



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 262 OF 2011

GEORGE TITI KADUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case Number 5125 of 2009 in the Chief Magistrate's Court at Kibera – Mrs. Nyakundi (PM) on 3rd October 2011)

JUDGMENT

1. The Appellant, **George Titi Kadu** was charged in **Nairobi C.M.Cr. Case No. 5125 of 2009** with the offence of obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. The particulars of the charge were that on the 26th day of October 2009, in Nairobi, with intent to defraud, he obtained from Caroline Ndida Mutoko Kshs. 1,000,000/= which had been entrusted to her for social development by the Royal Danish Embassy, by falsely pretending that he was in a position to supply 16 water tanks to various schools within the Republic of Kenya, a fact he knew to be false.
2. The gist of the prosecution was that on 21st July 2009 Miss Mutoko the complainant who testified as **PW1** saw in the Star Newspaper, an advertisement to the effect that Pioneer Water Tanks were supplying water tanks on charitable basis for community development in Kenya. **PW1** contacted the appellant who had placed the advertisement. After negotiations **PW1** placed a request for 16 water tanks to be supplied to a list of schools that she also gave him. The 16 water tanks were to cost Kshs. 1 million and would be funded by the Royal Danish Embassy.
3. The money was paid BY Electronic Funds Transfer (EFT) to the appellant's account under the name of Otung Ltd through C. J. Kitony Advocates. Thereafter the appellant failed to supply the water tanks and an inquiry sent to Pioneer Water Tanks Australia, elicited the reply that the appellant was not their agent in Kenya. **PW1** wrote to the appellant to refund the money paid to him and when he failed to refund the money or deliver the water tanks she reported the matter to the police and caused his arrest. The appellant was subsequently charged as read.
4. The appellant in his sworn defence told the court that on 4th march 2005 his company, Otung Ltd, was named the sole and exclusive representative of a company known as Pioneer Water Tanks Australia. He produced a letter to that effect which was marked as DEX-1. He admitted that he

- entered into a contract with **PW1** to supply water tanks under a Danish initiative, but stated that **PW1** was angered when her photograph appeared in the press in relation to the said initiative and terminated the contract. That his company's bank account was frozen and he was arrested and charged.
5. At the close of the trial the appellant was convicted and sentenced to serve 18 months imprisonment. The appellant filed a Petition of appeal dated 10th October 2011, in which he basically attacked the weight of the evidence and the manner in which it was evaluated. He opined that this was a civil matter and not a criminal one.
 6. At the hearing of his appeal the appellant appeared in person and filed written submission in which he contended that the prosecution evidence was contradictory on the time in which he was required to deliver the subject water tanks. He also argued that the indictment was defective as it did not accord with the evidence adduced or disclose an offence. In his view the only false presentation in this case would have been in regard to the relationship between the appellant and the Australia based company.
 7. The appellant argued that the prosecution statements lacked the status and character of evidence and that **PW1** either wilfully lied or had no knowledge of what she was providing in court. That the prosecution did not demonstrate that the appellant made a representation of a past or present fact that he was in a position to supply the 16 water tanks.
 8. The appellant complained that the trial court denied him the right to defend himself fully by disallowing some of his evidence. That the learned trial magistrate descended into the arena in a manner that was unfair to the appellant leading to her conclusion that he was guilty as charged. In his opinion this case came to court as a result of malice on the part of **PW1** and the Danish Ambassador to Kenya.
 9. Miss Ndombi learned counsel for the Respondent, in reply, submitted that the evidence was corroborated by the documentation produced in court which showed that the appellant obtained Kshs.1,000,000/= from **PW1** and promised that he would supply 16 water tanks to various rural schools. **PW4** and **PW7**'s evidence was that funds were electronically transferred to the appellant's company Otung Ltd.
 10. From the foregoing the undisputed facts of this case are that **PW1** and the appellant entered into an understanding, in which **PW1** was to pay a sum of Kshs 1 million to the appellant and the appellant on his part was to supply 16 water tanks to a list of schools of **PW1**'s choice. There is also no dispute that **PW1** did cause to be transferred, from the Royal Danish Embassy through C. J. Kitony Advocates a sum of Kshs 1 million, to the appellant's company Otung Ltd. There is further no dispute that the appellant failed to supply the said water tanks and had not done so even at the time of his conviction.
 11. Section 313 of the Penal Code under which the appellant was convicted provides that:

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

The issue for determination is therefore, whether this was a contract which was vitiated by **PW1** herself and therefore this matter ought to be canvassed in a civil court, or the appellant made false representations to **PW1** intending to defraud her.

12. From the record the representation made by the appellant to **PW1** was what **PW1** saw featured in the advertisement carried in the Star Newspaper in the month of May 2009 and which was the genesis of the case before me. The advertisement intimated that there was an organization called

- Pioneer Water Tanks which was involved in giving water tanks on philanthropic basis to communities in Kenya for development purposes. When the complainant made inquiries from one Mr. Pike, the managing director of the said newspaper he gave the contacts of the appellant herein as the person who had placed the said advertisement.
13. To confirm that the appellant was involved in the project as advertised he was invited and he agreed to be hosted on KISS 100 FM radio station, where he elucidated on the project, in the month of July 2009. The appellant himself wrote to the 16 schools in the list given to him by **PW1** and following subsequent negotiations he wrote a letter to **PW1** agreeing to supply all 16 schools with the water tanks at a cost of Kshs.1 million. According to **PW1**, she invited the appellant back on radio a second time where they celebrated their achievement and thanked Pioneer Water Tanks on air.
 14. Things began to go wrong when the appellant tried to ride on the laurels of the Royal Danish Embassy and **PW1** to market his venture without their express permission. At this point **PW1** contacted the Pioneer Water Tanks headquarters in Australia to lodge a complaint about a person she believed to be their agent in Kenya, only to learn that the appellant was not the representative of Pioneer Water Tanks in Kenya.
 15. Confronted with the communication from Pioneer Water Tanks Australia all the appellant said was that those were lies. He left **PW1**'s office with the understanding that he was going to transfer the funds in his account back to where they came from and terminate the agreement between them. From that moment on he would not pick or return Miss Mutoko's calls till the time of his arrest.
 16. From the foregoing this was not merely a case of a contract not fulfilled. In my view the appellant's representation was not merely a promise or a statement of intention *de futuro*. This was a representation of an existing fact, which was that the appellant had the power and the means to cause Pioneer Water Tanks to avail the water tanks for **PW1** to supply to the schools involved, at no costs to those schools. The appellant knew from the beginning that he was not a representative of Pioneer Water Tanks Australia in Kenya.
 17. He appears to have cleverly crafted his advertisement under the heading "Free Water Tanks" to capture the attention of unsuspecting citizens and he succeeded. He gave a quotation of Kshs.2.5 million for 16 water tanks and when told that **PW1** could afford only Kshs.1 million to begin with, he quickly agreed that such an amount could still avail her the 16 water tanks she required. This ought to have raised a red flag, but it did not.
 18. It is common in cases of this nature for those charged to retreat behind the cloak of the law of contract and claim that theirs was a legitimate contract, and that therefore, criminal charges should not be brought to bear against them because the matter belongs to the realm of civil law.
 19. However, if proved, as it has been in the case before me, that the representation about the Pioneer Water Tanks was false; that the representation was made by the appellant, in this case through an advertisement in a newspaper and also in person to **PW1**; that the representation was a matter of fact which was present and on-going, in this case the provision of water tanks was said to be an on-going project that the appellant was well aware of the falsehood, in this case he was aware that he was not or was no longer the country representative for Pioneer Water Tanks Australia and that in reliance of the said false representation the giver, in this case **PW1**, acted and caused to be paid to the appellant Kshs.1 million, then a criminal element has been introduced.
 20. In the foregoing circumstances I find that the criminal charges were properly brought and the appellant cannot hide behind the cloak of civil law. The prosecution proved their case against him and the learned trial magistrate was in order to convict him.
 21. For the foregoing reasons I see no basis to interfere with the conviction or the sentence imposed upon him by the trial court. The appeal is therefore dismissed.

SIGNED DATED and DELIVERED in open court this **26th** day of **June 2014**.

L. A. ACHODE

JUDGE