



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CRIMINAL APPEAL NO. 147 OF 2009**

**ESTHER WANGUI**  
**NYAGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

Esther Wangui Nyaga, hereinafter referred to as the Appellant was charged before the Senior Resident Magistrate Embu with 2 counts under the penal code. Count 1 was conspiracy to defraud Contrary to Section 317 of the penal code; whereas Count 2 was obtaining money by false pretences Contrary to Section 313 of the penal code. Particulars on both counts are as in the charge sheet.

She denied both counts and the matter proceeded to full trial with the prosecution calling only 2 witnesses – the complainant and the investigating officer.

On her part, the Appellant testified on oath and called one witness. She was nonetheless found guilty as charged on Count 1 and not guilty on Count 2 and acquitted accordingly. On the first count she was fined 10,000 Sh. or a term of 1 year imprisonment. Being dissatisfied with the said conviction and sentence, she filed this appeal through the firm of Joe Kathungu & Co. Advocates who also represented her before the trial court. I do not find it necessary to repeat the said grounds for purposes of this judgment.

The Appeal is opposed by learned counsel for the state. In a nutshell, the complainant's evidence was that she and the Appellant knew each other very well before. On 16.06.03 they came to Embu town where they were supposed to pick some pool forms for a merry-go-round. While at Embu town, they are said to have met 2 women. The Appellant is said to have introduced them to the complainant. They went for a meal at a nearby café where the women are said to have told the complainant and the appellant that they would help them by praying for the money they had in order to exorcise evil spirits from them.

The complainant was asked to go to the bank and withdraw her savings which she says she did. The withdrawal slip produced as evidence before the court. Other than her word of mouth however, nobody said they saw the said money.

It is also noteworthy that the Appellant did not accompany her to the bank. She told the court that at the café she was told to wrap the money in a lesso and tie a knot. The Appellant was asked to do the same and she complied. She said she wrapped the 205,000 Sh. which she had withdrawn from the bank. They

were then prayed for and told to go and re-deposit the money to the bank. She told the court that the Appellant accompanied her to the bank but when they untied the knots, instead of finding the money, they just found empty envelopes. They learnt that they had been duped. They both went to the police station and reported the matter.

According to the complainant, it was even the Appellant who was assisting her to record her statement as she was shaken. She appears to have changed her mind later and decided to implicate the Appellant who was arrested and charged with the 2 offences. She said that she just suspected that the Appellant had conspired with the 2 women to defraud her because she is the one who had introduced her to them and insisted she does what they asked her to do.

That is basically the evidence the learned magistrate relied upon to convict. The Appellant tendered her evidence on oath and called 1 witness. She denied having known the 2 women. She said she was also a victim like the complainant. She said she also lost her 400 Sh. to the said women.

I have considered the above evidence and with all due respect to the learned trial magistrate, this was a matter that should not have gone beyond Section 210 of the C.P.C.

The complainant's evidence was not corroborated by any other evidence. She met strangers and agreed on her own violation (as she stated) to go and withdraw money from her account.

The Appellant did not accompany her to the bank and as stated earlier, there was no evidence that she took that money and gave it to those women. The fact that she withdrew the money from the bank does not necessarily mean that she took that money to the said strangers. In any event, even from her own evidence, she did not see the Appellant take the money; nor had she seen the Appellant talk with the 2 women before that incident in a manner to suggest that they were conspiring to defraud her. Indeed, the Appellant did not coax her at all to go to the bank and withdraw the money let alone accompany her there.

The Appellant's conduct thereafter also clearly shows that she had nothing to hide. Why would she agree to take the complainant to the police station to report the matter and even assist her by recording her statement?

There was no evidence that the Appellant and the said women had met either before or after the incident in question; where was the conspiracy?

In her judgment, the learned trial magistrate stated:-

***“There is a overwhelming possibility that the Accused had an implied agreement with the two women to do the unlawful act of defrauding the complainant.”***

There is nothing in criminal law as “overwhelming possibility” which can be equated to beyond reasonable doubt. The learned trial magistrate just made surmises and plucked the conspiracy theory from the air as it were. There was no proof at all in respect of either count. The Appellant was wrongly convicted. The conviction was not safe at all. The Appellant has a good appeal. The same succeeds. I allow it and quash the conviction and set aside the sentence imposed by the learned magistrate. If the fine imposed was paid, then I order that the same be refunded to the Appellant.

**W. KARANJA**

**JUDGE**

Delivered, signed & dated at Embu this 17<sup>th</sup> day of November 2010.

**In presence of:- Appellant – Ms. Kimani for her and Ms. Matiru for state.**

