



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO.140 OF 2002**

(Being an appeal from Original Conviction and Sentence in Criminal Case No.2458 of 2000 of the Chief Magistrate’s Court at Mombasa –A.W. Ngugi, RM)

**FELMON MADEDA ..... APPELLANT**

**VERESUS**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

Section 315 of the Penal Code states as follows:

*“315. Any person who by means of any fraudulent trick or devise 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 or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device is guilty of a misdemeanor and is liable to imprisonment for three years.”*

The Appellant herein Madeda Felmon was charged, tried and convicted of an offence under the same Section of the Penal Code, except that the charge that he faced though under the same section had particulars that do not fully reflect the offence under the section. The particulars of the charge brought against the appellant states as follows:

*“On 4th day of October 1999 at Bank of India in Mombasa District within Coast Province, by means of fraudulent trick, induced Joseph Chula Wale to deliver motor vehicle registration Number KAA 227M Isuzu Tougher to him for business.”*

The facts as given in evidence and as accepted by the learned Magistrate were that the complainant PW.1 who is working at Bank of India and is a businessman doing transport business was introduced to the Appellant by the complainant’s Driver. Appellant wanted a vehicle to transport milk from Taita Wundanyi to Mombasa. Although the Appellant needed the vehicle urgently the same vehicle was still in the garage for service. The vehicle took a month in the garage before it was repaired. The two agreed that the Appellant would pay KShs.4,000/- per day and an agreement was prepared but the Appellant did not sign it. On 5th September, 2000 the complainant gave the Appellant the vehicle which continued to be driven by the complainant’s driver and never left the possession of the complainant’s driver even during the alleged business trips from Wundanyi to Magongo in Mombasa. According to the Prosecution, the Appellant used the vehicle for 21 days. The Appellant then disappeared and the driver took the vehicle back to the complainant. The complainant and Driver then searched for the Appellant and when they

found him, at Mwembe Tayari they took him to Central Police Station where he was charged.

The complainant added in his evidence that the Appellant was to pay KShs.84,000/- which he had not paid. This was the totality of the Prosecution's case against the Appellant. Defence did in general accept the prosecutions stand except the Appellant said that after using the vehicle for 2½ weeks, he noted that he was not making any good business and he approached the complainant and asked for time to enable him make arrangements to pay what was due and the complainant allowed him time. There are certain aspects of the Prosecution's case which are not clear such as that whereas the complainant PW.1 says the Appellant was apprehended by himself and PW.2 at Mwembe Tayari and taken to Central Police Station, PW.2 says the Appellant was arrested at Reef Hotel by PW.2 and his boss (who was PW.1). There is also the question as to why the date 4.10.1999 was even entered in the charge sheet as the date on which the offence took place. PW.1 the complainant does not state anywhere that any offensive action or omission ever took place on 4.10.1999 and in fact confirms that on 4th October 1999, the Appellant was going on with his work having taken the vehicle on 4.9.99.

He says the Appellant and complainant's driver approached him in August and not on 4th October 1999. PW.2 never mentioned that date 4th October 1999 at all. PW.3 does not seem to have received any report at all in the year 1999 when the offence is alleged to have taken place as one would have expected. The first time he recalled dealing with this matter was on 17.7.2000 although the charge sheet gives the date of arrest as a date prior to 17.7.2000. One may then ask what offence was committed on 4.10.1999 and if no offence was committed on that day when was this offence committed? and why was that date 4.10.1999 used in the charge sheet. In any case is it not the duty of the Prosecution to prove the facts alleged in the particulars of offence? Had the prosecution proved that this offence took place on 4.10.1999? These are all disturbing questions in this appeal. However, although those aspects I have mentioned herein above would clearly shown that this conviction was not safe, one matter stands out and that is that the Prosecution set out to prove beyond reasonable doubt that the Appellant obtained the vehicle for business by means of fraudulent trick. What was the trick? The learned Magistrate says as follows in her judgment:

*"I have considered all the evidence in court its not in doubt the accused person used the vehicle for 21 days. The issue is whether the accused used fraudulent means to hire the vehicle for business. I have considered the defence tendered by the accused person but the same does not raise any doubt on the prosecution's case. He admits having used the vehicle at a cost of KShs.4,000/- per month and he never paid the same. If he was genuine he would have sought indulgence from the complainant rather than go underground without a word. In view of the foregoing, I find the accused person guilty and convict him accordingly."*

It appears to me that the learned Magistrate found that the Appellant's alleged disappearance without payment of the agreed money is what constituted fraudulent tricks. With every respect, this was a misdirection on law. The fraudulent trick should have been proved to have taken place at the very beginning of the transaction and should have been what operated in the mind of the complainant to give away the vehicle. A look at Chapter XXX of the Penal Code under which Section 315 falls shows that offences under that Chapter are grouped together and are described as "False Pretences" and False Pretence is defined in the very first Section of that Chapter Section 312. That definition is as follows:

*"312. Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is else, and which the person making it knows to be false or does not believe to be true, is a false pretence."*

The mere fact that the deal failed cannot be used to judge whether a presentation was a false pretence or not. In this case, the mere fact that the payment was not made and the Appellant was not there cannot be said to have made the request a fraudulent trick. In any case, in this case the learned Magistrate did not consider the effect of the evidence that the complainant in an alleged search for Appellant never went to Taita, the Appellant's home and that there was no agreement exhibited and no evidence as to when the payments were to be made to the complainant. All these needed to be considered before concluding that the Appellant went underground.

In looking at the evidence, can one see any evidence of fraudulent trick? I cannot see one. The Appellant wanted vehicle to hire for business. He duly hired one from the complainant. He used it for business. The vehicle was at all times with complainant's driver and when Appellant's business could not succeed, he did not go away with the vehicle. There was an agreement which he had a right to sign or not to sign depending on whether the terms of agreement were acceptable to him or not. If the complainant felt the Appellant was not genuine, he could recall the vehicle any time and rescind the agreement, claim his money and call it a day. Even now all he can still do is to claim his money KShs.84,000/- and if Appellant fails to pay it, he can sue him for it and on succeeding, execute.

I do feel, the learned Magistrate with respect had an approach of this case as if it was a civil case where payment of civil debts would be enforced by a criminal charge.

I have carefully perused the entire evidence in this case, but I cannot see any fraudulent trick used by the Appellant to obtain the vehicle in question. As I have said, I can see a clear civil suit. Lastly, I do agree the learned Magistrate merely reproduced the Defence but did not consider it and reject it or accept it.

The Learned State Counsel asked court to consider Section 354 (3)(a) and find the Appellant guilty of a lesser offence. First Section 354(3)(a) does not provide for what he asked me to do. Secondly, and in any event as I have stated I see no offence that was committed. Civil matters have their own forum.

This appeal must succeed. It is allowed, conviction quashed and sentence set aside. Appellant is set free forthwith unless otherwise legally held. Judgment accordingly.

**Dated and delivered at Mombasa this 6th day of September, 2002.**

**J.W. ONYANGO OTIENO**

**JUDGE**