



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Criminal Appeal 117 of 2007**

**JOHN ODUOR OJERA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of Honourable M/s. A. Ireri RM dated*

*29<sup>th</sup> June 2007 in Machakos CM'S CR.C 2006 of 2005)*

**JUDGMENT**

1. The Appellant herein, John Oduor Ojera was the accused person in **Machakos CM'S Court Criminal Case Number 2006/2005** where he had been charged with the offence of stealing by agent contrary to Section 283 (b) of the Penal Code. The particulars of offence were that **“on diverse dates between 27<sup>th</sup> day of August 2004 and 21<sup>st</sup> day of March 2005 in the Machakos District of the Eastern Province being an agent to AFRI-CHINA INTERNATIONAL COMPANY (K) LTD stole Kshs.1,731,549/= which had been entrusted to him through his A/C No.01337011425 by PFI ZHANG for him to deliver the same to the said PFI ZHANG”**.

2. The evidence tendered before the subordinate court in support of the charge was that PW1 Emmanuel Kenga, Assistant Commissioner of Police and a documents examiner examined certain documents relating to the case and confirmed that they were all signed by the Appellant as his signature was on them.

3. PW2, Pei Zhang, the complainant stated that he was a Director at Afri-China International and the company entered into an agreement with the Appellant as an agent for him to buy Macadamia nuts. He was advanced Kshs.17 Million for that purpose and a further Kshs.598,250 a week after the initial disbursement was made. It was agreed that he would account for his expenditure on a monthly basis but he was unable to account for Kshs.1.7 Million plus a sum of Kshs.317,000/= which was given to him as a personal loan. He added that the Appellant explained the deficit by stating that **“he used to buy nuts at a higher price.”** In cross-examination he stated that the Appellant **“delivered nuts but did not account for some monies”** and in re-examination added as follows;

**“we know the price fluctuations in nuts.”**

4. PW3, Zheng Miao, Director and Chairman of the Afri-China Company was a signatory to the agency agreement with the Appellant and he was surprised when the Appellant after initial delivery of nuts said that he was out of money and was unable to make any further supplies.

5. PW4, P.C. Robert Ndambuki investigated the matter and charged the Appellant with the offence of stealing by agent and later introduced a second count of the offence of obtaining money by false pretence in that he allegedly obtained Kshs.317,000/= from Pei Zhang, PW2 by pretending that he was able to refund the said amount to her.

6. When the Appellant was put on his defence he admitted that he entered into an agency agreement with PW2 and PW3 but that they also agreed that he would be an employee of the Afri-China Company and that he was given a company car and his utility bills were paid by the company. He was advanced monies to buy macadamia nuts and a disagreement arose in 2005 because the company had not paid him his commission totaling Kshs.7.6 Million. He instructed his lawyers to demand the said sum and while his lawyer's and those of the company exchanged letters on the issue, he was arrested and charged with the present offence.

7. He explained to court as he had allegedly done to the police officers who took his statement, that in February and March 2004, macadamia nuts were selling at Kshs.45/= per kilogramme but the price later shot to Kshs.90/= per kilogramme and that is what caused the short fall and created suspicion on the part of the company. In cross-examination, he stated that the company was operating from the premise that the prices were fixed and did not take into account the fluctuations and variations in the said prices.

8. DW2, Evelyn Kagwiria stated that she was a macadamia nut dealer and she was aware that the prices of nuts in 2003 were high, and had also a tendency of fluctuating.

9. The learned trial magistrate found that the two offences had been proved beyond reasonable doubt and sentenced the Appellant to serve 2 years in prison in respect of count I and 6 months in prison in respect of count II. Both sentences were to run concurrently.

10. The Appellant has now appealed against both conviction and sentence principally on the following grounds;

- i. that the matter was a civil dispute and had no criminal elements to it;
- ii. that in any event, the weight of the evidence could not have sustained a conviction;
- iii. the sentences imposed were harsh.

11. The Appeal is conceded for reasons that the charges in both counts were not proved beyond reasonable doubt and the basis for the alleged loss to the complainant was unclear. I agree with learned state counsel and would state my views as follows:-

Firstly, from the evidence of PW1 and PW2, as well as the Appellant's evidence in his defence, their relationship was governed by the "**Macadamia Nuts Agency Agreement**" (**Exh.2**) which was executed on 29/1/2005. One of the clauses in that agreement is clause 14 which is the dispute resolution clause and it merely states that disputes shall be construed according to the Laws of Kenya. Clause 10 is about termination of the contract and of importance is the provision that if the agreement is terminated, "**any advance given or outstanding payment shall be settled fully by(the) agent and company respectively immediately upon termination of agreement. The agent shall pay any advance monies by cash or by delivery of macadamia nuts to the company of equivalent value.**"

12. The agreement envisaged a situation where one party owes the other money and would need to pay the offended party but in the case of the Appellant, he had the option to pay in cash or equivalent in nuts. That is what happened in 2005 when the Appellant was unable, in the company's view, to deliver macadamia nuts worth Kshs.1,731,549/=. But of serious importance is the fact in clause 10 (c) and (d) where both parties "**considered the possibility of making expenditures in the performance of this agreement and the possibility of losses and damages resulting to each of them upon expiration or termination**". The agreement was only for 1/1/2005 – 31/12/2005 and so by effluxion of time it was terminated on this latter date. In clause 10 (d) no party was to be liable to the other for losses.

13. The import of what I am saying is that interpretation of the agreement was to be left to a civil court and not a criminal court as happened in this case. The learned magistrate was pointed in that direction during submissions but misdirected herself.

14. Secondly, in respect of count 1, the basis for the unaccounted for sum of Kshs.1,731,549/= was not properly laid. No documents of accounts were tendered in evidence and no audit of the sums advanced was given. It was admitted by the Appellant that he received a lump sum of Kshs.17 Million. PW1 and PW2 admitted that the Appellant indeed supplied macadamia nuts but not the expected quantity. There is no evidence that anyone investigated the purchase price of the macadamia consignment supplied and whether in fact any sums capable of being stolen were otherwise visible. Mere production of the Appellant's bank statements was no answer to that crucial question.

15. I repeat, what evidence was tendered to show that the said sum of money was stolen? I submit none. The Appellant had the money with the authority of PW1 and PW2 and there is no evidence that he later stole it.

16. On count 2, the issue is even more amusing. A friendly loan is advanced to the Appellant and he was to repay it. What criminal issue arises if he fails to repay it? To my mind, no offence of obtaining by false pretences is disclosed by those facts alone.

17. On the whole therefore, the dispute between the parties ought to have been and can still be resolved by way of civil proceedings. Indeed the fact that their lawyers started corresponding on who owed who and how much was a clear pointer to that fact. To use criminal proceedings to recover civil debts is abuse of the court process.

18. The Appeal is rightfully conceded and I will also allow it. The conviction is quashed and sentence set aside. The Appellant is on bond and his security shall be released.

19. Orders accordingly.

Dated and delivered at Machakos this 13<sup>th</sup> day of **May** 2009.

ISAAC LENAOLA

JUDGE

**In presence of:        Mr Mung'atta for Appellant**

**Mr O'Mirera for Respondent**

ISAAC LENAOLA

JUDGE