



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Criminal Appeal 17 of 2010
(Being an appeal from the conviction and sentence of the learned SRM, J.M. WERE in original Keroka SRM CRIMINAL Case No. 733 of 2008 dated 4/2/2010)

BETWEEN

ALFRED MOGIRE MATIABE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant faced six counts of obtaining money by false pretences contrary to **section 313** of the **Penal Code**. It was alleged that on diverse dates between 18th December 2007 and 26th December 2007, he obtained a total of Kshs. 255,000/= from six different complainants, all whom testified before the trial court. The appellant was convicted and sentenced to a fine of Kshs. 15,000/= on each count in default to serve six months' imprisonment in respect of each count.

Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this court. He raised three grounds of appeal that:

- “1. That the learned trial magistrate erred in law in convicting the appellant on evidence not adduced and did not consider the appellant’s defence.**
- 2. That the sentence was manifestly harsh, oppressive and excessive in the special circumstances of this case.**
- 3. That the evidence on record could not support the charges and the resultant conviction and sentence.”**

The brief facts of the case before the trial court were that the appellant, who is a neighbour of

the six complainants, has his brother working in the Nakuru Municipal Council. Sometimes in December 2007 or thereabout the appellant approached the complainants and told them that he was in a position to get their children who had completed secondary school education to be employed by the Nakuru Municipal Council after an initial training of about 3 months. He required each of the complainants to produce some given amounts of money so as to facilitate the promised employment. The complainants, desperate to have their unemployed children secure jobs as promised, did all they could to get the money that was required by the appellant. Some sold their cattle and trees and others borrowed huge sums of money which they gave to the appellant.

Joyce Moturi, PW1, testified that she met the appellant on 25th December 2007 at his home. She was with her son known as Amos. She gave the appellant Kshs. 40,000/= to secure employment for her son and a further Kshs. 35,000/= on behalf of her sister's son known as Maroche. On the same day some of the other complainants also went to the appellant's home and gave him various sums of money as required of them.

The appellant promised to pick the said children on 4th of January 2008 and he did so. They were taken to Nakuru but to their surprise there was neither training nor employment that was offered to them. They even went without food and their parents had to send them money for their sustenance. In March 2008, Amos, the son of PW1, returned to his parents' home. PW1 went to the house of the appellant and asked him what had happened but the appellant told her that he was still working on the deal. PW1 demanded refund of her money but the appellant was unable to refund the same. The matter was reported to the District Officer, Masimba, and to Ramasha Police station. PW1 said that she sold two cows and some trees to raise the money that she gave to the appellant.

The other five complainants gave similar evidence as that of PW1.

Amos Atuti, PW7, the son of PW1 testified that upon his mother giving Kshs. 40,000/= to the appellant, they were taken to Nakuru on 4th January 2008. They were put in some rented premises for about one week. The appellant went to the premises three days thereafter. He never took them to any training as promised.

Devina Moraa, PW8, was also one of the people who had been promised employment by the appellant. She corroborated the evidence of PW7. She saw the appellant being given a sum of Kshs. 30,000/=. Thereafter they were taken to Nakuru where they stayed for one week.

Police Constable Deko Numo, PW9, was the Investigating Officer. He testified as to how the appellant obtained money from the complainants and the investigations that he carried out culminating in the arrest of the appellant.

In his defence, the appellant denied having received any money from the complainants. He simply stated that all the allegations that had been made against him were false.

Mr. Makori for the appellant argued that apart from the complainants, no independence witness was called by the prosecution and so the conviction of the appellant was unsafe. Although counsel alleged that none of the complainants' children on whose behalf the money had been given to the appellant was called as a witness, that is not true. At least two of them testified as prosecution witnesses and said that they were present and saw the appellant receiving money from their respective parents.

In addition, counsel submitted that the appellant's brother who was said to be working in Nakuru, one Mr. Mageto, and the District Officer Masimba were not called as prosecution witnesses.

My view is that the two witnesses would not have added any value to the prosecution case. They were not there when the offence was committed. It was upon the prosecution to choose who the relevant witnesses were.

The appellant's contention that his defence was not considered by the trial court is not true. The learned trial magistrate considered the appellant's defence and dismissed his denial that no money was given to him as untrue. He even posed the following question in his judgment:

“I have had to ask myself, why would elderly village women who are not related gang up to falsely accuse the accused person for a non-existent occurrence?”

He went on to state that:

“I find that the prosecution witnesses clearly narrated how the events took place and that the accused who they knew had previously stayed at Nakuru and whose brother also allegedly worked at Nakuru Municipal Council was sincere in his offer to assist them... I find the accused's defence feeble and has not displaced the prosecution evidence. The prosecution evidence is corroborated, credible and consistent. I do find that all the charges against the accused person have been proved beyond any reasonable doubt.”

Mr. Mutai, Learned State Counsel, submitted that the prosecution evidence against the appellant was overwhelming. I agree with him.

Having carefully considered the evidence that was tendered before the trial court, the appellant's conviction was well founded in law.

As regards sentence, **section 14** of the **Criminal Procedure Code** clearly states that where a person is convicted at one trial for several offences, the court may sentence him to

several punishments as prescribed and when those punishments consists of imprisonment, the jail term shall commence one after the expiration of the other unless the court directs that they shall run concurrently.

In this appeal, the appellant was sentenced to a fine of Kshs. 15,000/= on each count in default to serve six months' imprisonment on each count. The sentence that was passed is lawful and the learned trial magistrate cannot be faulted for passing the same. Consequently, I find no merit in this appeal and dismiss the same.

DATED, SIGNED AND DELIVERED AT KISII THIS 15th DAY OF APRIL, 2010.

**D. MUSINGA
JUDGE.
15/4/2010**

Before D. Musinga, J.

Mobisa - cc

Mr. Bosire for Mr. Makori for the appellant

Mr. Mutai for the Respondent

Appellant present

COURT: Judgment delivered in open court.

**D. MUSINGA
JUDGE.**