REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 590 OF 2003
(From original conviction (s) and Sentence(s) in Criminal case No. 5427 of 1999 of the Chief Magistrate's Court at Kibera (Ms Mwangi - PM)

BETTY RIGHA KARUMANA...…..……..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant **BETTY RIGHA KARUMANA** was convicted for **OBTAINING MONEY BY FALSE PRETENCES** contrary to Section 313 of the Penal Code. She was sentenced to 3 years imprisonment. She lodged this Appeal against both the conviction and sentence. The Appeal has been conceded by the State through learned counsel **MRS. TOIGAT.**

The Appellant filed an Amended Supplementary Petition of Appeal dated 27th August 2003 in which thirteen grounds were raised. These grounds were intertwined and can be summarized as follows: -

1. That the learned trial magistrate erred in law and fact in convicting the Appellant on evidence which did not disclose a nexus between the Appellant and the sum of money allegedly obtained.

2. That the learned trial magistrate erred in law and fact in failing to give the Appellant's defence due consideration.

3. That the learned trial magistrate erred in law and fact in passing an excessive sentence.

The facts of the case were that the Appellant obtained 340,000/- from the Complainant in two installments; one, on the 12th October and the other on the 17th October 1998. That the money was intended for the supply of a motor vehicle to the Complainant within a short period. That the Complainant did not get the vehicle at all and, therefore, reported the matter to the Police who arrested and charged the Appellant.

Learned counsel for the Appellant **MR. AMUGA** made submissions on behalf of the Appellant. In his submission he challenged the Prosecution case for the lack of evidence establishing that the Appellant took the amount in question and or converted it to her use. The 10,000/- were received on the 12th October 1998. It was AMUGA's submission that the same was received by one **KANDIE,** on behalf of the CO., **TIME WORK COMMERCIAL CO. LTD.** That is however not the correct position from the evidence adduced. According to both PW1, who was the Complainant, and her husband PW2, the 10,000/- was paid to the Appellant and she also issued a receipt which was an exhibit. As far as the

10,000/- is concerned, even though the learned counse**l, MR. AMUGA** did not submit on this, it was paid by the Complainant to the accused and another for a specific purpose. The purpose was testified to by both PW1 and 2. It was a commitment fee to the deal which was to be entered into between the Complainant and the CO. T**IME WORK COMMERCIAL COMPANY LIMITED** (hereinafter referred to as TWC Ltd.) It was paid on the 12th October 1998 and received by the Appellant. That money had nothing to do with the purchase price of the vehicle. It ought therefore to have formed the subject of a separate count, if at all. On the 330,000/-, it was **MR. AMUGA'**S submission that there was no evidence to show that the Appellant assessed or utilized it. In my considered view, even though that aspect of the case is important, there was a primary issue. The issue was the role that the Appellant played and the purpose for which the money was paid. The role of the Appellant is confirmed in the signed agreement produced as exhibit 5. In that agreement, signed by the Complainant and one **GEORGE RIGHA,** it was agreed that the latter was to supply to the former a vehicle whose purchase price was quoted as 330,000/-. The Appellant and PW2 both signed as witnesses. In that agreement, the Appellant was not contracting with the Complainant. She was not expected to receive any money from or supply any vehicle to the Complainant. The Prosecution could not have charged her in the first place, but should have called her as a witness. That position would not change even if she was not an employee of **SHAH** and **ASSOCIATES** as he claimed in her defence. The position would not be changed either, even if it were proved that the Appellant received the cheque. For a charge of **OBTAINING BY FALSE PRETENCE**S contrary to Section 313 of the Penal Code, it is the onus of the Prosecution to establish that the person charged made a representation, which they knew to be false and which influenced the mind of the Complainant and caused him to take an action to his detriment. The evidence adduced by PW1 and 2 was supported by the agreement in which one, not the Appellant, gave a representation and promise to deliver a vehicle to the Complainant within a month, on receipt of the sum paid. That promise was not met and no vehicle was ever delivered to the Complainant. Whether or not the promise made to the Complainant could form the basis for a charge of **OBTAINING BY FALSE PRETENCES** will not be considered in this case for being beyond the purview of this case. Having found that the promise was not made by the Appellant, then the Prosecution could not succeed in proving the charge against the Appellant.

I find that the learned trial magistrate failed to give proper consideration to the evidence adduced before her. Had she done so, she may have doubted that the Appellant received any money from the Complainant and that if she did so, then it was without a fraudulent intention.

The learned trial magistrate also failed to comply with Section 210 and Section 211 of the Criminal Procedure Code. All the court wrote was;

> ***"Court Ruling***
>
> ***Section 211 Criminal Procedure Code complied with Defence hearing on 15th May 2003"***

The Appellant had been charged with three counts of **OBTAINING BY FALSE PRETENCES.** There were three Complainants **SALOME GITAU, JUSTUS ABALLA** and D**IOJOK BAY**EK. Only one, **SALOME GITAU,** PW1, was called as a witness. The learned trial magistrate did not make a finding on whether at the close of the Prosecution case, there was established a case for the Appellant to answer. Pursuant to Section 210 of the Criminal Procedure Code the learned trial magistrate would have acquitted the Appellant for the offence if it satisfied that the offence was not established. If on the other hand, the learned trial magistrate found that a case had been established requiring the Appellant to answer the Charge, she would have notified the Appellant which offences or counts of offences she was required to answer. The court would have then informed the Appellant of the method of defence available to him and would have proceeded to take the defence in the mode chosen.

No ruling was made and the Appellant was not informed as to which counts she was required to answer. That omission rendered the trial defective. The defect is incurable under **Section 382 of Criminal Procedure Code** since the Appellant was eventually convicted. The learned trial magistrate's judgment did not show for which of the three counts the Appellant was found guilty and convicted. The learned trial

magistrate merely found that the Prosecution had proved its case against the Appellant and proceeded to convict her. The judgment did not comply with **Section 169 (2**) of the Criminal Procedure Code in that it did not specify the offence of which, and the section of the Penal Code under which the Appellant was convicted. That rendered the judgment defective and such defect cannot be cured by **Section 382 of the Criminal Procedure Code.**

Having considered this Appeal for the reasons given herein above, I find that the conviction was unsafe and cannot be allowed to stand. Accordingly I allow this Appeal, quash the conviction and set aside the sentence.

The Appellant should be set free, if serving sentence in this case, unless she is otherwise lawfully held.

Dated at Nairobi this 15th day of December 2004**.**

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE