



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 110 OF 2010**

**KENNETH KIPTOO SUGUT ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an Appeal against the conviction and sentence in Eldoret Chief Magistrate's Court Criminal case No. 10,125 of 2007 delivered on 7.7.2010 by HON. ATIENO ALEGO (Resident Magistrate))**

**JUDGMENT**

The appellants, **KENNETH KIPTOO SUGUT** and another were charged with obtaining money by false pretences contrary to S.313 of the Penal Code, in that on the 20<sup>th</sup> November 2007 at Matunda Town Western Province, jointly obtained from Jane Jelagat Kotut a sum of Kshs. 371,000/- by falsely pretending that they were in a position to sell 500 bags of white maize to the said Jane Jelagat Kotut, a fact they knew to be false. The two appeared before the Senior Resident Magistrate at Eldoret and pleaded not guilty to the charge. However, after trial, the appellant was convicted and sentenced to three years imprisonment. His co-accused was acquitted under S. 215 of the Criminal Procedure Code.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal on the following grounds:-

- (1) That the learned Magistrate erred in law and in fact by grossly misdirecting herself on the identification of the appellant amounting to an error in law.**
- (2) That the learned Magistrate erred in law and in fact by grossly misdirecting herself on the reliance of uncorroborated incriminating evidence of an alleged accomplice in support of conviction and sentence.**
- (3) That the learned Magistrate erred in law and in fact by grossly misdirecting and non direction of material facts by failing to consider the entire evidence evaluating it and drawing a just and fair conclusion.**
- (4) That the learned Magistrate erred in law and in fact by failing to warn herself on the dangers of relying on the evidence of an accomplice and thereafter wholly relying on the same to convict the appellant.**
- (5) That the learned Magistrate erred in law and in fact by concluding that the charge as against the appellant had been proved beyond reasonable doubt in the absence of evidence in support thereof notwithstanding.**
- (6) That the learned Magistrate erred in law and in fact by sentencing the appellant to three (3) years imprisonment whereas the same was excessive.**

**(7) That the learned Magistrate erred in law and in fact by failing to consider the appellant's mitigation before passing sentence.**

At the hearing of the appeal, **MR. OKARA**, learned Counsel, appeared for the appellant and relied on the aforementioned grounds. In his submissions, learned Counsel considered the evidence adduced against the appellant by the prosecution witnesses particularly by PW 1 and PW 2 and contended that the charge was unsustainable against the appellant.

Learned Counsel submitted that the prosecution evidence was full of contradictions and that the identification parade was not properly conducted since it was conducted in the police cells and the witnesses had already seen the suspect.

Learned Counsel also submitted that the appellant was implicated by the co-accused who alleged that the appellant was implicated by the co-accused who alleged that the appellant had ran away with money, a fact which was not established. Learned Counsel further submitted that the money was obtained by the co-accused and that there was no evidence of obtaining against the appellant. Therefore, the learned trial Magistrate misdirected herself by acquitting the co-accused and convicting the appellant.

On sentence, the learned Counsel submitted that it was excessive.

In his response to the foregoing submissions, the learned Senior Deputy Prosecution Counsel, **MR. OLUOCH**, conceded the appeal on behalf of the respondent by submitting that there was no evidence that the appellant took off with the money and that the only person who said so was the co-accused whose evidence was that of an accomplice but was not corroborated.

Having heard the appellant's submissions and those of the respondent, the duty of this Court is to reconsider the evidence adduced before the trial Court and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing all the witnesses.

In that regard, the case for the prosecution was briefly that on the material date, the complainant **JANE JELAGAT KOTUT (PW 1)**, a business woman dealing in maize was invited by the appellant's co-accused to purchase maize at Matunda. The two proceeded to Matunda where the appellant was introduced by the co-accused as the owner of the maize for sale. It was agreed that the available 500 bags of maize would be sold to the complainant and the co-accused at Kshs. 900/- per bag. The complainant gave the appellant's co-accused a sum of Kshs. 371,000/- for the maize. The appellant and the co-accused were then required to go for the maize as the complainant waited. Later, the co-accused returned alone and informed the complainant that the appellant had vanished. The complainant reported to the police. **ROSE CHEPKOECH LAGAT (PW 2)** teamed up with the complainant and the appellant's co-accused to purchase the maize from the appellant. They raised a sum of Ksh. 456,000/= and proceeded to Matunda. The money was given to the co-accused who went with the appellant for the maize. The co-accused later returned and alleged that the appellant had disappeared with the money. **NICHOLAS KIPLIMO SIRMA (PW 3)** was hired by the appellant's co-accused to carry the maize for her after the intended purchase. He was also at Matunda where he met the appellant said to be the owner of the maize. Thereafter, he accompanied the appellant and the co-accused towards Moi's bridge where the maize was to be obtained from. They arrived at a centre where he (PW 3) and the appellant waited for the co-accused as she went to fetch a vehicle. The co-accused took long to return thereby prompting him (PW 3) to go back to Eldoret. He said that 500 bags of maize were to be purchased and that the complainant gave a sum of Ksh. 371,000/- to the appellant. He (PW 3) also said that the presumed owner of the maize was the appellant's co-accused.

**P.C. JAMES BIWOTT (PW 4)** of Eldoret Police Station received the necessary report from the complainant and the co-accused. He proceeded to Moi's bridge in search of the appellant but did not find him. Thereafter he charged the co-accused and after the arrest of the appellant by officers from the flying squad he charged him along with the co-accused. **C. IP JOHN MUREITHI (PW 5)** of Eldoret Police Station conducted an identification parade in which the appellant was allegedly pointed out by Nicholas (PW 3) and Rose (PW2).

The appellant was placed on his defence on the basis of all the foregoing evidence. His defence was that he was a fuel transporter at Moi's bridge and was arrested on 22<sup>nd</sup> May 2008 in Kitale while on his way to Lodwar. He was told that he was required at the Eldoret Police Station. He was brought to Eldoret by flying squad officers and introduced to three ladies and a gentleman. Thereafter, he was placed in an identification parade and identified by the said ladies. His fingerprints were obtained and on the following day he was charged in Court with an offence he had no idea about. He denied the charge and contended that he was mistaken.

From all the evidence, it is apparent that money was obtained from the complainant (PW 1) on pretext that five hundred bags of maize were to be sold to her. It later turned out there were no bags of maize for sale and that those who made the representation that maize was available for sale acted dishonestly with a view to defrauding and actually did defraud the complainant.

It is also apparent that the complainant was lured into the transaction, hitherto criminal, by the appellant's co-accused one Judy Wangare Mburu who was acquitted of the charge by the learned trial Magistrate.

Ironically, the learned trial Magistrate noted that the co-accused was the author of the whole deal and that she was the one who received money from the complainant. If that were so and it was indeed so, it becomes difficult to understand why the co-accused had to be acquitted. She was part and parcel of the criminal transaction. She prompted and concluded it successfully to the detriment of the complainant. Lucky for her, the learned trial Magistrate believed her defence story and treated her as a victim of circumstances of a deal gone sour.

With regard to the appellant, the learned trial Magistrate found that he took the money but failed to deliver the maize nor refund the money. The learned trial Magistrate was of course prevailed upon by the co-accused's defence to find that the appellant took the money. Nonetheless, the learned trial Magistrate also found that the prosecution evidence against the appellant as compared to that against the co-accused was overwhelming. Therefore, if the co-accused were to be treated as an accomplice, her evidence against the appellant was corroborated by that of the prosecution witnesses in showing that the appellant aided and abetted the commission of the offence.

Although the evidence by the complainant (PW 1) and Rose (PW2) indicated that the money was not handed to the appellant but to the co-accused, it showed that the appellant was introduced as the owner and actual seller of the maize. He held and represented himself as such. He left with the co-accused to fetch the maize after money was handed over by the complainant. All these pointed to his complicity in the offence. Nicholas (PW 3) also knew that the owner of the maize was the appellant but his evidence on who received the money from the complainant was in contradiction to that given by the complainant (PW 1) and Rose (PW 2) and therefore unreliable.

In his defence, the appellant denied the offence and implied that the three ladies (presumably, the complainant (PW 1), Rose (PW 2) and the co-accused) he met at the Eldoret Police Station after his arrest were strangers to him. However, the evidence by the said three ladies established that he appeared at the scene on the material date of the offence and was introduced as the owner of the maize and presented himself to be such owner. He could not therefore be heard to claim that he was a stranger to the three ladies. The evidence against him strongly implied and proved that he was one of those persons who defrauded the complainant by false pretence.

Consequently, this Court is of the view that the appellant's conviction by the learned trial Magistrate was safe and ought not be interfered with.

As regards the sentence of three years imprisonment, it was lawful. It was neither harsh nor excessive.

In sum and although the respondent conceded the appeal, it has no merit and is hereby dismissed.

**J. R. KARANJA**  
**JUDGE**

**[Delivered and signed this 21<sup>st</sup> day of July 2011]**