

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 248 of 2007

JONATHAN KOTENE KIPEES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(From original conviction and sentence of the Senior Resident Magistrate's Court at Narok in
Criminal Case No.300 of 2007 – P.N. Maina [R.M.]**

JUDGMENT

The appellant, Jonathan Kotene Kipees was charged with the offence of obtaining by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence were that on the 2nd October 2006 at Narok Township, the appellant, with the intent to defraud, obtained from David Letuati the sum of Ksh.15,000/= by falsely pretending that he would be in a position to supply building timber to the said David Letuati, a fact he knew to be false or untrue. The appellant pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve ten months imprisonment. He was aggrieved by his conviction and sentence and duly appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted on scanty evidence that did not establish his guilt to the required standard of proof beyond reasonable doubt. He faulted the trial magistrate for failing to consider all the ingredients in support of the charge and thereby arriving at the erroneous decision finding the appellant guilty. He was aggrieved that he was convicted in the absence of evidence by the prosecution establishing his intent to defraud the complainant. He was aggrieved that the trial magistrate had failed to consider that the issues in dispute between the appellant and the complainant was breach of contract and not a criminal offence. He was finally aggrieved that the trial magistrate had shifted the burden of proof to the appellant and had further sentenced the appellant to serve a custodial sentence that was excessive in the circumstances. The appellant urged the court to allow his appeal.

At the hearing of the appeal, I heard the submissions made by Mr. Kahiga on behalf of the appellant and by Mr. Mugambi on behalf of the State. Mr. Kahiga reiterated the contents of the petition of appeal filed by the appellant. He submitted that the prosecution had not established to the required standard that the appellant had the intention to defraud the complainant. He submitted that the issue in dispute between the appellant and the complainant was not a criminal matter but was rather a civil dispute which ought not to have been criminalised. He referred the court to several decided cases in support of his submission. He submitted that the sentence that was imposed on the appellant was excessive in the circumstances taking into consideration the value of the subject matter of the criminal case. He urged the court to allow the appeal. Mr. Mugambi for the State conceded to the appeal. He submitted that the charge brought against the appellant was not established because the intention to defraud was not proved.

The duty of this court as the first appellate court was set out in **Okeno vs Republic [1972] E.A 32** at page 36 where it was held that;

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic [1957] E.A 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own

conclusion (Shantilal M. Ruala vs R.[1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] E.A 424.

In the present case, the facts of the case are more or less not in dispute. The appellant offered to sell the complainant PW1 David Letuati and his wife PW2 Magdalene Moipene Letuati 2,700 feet of timber at a price of Ksh.18/= per foot. The complainant required the timber for the purposes of construction of his house. The appellant was paid a sum of Ksh.15,000/= as a deposit on the 2nd October 2006. The total consideration for the said timber was Ksh.48,600/=. The appellant undertook to deliver the said timber by the 3rd October 2006. He did not deliver the timber as promised. The complainant made frantic efforts to either secure the refund of the said deposit paid or to have the appellant supply the timber. His effort was in vain. The appellant gave excuses and finally refused to take any calls from the complainant. The complainant reported the appellant to the area chief on the 12th February 2007. The area chief of Lower Melili location, who testified as PW3 Lukas Ole Kudate, summoned the appellant. The appellant did not respond to the summons of the chief. He recommended that the complainant reports the matter to the police. A report was made to the police leading to the arrest and subsequent charging of the appellant.

When the appellant was put on his defence, he admitted that he had indeed been paid the sum of Ksh.15,000/= by the complainant as a deposit to enable him supply timber. He however testified that he was prevented from supplying the timber due to the fact that the roads to the place where he had ordered the timber were made inaccessible by the rains. He testified that when he offered to refund the complainant the said deposit, the complainant insisted that he should be paid a higher sum other than the sum of Ksh.15,000/= which he had paid as a deposit. He denied that he had obtained the said sum fraudulently from the complainant.

The issue for determination by this court therefore is whether the prosecution established to the required standard of proof beyond reasonable doubt that the appellant, by false pretences, and with the intent to defraud, obtained the said sum of Ksh.15,000/= from the complainant. Mr. Kahiga submitted that the prosecution did not establish that the appellant had the intention to defraud the complainant because he was prevented from performing his part of the bargain by events which were beyond his control. Mr. Mugambi for the State conceded to the appeal. He submitted that the prosecution had not established that the appellant had the intention to defraud the complainant. In **George Woodgate vs R [1959] EA 525** at page 528, the then Court of Appeal of East Africa defined "*to defraud*" as follows;

"The classic definitions of 'to deceive' and 'to defraud' showing the distinction between the two things, are contained in a passage from the judgment of Buckley J, in Re London and Globe Finance Corporation Ltd (1) (1903) 1Ch 728 at page 732 – 3. The passage, which has constantly been referred to as the locus classicus on the point by the courts in England and more than once by this court, and which was quoted in the judgment of the first appellate court in the present case, reads as follows;

'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit: It is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a cause of action'."

In the present case, it was clear that the appellant intended to obtain the said sum of Ksh.15,000/= from the complainant knowing well that he was not in a position to supply the timber to the complainant. The appellant intended to defraud the complainant. If the appellant actually intended to supply the timber to the complainant, he could not have gone underground when he was sought by the complainant. He could not have refused to abide by the summons of the area chief of Lower Melili location when he was called to have the matter arbitrated and resolved amicably. Further, it was apparent that the appellant applied the said sum of Ksh.15,000/= to his own use. He did not pay to the suppliers of the timber the said

amount. Nothing would have been easier than for the appellant to call the persons whom he alleged were to supply him with the timber to testify on his behalf when he was put on his defence.

When the complainant pressurised him to refund the said amount of Ksh.15,000/=, the appellant testified that he sold his sheep so as to enable him pay the said sum to the complainant. It was therefore evident that the appellant obtained the said sum of Ksh.15,000/= from the complainant under false pretences, and with the intention to defraud him. The appellant's conduct during the entire period, from the time he obtained the money from the complainant to the time he was arrested by the police, was not consistent with the conduct of an innocent person. The appellant's conduct was consistent with the conduct of a person who had every intention of not paying back the said sum of Ksh.15,000/= which he had obtained by false pretences from the complainant. It was clear from the above reasons that the appeal by the appellant against conviction has no merit and is hereby dismissed. The prosecution proved to the required standard of proof beyond reasonable doubt that the appellant, by false pretences, and with the intention to defraud, did obtain the said sum of Ksh.15,000/= from the complainant by deceit. The appellant knew that he was not in a position to supply the timber to the complainant. The charge was proved.

On sentence, the appellant is on firmer ground. The appellant was a first offender. The circumstances of the case were such that a custodial sentence was uncalled for. The subject matter of the case was the sum of Ksh.15,000/=. Although the sentence of ten months imprisonment was legal, in the circumstances of this case the appellant ought to have been given an option of a fine. During the hearing of this appeal, the appellant was ordered by this court to deposit the sum of Ksh.15000/=. The appellant deposited the said sum in court. I hereby direct that the said sum of Ksh.15000/= shall be released to the complainant in this case i.e. David Letuati being a refund of the sum that was fraudulently obtained from him by the appellant. The sentence of the trial magistrate is hereby set aside. It is substituted by an appropriate sentence of this court. The appellant is sentenced to pay a fine of Ksh.10,000/= or in default thereof he shall serve six months imprisonment.

It is so ordered.

DATED at NAKURU this 14th day of December, 2007

L. KIMARU

JUDGE