Yamakhana v Republic (Criminal Appeal E011 of 2024)
[2024] KEHC 7557 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E011 OF 2024

RE ABURILI, J

JUNE 19, 2024

BETWEEN

KELVIN SIMIYU YAMAKHANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence by the Hon. Nyigei on the 14th February 2024 in the Chief Magistrate's Court at Kisumu in Criminal Case No. 1385 of 2021)

JUDGMENT

Introduction

1. The appellant herein Kelvin Simiyu Yamakhana was charged with the offence of obtaining money by false pretence contrary to section 313 of the Penal Code the particulars being that on diverse dates between 14.5.2018 and 15.5.2018 jointly with another already before court, with intent to defraud, obtained Kshs. 324,000 by false pretence that he was the owner of Self Help Africa Company which he would award one Newton Arombo Kayaka a tender to supply paint which he knew to be false.

2. The trial court after considering the evidence presented by the prosecution and the defence offered by the appellant found that the prosecution had proved their case against the appellant beyond reasonable doubt and proceeded to convict him. After considering the appellant's mitigation, the trial court sentenced the appellant to a fine of Kshs. 100,000 in default of which he would serve 2 years' imprisonment. The trial magistrate went further to proclaim that if the appellant chose to pay the Kshs. 100,000 fine, he first had to refund the complainant Kshs. 200,000 before being released.

3. Aggrieved by the trial court's findings and holding, the appellant filed his petition of appeal dated 27th February 2024. The grounds of appeal are:

    1. That your lady I pleaded not guilty to the charges and I do maintain the same.

2. That your lady, the learned trial magistrate erred in law and facts in convicting the appellant in the offence of obtaining not withstanding that the evidence before the trial court when properly analysed and evaluated did not support conviction.

3. That the conviction and sentence by learned trial magistrate was unfair and unjust.

4. That the trial magistrate erred in law and facts evaluating the respondents evidence separate forming a considered opinion thereof and therein laying the burden of disproving the pre-mediated impression upon the appellant contrary to establish principle in criminal law.

5. That, I pray to be served with the proceedings to enable me prepare myself for the hearing of this appeal.

4. The parties canvassed the appeal by way of submissions with the appellant filing written submissions while the respondent's counsel made oral submissions.

The Appellant's Submissions

5. The appellant submitted that the ingredients of the offence that he was charged with were not proved beyond reasonable doubt as there was no evidence adduced that he received money from the complainant.

6. It was his submission further that the prosecution failed to prove the ingredients of false pretence as they did not adduce any evidence to link him to the alleged Self Help Group. It was his submission that the money was received by someone else and not him.

7. The appellant submitted that the sentence was unfair and that the trial court erred in convicting him to pay a fine of Kshs. 300,000 or serve 2 years' imprisonment as the same was against the evidence and was thus harsh and disproportionate as was held in the case of Benard Kimani Gacheru v Republic (2002) eKLR.

The Respondent's Submissions

8. Mr. Marete submitted on behalf of the respondent opposing the appeal against conviction and sentence, arguing that the same was sound and that the evidence against the appellant was overwhelming.

9. On the sentence imposed, Mr. Marete submitted that the same was lawful although he observed that there was an issue with the refund under section 175 of the Criminal Procedure Code.

Analysis and Determination

10. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This principle was aptly stated in the case of Okeno v Republic [1972] EA 32 at 36 where the East Africa Court of Appeal stated on the duty of the Court on a first appeal as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was

some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

11. It is therefore necessary to re-evaluate the evidence and reach a conclusion bearing in mind that this court has not had the benefit of hearing or seeing the witnesses, an advantage only the trial court has.

12. I will make the determination by analyzing the evidence adduced in the trial court. The issues emerging for determination are:

    a. Whether or not the Prosecution proved its case beyond reasonable doubt.

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.

13. As to whether the prosecution proved their case beyond reasonable doubt, the offence of obtaining by false pretenses is created under Section 313 of the Penal Code which provides as follows:

> " Any person who by any false pretence, and with intent to defraud, 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, is guilty of a misdemeanour and is liable to imprisonment for three years."

14. From the above provision, it is clear that for the offence to be proved to the required legal standard, the prosecution must prove that the person accused had done the following:

    i. Obtained anything capable of being stolen;

    ii. By false pretences; and

    iii. With an intention to defraud.

15. As was held in Anne Njambi Kiragu V Republic, [2021] eKLR, all the above three ingredients must be proved together in order to establish the offence. Proving one or either of them cannot suffice.

16. Although money is obviously something that is capable of being stolen, it is not the receipt of money that constitutes the offence. What establishes the offence is the taking of money or anything capable of being stolen with an intention to defraud. So what demonstrates intention to defraud? In my view, intention to defraud is found in the alleged false pretence if proved.

17. Section 312 of the Penal Code defines a false pretence as:

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

18. From the above definition, it is evident that false pretences consist of the following:

    i. A representation of fact by word, writing or conduct;

    ii. The representation must be past or present;

    iii. The representation must be false; and

iv. The person making the representation should have made it knowing it to be false or did not believe it to be true.

19. The evidence presented by the prosecution was that the complainant, Newton Arombo Kataka, who was also the appellant's uncle was approached by the appellant who informed him that the organization that the appellant worked for, a Self Help Group, needed a supply of paint and as the complainant sold paint, he offered to supply the same.

20. The complainant testified that the appellant introduced him to one Lawrence who he alleged was the manager of the Self Help Group and that following a meeting with the said manager, he, the complainant parted with Kshs. 124,000 as expenses for transport, food and accommodation and that he later sent Kshs. 200,000 via Mpesa to a number given to him by Lawrence and that the recipient was neither the appellant nor Lawrence but one Ronald Cheruiyot Koech. The complainant testified that despite this, he never got a tender for the supply of paint as was stated by the appellant and Lawrence.

21. PW2 testified that the appellant went to their shop and told PW1 in the presence of PW2 that he worked for Self Help Company and that he wanted the complainant to supply paint to the said company. It was his testimony that the appellant gave his Boss's mobile phone number, one Lawrence to the complainant and that the said boss asked for money from the complainant. The witness further testified that the complainant deposited Kshs. 200,000 to the number supplied to him by Lawrence who who was introduced by the accused/appellant herein and later they disappeared and the complainant realized that Lawrence and the appellant had colluded.

22. It was his testimony that in order to catch the appellant, they had to call him and inform him to come and collect the balance of Kshs. 50,000 at which time the appellant was arrested. In cross-examination, PW2 admitted that the complainant did not give the appellant money directly.

23. PW3 No. 83551 CPL. James Owiny produced the OB report No. 64/24/5/2018 wherein a report had been made by the complainant of the appellant obtaining money by false pretense. It was his testimony that a total of Kshs. 200,000 in four instalments of kshs 70,000 and 30,000 on 14/5/2018 and on 15/5/2018, a further sum of kshs 70,000 and kshs 30,000 were sent by the complainant to phone number 0791069972 belonging to one Ronald Cheruiyot Koech.

24. PW3 testified that the appellant organized a meeting at Scottish Hotel Kisumu where the complainant was to meet the appellant's manager Arap Chumo and the complainant used Kshs. 124,000 making a total of kshs 324,000 and that the appellant had told the complainant that the money was for securing of a tender for the supply of paint to the company which the appellant worked for, which tender never went through

25. In his defence, the appellant denied the charges against him and stated that he was detained at Kisumu Central Police Station where he had gone to report his abduction by the complainant who was forcing him to leave the land which he and his wife resided on at Lugari, which land he, the appellant had been bequeathed by his grandfather. It was his testimony that the complainant, his uncle, colluded with the police and he ended up being locked up and subsequently brought to court and charged with the offence herein.

26. In cross-examination, the appellant denied taking any money from the complainant or being employed by Self Help Africa.

27. The evidence by PW1 and PW2 was that it was the appellant who introduced PW1 to the alleged manager of the Self Help Group that was to procure paint from the complainant at the meeting at Scottish Hotel Kisumu. The Mpesa statements confirmed the payments made to the phone

numbers provided by the appellant. The appellant introduced Lawrence as his boss and both made the complainant to believe that the appellant worked for Self Help Group which was not true. The appellant also made the complainant believe that there was a tender for supply of paint which the complainant would bid for, yet there was no such tender. The appellant then made the complainant believe that Lawrence was the appellant's boss and that his company was to tender for the supply of paint, a fact which the appellant knew to be false.

28. From the evidence presented before the trial court, it is clear that the appellant presented himself to be an employee of Self Help Group that was in need of supply of paint and he went on to introduce the complainant, his uncle to the alleged manager of the said company. The appellant intended to defraud the complainant from the start because he knew that there was no such company in existence that was to tender for supply of paint and that no such tender was in the offing.

29. From the foregoing analysis, I have reached the conclusion that the evidence adduced by the prosecution in this case established the offence of obtaining money by false pretence beyond any reasonable doubt. I find no reason to interfere with the trial court's finding on the same.

30. As regards the sentences meted out on the appellant, I do note that the appellant was sentenced to pay a fine of Kshs. 100,000 or in default serve 2 years' imprisonment. The trial court went on to clarify that if the appellant was to pay the fine, he had to first settle the amount of Kshs. 200,000 owed to the complainant.

31. The question therefore is whether there is sufficient ground for this court to interfere with the trial court exercise of its discretion in sentencing. In Bernard Kimani Gacheru v Republic [2002] eKLR, it was held that sentence imposed was well deserved and the court found absolutely no reason to interfere with it and stated as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

32. Section 313 of the Penal Code provides for a sentence of three years upon conviction. Section 175 (2) Criminal Procedure Code which empowers the court to order the convicted person to pay to the complainant such sum as it considers could justly be recovered in damages in civil proceedings brought by the complainant against a convicted person if a civil liability is found to exist on the facts proved in the case.

33. However, under section 175 (3) no order shall be made under (2) in, among others, any other circumstances, the court considers that such an order would unduly prejudice the rights of the convicted person in respect of the civil liability.

34. Section 31 of the Penal Code expressly allows courts to order compensation in criminal cases in addition to or in substitution of any other sentence. For the avoidance of doubt, Section 31 of the Penal Code provides that:

> " Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment."

35. 16. As I held in Francis Gachugu Njuguna V Republic, [2021] eKLR, Section 31 of the Penal Code must be read together with Section 175 (2) (b) of the Criminal Procedure Code which provides for circumstances in which compensation can be ordered in criminal proceedings. The provision is as follows:

> " 175
>
> (2) A court which—
>
> a) .....
>
> (b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party"), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned."

36. From the foregoing, there cannot be any doubt that courts have jurisdiction and discretion to order, in appropriate cases, compensation in criminal cases. Such orders should be made on the basis of proven facts showing that the injury suffered by the complainant or other third party was as a result of the act constituting the offence subject matter of the conviction in question and that the act was one which would give rise to civil liability in favour of the complainant or injured party against the convict and the extent of such liability. Each case must therefore be determined on its own peculiar facts and circumstances.

37. In this case, the complainant proved beyond reasonable doubt that he lost Kshs 200,000 plus Kshs 124,000 to the appellant herein. Such sums of money can be subject of a civil suit for recovery. No prejudice was occasioned to the appellant by the order of compensation.

38. Thus, the discretion to order compensation in criminal cases must be exercised cautiously and sparingly and only in clear and deserving cases so as not to cause prejudice on convicted persons.

39. I have considered the mitigation of the appellant that he was a first offender. On the other hand, I have taken into account the fact that the appellant defrauded the complainant of huge sums of money. Considering all the circumstances of this case and in the light of the statutory penal provisions, I find that the sentence imposed on the appellant to be sufficient. In addition, I find that there was no prejudice occasioned to the appellant by an order of compensation made by the trial court. I find the sentence and order for compensation to have been lawful. I uphold the same.

40. The upshot of the above is that the instant appeal is found to be devoid of any merit and is hereby dismissed. The conviction and sentence as well as the order for compensation of the complainant are sustained.

41. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE