REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPEAL NO. 307 OF 2010

(From Original Conviction and Sentence in Criminal Case No.702 of 2009 of the Principal Magistrate's Court at Kwale: A.M. Obura – R.M.)

NABIL ADAMJEE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant NABIL ADAMJEE, has filed this appeal against his conviction and sentence by the learned Principal Magistrate sitting at Kwale Law Courts. The Appellant was arraigned before the subordinate court on 14th May 2009 on two counts of OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE. The Appellant faced a third count of ISSUING A BAD CHEQUE CONTRARY TO SECTION 316(A) OF THE PENAL CODE. The Appellant entered a plea of 'Not guilty' to all three charges. His hearing then commenced on 28th August 2009 at which hearing the prosecution led by INSPECTOR GITONGA, called a total of four (4) witnesses in support of their case.

PW1 FAHAD IBRAHIM, testified that he met the Appellant in 2006 and the Appellant convinced him that there was profit to be made in the stock market. PW1 then deposited Kshs.2.0 million into the Appellant's bank account in November 2006, which monies the Appellant was to invest on his behalf. The expected profit did not materialize thus PW1 demanded a refund of his money. The Appellant then gave PW1 a post-dated cheque for Kshs.2,158,000/-but when PW1 banked the cheque it was dishonoured for lack of funds.
Likewise PW2 IBRAHIM ALI SIDDIQ, told the court that he met the Appellant through his ex-wife one SABINA LUCAS. The Appellant persuaded PW2 to invest in the business of supplying wooden poles to Kenya Power and Lighting Company which the Appellant assured him was a very profitable business. PW2 gave the Appellant the sum of Kshs.7.8 million to invest in this business. Later when PW2 realized that the anticipated profits were not forthcoming he demanded his money back. The Appellant was unable to refund him. Both PW1 and PW2 reported the matter to police whereupon the Appellant was arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. The Appellant gave an unsworn defence by which he denied the charges. On 25th June 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant on all three charges. Thereafter she sentenced the Appellant to serve three (3) years imprisonment on each of Counts 1 and 2 and one (1) year imprisonment on Count No. 3. The trial magistrate further ordered that the sentences be served concurrently. Being dissatisfied with both his convictions and sentence, the Appellant filed this present appeal.
The Appellant who appeared in person at the hearing of this appeal relied entirely upon his written submissions which had been duly filed in court. MR. ONSERIO the learned State Counsel neither supported nor opposed this appeal but opted to leave it to the court.
As a court of first appeal I am guided by the decision of the Court of Appeal in the case of AJODE –VS-REPUBLIC [2004]2 KLR 81, wherein it was held "In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that"

I have carefully considered the record of the trial before the lower court. The Appellant faced the charge on Count No. 1 and 2 of Obtaining money by False Pretences. The fact of 'obtaining' is not in any doubt whatsoever. Both PW1 and PW2 testified that they each gave to the Appellant the sum of Kshs.2.0 million and Kshs.7.8 million respectively for purposes of investment. When the desired profits were not realized each witness asked for a refund of their money. Various documents were produced before the lower court in which the Appellant made promises to refund the monies. This fact in itself amounts to an admission that he did receive those amounts. In his defence the Appellant does not deny having received these monies for the purposes of investment. However the mere proof that money exchanged hands is not sufficient proof that an offence under S. 313 of the Penal Code has been committed. The prosecution must go further and satisfy the court that the basis for the receipt of the monies was a 'false pretence'. It must be shown that the complainants were persuaded to release the funds on the basis of this false pretences. What is the 'false pretence' complained of here? Both PW1 and PW2 state that the Appellant was involved in businesses which he claimed secured very large profits for him. This cannot be said to be a false pretence. There is no evidence to contradict the fact that the Appellant was actually engaged in business. In his defence the Appellant produced the Memorandum of Association of his company SOLFIN SOLUTIONS LIMITED, which was incorporated in 2003. The company was involved in the business of 'portfolio management' on behalf of clients. The complainants trusted the word of the Appellant and acting upon the hope of realizing equally large profits themselves decided to invest their monies with the Appellant. Still no 'false pretence' is shown to exist. In order for one to be held criminally liable for under S. 313 the 'false pretence' must be a representation regarding a fact 'already in existence'. A representation with respect to a 'future event' cannot amount to a crime [see OWARE –VS- REPUBLIC 1989 KLR 287]. The Appellant's promise was made with respect to future earnings and/or profits. At the time PW1 and PW2 gave him their monies no profits had as yet accrued. The profits were only to accrue after these monies were invested. In the case of PW1 he did by his own admission realize a profit of Kshs.158,000/-. The fact that this was less than what he had hoped for cannot be said to be a false pretence. PW1 and PW2 both entered into the transaction with the Appellant as a business venture. Business the world over is known to be a gamble – it has risks. One may make (and indeed one hopes to make) profits but in the same vein one may just as easily suffer a loss. No business in the world is risk-free and none can guarantee one a profit, much less the exact amount of profit to be realized. If PW1 was that disappointed with the low profit he made why did he not report the Stock Exchange to the police since it is they who determine how much profits accrue? It is a win or lose situation. By so investing their monies PW1 and PW2 assumed this risk. Having failed to realize the anticipated profits they cannot now seek to punish the Appellant. They both voluntarily chose to give the Appellant their money to invest on their behalf. They each 'hoped' to make a profit. The fact that no such profit materialized does not make the Appellant guilty of any crime known to law. If this were the case then I day say the business world would grind to a halt. The promise or assurance by the Appellant to PW1 and PW2 that if they gave him money to invest in his business they would get a profit cannot and is not a 'false pretence'. The promise was about a future event – profits to be earned in the future. At the time the Appellant made the promise no such profits existed. A promise about a future event cannot be criminalized.

From their evidence it appears that the major complaint by both PW1 and PW2 was the failure by the Appellant to refund their monies. I do therefore agree with the Appellant that this was a civil complaint. If the two witnesses wanted to be refunded the money they had given the Appellant then they ought to have filed a civil suit against him. Time and again the police have been warned that they are not debt collectors. Why do they involve themselves in arresting citizens on the basis of civil claims? This is entirely wrong. Surely the police have enough work to do in containing crime and ensuring the security of citizens. Why add the unnecessary and illegal task of being debt-collectors? Why should a police officer oversee or be involved in a promise by a debtor to refund his creditor? That is the work of lawyers not the police. The arrest and trial of the Appellant was totally unnecessary. I advise him to sue the Police Department for False Imprisonment as well as Malicious Prosecution.

Finally on this point I find that no 'false pretence' is proved against the Appellant. The learned trial magistrate totally misdirected herself in finding that the charge of obtaining by False Pretences had been proved. I therefore quash the conviction of the Appellant on both Counts 1 and 2. The attendant three (3) year sentences are also set aside.

On the third count the Appellant was convicted for the offence of Issuing a Bad Cheque contrary to S. 316(A) of the Penal Code. PW1 told the court that after he demanded a refund of his money the Appellant issued him with a cheque in the amount of Kshs.2,158,000. PW1 states clearly in his evidence at page 11 line 16 “He [the Appellant] post-dated the cheque and adviced me not to bank it as he did not have the money at the time”

Therefore the Appellant clearly revealed to PW1 that he did not have the funds to cover the amount of the cheque and requested PW1 not to bank it. The Appellant promised to refund PW1 his money within 30 days. After waiting for 30 days PW1 proceeded to bank the cheque which not surprisingly was dishonoured. S 316(A) of the Penal Code makes it an offence for a person to issue a cheque when he has insufficient funds to cover such payments. Ordinarily one is not required to enquire from a payee if his account has funds. However in this case the Appellant revealed to PW1 that his account did not have sufficient funds. PW1 refrained from banking the cheque. In the circumstances and given his previous dealings with the Appellant PW1 ought to have enquired if it was safe to bank the cheque. He did not do so. In the circumstances I do not find that any criminal liability attaches to the Appellant. The lack of funds was revealed to the payee who nevertheless insisted on banking the cheque. There was no intent by the Appellant to misrepresent the state of his bank account. As such I find the Appellant’s conviction on this charge was not safe and I do hereby quash the same and the one (1) year sentence is set aside.

The upshot of the above is that this appeal succeeds. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.
Dated and Delivered in Mombasa this 17th day of November 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Onserio for State

M. ODERO
JUDGE
17/11/2010