



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 169 of 2008

SAMUEL KIMONDO GATHERU APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein, Samuel Kimondo Gatheru, was tried and convicted for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. He was sentenced to 4 years imprisonment. He has now come before this court seeking to upset both the conviction and sentence on appeal.

On appeal the appellant has put forward the following grounds:

1. *That the learned trial magistrate erred in law and fact in failing to consider that the charge was unconstitutional, oppressive and discriminative as I was charged after violation of my constitutional fundamental rights in regard to section 72(3) (b) and section 77(1) of the constitution and section 123 of the Criminal procedure code.*
2. *That the learned trial magistrate erred in law and fact in failing to put into consideration that the complainants knew me for only two weeks time and therefore he could in no way pay the total amount of the deal without a written agreement.*
3. *and the learned trial magistrate erred in law and fact in finding prosecution case as well ad iced where as all the entire evidence was conflicting.*
4. *And the learned trial magistrate erred in law and fact in dismissing my advanced defence of I the appellant.*
5. *And the learned trial magistrate erred in law and fact in convicting me from a prosecution case that lack adequate investigation.*
6. *That the learned trial magistrate erred in law and fact in failing to note that there was transaction as I admitted receiving 20,000/- and that the complainant admitted receiving some goods in return and the deal was over through.*

When the appeal came up for hearing the appellant was granted leave to file and rely on written submissions in form of supplementary grounds. Mr. Orinda, learned Principal State counsel conceded the appeal on two main grounds: First that there was no cogent evidence to prove that the appellant committed the offence. Secondly, that the complaint was that of a civil nature, in that it is a contractual relationship gone sour.

The case before the trial court was short and straight forward. On the prosecution's side, four

witnesses testified in support of the charge. Patrick Muriuki Wangai (P.W.1) said that on 16th March 2007 he travelled from Nairobi to Karatina with Mercy Wambugu (P.W.2) to purchase snow peas. P.W.1 said he received Kshs. 55,000/- which he handed over to the appellant. P.W.1 said they hired a motor vehicle and left for Mbururi where they found beans worth Kshs. 1543 and at Naromoru. The appellant is alleged to have told P.W.1 and P.W.2 to wait for him as he left to bring the remaining consignment. The motor vehicle came back without the beans. The appellant is alleged to have switched off his mobile phone. The appellant's conduct prompted P.W.1 and P.W.2 to

make a report to the police. P.C. Alfred Marite (P.W.4) arrested the appellant.

When placed on his defence, the appellant stated that he was only given Kshs. 20,000/- after which he left for Naromoru as P.W.1 and P.W.2 left for Mwea. The appellant claimed he supplied P.W.1 and P.W.2 between 400 Kgs and 500 Kgs of beans.

On appeal, the appellant stated that his defence was wrongly dismissed and that the prosecution did not prove its case beyond reasonable doubt. The record shows that the evidence of P.W.1 indicates the appellant was paid Kshs. 55,000/-. The appellant denied having been paid Kshs. 55,000/- but admits having received a sum of Kshs. 20,000/-. He claimed he supplied beans worth KSHS. 16,000/- There is no documentary evidence produced by both sides. The

case therefore heavily depended on the demeanor of the witnesses. In his judgment, the learned Resident Magistrate did not comment on the demeanor of any of the witnesses. There is no doubt that P.W.1 and P.W.2 travelled to Karatina to buy beans. The duo paid the appellant money to supply the beans.

After a careful consideration of the evidence I am convinced that though the learned Resident Magistrate did not comment on the demeanor of the witness, nevertheless the evidence of P.W.1, P.W.2 and P.W.3 appear to be consistent. The appellant received money from P.W.1 and he did not supply the beans. The appellant did not cast any doubt on the evidence of Charles Githinji Macharia (P.W.3), that he had previously dealt with him. In fact P.W.3 was impressed by the appellant's previous record but was

let down the second time round. There is nothing to show that the complainant and her witnesses had any grudge against the appellant. I am satisfied that there was ample evidence which proved that the appellant received money but may not have supplied the beans. The appellant claims he supplied the beans to the complainant's driver. The appellant appears to have given a plausible explanation that it is possible that the beans could have been diverted elsewhere. This issue has created doubt in my mind. The law required that I give the accused (appellant) the benefit of doubt.

The appellant has put forward the ground that his constitutional rights under S. 72(3)(b) of the Constitution were breached. The record is not clear as to when the appellant was arrested. However the

evidence of P.W.3 and P.W.4 indicates that he was arrested between 28th and 29th March 2007. He was arraigned before court on 8th May 2007. The appellant specifically mentioned in his defence that he was held in police custody for 9 days before being taken to court. The prosecution did not at that stage offer any explanation for the delay. On appeal the appellant listed that issue in his petition. Again the learned Principal State Counsel did not address this court on the issue. In the end I find that the appellant's constitutional rights under S. 72(3)(b) of the Constitution were breached. Where there are no reasons given to explain such a breach the accused is entitled to an acquittal.

In the final analysis and on the basis of the above reasons, the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

In open court in the presence of the appellant and Mr. Makura for the state.

J.K. SERGON
JUDGE