REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 36 OF 2004

1. ROBERT MANYARA)

2. MARTIN BAARIU) ……..APPELANTS

AND

REPUBLIC …….. RESPONDENTS

(Being an appeal from the judgment of F. A. Mabele, Principal Magistrate in Meru Chief Magistrate's Criminal Case No.4665 of 2003 dated 11/2/2003 dated 11/2/2004)

JUDGMENT OF THE COURT

The two appellants, Robert Manyara and Martin Baariu faced one count of obtaining by false pretences contrary to section 313 of the Penal Code. The particulars of the offence are that on divers dates between 15.11.2003 and 29.6.03 at Gaitu Market in Meru Central District within the Eastern Province, with intent to defraud jointly with others not before court, obtained form Martin Mbae the sum of Kshs. 216,000/= by falsely pretending that they would treat the money to be Kshs. 1,000,000/=. The appellants were tried by the Meru Principal Magistrate, Mr. F.A. Mabele, found guilty as charged and sentence to serve three (3) years imprisonment. Each of the appellants has appealed against both conviction and sentence.

The facts of the case are that on 5.3.2003 the complainant Martin Mbae (PWI) was informed that some two people namely Geoffrey and Kimathi were looking for him at the Charia Market and that the two people wanted to buy groundnuts. Being a groundnuts trader, PWI asked the two men for money so that he could buy the groundnuts for them. The two people then went away but Geoffrey returned later and showed PWI some papers which Geoffrey claimed could be converted into money if a certain chemical was applied to them. Geoffrey also told PWI that the papers were wroth a lot of money.

Later on, Geoffrey returned to PWI in the company of one Manyara who was said to be a former employee of one Ndubai and was now staying in Nairobi. Manyara said that he was the one with the papers and that they (Geoffrey and Manyara) should be given money for the purchase of the chemicals. PWI went to his butchery with the two men and gave them Kshs. 60,000/= after which the men went away.

For a long while, PWI did not see the two men until sometime in May 2003 when he met Kimathi. On enquiring from Kimathi where Manyara and Geoffrey were he was told that Manyara would be returning soon from a trip to Nakuru. Kimathi assured PWI that what PWI was expecting would be done. Kimathi then asked PWI for more money for the chemicals whereupon PWI gave Kimathi some Kshs. 50,000/= at the Pig and Whistle Hotel in the company of one Samson Mbaabu (PW2). At that time Kimathi was carrying a plastic bottle that had a coca-cola like liquid which he said was the chemical to be used for making the money.

In June 2003, PWI met Marti Baarui, the second appellant who introduced himself as a laboratory technician with some Asian. On that day, PWI was informed that Kimathi had gone to Laikipia. PWI and the second appellant met again on the following day. The second appellant had with him some kind of chemical and two bank notes, one Kshs. 500/= and the other for Kshs. 1,000/= which were not very clear. The second appellant then left, telling PWI that he was now taking the papers to Meru Town to be worked on in a laboratory. The second appellant left behind with PWI a pair of syringes and a pair of yellow gloves. PWI later handed these items to the police as exhibits. On the following day at about 3.00pm, the second appellant again met with PWI. This time round, the second appellant was carrying a green paper bag and a box. When the box was opened, it was full of Kshs. 100/= notes. The second appellant then asked PWI for Kshs. 90,000/= which PWI gave him on the 28.6.2003. On another later date at a meeting at the Pig and Whistle Hotel PWI gave the second appellant a further Kshs. 15,000/=.

The other prosecution witnesses were Samson Mbaabu (PW2) and John Gitonga (PW3). According to PW2, he was in the company of PWI on 5.3.2003 when Geoffrey and Kimathi approached PWI and asked him for nuts. Again in April when Geoffrey returned to meet PWI with papers allegedly used for making money and that he heard Geoffrey telling PWI to give money for buying chemicals for doing the conversion of paper into money and for which PWI would earn a commission and interest.

PW2 stated further that on 28.6.2003 he gave PWI a sum of Kshs. 50,000/= and accompanied him to the Pig and Whistle Hotel. At the hotel, PW2 saw PWI give some money to the second appellant although he could not say how much money it was. PW2 also testified that earlier on, he had witnessed PWI giving some money to the second appellant.

PW3, John Gitonga stated that sometime in March while he was in the butchery one Geoffrey went to the butchery and asked for PWI. Geoffrey had some goods which he left behind for PW3 to keep for him. Geoffrey also told PW3 to ask Martin to wait for him the next morning. On the following day, Geoffrey and Martin came back to the butchery together and took away the things left behind by Geoffrey the previous day. In April, Geoffrey returned in the company of the first appellant and that is when PW3 saw PWI give Manyara Kshs. 3,000/=.

When the appellants failed to refund the money as agreed, PWI made a report to the police on 5.10.2003. CPL John Kilonzo (PW4) investigated the matter and subsequently arrested the two appellants and charged them with the offence of obtaining by false pretences.

The two appellants denied the allegations against them. The first appellant, Robert Manyara gave sworn testimony. He told the court that he is a night taxi operator at Continental, and that during the day, he normally sleeps. That at the time when he is alleged to have been with Geoffrey he was asleep. He questioned PWI's allegation of having given him Kshs. 63,000/= when there was no documental evidence to prove the same. That at the time of his arrest he was taking his vehicle to the garage. He alleged that his was a case of mistaken identity. He called no witnesses.

The second appellant, Martin Baariu made an unsworn statement and also called for the Occurrence Book (O.B.) No. 26 of 27.9.2003. He stated that on 7.11.2003 he was at the stage waiting for a vehicle. There were other people at the stage. Then some three people whom he did not know came to where he was and identified themselves as police officers. After asking him a few questions, they shoved him into a waiting police vehicle and took him to the police station. When he refused to produce a bribe of Kshs. 500/= demanded by police, he was charged. He denied his involvement in the crime. He produced the OB as part of his evidence. D Exhibit DI. The second appellant maintained that he was innocent and that was one of the reason whey he refused to part with a bribe to the police.

In his judgment, the learned trial magistrate reached the conclusion that the prosecution had proved its case beyond any reasonable doubt through the evidence of PWI, PW2 and PW3.

In their consolidated Petition of Appeal, the appellants have set out eight grounds of appeal, namely that:-

1. The learned principal magistrate erred on a point of law when he convicted the appellants on a charge

of obtaining money by false pretences when the ingredients of the charge were not proved.

2. The learned principal magistrate erred on a point of law when he relied on the evidence of the complainant to convict the appellants which evidence was that of an accomplice and lacked corroboration.

3. the learned principal magistrate erred on a point of law when he rejected the appellants' defence without proper reasons for doing so.

4. The learned principal magistrate erred on a point of law and fact in relying on the exhibits that were produced in court to connect the appellant with the offence without proof that the same belonged to the appellants.

5. The learned principal magistrate erred on a point of law and fact when he relied on the prosecution's evidence which was full of contradictions incapable of being believed.

6. The learned principal magistrate erred on a point of law and fact in failing to make a finding that the offence if any, was committed by other persons and not the appellants and he failed to exercise the benefit of doubt in favour of the appellant.

7. The learned principal magistrate erred on a point of law when he held that the prosecution had proved its case beyond any reasonable doubt.

8. Without prejudice to the grounds set out herein, the learned principal magistrate imposed a harsh sentence against the appellants.

Have the appellants proved any or all of the grounds set out hereinabove so as to warrant an interference by this court of the conclusions reached by the learned principal magistrate in convicting the appellants and in sentencing them as he did? My duty as the first appellate court is to evaluate and reconsider the evidence adduced before the trial court and to make my own independent findings as to whether indeed the conclusions reached by the learned principal magistrate had a sound legal basis. The case of OKENO V. REPUBLIC (1972) E.A. 32.

In making my findings on the learned principal magistrate's judgment, I shall deal with the grounds of appeal as argued by counsel for the appellants. At the commencement of the hearing Mrs. J. Ntarangwi for the appellants submitted that she intended to argue grounds 1, 4 and 5 together and then grounds 2 and 4 each on its own. Though she did not mention of the other grounds, she did not specifically say she was abandoning them, she argued all the grounds.

On ground 1, Mrs. Ntarangwi submitted that the charge against the appellants was defective on the grounds that the various amounts allegedly obtained by the appellants should have formed separate counts against the appellants. With all due respect, the aspect of the charge being defective was not one of the grounds raised by the appellants in their petition of appeal. The ground was that the ingredients of the offence were not proved by the prosecution. The appellants' submissions on that point have no place as Mrs. Ntarangwi did not ask the court for leave to amend the Petition of Appeal to incorporate the ground of duplicity of the charge against the appellants.

Assuming however that the issue of duplicity was a ground of appeal, my view is that I would not find the charge against the appellants to be bad for duplicity. On UR V WILMOT (1933) ELL E.R. 628, whose decision was accepted as still good law in R. v De COMMARMEND (1960) EA 64, it was held that where the offences charged consists of one single act they may be made the subject of one single count. Applying that principle to the present case, the appellants several acts were part of one single transaction namely the multiplying of the money. Each time money is said to have been obtained from PWI, the purpose thereof was to bring the whole transaction of multiplying the money nearer to conclusion. IN my view therefore, the acts were one and indivisible until it became clear to PWI that he had been taken for a ride. A charge becomes bad for duplicity when an accused is charged in the alternative in the same count.

It is not so in the present case.

Ground 1 of the appeal is that the ingredients of the offence of obtaining were not proved. Although Mrs. Ntarangwi submitted passionately on the issue she did not cite any authority to the court to support her submissions.

Section 313 of the Penal Code under which the appellants were charged states as follows:-

"Any person who by any false pretence and with intent to defraud obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen is guilty of a misdemeanor and is liable to imprisonment for three years."

It is not in doubt that an intent to defraud is an essential element in the offence of obtaining by false pretences, and the same must be so stated in the particulars of the offence in a court charging that offence.

I have carefully considered the evidence on record and the charge as framed against the two appellants. I have also considered the submissions by learned counsel for the appellants. Applying the principles set out by the Court of Appeal in TERRAH MUKINIDA V REPUBLIC (1966) EA 425, I find no basis in the submissions that the ingredients of the offence with which the appellants were charged were not proved. If on the other hand the particulars of the charge did not allege an intent to defraud on the part of the appellants this court would have hesitated to find that the ingredients of the charge of obtaining had not been proved.

The evidence adduced by PWI was consistent and believable. Mrs. Ntarangwi submitted that the trial court should not have believed PWI's evidence because according to her, PWI was an accomplice in the offence. BLACK'S LAW DICTIONARY – 7th Edition defines an accomplice as:-

"A person who is in any way concerned with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory." In WHARTONS CRIMINAL LAW Vol. 38 at page 220 (15th Edition 1993), it says:-

"A person is an accomplice of another in committing a crime if, with intent to promote or facilitate the commission of the crime, he solicits, requests or commands the other person to commit it, or aids the other person in planning or committing it."

The appellant's main contention on this issue is that since PWI is the one who wanted the money multiplied, then he was an accomplice. I do not think that PWI could have been an accomplice in the commission of an offence against himself. The evidence is clear that the two appellants with others not before the court induced PWI to believe that they had the ability to multiply money, and through that deception they obtained the sum of Kshs. 216,000/=. That ground of the appeal in my view must fail.

As rightly stated by Mr. Muteti for the respondent there was sufficient evidence by both PWI and PW2 that money was obtained by the appellants from PWI. It is the appellants who hatched the scheme of "multiplying" the money which scheme they presented to PWI and induced him to believe in it.

I have also considered the evidence of the exhibits which the appellants have contended were not proved to belong to them. I have considered this piece of evidence in totality of the entire case and find that with or without those exhibits the case against the appellants was water tight. I therefore find no reason to interfere with the magistrates admission of the same.

The appellants contended in ground 5 of the appeal that the learned trial magistrate erred in law and in fact in basing his conviction on contradictory evidence and that as a result as per ground 7 of the appeal, the prosecution did not prove its case beyond any reasonable doubt against the appellants. It was also contended by the appellants in ground 3 of the appeal that the learned trial magistrate did not weigh the appellants evidence.

I have carefully considered the record and the evidence before the trial court. I have evaluated the same again. My finding is that the learned trial magistrate considered both the prosecution and the defence case in his judgment. The evidence of the first appellant is that there was nothing in writing to prove that PWI had given him the money as alleged and secondly that PWI must have mistaken him for somebody else. The second appellant alleged that he was charged because of refusing to give a bribe of Kshs. 3,000/= to the police who had arrested him.

The learned trial magistrate assessed the evidence before him in the following words:- "It is clear from the evidence adduced by PWI, PW2 and PW3 that the accused at various stages came to PWI and told him that they would give him money as a commission if he gave them money to buy a chemical that would be used to convert some papers into money. As a result PWI paid a total of Kshs. 215,000/= to the 2 accused persons for that to be done. Both PW2 and PW3 at some stage witnessed PWI give out some money to the accused or their accomplices. And eventually PWI was not given any money for the alleged commission or interest. He was also not given back his own money."

The learned trial magistrate also proceeded to state as follows:-

"Whether or not there is no written agreement to that effect ……. I find PWI and his 2 witnesses to have given credible evidence. I am therefore satisfied that the case is proved beyond any reasonable doubt against the accused persons. The exhibits they left with PWI clearly show that they were behind the scheme."

I have also independently evaluated the whole evidence on record and fully agree with the findings of the learned trial magistrate of course bearing in my mind my earlier observations on the exhibits. In nay event, the appellants, knowing fully well that their intent was to defraud PWI of his money would have been careful to ensure that there was no record, no agreement to show that they had been given any money by PWI. Further the meetings between the appellants and PWI took place in broad daylight and it was not just once. The meeting extended over some months. PWI was quite positive about the identification of the two appellants who with others not before the court perpetrated the crime against PWI.

The appellants, especially the second appellant relied heavily on D exhibit I to exonerate themselves from blame. I have considered the said piece of evidence in light of the rest of the evidence on record. I have reached the conclusion that the said evidence does not controvert the prosecution's case against both appellants. Though the same is an alleged report to the police, the space marked "Signed by……." Was not signed so that it makes it doubtful whether indeed that was the report made by PWI. Having found as I have that that evidence is not of much use to the appellants, there is no other evidence adduced by the appellants that makes such holes in the prosecution case as would make it unsafe to rely on such evidence.

In the result I find no merit in the appeal. The same is dismissed. I also find no merit in interfering with the sentence imposed upon each of the appellants by the learned trial magistrate. Both the conviction and sentence of the learned trial magistrate are confirmed. Orders accordingly.

Dated and delivered at Meru this 5th day of May 2005.

RUTH N. SITATI

Ag JUDGE

5.5.2005