



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLANT SIDE
CRIMINAL APPEAL NO. 131 OF 2001

(from original Conviction and Sentence in Criminal case No. 2613 of 2000 of the Resident Magistrate's Court at Mombasa – Ann Nguji Ms. – RM).

SIMON KIMWELE MUTUNGA.....APPELLANT

-VERSUS

REPUBLIC..... RESPONDENT

J U D G E M E N T

The appellant was convicted on two counts of (i) obtaining money by false pretence contrary to section 313 of the Penal Code and (ii) personating a public officer contrary to Section 105(b) of the penal code. The appellant was sentenced in both counts to 3 years imprisonment.

The appeal was against both counts as set out in the amended petition of appeal. The facts were that the appellant between the 30th day of June 2000 at Magongo area in Mombasa District within the Coast Province, jointly with others not before court, with intent to defraud obtained from one Raphael Mwikamba Wachenje a sum of Shs. 290,000/= by falsely pretending that he was selling gold which never existed. On the 2nd count the facts were that on the 24th day of July 2000 at Wimpy Hotel in Mombasa, the appellant falsely presented himself to be a person employed in the public service, namely a Police Officer and assumed to arrest Raphael Mwikamba Wachenje. The appellant was charged and later convicted and sentenced for the said offences and now the appellant appeals against the conviction and sentence.

The appellant proposes three grounds of Appeal namely:-

(i) That the Learned Resident Magistrate erred in law and fact in holding that the Appellant falsely obtained KShs.290,000/= from the complainant whereas the evidence on record shows that the complainant only talked of a promise to give the appellant Kshs.20,000/= which in itself does not constitute an offence of obtaining by false pretences.

(ii) That, the learned Resident Magistrate misdirected herself in dismissing the appellant's defence as a mere denial while the appellant categorically stated that he was sent to Wimpy to collect the money by one PC Wafula from Makupa Police Station.

(iii) That, the custodial sentence of three years for both counts was manifestly excessive.

The Appellant was represented by Mr. Kenzi at the hearing of the appeal. The appellant's Counsel opted to argue grounds 1 and 2 of the Appeal without mentioning the fate of ground 3. The Appellant's

submission is that there was no documentary prove that the appellant received money from the complainant amounting to KShs.290,000/=. That the complainant admitted having given out money to other people other than the appellant which include one Agnes and the other being Wafula. The appellant's argument is that since the complainant was referring to having given money to them, the appellant may not be among those people who received money from the complainant. The appellant further submits that he only appeared in the picture of the transactions when he met the complainant as Mr. Michael. The appellant also states that there is no evidence to support the fact that he received more than KShs.10,000/=which amount he had gone to collect on behalf of One P.C. Wafula.

The appellant also pointed out in the evidence of Prosecution witness 2 that he met with three ladies whose identities were not disclosed hence there is doubt that the appellant actually received cash from the complainant. The appellant also argues that there is no documentary evidence to support the charge of count 1 and that this fact was never considered by the trial magistrate.

According to the appellant in count 2, he was sent by a Police officer to collect money on his behalf from the complainant who on that representation the complainant proceeded to pay him a sum of KShs.20,000/=. He did not present himself as a Police officer hence the charge cannot stand.

On those grounds the appellant sought for the convictions quashed and the sentences set aside.

The Respondent was represented by Ms. Kwena the State Counsel who indicated to court that she does not support the convictions and sentences in both counts. Her argument was that the Prosecution did not prove its case beyond reasonable doubt before the learned trial magistrate. It was her submission that it was not clear how much money exchanged hands. The Appellant concedes having received a sum of KShs.10,000/= but the complainant did not establish how much he gave the appellant. The appellant's cousin P.W.2. was not helpful to court too. The police officer P.W.9 did not witness any exchange of money. The Respondent further stated that the evidence was not flowing and therefore she was not supporting the conviction and sentence. The State Counsel also alluded that there was no proper investigation. The State Counsel therefore urged the court to quash the convictions and set aside the sentence.

The Prosecution case before the learned trial Resident Magistrate that the appellant jointly with others not before court had promised to sell gold to the complainant in Magongo area. That on the 39th day of June 2000 the complainant went to his bank in Ukunda and withdrew KShs.100,000/= and gave it to the appellant and his colleague. By June he had given them a total of KShs.130,000/=. Later on the 2nd day of July 2000 they met again at Saba Saba area when the appellant pretended to be a Policeman by the name PC Michael and arrived to arrest the complainant with his colleague. They said they were going to charge the complainant for the offence of being in possession of fake gold and demanded for Shs.300,000/= to enable the complainant gain his freedom. The complainant gave the appellant and his colleague KShs.20,000/= from his account. On 3.7.2000 the appellant and his colleague demanded to be further paid by the complainant a further sum of Kshs.100,000/= but was instead paid KShs.80,000/=. On 11.7.2000 the appellant together with another man pretending to be a police officer went to Travellers Bar where the complainant is alleged to have given them Kshs.50,000/=. The appellant and his colleague had agreed to collect the balance of KShs.10,000/= from the complainant at Wimpy on 25.7.2000 and it was then that the complainant reported the matter to the Police and the appellant was arrested.

The questions of law which are submitted for the opinion of this court are as follows:-

- (i) Was the learned Trial Resident Magistrate correct in law in holding that the appellant falsely obtained KSh.290,000/= from the complainant.
- (ii) Did the Learned Trial Resident Magistrate misdirect herself in dismissing the appellant's defence as a mere denial.
- (iii) Was the case proved beyond reasonable doubt.

On count 1, the Prosecution should prove that the appellant had the intention to defraud and that he indeed obtained the sum of KShs.290,000/= from the Complainant. The Prosecution should further prove that the appellant had pretended to possess gold for sale.

From the proceedings presented in the record of Appeal it is clear that the complainant did not clearly establish how much money he had paid the appellant. The appellant in fact did not pretend to possess gold for sale. It appears the appellant presented himself as a police officer investigating offences related to sale of fake gold and thereby sought to extort money from the complainant. The evidence presented relating to count 1 is mixed up and cannot be said to prove any offence committed by the appellant. The Prosecution did not prove its case beyond reasonable doubt. The conviction is therefore quashed and the sentence is set aside in relation to count 1. Hence the appeal is allowed in respect of count 1.

On count two, the particulars which must be proved by the prosecution were that the appellant falsely presented himself as a person employed in public service and that he assumed to arrest the complainant.

Upon perusal of the evidence presented before trial magistrate it is clear that the appellant presented himself as a Police by the name P.C. Michael. This piece of evidence was never shaken or contradicted throughout the whole trial. The appellant did nothing whatever to minimize the damning nature of those facts and in my view he was properly convicted in count 2 and that the sentence was eminently sensible. I think that the learned trial Resident Magistrate's finding on count 2 was quite obviously right. I therefore order that the Appeal in respect of Count 2 is dismissed.

Dated and Delivered at Mombasa this 10th day of February, 2003.

J.K. SERGON

J U D G E