



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 77 of 2006

ZADOCK OTIENO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Kangundo Senior Resident Magistrate's Court Criminal Case Number 632 of 2005 dated 30/05/2006).

JUDGMENT OF THE COURT

1. The appellant herein, **Zadock Otieno Obula** was arraigned before the Kangundo Senior Resident Magistrate Court, charged in the first count with obtaining by false pretences, contrary to section 313 of the Penal Code. The particulars of the offence were that:-

“on the 17th day of September, 2005 at Kitambasye village, Kiboko sub-location, Kyanzavi location, in Machakos District within Eastern Province, jointly with another not before the court with intent to defraud obtained from Teresia Ndunge Mutua 30,000/= by falsely pretending he was the servant of Nyasani Advocate Company limited and that he had been sent by the said Nyasani Advocate Company limited to Teresia Ndunge for the said 30,000/= and that he was authorized by the said Nyasani Advocate Company limited to receive the said money on behalf of the Nyasani Advocate Company Limited”.

2. In the second count, the appellant was charge with stealing contrary to section 275 of the Penal Code. It was alleged that he committed the offence on 22nd September, 2005 at Ol donyo Sabuk Market within Kiboko sub-location of Machakos District by stealing one Mobile phone made Nokia 2600 No. 355669/777446/9 valued at Kshs. 7,200/=, the property of Hillary Maundu.

3. The appellant denied the charges, forcing the prosecution to call five (5) witnesses in support of its case against the appellant. PW1 was Teresia Ndunge from Kitambasye village in Donyo Sabuk. She stated that on 16/09/2005 at a bout 10.00a.m, the appellant, who was known to her, went to her home accompanied by another person. PW1 said she was in the company of her sister. She went on to state that the appellant asked her for Kshs. 50,000/= to enable him stop a case that had been filed against PW1's family at Kithamani Law Courts; that the appellant had introduced himself as a court broker. PW1 stated that since her mother was not at home on that day, they could not find the money to give to the appellant but promised that he (appellant) would be given the money that evening.

4. Pursuant to PW1's promise to the appellant, she stated that she sold her mother's 30 bags

of maize for Kshs. 30,000/= and the money was delivered to the appellants office at Donyo Sabuk Market on the following day. Later PW1 said she discovered the appellant was a hoax. The money was never recovered. During cross-examination , PW1 stated that though the appellant did not issue her with any receipt, she gave the appellant the money in the presence of two witnesses.

5. PW2 was **Hillary Maundu Mutua** from Baringo village of Kitambasa location. PW2 stated that on 22/09/2004 at about 1.00 am, while he was at his neighbour's home, the appellant went to the said home and informed him (PW2) that PW2's mother's property was up for auction because of a case that had been filed against her at Yatta Law Courts. PW2 stated further that the appellant whom PW2 used to see at Donyo Sabuk market used PW2's phone to call somebody who could allegedly stop the auctioneers from auctioning PW2's family property. The appellant took the phone but after two days the appellants did not have the phone. PW2 stated that after one week the appellant said he could not return PW2's phone because PW2's family owed the appellant a balance of Kshs. 20,000/= in auctioneer's charges. PW2 stated that he established from his sister, PW1 that the appellant had obtained Kshs. 30,000/= from PW1.

6. PW2 also testified that on 16/09/2005, he received a letter from the appellant asking for Kshs. 30,000/=. PW2 then reported the matter to the police who arrested the appellant and recovered PW2's Nokia Phone S/N 35566900/777446/9 valued at Kshs. 7200/=. PW2 identified the phone in court as MFI-4.

7. PW3 was **Veronicah Kavundu Mutua** who told the court that the appellant was known to her, because he was handling her case regarding her motor vehicle which had knocked down a child. She told the court that the appellant used to work for the firm of Nyasani Advocates who were handling her case and that by letter dated 16/09/2005, the appellant asked for Kshs. 30,000/= allegedly being auctioneer's charges. PW3 stated that when she got the appellant's letter, she went to see her lawyer from whom she learnt that the appellant was acting on his own instructions, and ordered PW3 to report the matter to the police. The appellant was subsequently arrested and charged. PW3 also stated in cross-examination that before the appellant wrote the letter of 16/09/2005 (MFI-13) he had informed her that the Yatta case, being CMCC No.147 of 1998 had been finalized, an allegation which was by PW3's advocate, Mr. Nyasani.

8. PW4 was **Teresia Maundu**. She testified that on 16/09/2005, the appellant went to their home and demanded Kshs. 30,000/= from PW1 allegedly for bribing the auctioneer so that the latter could not attach the family property, and that she gave Kshs. 10,000/= to PW1 as part payment of the 30,000/= demanded by the appellant. PW4 said that she was not present when PW1 gave the Kshs. 30,000/= to the appellant.

9. PW5 was Number 383233 Police Constable **Julius Gikundi** (Gikandi) of Donyo Sabuk Police Station. He recalled that on the 19/09/2005 he reported for duty at 7.00 am, and after going through the Occurrence Book (OB) he found instructions for him to investigate an allegation that the appellant herein had obtained Kshs. 30,000/= by false pretences. He further stated that according to the report, the money allegedly obtained by the appellant was to assist the complainant in Civil Case Number 147/1998 in which the complainant was the defendant.

10. Gikundi stated further that before he commenced investigations as instructed, he received another complaint from PW2 with allegations that the appellant had received PW2's phone by false pretences. Gikundi also stated that during his investigations, he found the appellant in possession of PW2's phone, (MFI-4) and further established that the Phone belonged to PW4 when PW4 produced a purchase receipt for the same. Gikundi also testified that he knew the accused who ran a security firm at Donyo Sabuki. Gikundi produced MFI-1 to MFI-4 as P. Exhibits 1-4. He said he did not recover any money from the appellant.

11. On cross-examination, Gikundi stated that he arrested the appellant about one month after

the report was made and that he did so after Nyasani advocate confirmed to him (Gikundi) that he (Nyasani) had not sent the appellant to the complainant. Gikundi testified further that when, he questioned the appellant about PW2's phone, the appellant sent him (Gikundi) to one Odhiambo who said appellant had given Odhiambo the phone as security for the money which he (appellant) owed Odhiambo.

12. At the close of the prosecution case, the lower court put the appellant on his defence. The appellant gave un-sworn evidence, called no witnesses, but made written final submissions. The appellant told the court that on 16/09/2005 at about 12.30 am, (though both handwritten and typed record reads 12.30, it must have been 12.30 p.m) while he was in his office, he wrote a letter to Hilary Maundu, PW3, and that he wrote the letter because PW3 had asked the appellant for some Money which money was meant to assist Maundi and his family in settling the issue of liability in Court Case Number, 148 of 1998 at Yatta Law Courts. The appellant also stated that earlier on, on 6/08/2005, PW2 and PW3 had visited him at his office seeking his (appellant's) assistance in the case in which PW2 was the defendant. The appellant produced in evidence as D. exhibit 2 a photocopy of the Visitors Book for the day in question and also produced the following documents as D. exhibits 1(a) – 1(d)

- D.exhibit (a) – a letter dated 28/07/2005 purportedly written by Veronicah K. Mutua ID No. 1083835 in which the said Veronicah said she had authorised her son Hilary Maundu Mutua ID No.12941625/75 to follow the proceedings in her case Ref. MKS/C/56/92 c/o Kamau Kinga & Co. advocates. The letter under reference was not addressed to anyone.
- D.exhibit 1(b) – is a letter by Kamau Kinga & Co. Advocates, dated 19/6/96 addressed to Veronicah Kavindu Mutua regarding HCCC No.1938 of 1993, advising Veronicah that her case had been fixed for hearing on 18th & 19th days of November, 1996.
- D. exhibit 1 (c) - is another letter dated 17/Jan/95 by Kamau Kinga & Co. Advocates to Veronicah Kavindu Mutua advising her that her case being HCCC No.1938 of 1993 had been fixed for hearing on 4th and 5th days of July, 1995 at 9.00am.
- D. exhibit 1(d) – is a copy of Grant of Letters of Administration (Form P&A 41) issued to Veronicah Kavindu Mutua and Henry Mwando Mutua in respect of the e state of Peter Mutua Mwando. The letter was dated 7th May, 1993.
- D. exhibit 1(e) – being copy of certificate of death dated 27th July, 1992 in respect of Peter Mutua Mwando who died on 4th July, 1992 aged 52 years.

I shall return to those exhibits later in the judgment.

13. The appellant also stated that on 11/08/2005, PW2 went back to appellant's office accompanied by Teresiah Ndunge (PW4) who also signed the appellant's visitors book as per annexure D. exhibits 3 and 4 and that together the appellant and PW2 and PW4 travelled to Nairobi for the offices of Kamau Kinga Advocates, who apparently gave a letter for PW2 and PW4 to go and collect the dues on 12/10/2005. She added that because of the help she had given the complainant, the complainant commissioned him to follow up the case since apparently the complainants' lawyer was not working fast enough. That after the said instructions the appellant travelled to Thika to see Nyasani & Co. Advocates who were his (appellant's) lawyers and that Nyasani advocate instructed the appellant to take some Kshs. 30,000/= to the said advocate as she also signed the instructions. That because the complainant did not have the money in hand, they asked the appellant to lend them Kshs. 20,000/=. The appellant also explained that on 16/09/2005, he dispatched his security man to Thika to take a letter to Nyasani & Co. Advocate and that he himself (appellant) could not go to Thika because of Yatta Criminal Case No.1383 of 2005 as per D. exhibit 6. This is the Bond and Bail Bond - Criminal 95- which shows that the appellant was facing a charge of affray

contrary to section 92 of the Penal Code, which was stated for mention on 16/09/2005.

14. The appellant also stated that he was meant to travel to Nairobi together with the complainant on 12/10/2005, but that the complainant never showed up and so the Nairobi trip never materialized. The appellant further said that on 11/08/2005 while he and the complainant were travelling to Nairobi, PW3 gave the appellant his (PW3's) phone as security to cover the cost of traveling since it was the appellant who was paying, the transport costs – amounting to Ksh. 3,500/= and that the appellant would return the phone once the 3,500/= was refunded to him. That on 9/11/2005, PW2 went to appellant's office promising to refund the Kshs. 3,500/=but that she did not do so and that it was not until the hearing of the case against him. The appellant produced as E. exhibit 8 a copy of the visitors register to prove that PW2 was at appellant's office.

15. The appellant went on to explain that he was arrested on 3/12/2005 at about 4.30 p.m while playing pool at Donyo Sabuk Police Station. He said that though his house was searched, no recoveries were made and that he could not surrender the phone because it was with one Vincent to whom appellant had sold the phone to recover the transport costs of Kshs.3,500/= The appellant denied that he committed the offences.

16. In her two page judgment, the learned trial Magistrate found that the prosecution had proved its case beyond any reasonable doubt against the appellant. She concluded that the appellant's defence was a mere denial which did not shake the prosecution's case against him. The learned trial Magistrate said she saw and/or found no reason why the complainant's family could have framed the appellant. On conviction, the appellant was fined Kshs. 35,000/= in default to serve two year's imprisonment. The trial court also ordered that if the fine was paid, Kshs. 30,000/= was to be paid to the complainant.

17. Being dissatisfied with both conviction and sentence, the appellant has appealed. The appellant has complained that :-

a. There was no evidence from any of the witnesses that they saw the money being handed to the appellant.

b) The prosecution's case is based on contradictory evidence.

18. At the hearing of the appeal, the appellant reiterated the averments of her grounds of appeal and urged the court to find that the conviction by the learned trial Magistrate was unsafe. The appellant also stated that though he did not deny being found in possession of the telephone set, he said he had it lawfully, the same having been given to him by the family of PW3 as security.

19. Mr. Wang'odu Learned State Counsel opposed the appeal arguing that all the evidence on record points to the fact that the appellant received Kshs. 30,000/= from the complainant on the pretext that he was going to stop auctioneers from executing against the complainant. Mr. Wang'odu contended further that there was no mistake about the appellant's identity because the witnesses all knew the appellant before the day in question. That the appellant failed to account for the Kshs. 30,000/=which he had said was to be paid to Nyasani & Co. Advocates in Thika. Mr. Wang'odu urged the court to dismiss the appeal on both conviction and sentence.

20. It is now my duty as the first appellate court to reconsider the evidence that is on record, evaluate it afresh and reach my own conclusions in the matter (**see OKENO VS REPUBLIC [1972] E.A. 32**).

21. I have carefully reconsidered the evidence and evaluated it afresh and the conclusion I have reached is that the findings of the learned trial Magistrate were sound. I have considered

the evidence by PW1, Teresia Ndunge, who said that the appellant went to their home on 16/09/2005 and demanded Kshs. 50,000 so that he could use the recovery to “stop” the case at Kithimani Law Courts; that PW1 sold 30 bags of maize for Kshs. 30,000/= and took the money to the appellant on the morning of 17/09/2005 and left. Although there is no record of that visit by PW1 to the appellant’s offices, I am satisfied that PW1 made the onset and that she took Kshs. 30,000/= to the appellant.

22. PW2 stated that on 22/09/2005, he gave his phone to the appellant who wanted to use it but, instead the appellant stuck on the phone on allegation that PW2’s family still needed to pay the sum of Kshs. 20,000/= to make up the Kshs. 50,000/= acquired for “stopping” the case at Kithimani. PW2 also stated by his letter dated 16/09/2005 the appellant asked PW2 for Kshs. 12,000/= and also confirmed that he (appellant) had in his possession the sum of Kshs. 30,000/= for the court. The said letter was produced by PW5 as P. exhibit 1.

23. As for whether or not the appellant used the Kshs. 30,000/= for the purposes for which it was intended, the appellant stated that he dispatched his security to Thika with Kshs. 20,000/=, but surprisingly the appellant did not adduce the evidence of that crucial witness of his. PW3, confirmed that when she enquired of her daughter, PW1 about the appellant’s demand for money, PW1 had informed her (PW3) that she (PW1) had sold some 30 bags of maize when the appellant who went to the home accompanied by an “auctioneer” threatened to carry away PW3’s goods from the home.

24. PW4, **Teresia Maundu**, also testified that on 16/09/2005, the appellant went to PW3’s home and demanded money from PW1 so that he (appellant) could bribe the auctioneer so that the auctioneer could not carry away PW3’s goods. She said that PW1 sold maize and that she herself (PW4) also gave Kshs. 10,000/= towards the amount that was demanded by the appellant. In my view, the totality of this evidence points to the irresistible conclusion that the appellant obtained the money and that he did so with false pretences. His appeal on the first, count thus fails.

25. As far as count 2 is concerned, the appellant admits that he was found in possession of PW2’s phone. In fact from the appellant’s own testimony the appellant had already sold the phone to a third party by the time of his arrest. The question that arises is whether the appellant stole the phone or whether it was voluntarily given to him by PW2. I have considered the evidence of PW2, PW5 and the testimony that was given by the appellant and find that though the phone was initially given to the appellant by PW2, later on the appellant refused to return the phone to PW2 on allegations that the phone was being held as security for the transport costs of Kshs. 3,500/-incurred by the appellant when travelling to Nairobi with the complainants family. The appellant also said that the phone was to serve as security for Kshs. 20,000/= which he said he lent to complainant’s family and which amount the appellant allegedly dispatched to Thika through his messenger. It is my considered view that there is no truth in what the appellant stated. That he lent no money to the complainant’s family and that he did not spend any money on transport for the complainant and her family. I am convinced that the appellant is a liar.

26. Though the learned trial Magistrate seems to have made no finding on this second count, I am satisfied that there was sufficient evidence to find a conviction against the appellant and I so find. Accordingly I find the appellant guilty on the second count and convict him accordingly.

27. What sentence should I impose upon the appellant? I would, and do proceed to sentence the appellant to two (2) years’ imprisonment without the option of a fine. Sentence to run from 30/05/2006.

28. As the appellant did not raise any issue with the sentence on the first count, I do not see any reason why I should interfere with the same though Mr. Wang’ondy has urged the court to enhance the same to three (3) years’ imprisonment saying that the maximum prison term for

first count is three (3) years.

29. In the result the appellants appeal fails and I therefore dismiss the same in its entirety. The two years' imprisonment on the second count shall run concurrently with the sentence on the first count.

30. It is so ordered.

Dated and delivered at Machakos this 28th day of November, 2007

R.N. SITATI

JUDGE