



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 167 OF 2009**

**B E T W E E N**

**REGINETTA M. IYADI ..... APPELLANT**

**A N D**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the original Criminal Case No.2009 of 2008 in the Chief Magistrate's Court Kakamega from the Judgment of P.N. ARERI, R.M. delivered on 3.11.2009)*

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

**Introduction**

1. The appellant herein, Regineta M. Iyadi alias Agneta was charged with two counts of obtaining money by false pretence contrary to section 313 of the Penal. In Count I, it was alleged that on the 11th day of December 2007 at Somken Cafe in Kakamega Town, Kakamega Municipality Location in Central Kakamega District within Western Province, by false pretence and with intent to defraud, obtained from Lydia Nekesa Wambia a sum of **KShs.16,580/=** by falsely pretending that she was in a position to purchase Mumias Sugar Company shares on her behalf and open a central depository scheme account (CDS) at the Discount Securities Limited in Kakamega.
2. In Count II, it was alleged that on the 1<sup>st</sup> day of June 2008 through M-PESA money transfer in Kakamega Town, Kakamega Central District within Western Province, by false pretence and with intent to defraud, obtained from Lydia Nekesa Wambia a sum of **KShs.2000/=** by falsely pretending that the said amount of money would facilitate the bus fare of previous owners of Mumias Sugar Company shares to Nairobi to verify the genuity (sic) of the Mumias Sugar Company shares at the Nairobi Stock Exchange.
3. The appellant denied both counts, thus opening the way for a full trial during which the prosecution called 3 witnesses. After the full hearing and upon consideration of all the evidence that was placed before it, the trial court was satisfied that the prosecution had proved its case against the appellant on both counts. The appellant was consequently found guilty and convicted on both counts. She was fined KShs.10,000/= on each count, in default she was to serve nine (9) months imprisonment. The terms of imprisonment were to run concurrently. The appellant paid the fines.

The Appeal

4. The appellant was however aggrieved by both conviction and sentence and filed her appeal on the following grounds.

- a) THAT the trial magistrate erred in law and fact in failing to make a finding that the prosecution had failed to prove all the ingredients of false pretence.
- b) THAT the trial magistrate erred by not taking into account clear evidence of an agreement between the appellant and the complainant the breach of which should have given rise to civil remedy.
- c) THAT the trial magistrate erred in law and fact by shifting the burden of proof to the appellant
- d) THAT the trial magistrate erred in law by failing to take into account the admission by the investigating officer that he was not conversant with share issues and procedures which was fundamental to the determination of the prosecution case.
- e) THAT the trial magistrate erred in convicting the appellant against the weight of evidence.
- f) That the trial magistrate erred in law by failing to make finding that Count II had not been proved at all.

5. The appellant prays that the appeal be allowed, conviction quashed and sentence set aside and the fine she paid pursuant to the conviction be refunded to her.

#### **The Prosecution case**

6. From the three prosecution witnesses, the prosecution's case was as follows – The complainant in the case who testified as **PW1 LYDIA NEKESA WAMBIA**, from Matulu sub-location and a teacher at Friends Secondary School Muji in Webuye, was at Somken café, Kakamega town together with her husband at about 5.00 p.m. on 11<sup>th</sup> December 2007 when they met the appellant who was to buy some Mumias Sugar Company shares worth **KShs.16,000/=** for her (complainant). The appellant had already been given **KShs.500/=** for fare to Nairobi so as to open a CDS account in favour of the complainant (hereinafter referred to as Lydia). Lydia had also given out to the appellant her national identity card and 2 passport size photographs. In April 2008, Lydia asked the appellant to sell the shares. The appellant gave a positive indication that she would sell the shares since the price appeared favourable. In June of 2008, Lydia again asked the appellant to sell the shares, whereupon the appellant asked for **KShs.2000/=**. Lydia deposited money to the appellant via M-PESA on 1<sup>st</sup> June 2008 to facilitate the appellant's travel to Nairobi so she could sell Lydia's shares as agreed.

7. Lydia also travelled to Nairobi but she could not reach the appellant via mobile phone. Later Lydia discovered that the appellant did not open the CDS account. On 6<sup>th</sup> September 2008 the appellant undertook to pay back Lydia's money. Lydia produced documentary evidence confirming the same. The appellant later reneged on her undertaking to refund the money, telling Lydia to do whatever she wanted. The matter was thereafter reported to Webuye Police Station and on 16<sup>th</sup> November 2008, Lydia recorded her statement with the police.

8. During cross-examination, Lydia conceded that despite the appellant's default on the agreement dated 11<sup>th</sup> December 2008, she (Lydia) had not sued the appellant for recovery of the money. She also confirmed that after being introduced to the appellant, she had no doubt that appellant was engaged in the business of buying and selling shares. Lydia also testified that she did not know how or from where the appellant was to buy the shares. Lydia denied that the appellant had bought the shares as per the documents shown to her (Lydia) at the hearing of the case. According to Lydia, the appellant did not

indicate to her that the work of buying shares for her would be done at a commission.

**9. PW2 was BERNARD MANYASI**, husband to Lydia. He corroborated Lydia's story on how they met with the appellant on 11<sup>th</sup> December 2007 and how Lydia gave the appellant KShs.16,500/= for purchase of shares on Lydia's behalf. PW2 also testified that the appellant neither bought the shares nor opened CDS account for Lydia. That the appellant later committed herself to refund the money to Lydia but never did so, necessitating a report being made to the police at Kakamega.

**10.** When cross-examined by counsel for appellant, PW2 denied that his decision to make a report to the police was actuated by malice. PW2 also stated that after he reported the matter to the police the appellant did not reveal to him and to Lydia that the share certificates for the farmers from whom the shares were to be bought had any problems. He also told the court that he and his wife wanted to make a profit from the 1500 shares for which Lydia had given KShs.16,500/= to the appellant.

**11. Number 62377 Police Constable Festo Wamwayi** testified as **PW3**. PC Wamwayi was by then based at CID office Kakamega on general duties. On the 17<sup>th</sup> November 2008, while he was in the office, he received a report from PW2 alleging that the appellant had defrauded Lydia of the sum of KShs.16500/=. After recording statements from both Lydia and PW2, and after taking possession of Lydia's statement recorded at Webuye Police Station, PW3 summoned the appellant to the CID offices and bonded her to appear in court. The agreement for refund was produced as PExhibit I.

**12.** During cross-examination, PW3 told the court that the appellant showed him some share certificates although the same were not transferred to Lydia's CDS account. He admitted that he was not conversant with matters to do with shares, but denied that he had prematurely charged the appellant. He also confirmed that he did not show the share certificates produced by the appellant to Lydia.

### **The Appellant's Case**

**13.** The appellant gave sworn testimony and told the court that she deals in shares at the Stock Exchange. She admits that on 11<sup>th</sup> December 2007, Lydia who is her friend gave her money KShs.16,500/= for the purchase of Mumias Sugar Company shares. The shares were to be bought from farmers contracted by Mumias Sugar Company. After buying the shares she was to deposit the same at the CDS account in Nairobi. The shares were bought from the following persons:-

Wakunda Natembea Walusaka – 633 shares

Hilary Namukuru Masinde – 610 shares

Stephen Ndiemaye Otuyu – 272 – shares. She produced share certificate numbers 0167734, 494462 and 521672 as DExhibits 1(a) (b) and (c) respectively. The certificates had been presented to Discount Securities and bore their

stamps though the shares purchased were yet to be verified.

**14.** The appellant stated further that share transfers were usually done in Nairobi and required the farmer selling the shares to be personally present. That Lydia refused to provide money to transport the farmers to Nairobi even after she (appellant) had shown Lydia the share certificates. She was arrested before completing the process of share transfer as required. She denied committing the offences and stated that she had no intention to defraud Lydia whom she referred to as her friend.

**15.** During cross examination, the appellant stated that it takes 4 months from date of purchasing to process share transfer, although she admitted that 5 months after the purchase, she had not completed the process. She also admitted that at the time of her arrest, the shares had not been transferred into Lydia's name and further that the errors on the share certificates had also not been corrected, and explained that the delay was caused by Lydia who had failed to meet the travel expenses for the farmers who had sold the shares.

## **Judgment of the Trial Court**

16. After carefully considering the evidence that was placed before it the learned trial court reached the conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt on both counts. The appellant was found guilty, convicted and fined KShs.10,000/= on each count in default to serve nine (9) months imprisonment. The default sentences were to run concurrently.

### **The Submissions**

17. At the hearing of this appeal, Mr. Nandwa, counsel for the appellant submitted that by producing the share certificates in court as exhibits, the appellant had exonerated herself from any blame, thereby showing that the ingredients of the offence of obtaining by false pretences had not been proved. Counsel also submitted that the issue between the appellant and Lydia was one of breach of contract which is a civil matter and not a criminal matter. He relied on the case of **Sulumu & Another –vs Republic [1986]KLR 259** to support his proposition. That breach of contract is a purely civil matter which should be dealt with as such.

18. Mr. Oroni, prosecution counsel conceded the appeal on the ground that the prosecution failed to prove the ingredients of the offence of obtaining money by false pretences. Both counsel asked the court to allow the appeal.

### **The Law**

19. In the Sulumu case (above) the appellants were tried and convicted of the offence of obtaining money by false pretences wherein it was alleged that they had obtained money from the complainant by falsely pretending that a bottle containing some coloured liquid which they produced to him contained mercury valued at KShs.4.4 million. The contents of the bottle were later found to be valueless.

20. It emerged during the hearing of the case that the complainant and others had agreed to a request by the 2<sup>nd</sup> appellant to advance monies to the 1<sup>st</sup> appellant and 2 other persons because the complainant believed these persons could soon get a windfall from dealings in coffee and mercury. It also transpired that none of the appellants had asked the complainant to make the payments.

21. On appeal the court held inter alia, that *“On a charge of obtaining by false pretence, the prosecution must prove the making of the pretence as stated in the indictment and where there is a substantial variation between the false pretence as alleged in that indictment and the pretence proved in the case, this will be fatal to the conviction.”*

### **Analysis of Evidence**

22. In the instant case, there is no dispute that Lydia and the appellant entered into an agreement under which the appellant was to buy shares on Lydia’s behalf and have them registered in Lydia’s name by opening a CDS account in Nairobi. There is also evidence that Lydia was to pay for transport for the farmers to Nairobi where they were required to effect the share transfer. Lydia was required to pay a total of KSh.7200/= for the three farmers and the appellant. According to Lydia’s testimony, she gave the appellant only KShs.2000/= for transport.

23. In her testimony, the appellant confirmed she had the share certificates but the same could not be transferred into Lydia’s name because Lydia did not provide the transport for the farmers to travel to Nairobi to effect the transfer.

24. Placing this evidence alongside the charges against the appellant, it is clear that the pretence in this case was not proved. The appellant proved that she indeed purchased shares from 3 farmers contracted by Mumias Sugar Company. The shares were purchased, as per DExhibit 1(a)(b) and (c). My finding is that there is a substantial variation between the false pretence as alleged in the charge sheet and the pretence proved in the case. The result is that the appellant gets the benefit of the doubt. I also make a finding that

Lydia's complaint against the appellant was of a civil nature. I am therefore satisfied that Mr. Oroni, for the Respondent properly conceded the appeal.

**Conclusion**

25. The upshot of what I have said above is that this appeal succeeds on both conviction and sentence. The conviction is quashed and the sentence imposed upon the appellant by the learned trial magistrate is set aside.

26. The fines paid by the appellant upon conviction by the trial court shall be refunded to her in accordance with the rules and regulations of the court.

27. Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 17<sup>th</sup> day of December 2014

**RUTH N. SITATI**

**JUDGE**

In the presence of

Mr. Anziya for Nandwa (present) - for the Appellant

Mr. Ngetich (present) - for the Respondent

Mr. Murumia - Court Assistant