



IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL 182 OF 2013

BOB NGOME NYONGESA..... APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Appeal arising from the original Criminal Case No.2546 of 2012 in Kakamega Chief Magistrate [F. MAKOYO, R.M.]

**J U D G M E N T**

The appellant was charged with the offence of obtaining money by false pretense contrary to **section 313** of the **Penal Code**. The particulars of the offence were that on the 26.11.2012 at Lubao area in Kakamega Central District within Western Province within intent to defraud, the appellant obtained from **MOHAMMED ABDALLA OSMAN** a sum of KShs.250,000/= falsely by pretending that he will sell him gold to wit six kilograms a fact he knew to be false. He was convicted of the offence and sentenced to serve 18 months imprisonment.

The grounds of appeal are that he did not plead guilty to the charge, the prosecution evidence was not sufficient, his alibi defence was rejected, there was no eye witness, the evidence was conflicting and certain documents were not produced. The appellant filed written submissions and relied on them. It is contended in those submissions that the date of the alleged fraud is not clear. At times it is indicated to be 21.11.2012 while others mentioned 26.11.2012. One person by the name Shaban was mentioned but he was not called to testify. It is also contended that whereas the complainant claimed to have lost KShs.250,000/= one of the witnesses mentioned only 50,000/=. The first report was not produced in court. The evidence was contradictory and he ought to have been acquitted. Mr. Oroni, State Counsel, relied on the record of the trial court.

The complainant, **MOHAMMED OSMAN ABDALLA**, testified as PW1. His evidence is that he was introduced to the appellant by his friend from Mumias called Shaban. On the 21.11.2012 Shaban called him and told him that a friend of his had gold and wanted to sell to him. The friend was the appellant and he directed the appellant to his business premises. The appellant was in the company of a Congolese man and he took them to Stand Kisa at Chavakali where there was a buyer. They did not agree on the price and they came back to Kakamega. On 25.11.2012 the appellant called him saying that he had the gold but he was in Machakos but had no transport. He sent him KShs.1,500/= by MPESA. The appellant said he was going to his house in Kitale. The appellant later called him saying he had reached Kitale but wanted 2,000/= for taxi and the complainant sent him the money. The appellant called him the following morning at 5.00 a.m. and they agreed to meet at Webuye. They met at Webuye and he was shown the gold. He promised to pay the appellant at Kakamega. They came together in the appellant's car and when they reached Lubao they went to the complainant's nephew **ABBAS HASSAN (PW2)** where the complainant borrowed a further sum of KShs.50,000/= as he had only 200,000/=. He paid the entire sum of KShs.250,000/= to the appellant at Lubao and the appellant left. He went to Stand Kisa to sell the gold but he was told it was fake. He tried to call the appellant but he had switched off the phone.

PW1 further testified that on 28.11.2012 he reported the matter at Kakamega police station. On 19.12.2012 at about 4.00 a.m. he was at Ripples club watching football when the appellant appeared. He notified the police and the appellant was arrested while at the club. It is his evidence that when he went to Stand Kisa the first time with the Congolese the buyer did not taste the gold but negotiated on the price per gram. The complainant further testified that he knew one Margaret Nyambura as a friend and he had been calling her.

**PW2 ABBAS HUSSEIN** is a relative to the complainant. He testified that on the 26.11.2012 at about 7.30 a.m. PW1, the appellant and a driver went to their Lubao filling station where PW2 was working. They came from the Webuye side. PW1 asked for KShs.50,000/= and he gave him. They went to a room at the back and the appellant left. PW1 later told him that the appellant had sold him fake gold.

**PW3 PC ABDILAK SHARIF MOHAMMED** was based at the Kakamega police station. He recorded PW1's complaint on 19.12.2012 at 4.00 p.m. He looked at the alleged gold and it was clear that it was not gold. He saw no reason to take to the Government Chemist for analysis. He obtained the complainant's MPESA statement from Cell tell in Nairobi. He confirmed that money was sent by the complainant to the appellant. He later arrested the appellant at Ripples Bar after he was alerted by the complainant. **PW4 HUSSEIN GORO ABDALLA** is a driver to the complainant. His evidence is that on the 26.11.2012 at 5.00 p.m. he drove PW1 to Webuye where they met the appellant. They stopped at Lubao where he witnessed PW2 giving the complainant KShs.50,000/=. He saw the complainant giving the appellant a sum of KShs.50,000/=. He then went with the complainant to Stand Kisa to sell the gold, but they were told the gold was fake.

The appellant was put on his defence and gave sworn testimony. He testified that he had a wife by the name Margaret Nyambura. On the 19.12.2012 his wife told him that she was going to visit her parents but a friend called him at night informing him that he had seen his wife at Ripples club with another man. He went to the club and met his wife with the complainant at about 4.00 a.m. He started quarrelling with the complainant as he refused to leave the club until his wife left with him. He was arrested by the bouncers of the club and the police went there and arrested him. He denied that he was sent money through the phone by the complainant. The phone is normally in his house and the complainant used to send money to his wife using that number. They have a child by the name Najib with his wife. He converted to Islam and his name is Jabril Musa. His wife has never gone to the prison to see him. According to him he was framed as he suspected his wife was having an affair with the complainant.

The main issue is whether the appellant falsely obtained money from the complainant by way of false pretense. According to the complainant he gave out the money at Lubao to the appellant. PW4 witnessed the handing over of KShs.50,000/=. It is the complainant's evidence that they had agreed a price of KShs.250,000/= but he only had 200,000/=. He borrowed the KShs.50,000/= from his Fuel filling station at Lubao. It is the evidence of PW2 that he handed over KShs.50,000/= to PW1 at the filling station. PW2 saw the appellant at the filling station. On his part the appellant contends that he is being framed as he noted that his wife had an affair with the complainant. The trial court dismissed that line of evidence as an afterthought. From the evidence on record the issue of Margaret Nyambura arose after the complainant was recalled. I believe this was after the appellant had evaluated the Cell tell MPESA statement. When PW1 was testifying for the first time there was no mention of Margaret Nyambura or a confrontation at Riples bar.

Given the evidence on record, I do find that the prosecution proved its case as required. The trial court came to the right conclusion. The evidence was direct and the defence evidence does not raise any doubt that the appellant received the money. The sentence is quite lenient and I will not disturb it. The appeal lacks merit and is hereby disallowed.

**Delivered, dated and signed at Kakamega this 18<sup>th</sup> day of September 2014**

**SAID J. CHITEMBWE**

**J U D G E**