REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL 92 OF 2010

REPUBLIC…….....……APPELLANT

VERSUS

CANNOBBIO PIERO PIERO.....….....……RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1460 of 2008 of the Chief Magistrate's Court at Malindi before Hon. C. Ocharo – RM and formerly 792 of 2008 of the Senior Resident Magistrate\'s Court, Kilifi)

JUDGMENT

1. The Appellant in this case is the Director of Public Prosecution (DPP), the Respondent being Cannobio Piero, the accused in the lower court trial wherein he was charged with the offence of Obtaining money by false pretences contrary to section 313 of the Penal Code .

The Particulars of the charge against the Respondent are that:

"Between 24th November, 2004 and 28th September, 2006 at Bofa area Kilifi within the Coast province with intent to defraud obtained from Maurizo Dalpiaz kshs. 10,000,000 (10 million) by falsely pretending that he had a plot to sale to the said Maurizo Dalpiaz." (sic)

2. Only two witnesses, namely the Complainant (PW1) and a police officer (PW2) testified on behalf of the prosecution, whereupon the prosecution closed its case. Submissions were made on behalf of the Respondent by his counsel Mr. Kinyua and by the Court prosecutor. On 12/8/09 the court delivered its ruling.

3. Upon analysing the prosecution evidence, the learned trial magistrate concluded that the prosecution case did not muster the threshold of a p*rima facie* case. The respondent was therefore acquitted under Section 210 of the Criminal Procedure Code . It is against this acquittal that the DPP has appealed. The DPP has raised four grounds of appeal as follows:

The learned trial magistrate:-

I. misdirected herself in law in failing to find that the prosecution had proved all constitutive elements of the offence of obtaining money by false pretences contrary to section 313 of the penal code against the respondent by acquitting the accused person.

II. erred in law in holding that the accused was not party to the contract when it was apparent from the evidence adduced by the prosecution that the accused had executed the sale agreements in respect of L.R.

No. 5034/275.

III. erred and misdirected herself in law by falling to analyse the evidence before her as a result of which she arrived at the wrong conviction that “there was no intention on the part of the accused to defraud the compliant of Kshs. 10,000,000

IV. misdirected herself in law by failing to place the accused in his defense when it was apparent that from the evidence adduced, the court could have safely convicted the accused if he had opted to be silent in his defence.

1. The oral submissions during the hearing of the appeal proceeded along the lines of these formal grounds. It was the DPP\'s contention that all the ingredients of the charge had been established.

Mr. Lughanje representing the Respondent opposed the appeal . He supported the findings of the lower court and further argued that the charge sheet was defective and that the case before us is civil in nature.

2. As obligated to do on a first appeal, I have read through the record and have appreciated the proceedings and evidence. (See **Okeno v Republic [1975] EA 322.)** What amounts to a *prima facie* case has been settled since the case of **R v Butt** as

*“**one which a reasonable tribunal properly directing its mind to the law and evidence would convict if no explanation is offered**.”*

Such is the standard against which the prosecution evidence in the lower court ought to have been considered . It is the contention of the state that a *prima facie* case had been established on the offence charged, hence the acquittal was not justified.

3. The elements of the offence of Obtaining by false pretence are:

i. false pretence

ii.intention to defraud

iii.obtaining anything capable of being stolen

A false pretence is defined in S. 312 of the Penal Code thus:

“any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.” *(See also* ***Silumu V R [1986] KLR 259)”***

1. This appeal has been brought by the state under the provisions of section 348 A of the Criminal Procedure Code. Although the counsels appeared to lay an emphasis on factual matters while canvassing the appeal, under section 348 A of the Criminal Procedure Code the D.P.P can only appeal on a point of law in a matter where there has been an acquittal, which in this case appears to be whether the acquittal in the lower court was proper.

2. In the grounds of appeal by the state it was contended that all the constitutive elements of the offence had been established and that the trial magistrate misdirected herself in failing to so find. In particular the state complained that the trial magistrate erred in holding that the accused was not a party to the contract whereas it was apparent from the evidence adduced. Secondly that she misdirected herself in law by failing to analyse correctly the evidence before her thereby arriving at the erroneous conclusion that there was no intention to defraud on the part of the accused.

3. In that regard I have looked at the ruling of the trial magistrate. The trial magistrate stated in part, *“it is a fact that the complainant entered into a sale agreement with Licinus Investment Co. a limited company*

(P.Exhibit 2 & 3).....it is therefore apparent that the accused was not a party to the contract, though it is said that he acted on behalf of the company as one of the directors." The learned Magistrate then posed the question: "why then not charge the company together with its directors?" These statements clearly show a misapprehension of the nature of the matter before the trial magistrate. The question in issue was criminal culpability and not civil liability based on privity of contract. It is well known that companies being artificial persons act through individuals.

4. It is also a fact of life that fraudulent companies have sometimes been set up for purposes of executing unlawful purposes hence the provision for the lifting of the veil of incorporation where there are fraudulent dealings by the \'company\' directors. The real question before the trial court for purposes of the case before it was not whether the accused was a party to the contract but whether he executed the agreements, supposedly on behalf of Licinus Investment Co. with intention to defraud. I say supposedly because, 2 years later in Mombasa HCCC 60 of 2008 (p. Exhibit 9 (a)), the Respondent sought to nullify the agreements on that same ground.

5. The learned trial magistrate further stated with respect to the restraining order, P.exhibit 7, that it was issued after the complainant had entered into the first sale agreement P. exhibit 2 with the complainant. She concluded , " so it cannot be said that he (accused) was aware that he had no capacity to dispose off the property." As far as P. Exhibit 2 is concerned that could be the correct position. However, the trial court appears not have considered that this position is not true of the second agreement, which the court seems to have disregarded.

6. This second agreement produced as P. exhibit 3 and dated 28th September, 2006 stated in part, "the vendor i.e Licinus Investment (represented by the accused) confirms that the matter between the vendor and the said Gilberto Agosta (beneficiary of the order in P. exhibit 7..) <u>has been settled and that he (vendor) is now in a position to transfer the property to the purchaser."</u>

7. Clearly, the latter statement was false as in 2008 in HCCC 60 of 2008 the accused was swearing to the exact opposite, at least with regard to his "position or ability to transfer the property." Neither had the injunction in P.Exh.7 in favor of Agosta been raised.

8. The lower court did not apparently consider P. Exhibit 9 (a), an application by the accused person intended to nullify the two above agreements stating that <u>he had no capacity to transact and transfer the property</u>. It stated, amongst other things, that he was not authorised to enter into the agreement with the complainant and that the grant in respect to the property had conditions that restricted the subdivision of the property. As a director of Linicus Investment Co. should he not have been aware of his lack of authority, if any, to transact? Further, he had all along been in possession of the title and ought to have known the conditions set therein. It is telling that he appears to be the only active director of the company

9. The trial court also stated in the judgment : "*interestingly the complainant is in occupation of the <u>house he purchased from the company through the accused</u>. It would therefore be a fallacy to claim.....It emerged that the real issue was on the transfer of the property...The purchase was indeed effected and the complainant was in possession."(sic)*

The trial Magistrate appears to have misdirected herself on the principles of law regarding possession and ownership, which are distinct. The Complainant did not enter into a lease agreement with the respondent whereby mere quiet possession would suffice. He entered into an agreement to acquire <u>ownership</u> of the property and made certain payments. The trial court misapprehended the complainants concern that he had not acquired ownership of the property. The subject matter of the sale agreements P. exhibit 2 & 3, was not possession but ownership of the property. Clearly therefore the conclusion that there was no intention to defraud the complainant based on the complainant\'s possession was erroneous.

10. With respect to the second agreement, p.exhibit 3, which came a year after the injunction in HCCC 270 of 2004, (p.exhibit 7) the trial court did not expressly make a finding on the element of false pretence, beyond implying that as the complainant was in possession "the purchase had been effected" (sic). The accused had on the face of it represented to the complainant by word, writing and conduct that there was a

plot named “A” that existed and that it was available for sale and further that he had authority to sell it and transfer it to the complainant. These were all facts that were false and apparently were none existent as per P.exhibit 9 (a).

11. In **Nyambane v Republic [1986] KLR 249,** a case whose facts were similar to the instant case, the appellant told the complainant that he had a friend who was selling a car cheaply. He presented himself as having the power and the means to obtain the car for the complainant whilst he did not possess either, causing the complainant to give him money towards this endeavour. The Court of Appeal found that that representation amounted to false pretence and found the appellant guilty of the offence of obtaining money by false pretence c/s 313 of the Penal Code. The court stated:-

“....that there can in the nature of things be few promises intended to be performed immediatley which do not import some statement about the promissor\'s readiness to perform, that is he has an existing fact the power and means to perform his promises.

That in our view fits the present situation. By telling the complainant that he had a friend who was selling a peugeot 504 car very cheap and promising, in effect, to bring its owner and arrange the sale of it to the complainants, the appellant was representing that he had the power and the means to obtain the car for the complainants at the stated price, or, as it is stated in the particulars of the charge set out at the beginning of this judgment, that the appellant was in a position to buy (the complainant) a motor vehicle at a cheaper price in Nairobi....”

12. On the element of obtaining, the trial magistrate stated that there was no proof of the accused having received payment. A scrutiny of the evidence shows that the firm of Sachdeva & Co advocates were to receive and did receive the money as per P.exhibit 3, sale agreement, and as per P. exhibit 8 it appears that the advocates were the respondent\'s agents for purposes of the agreement. Furthermore P.exhibit 1 and 2 is an acknowledgement of receipt of money by the accused. There was proof towards the issue of obtaining, the amount notwithstanding. Mr. Lughanje for the defence raised the issue of the amount of money indicated in the charge sheet. He highlighted the discrepancies of the amount in relation to exchange rates. This is not a defect that would truly prejudice the accused as held in **R V Lurie [1951]2 ALL ER 704.** I also note that the record of the trial especially with respect with PW1 is testimony was not easy to follow possibly because it involved interpretation from Italian to English.

13. The Acquittal order is therefore hereby quashed. In light of the foregoing I am of the view that the most prudent order to make is for a retrial as the amount alleged to be involved is collosal. The initial trial was conducted with dispatch and it does not appear that the Respondent will prejudiced (see **Manji vs Republic [1966]E.A 343).** For the purposes above the Respondent is ordered to appear before the Principal Magistrate\'s Court in Malindi on 8th Day of October, 2012.

Delivered and signed at Malindi this **19th** day of **September**, **2012** in the presence of Mr. Lughanje for the Respondent and Mrs. Mathangani holding brief for Mr. Kemo.

Court Clerk – Leah, Evans.

C. W. Meoli
JUDGE