



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 49 OF 2009.

JOSEPH KARANJA

NDUNG’U.....APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

J U D G M E N T.

1. The appellant together with two other co-accused persons were charged with the offence of obtaining goods by false pretences contrary to section 313 of the Penal Code. The particulars of the charge stated that on the 24th day of October, 2003 at Birunda Farm in Trans Nzoia District of the Rift Valley Province, jointly with intent to defraud obtained 115 bags of shelled maize valued at Ksh. 143,550/= and 78 gunny bags valued at Ksh. 940/= all to the total value of Ksh. 144,490/- from **REARDON MALUMBE LITUNYA** by falsely pretending that they would pay him after collecting all the said 115 bags of shelled maize and 78 gunny bags which they never did a fact they knew to be false.

2. After a full trial that took a considerable period of time the learned trial magistrate, convicted the appellant on 8th September, 2009 and sentenced him to 3 years imprisonment. Being aggrieved by the conviction, the appellant has appealed and raised several grounds of appeal in the petition of appeal to wit:

(i) *Conviction of the appellant was contrary to the evidence adduced as a whole.*

(ii) ***THAT**, the Learned Trial Magistrate erred in both law and fact when he found that the prosecution case had been beyond reasonable doubt while it had not.*

(iii) ***THAT**, the Learned Trial Magistrate erred in both law and fact when he failed to appreciate that the evidence adduced was at variance with the particulars of the offence charged.*

(iv) ***THAT***, the appellant was not give a fair trial and was prevented from bringing certain evidence before court during the trial.

(v) ***THAT***, the Trial Magistrate erred in both law and fact when he failed to appreciate that there was an offence committed, and that the acts complained of constituted a civil wrong.

(vi) ***THAT***, the Learned Trial Magistrate erred in law when he disregarded the defence of the appellant.

(vii) ***THAT***, the Learned Trial Magistrate erred both in law and fact when he shifted the burden of proof to the appellant.

3. During the hearing of this appeal, M/s. Bartoo, the learned State Counsel did not oppose this appeal. She submitted that there was no evidence to support the charge. The appellant was merely present during the transaction where the complainant sold maize to the 3rd accused person who failed to pay. The appellant was merely present as a loader; all the agreements that were produced in court were entered into between the complainant and the 3rd accused person before the trial court.

4. This being the first appeal court, this court is mandated by law to re-evaluate the evidence before the trial court and arrive at its own independent decision on whether or not to uphold the conviction. The evidence that led to the conviction and sentence of the appellant was led by a total of five (5) prosecution witnesses. Briefly stated **Dr. Readon Malumbe Litunya (PW1)** was approached by **Cleophas Onyango** and the appellant who said they wanted to purchase maize. After they agreed on a price, they later returned with the 1st and 3rd accused person and a motor vehicle to load the maize. At first the complainant thought the accused persons had purchased 33 bags but it occurred to him that the accused persons had taken more maize.

5. PW1 then followed the accused persons to Kiminini town and where they weighed the maize and it turned out to be 64 bags. The accused person agreed to pay for the extra bags but since it was late, they agreed to deliver the money the next day. The next day the accused persons bought more bags of maize from the complainant. They went on buying maize from the complainant and receipt was duly acknowledged. They signed a form of an agreement between the complainant and the third accused person. Although the accused persons promised to pay for the maize they failed to do so, and the matter was reported to the police.

6. The three accused persons were arrested, the 1st accused person jumped bail and it is the 2nd and 3rd accused persons who were convicted and sentenced. The evidence of the complainant was repeated by other witnesses, thus it is pointless to reproduce it here. Suffice it to state that they all concurred that the appellant was merely a loader. This is further confirmed by the acknowledgement agreements which were signed by the complainant and the 3rd accused person.

7. Moreover, the evidence on record does not support the charge of obtaining by false pretence. Section 312 of the Penal Code makes provisions of what constitutes a charge of obtaining by false pretences. The charge against the appellant is in total contrast with the evidence against the appellant. The upshot of the above analysis is that the conviction against the appellant is hereby set aside. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith. The Appeal is allowed.

Judgment read and signed on 11th February, 2011.

M. K. KOOME.

JUDGE.