agreed to raise the said sum together with her sister. In January 2011, the Appellant called her demanding for the money. She asked for his account number in order for her to deposit the money but the Appellant did not send the particulars of the account. Instead he sent his uncle by the name Mwaniki who he said he trusted. He gave her Mwaniki's physical description and on 28th January, 2011 she met him and gave him Ksh.170,000/= to take to the Appellant. She called the Appellant who confirmed having received the money. Thereafter, she gave Mwaniki another Ksh.145,000/= on 18th February, 2011, Ksh. 270,000/= on 2nd March 2011, Ksh. 756,000/= on 3rd March 2011, Ksh.750,000/= on 14 March, 2011 and Ksh.599,000/= on 18th March 2011. Another Ksh.366,000/= was given but PW1 did not state the date on which it was given out. She told court that

she borrowed money from her husband, her parent and her brother in order to raise the whole Ksh.5,000,000/= which was required by the Appellant. She also produced bank statements of her children's accounts under her care from which she withdrew most of the money. After paying the money, she asked the Appellant for a receipt from Kenya Power. She was told that Mwaniki would bring to her the said receipt but he did not show up. She demanded to see the Appellant but her sister told her that everything was being worked out by the Appellant. In the process, PW1 developed stress related illness and was admitted to hospital. The Appellant promised to pay back the money but he never kept his promise. She reported the matter to Kasarani Police Station upon which he was finally arrested.

PW1's sister Jane Wanjiru Mwaura testified as **PW2**. Her account is in agreement with what PW1 said. She first met the Appellant in December 2009 when she had a mechanical problem with her car and the Appellant fixed it. He later told her that he had won a tender to supply cables to Kenya Power Limited and needed Ksh. 1,100,000/=. She was able to raise the money which she gave the Appellant. The Appellant however did not sign for the money. The next time she met the Appellant was with PW1. They talked about the tender issue again and PW1 agreed to pay some money to the Appellant. She was given Ksh.200,000/= by PW1 to take to the Appellant. She delivered the money to him but he never refunded it. He instead disappeared and communicated through text messages which were abusive.

PW3, PC Kirimi Miguna attached to the CID office at Kasarani investigated the case. He recalled that on 10/12/2012 he met PW1 at the office of Chief Inspector Gikunda who was the Deputy DCIO. She claimed to have been conned by the Appellant whom she met through PW2. She told him that the Appellant had lured her into the business of supplying cables to Kenya Power Limited which promised a lot of profits. After interviewing her, he recorded her statement and started searching for the Appellant. He tried to get communication records from Safaricom in order to confirm the communication between the accused and the complainant but in vain as he was told that Safaricom keeps data for only 90 days. He liaised with the security officers at Kenya Power Limited, Nyeri and was able to arrest and charge him.

The Appellant gave a sworn statement of defence. He was **DW1**. He affirmed that he worked with Kenya Power and that he knew PW2 as his former girlfriend who was vying to become his second wife. He also acknowledged that he borrowed a sum of Ksh. 250,000= from her and had a signed agreement to this effect. However he denied knowing PW1. He also denied receiving any money from her.

He called Peter Muli who was his elder brother as **DW2**. He testified that he knew PW2 to have been the Appellant's lover. He was also aware of a money issue between the Appellant and PW2 but he did not know PW1. He testified that he witnessed PW2 give a sum of Ksh. 220,000/= to the Appellant who in turn gave her his Log Book as a security for the money.

The evidence on record indicates that indeed money was drawn from PW1's children's accounts. The statements of the said accounts were presented in court by PW3. The remaining mystery that needed to be untangled was whether the money was actually received by the Appellant. In her evidence, PW1 told the court that she would give the money to one Mwaniki who was the Appellant's agent. She was given a description of Mwaniki over the phone who she then gave money to take to the Appellant. However, the efforts to prove any communication between PW1 and the Appellant were futile. This unfortunate fact weakened the prosecution's case and was a very big blow to them. The only money that was received by the Appellant which he in fact acknowledged was from PW2. At the very least the alleged Appellant's agent by the name Mwaniki should have corroborated her case. In lieu thereof, a written document showing the payments should have been produced. In their absence, the court is unable to conclude that there existed sufficient evidence in proof of the charges. The court truly sympathizes with PW1 for losing such a huge sum of money but in the absence of conclusive proof that the money was actually received by the Appellant, it was difficult to sustain the Appellant's conviction. For this reason, I am only left with one option and that is to find the Appellant innocent.

This appeal succeeds. I quash the conviction and set aside the sentence. The Appellant is hereby set free unless he is otherwise lawfully held.

DATED and DELIVERED at NAIROBI this 12th Day of November, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

M/s Muhanda for the Appellant.

M/s Ndombi for the respondent