



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**Criminal Appeal 273 of 2003
(Appeal against the decision of MRS. R.A. OGANYO, R.M. in Butali Resident
Magistrate Court in Criminal Case No.409 of 2003)**

DAVID LUKONGO APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant, DAVID LUKONGO MUSINDE, was convicted on 9.12.2003 by the Resident Magistrate, MRS. R. A. OGANYO, in Butali Criminal Case No.409 of 2003 of the offence of obtaining property by false pretences contrary to section 313 of the Penal Code. After record and mitigation, he was sentenced to imprisonment for a period of three years.

Aggrieved by the conviction and sentence, he filed the appeal herein and proffered four main grounds. First, he contended that there was no proof beyond any reasonable doubt, secondly that the trial court failed to have regard to the contradictions in the evidence of PW1, PW2, and PW3, and thirdly that key witnesses did not testify and finally that he ought to have been given the benefit of doubt.

When the appeal came up for hearing, the Appellant who had no legal representation told the court that he relied on the grounds of appeal in his Petition and had nothing more to add.

Mr. Karuri, learned State Counsel, opposed the appeal and submitted that the charge of obtaining by false pretences was proved beyond any reasonable doubt. He recounted the evidence at the trial and submitted that the evidence against the appellant was watertight.

I have perused the evidence adduced in the trial court. The evidence that the appellant obtained from PW1, Kennedy Kitui Wanalika on 6.9.2002 a Theodolyte machine was overwhelming. PW1's wife, Irene Kituyi, witnessed it as she is the one who fetched it from the bedroom in her house and handed it over to PW1 who was with the Appellant. PW3, Esnas Nyakengo, was also a witness. The Appellant had agreed to sell it on PW1's behalf or to link PW1 with the buyer. The Appellant said he had a buyer Peter Kapanga whom he called on PW1's cell-phone and the latter appears to have been interested in it and he instructed PW1 to give the machine to the Appellant to deliver it to him in Thika. After obtaining the machine from PW1, the Appellant did not return it nor did he take any money to PW1 or offer any explanation as what had transpired after he collected the machine after Peter Kapanga declined to buy it. He kept away from and avoided PW1 until the latter ambushed him at the Law Courts in Kakamega and with other persons arrested the Appellant and handed him to the OCS at Kakamega Police Station after which he was charged with the offence for which he was convicted. Just before his arrest he had stated that the machine was with PCIO but that statement turned out not to be true when the PCIO denied the allegation. He had also made a statement earlier that the machine was in Malava but instead of returning it he went underground.

The Appellant gave sworn evidence in which he denied having been given the machine by PW1. But the evidence that he received the machine was overwhelming. Was there a false pretence proved in the case? The machine was released to the Appellant on the basis of the information given to PW1 by the Appellant which PW1 verified by talking to the intending buyer, Peter Kapanga, on his mobile. Joshua Lumasi Tovoko PW4 was the linkman who was going to get the intending buyer, Peter Kapanga. PW4 was the one who was told by the intending buyer that the machine lacked certain specifications. PW4 told PW1 that the intending buyer in Thika had declined to buy.

The machine was handed over to the Appellant who never returned it to PW1. The false pretence alleged in the particulars of the charge was that the Appellant –

“ with intent to defraud obtained from KENNEDY KITUI one DUMPY LEVELLING THEODOLYTE MACHINE s/No. MC- 113 valued at KShs.200,000 by falsely pretending that he would sell the machine on behalf of the complainant, Kennedy Kitui, and remit the (sale) proceeds to him, which he never did.”

The evidence adduced shows that the Appellant was to deliver the machine to Peter Kapanga of Thika who wanted to buy. He existed. PW1 spoke to him. PW4 knew him and discussed with him about the sale. But Peter Kapanga declined to buy. The Appellant to whom the machine was returned by PW4 when the said buyer declined to buy should have returned the machine to PW1 as there was no other agreement reached between PW1 and the Appellant for the latter to sell on PW1’s behalf. What the evidence shows is that the Appellant failed to return the machine to PW1 and avoided PW1 until when the latter ambushed him in court and arrested him. The evidence adduced does not support the alleged false pretence in the particulars of the charge. The machine had lawfully gone into the hands of the Appellant. He failed to return it when required to do so.

Section 268 (1) of the Penal Code stipulates that any person who fraudulently converts to the use of any person other than the general or special owner thereof any property is said to steal that thing or property. Section 268 (2) of the Penal Code stipulates that a person who converts any property is deemed to do so fraudulently if inter alia he does so, with an intent to permanently deprive the general or special owner of the thing of it. Perhaps the offence might have held under this section. But this is not the offence with which the Appellant was charged. And it is not a minor offence to that charged so that section 179 (2) of the Criminal Procedure Code (Cap.75) does not apply.

The result is that as the charge with which the Appellant was charged was not proved, the Appellant is entitled to an acquittal. Accordingly, I hereby quash the conviction, and set aside the sentence. Unless otherwise lawfully held, the Appellant shall be released and set free.

Dated at Kakamega this 22nd day of July, 2005

G.B.M KARIUKI

J U D G E