



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 4 of 2006

(From original conviction (s) and Sentence(s) in Criminal case No. 180 of 2003 of the Chief Magistrate’s Court at Nairobi (T.N. Ngugi (Mrs.) – SRM)

PETER GITHENYA KARIUKI..
.....APPELLANT

VERSUS

REPUBLIC.....
.....RESPONDENT

J U D G M E N T

PETER GITHENYA KARIUKI was convicted of **STEALING BY AGENT** contrary to **Section 283** of the Penal Code. He was sentenced to 18 months imprisonment. The Appellant lodged his appeal against conviction and sentence.

The Appellant raised 11 grounds of appeal which grounds are argumentative in nature. I summarize them into five grounds as follows: -

One that the learned trial magistrate erred in convicting the Appellant on the basis that PW1 owned the motor vehicle KAM 054 without proof.

Two that there was no evidence that the Appellant deposited 684,000/- into his account.

Three that PW2 never dealt with the Appellant at any time.

Four that no evidence was adduced to prove that the Appellant wrote the cheques in question.

Five that the sentence imposed was harsh in the circumstances.

The appeal was opposed by the State.

The particulars of the charge against the Appellant were as follows:-

“On diverse dates between 1st September 2002 and 20th September 2002 at Auto Options Plus Along Langata Road, Nairobi, stole cash Kshs.470,000/- which had been received by you for and on account

of PETER MAINA KIHUTHIA.”

The prosecution case was that the Complainant PW1 agreed with the Appellant that the Appellant would sell his vehicle registration number KAM 054Q on commission basis and would pay the Complainant Kshs.470,000/-. The vehicle was delivered to the Appellant by PW3, an employee of the Complainant on September 2002. Then PW2 saw the vehicle at the Appellant's sale yard and after negotiating the price with the Appellant delivered to the Appellant a cheque in the sum of Kshs.684,000/- dated 18/9/02. The Appellant had earlier on the 26/8/02 given PW2 a letter of offer for the vehicle. The letter of offer was exhibit 6 and the cheque exhibit 7. PW2 was not able to get the vehicle's log book immediately because the Complainant did not receive payment for the vehicle as they had agreed. Eventually the Complainant released the log book which was exhibit 4. PW2 was however able to secure the vehicle from the Appellant immediately upon payment for it. The vehicle was exhibit 5. The Complainant eventually reported the matter to the police. As part of their settlement, the Appellant drew 3 cheques in favour of the Complainant in the sum of Kshs.150,000/- each as payment for the vehicle as they had earlier agreed. However all the cheques were dishonoured. They were exhibits 1, 2 and 3 dated March 2003. The Police were able to produce a statement of account of the Appellant's bank A/c which was exhibit 10 together with the account mandate, exhibit 11 and the account opening forms dated 19th April 2002 exhibit 9. These documents were proof of the fact that Appellant was the sole account holder in his personal names. The police also produced a Certified Business Registration Form exhibit 8 which proved that the Appellant was the sole proprietor of AUTO OPTIONS PLUS.

The Appellant in his defence denied the charge. The Appellant stated that the Complainant carried out a similar business like himself and that he occasionally used his telephone lines and business premises to do his business. The Appellant stated that the Complainant took the vehicle to his yard (the appellant's yard) and that it belonged to Kencell. He denied depositing any cheque into his account in the sum of Kshs.684,000/-. He also denied drawing the three cheques exhibits 1, 2 and 3 and stated that the signatures on the cheques were a forgery. He also denied giving the three cheques to the Complainant.

I have carefully considered this appeal and have re-evaluated and re-analyzed the evidence adduced before the trial court while bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance as expected of this court as a first appellate court. The Appellant's appeal was argued on his behalf by **Mr. Aswani** Advocate. Counsel for the Appellant submitted that PW2 in his evidence was clear that he dealt with one **GEORGE** and not the Appellant. **Miss Gateru**, learned counsel for the State submitted that even though PW2 had negotiated the purchase price of the vehicle in question with an employee of the Appellant, PW2 paid the cheque to the Appellant who in turn gave him the car keys. The evidence of PW2 was that he negotiated the purchase price of the motor vehicle in question with an employee of the Appellant, one **GEORGE** who also signed the sale agreement in the presence of the Appellant and issued him with a receipt. PW2 said that he however gave the payment cheque to the Appellant.

Learned counsel for the Appellant submitted that the cheque of Kshs.684,000/- was not deposited in the Appellant's account but in the account of AUTO OPTIONS PLUS by his employees without his knowledge.

In reply to the Appellant's advocate's submissions, **Miss Gateru** submitted that the Complainant's evidence was that he spoke to the Appellant concerning the vehicle which the Appellant agreed to sell. That the Complainant then sent his employee PW3 who delivered it to the Appellant's yard. That further it was the Appellant who received the payment cheque from PW2 before releasing the car keys to him. That the Appellant cannot be heard to say that it was the employees who banked the cheque without his knowledge since the Appellant accepted that he was the sole proprietor of the company AUTO OPTIONS PLUS. That since the Appellant did not pay proceeds of the sale to the Complainant despite being paid for the vehicle, the Counsel submitted, the charge was fully proved.

The Counsel for the Appellant made submissions in regard to issues of fact concerning the actual person who negotiated for the vehicle with PW2 and regarding receiving and drawing of cheques exhibits 7 on the one hand and exhibits 1, 2 and 3 on the other hand. Starting first with the issue of the cheque exhibit

7, I do not think that it is of any material importance who received the same from PW2. In light of the evidence which was adduced in this case, the prosecution proved that the cheque was in the Appellant's business and trading name AUTO OPTIONS PLUS. The prosecution also proved that the cheque went through the Appellant's bank statement in the same name which he operated solely in his personal names. The prosecution proved that the cheque was honoured. Even if there was no evidence of who took the cheque, having proved it was deposited in the Appellant's business account which he operated alone was enough proof that he was paid for the vehicle by PW2. However, I do find that the evidence adduced by the prosecution was clear that he was present when the payment, cheque exhibit 7 changed hands from PW2 to either him or his employee. The prosecution proved that he received the car keys from PW3, the Complainant's employee earlier the same month of September 2002 before he sold the vehicle to PW2. The transaction between PW2 and the Appellant or his employees was preceded by an agreement between the Complainant and the Appellant. All these transactions were intertwined and the Appellant cannot be heard to deny that he was not aware of any part of them.

In regard to the 3 cheques of Kshs.150,000/- each, it is very clear that the Appellant gave the Complainant the three cheques while in police custody in order to clear the debt he (the Appellant) owed him over the vehicle. The cheques were dated March 2003 six months after the Appellant had sold the Complainant's vehicle to PW2. Even up to the day the case was heard on 24th October 2003, the Complainant had not been paid his money as agreed.

The issues of facts raised by the Appellant's advocate have no merit. The evidence of the prosecution was very clear as to the facts and the facts as given established the offence. The prosecution proved beyond any reasonable doubt that the Appellant was acting as the Complainant's agent when he received the vehicle exhibit 5 to sell on his behalf. It did not matter in whose name the vehicle was registered. Besides, the issue of actual ownership of the vehicle ought to have been raised during the trial and not at this stage. The prosecution also proved as required that the Appellant actually did receive payment for the vehicle in the sum of kshs.684,000/- but that he did not pay the Complainant Kshs.450,000/- as they had agreed.

The Appellant raised as a ground of appeal the issue that his defence was not duly considered. The learned counsel for the Appellant did not pursue this ground in his submission. I did consider it anyway. The Appellant was denying writing the three cheques exhibits, 1 2 and 3. The learned trial magistrate duly considered his defence at page J4, J5 and J6 of the judgment and analyzed it at Page J7 before rejecting it. The learned trial magistrate considered all the issues raised by the Appellant in his defence including his denial that he was never an agent of the Complainant. I agree with the learned trial magistrate's finding that the Appellant was the Complainant's agent in the matter of the sale of the vehicle exhibit 5, that the Appellant sold the vehicle to PW2 to whom he released it, that the Appellant received proceeds of the sale from PW2; that the proceeds were cleared through his bank account as reflected in the bank statement exhibit 8 and that he never paid the Complainant his money. The 3 cheques, exhibits 1, 2 and 3 were drawn by him and given to the Complainant as proceeds of the sale as agreed between them and are conclusive proof that the Appellant acted fraudulently to deprive the Complainant of his money and by so doing committed the offence for which he was charged. I find his appeal against conviction lacks in merit and is dismissed.

As for the appeal against the sentence, it was counsel for the Appellant's submission that the sentence was harsh and excessive. When viewed against the Appellant's mitigation that he had a wife and child and a sickly mother, counsel urged the court to release him on grounds that he had served a substantive part of the sentence. **Miss Gateru** submitted that the offence carried a maximum of 7 years imprisonment and in the circumstances 18 months imprisonment was lenient and was made after the learned trial magistrate took into account the Appellant's mitigation.

An appeal court cannot disturb the trial court's exercise of discretion without a good ground shown. I have perused the record of the proceedings and have noted that the learned trial magistrate took into account all the relevant factors and applied the correct principles in determining the suitable sentence to impose in this case. The learned trial magistrate acted fairly and correctly applied the relevant legal principles. I see no good ground upon which to disturb the sentence. Besides the sentence is quite lenient

considering all the circumstances of the case and the Appellant's total lack of remorse. I find the appeal against sentence also without merit and dismiss it.

The upshot of this appeal is that the same is dismissed with entirety.

Dated at Nairobi this 3rd day of August 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Aswani advocate for the Appellant

Miss Gateru - State Counsel

Erick- Court clerk

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LESIIT, J.

JUDGE