REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 175 of 2006

FREDRICK MWAZUNA MJUMWA……..……..…APPELLANT

VERSUS

REPUBLIC……...…….. RESPONDENT

(Arising from Chief Magistrate's Court Criminal Case No. 845 of 2004 in Mombasa)

JUDGMENT

The Appellant herein, Fredrick Mwazuna, was tried and convicted for the offence of obtaining money by false pretences contrary to Section 313 of the penal Code. The particulars of the offence are on the 31st day of May 2003, the Accused with intent to defraud, obtained Kshs. 300,000/= from Abed Hamud Mohammed by falsely pretending that he would import a motor vehicle make Toyota EX100 for the Complainant from Japan, a fact which he knew to be false. It is said he committed the offence at Fort Jesus Forex Bureau office in Mombasa District within the Coast Province. The Appellant was then sentenced to serve 3 years imprisonment. Being aggrieved he appealed to this court to upset the decision.

Let me set out the case that was before the trial court before considering the merits and demerits of the Appeal. The prosecution's case was supported by the evidence of four witnesses. The Complainant, Abeid Hamud Mohammed (PW1) said he met the Appellant on 30-5-03 with a view of importing a motor vehicle from Japan through him. He said the Appellant was a person well known to him. He produced photographs given to him by the Appellant of the motor vehicle he intended to purchase. Negotiations began and the duo finally agreed that the Complainant would buy the motor vehicle for kshs. 300,000/=. PW1 said he was taken by the Appellant to Fort Jesus Forex Bureau De Change where he instructed him to deposit the money into the account of Deno Corporation of Japan upon which he was issued with a receipt which he produced in court as an exhibit in evidence. PW1 also produced an agreement he entered with the Appellant trading as Alpin Green Motors on 31-5-2003 whereby he acknowledged receipt of the money with a promise to deliver the motor vehicle within 1½ months from the date of the agreement. When the motor vehicle was not delivered within the period as agreed, the Complainant booked a report at Urban Police Station on 11th September 2003. At the police station the Appellant wrote an agreement promising to refund the money to the Complainant which agreement was produced in evidence. The parties later appeared before Abdalla & Murshid advocates where the Appellant entered into a further agreement to refund the money. The agreement is dated 3-10-03. After entering into the agreement PW1 said the Appellant went underground until he was arrested by the police in the month of March 2004.

When placed in his defence, the Appellant admitted that he was involved in the business of importing and selling motor vehicles. The Appellant denied ever receiving the money from the Complainant. He claimed the Complainant deposited the money in the account of Deno corporation of Japan which account he gave to the Complainant. The Appellant further averred that the Complainant independently handled the transaction with Deno Corporation of Japan. The Appellant however admitted entering into three separate agreements with a promise to refund the money to the Complainant. The Appellant did not also deny entering into a written agreement to deliver the motor vehicle within 1½ months.

The Appellant put forward 7 grounds of appeal in his petition. However when the appeal came up for

hearing Mr. Mulongo sought to argue all the grounds together. It is the submission of the learned advocate that the trial court erred when it failed to appreciate the fact that the dispute was purely civil hence it had no bearing in criminal law. Mr. Monda, the learned state counsel conceded the appeal on this ground. Mr. Monda argued that it was wrong for the complainant to use criminal proceedings to recover a civil debt.

I have re-assessed and re-evaluated the evidence tendered before the trial court. I have also considered the submissions of both learned counsels. It is not disputed that the Appellant is a person who is known to import and sell motor vehicles. It is also a fact that the Appellant took the Complainant to a Fort Jesus Forex Bureau De Change where a sum of kshs. 300,000/= was said to have been deposited with the bureau in the account of Deno Corporation of Japan. I have carefully examined the alleged deposit slip given to the Complainant by Fort Jesus Forex Bureau Ltd on 31-5-2003. In my mind the Forex Bureau had just sold to the Complainant US Dollars at a rate of Kshs. 74 per dollar. The money was not deposited in any account or for that matter Deno Corporation of Japan. The Complainant was made to believe that he was actually depositing the money in the account of Deno Corporation of Japan. The only inference I can make from the transaction is that the Appellant had connived with the Forex Bureau to dupe the Complainant as though the bureau was a bank. There is evidence that the Appellant willfully executed an agreement with the Complainant on 31-5-2003 in which he acknowledged receipt of the money. It is not therefore true that he was coerced to admit receiving the money. It may be true that he was forced to write an agreement at the police station in the month of September 2003. But that does not mean he was also coerced in May 2003. There is also evidence that the Complainant has filed a civil suit to claim for a refund. The same is still pending for hearing. In my view this did not take away the criminal element of the saga. At the time of entering into the deal the Appellant in my view appears he only wanted to get the Complainant's money. It appears he had no intention of delivering the motor vehicle as promised. The evidence shows that the Appellant pretended he was in a position to import and deliver the motor vehicle to the Appellant yet he knew he would not. He claimed the Complainant dealt directly with Deno Corporation of Japan. That is far from the truth. The Appellant was the one who gave the name and details of Deno Corporation of Japan. He is the one who took the complainant to a Forex Bureau where he made the Complainant believe that he was making a deposit to the account of Deno Corporation of Japan while he knew that the Forex Bureau is not a bank. The sum total of his conduct is that he falsely pretended to be in a position to fulfill the terms of the contract he entered with the Complainant. In this regard I am satisfied that the trial magistrate came to correct decision in convicting the Appellant hence he cannot be faulted. The court of Appeal had an occasion to determine an issue similar to this in the case of Nyambane =vs= Republic [1986]K. L. R. P248.

In the above case the court of appeal held inter-alia:

That by telling the Complainant that he had a friend who was selling a car cheaply and promising to bring its owner and arrange the sale of it to the Complainant, the Appellant was representing that he had the power and means to obtain the car for the Complainant at the stated price. This was a false pretence as to an existing fact which the Appellant made in order to obtain the money and though the events occurred over several days, they were all one transaction.

I am bound and I respectfully agree with the position taken by the court of appeal.

Having come to the conclusion that the appeal as against conviction must be dismissed it is now appropriate to consider the appeal against the sentence. I have also stated that the Appellant was sentenced to serve 3 years imprisonment. It is the submission of the Appellant that the sentence is manifestly excessive. Under Section 313 of the penal Code the maximum sentence for such an offence is 3 years. In essence the Appellant was condemned to serve a maximum sentence. The record shows that the Appellant is a first offender. It is also clear that the Appellant having a civil suit still pending over the same matter. In all fairness the trial magistrate erred by pronouncing a maximum sentence for such an offender. In the circumstance this court is entitled to step in to moderate the matter. The Appellant, being a first offender should serve a lesser sentence. Consequently the appeal as against conviction is dismissed. However the appeal as against sentence is allowed to the extent that the sentence of three (3) years is set aside and substituted with that of 1 year imprisonment from the date of sentence.

Dated and delivered this 3rd day of November 2006.

J. K. SERGON

JUDGE