REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal 254 of 2003

(Appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Butali in Criminal Case No.795 of 2001. (MRS. R. M. OGANYO, SRM)

JACOB LUBONGO ………………………………….. APPELLANT

V E R S U S

REPUBLIC ……………………………………….. RESPONDENT

JUDGEMENT

On 24.10.2003, the Appellant was convicted by the Resident Magistrate, Mrs. R. A. Oganyo, in Butali Criminal Case Number 795 of 2001 of seven counts of obtaining money by false pretences. He was, after mitigation, sentenced to 18 months imprisonment on each count. The sentences were to run consecutively.

Aggrieved by the sentence and conviction, he filed appeal and in his six grounds of appeal submitted, in summary, that there was no proof beyond reasonable doubt, that there was no corroboration of the evidence of the complainants, and that the investigating officer was never called to testify. When the appeal came up for hearing before the court, the appellant who had no legal representation stated that he had nothing to add to the grounds in his Petition of Appeal.

Mr. Karuri, the learned State Counsel, opposed the appeal and submitted that the appellant was rightly convicted and that his appeal had no merit.

I have as the first appellate court carefully perused the evidence adduced in the trial court and drawn my own inferences, conclusions and deductions bearing in mind that the trial court had vantage position, having observed the witnesses as they testified before her.

The offences in the seven counts were alleged to have been committed between 26th September 2001 and 1st November 2001 in West Kabras in Kakamega and Webuye township in Bungoma. There were six complainants one of whom was alleged to have been defrauded twice of Shs.1,000/= and 12,000/= while the other five complainants were each defrauded of Shs.13,000/=.

In Counts I and II, the false pretence alleged in the particulars of the charge were

"obtaining with intent to defraud……… by falsely pretending to employ his daughter at BAT Ltd."

In Count V, the false pretence was *"obtaining with intent to defraud …………by falsely pretending to employ his son at BAT Company."* In Counts III, IV, VI and VII, the false pretence

alleged was obtaining from each of the complainants Shs.13,000/= *"with intent to defraud ………..by falsely pretending to employ her at B.A.T. Company."*

The evidence of PW1, Reuben Sasaka Mudamanu, showed that the appellant collected money from him under the pretext that he was an employee of B.A.T. Company where there were vacancies which he was capable of filling by employing PW1's children. PW1 in turn paid the money demanded.

Generally, most people would know that no payments are required by prospective employers and the demand for money by the Appellant should have put PW1 on guard. Falling prey to the ruse by the Appellant, PW1 agreed to bribe the Appellant so as to procure the promised jobs for the youngsters. That the Appellant obtained the money referred to in counts I to VI was a fact which was proved beyond any reasonable doubt. That the Appellant was not an employee of B.A.T. Company and that there were no vacancies in the said company which he could fill by employing the complainants in counts III, IV, VI and VII and the daughters of the complainant in Counts I and II and the son of the complainant in count V was established beyond any reasonable doubt.

The Appellant obtained the various sums of money referred to in each of the seven counts with intent to defraud because he was not who he claimed to be and had no power to employ as he falsely alleged.

The conviction of the Appellant on all the seven counts was proper. He would not have however succeeded in defrauding the complainants were the latter also not greedy for the promised jobs. They forgot that all that glitters is not gold. They took the bait and swallowed it, line hook and sinker. It is my finding that the conviction was proper and I dismiss the appeal on conviction.

As regards sentence, the sentences in counts I and II ought to have run concurrently. The sentences in counts III, IV, V, VI and VII arose from separate and independent transactions. Having regard to all the circumstances of this case and the mitigation by the appellant, it is my finding that the sentences were excessive. Accordingly, I reduce the sentences in counts III, IV, V, VI and VII to 9 months on each count, such sentences to run concurrently. It is so ordered. Sentences on counts I and II will run concurrently.

Dated at Kakamega this 22nd day of July, 2005.

G. B. M. KARIUKI

<u>J U D G E</u>