



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 188 OF 2008

STEPHEN KINYUA NGUYO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at

Karatina in Criminal Case No. 507 of 2007 dated 17th July 2008 by B. M. Kimemia – RM)

J U D G M E N T

The appellant **Stephen Kinyua Nguyo** was tried in the lower Court at Karatina for the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. It was claimed that on 13th June 2007 at Kimbo village, in Nyeri district with intent to defraud, he obtained from **Naomi Nyawira Wachira** the sum of Kshs.14,000/= by falsely pretending that he could sell a cow to the said **Naomi Nyawira Wachira**. He pleaded not guilty to the charge. He was however after trial convicted and sentenced to 2 years imprisonment. Being dissatisfied with both the conviction and sentence he filed this appeal, listing 8 grounds of appeal through **Messrs R.M. Kahiga & Co. Advocates** to wit;

- “1. That the learned trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt whereas from the evidence on record this is not the case.**
- 2. That the learned trial magistrate erred in law and in fact in convicting the appellant on insufficient and contradictory evidence adduced by the prosecution.**
- 3. That the learned trial magistrate erred in law and in fact in failing to resolve the contradictions in the prosecution case in favour of the appellant.**
- 4. That the learned trial magistrate erred in law and in fact in shifting the burden of proof from the prosecution to the appellant.**
- 5. That the learned trial magistrate erred in law and in fact in failing to subject the prosecution evidence to exhaustive analysis.**
- 6. That the learned trial magistrate erred in law and in fact in rejecting the appellant's defence**

without giving reasons.

7. That the learned trial magistrate erred in law and in fact in failing to appreciate that the credibility of the material witnesses for the prosecution was doubtful.

8. That the learned trial magistrate erred in law and in fact in meting out a harsh and excessive sentence against the Appellant under the circumstances.

The facts of the case may be briefly stated thus:-

On 13th June 2007 the complainant (PW1) went to the appellant's home in the company of PW11 and III and saw a cow she was interested in buying. Apparently, the appellant was a livestock trader. They negotiated the price down to Kshs.16,000/= from Kshs.20,000/= initially demanded by the appellant. By then she only had Kshs.14,000/= which she paid to the appellant for the cow. She wanted to go with the cow and pay the balance of Kshs.2,000/= later but the appellant refused. The trio then went away and returned two days later only to find that there was no cow and the appellant was missing. They reported the matter to Gakuyu police station. PWII too was a cow broker and is the one who had led PWI and III to the appellant's home as they worked together in the said cow business. PWIV, a police officer received information from **Inspector Katheka** regarding the offence and went with complainant with a view to arresting the appellant. The complainant identified the appellant and he was arrested. PWV was the investigating officer who conducted investigations and later charged the appellant.

In defence, the appellant stated on oath that he was a cow broker and that on the material date, he had taken his daughter to school and only returned at 6.00 p.m. He wasn't selling any cow on the material day and that he had never seen the complainant before. DWII the wife of the appellant stated that on the material date, she was at home whereas the appellant was in the shamba. She did not witness the transaction involving the purchase of the cow between the appellant and the complainant.

When the appeal came up for hearing, **Mr. Kahiga**, learned counsel for the appellant submitted that there was no evidence of false pretence as the cow was in existence at the time they were concluding the transaction, that what transpired subsequently was actually a breach of contract and not false pretence. There was no intent to deceive. For this submission counsel relied on the case of **Muchiri v/s Republic Cr. Appeal No. 414 of 2002 (UR)**. Sentence imposed was manifestly harsh and excessive and finally that the judgment of the learned magistrate did not meet the requirements of section 169 of the criminal procedure code.

Mr. Makura, learned Senior State Counsel opposed the appeal. He submitted that sufficient evidence had been adduced to sustain the conviction. That the conduct of the appellant of receiving the money and failing to avail the cow subsequently amounted to false representation as defined under section 312 of the penal code. Much as the matter was civil, it also boarded on criminality – On the issue of section 169 of the criminal procedure code, counsel submitted that though the judgment was short, it substantively complied with the said section of the law. Finally he submitted that the sentence imposed was neither harsh nor excessive.

Before considering the appeal, I must, as I am bound to, being first appellate court analyse the evidence in order to draw my own conclusion. See **Okeno v/s Republic (1972) E.A. 32**.

The complainant wanted to buy a cow. She was introduced to the appellant who showed her a cow which he indicated that he intended to sell. They negotiated and agreed on the purchase price which was Kshs.16,000/= from the initial Kshs.20,000/=. The complainant did not have the entire purchase price then. She made a down payment of Kshs.14,000/= leaving a balance of Kshs.2000/= that was to be paid subsequently whereupon she would collect the cow. When she came back 2 days later and it is not clear from the evidence, whether she had in hand the outstanding balance, she did not find the appellant at home. Nor did she find the cow. It was then that she took up the matter with the police. These set of facts in my view, cannot amount to obtaining by false pretence.

False pretence is defined in Section 312 of the Penal Code as;

“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact and which the person making it knows to be false or does not believe to be true”

The prosecution was required to show that the appellant made a representation that the cow was his and that he had the authority to sell it, yet that representation was false and the appellant knew that it was false. No such evidence was adduced to show that the cow did not belong to the appellant. Indeed the evidence on record is that the complainant saw the cow. She liked it and entered into negotiations with a view to purchasing it. If the cow was in existence at the time of negotiations, how possibly can there be false pretence. Yes, the complainant may have gone back and found both the appellant and the cow missing.

However to my mind that would not still amount to obtaining by false pretence. From the evidence, the complainant only went back to the appellant's residence in search of the cow once and missed both the appellant and the cow. I would have understood had the complainant visited the appellant severally and missed him and the cow. This would have suggested that he had deliberately gone underground after receiving the purchase price with a view to defeating the complainant's entitlement to the cow. That was not the case however for the appellant was on the same day at about 9 p.m. arrested from his home. To my mind what this all amounts to perhaps is a breach of contract, a matter best left for our civil courts. It would appear that the appellant somehow reneged on the earlier agreement to sell the cow to the complainant. However and as already stated this was a matter for civil courts and not one to attract criminal sanctions. Clearly there was no intention to deceive.

The judgment of the trial court is 2 pages, sketchy and appears to have been written in a hurry and casually. It does not meet the requirements of section 169 of the criminal procedure code. Aware of this failing perhaps, on the part

of the learned magistrate, **Mr. Makura** was contend with the submission that though the judgment was short, it substantively complied with the said section of the law. I do not however think that, that is the yardstick. A judgment must comply with the strict provisions of Section 169 of the Criminal Procedure Code. It must, inter alia, contain the point(s) for determination, the decision arrived at on the points aforesaid and reasons for those decisions. The trial court's judgment in the circumstances of this case fell short of this by a wide margin.

The appellant's defence was misunderstood to mean that he conceded that he obtained money when he had no cow to sell. That finding by the learned magistrate cannot stand in the light of what I have already stated.

The result is that the appeal is allowed, conviction quashed and sentence imposed set aside. The appellant shall be set free forthwith unless otherwise lawfully detained. Orders accordingly.

Dated and delivered at Nyeri this 31st day of July 2009

M. S. A. MAKHANDIA

JUDGE