Epodo v Republic (Criminal Appeal E036 of 2022)
[2023] KEHC 4077 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4077 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E036 OF 2022

RN NYAKUNDI, J

MAY 2, 2023

BETWEEN

BENJAMIN IJUMA EPODO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. D Orimba SPM in Lodwar law court cr. C. No. 514 of 2018 on 3.8.22)

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Mr. Edward Kakoi for the State

1. The appellant charged with the offence of obtaining money by false pretences contrary to Section 313 of the *Penal Code*. The facts being that on diverse dates between March 5, 2018 and June 30, 2018 the appellant obtained from Simon Ekadeli, Florence Iliki Lothala and Titus Nakowa Koloi a total of Kshs 1,196,000/= pretending that he was a servant of youth enterprise fund and that he had been sent by the said youth enterprise fund to register individuals to acquire loans and that he was then authorized to receive the said application fees on behalf of the said fund a fact he knew to be false.

2. The duty of an appellate court is to subject the evidence tendered in the lower court to a fresh and exhaustive examination and draw its own conclusions.

3. PW1 Simon Ekadeli Emoru explained how the appellant obtained from him a total of Kshs 100,000/= in cash which he remitted to the appellant and the balance he forwarded to the appellant via mpesa. He testified that the appellant promised to get a receipt from the advocate upon paying his fees which he never did and that instead of waiting for the applied loans, none were disbursed to him and on

asking the appellant, the appellant became elusive and later, he reported to the police who arrested and charged the appellant after investigation.

4. PW2 Titus Nakuwa testified that the appellant collected Kshs 301,000/= from 180 people. He said that upon collecting the money, the appellant alleged that the loans will be disbursed in a months' time, but upon lapse of that period, no money was disbursed as promised but instead the appellant became elusive and switched off his phone.

5. PW3 Florence Lokaola also testified how the appellant guided them into applying for a loan of Kshs 900,000/=. She testified that six of them applied individually and collected Kshs 6,000/= from each of the six women for transport and legal fees. She also testified that they collected part of the balances from the member and delivered Kshs 106,000/= to the appellant who gave them his mpesa account. She further testified that the appellant collected from them a sum of Kshs 26,000/= alleging that he will also write them business proposal which he never honored. That again on 6.6.2018, the appellant called her and said that 48 cheques had been issued and that he needed further Kshs 60,000/= to process and pay a Somali food supplier. It was her testimony that she gave the appellant the money.

6. PW4 Philip Eiton Ngipeyok who testified that on the first encounter with the appellant, he collected a total of Kshs 43,000/= from residents. He testified that the appellant left and came back later and informed them that money would be lend and he received more applications and collected Kshs 106,000/=.

7. PW5 No. Lamuel Odongo, said that he is a police officer based at Lorugum police station who on July 9, 2019 was at his place of work when the instant case was minuted to him to investigate. He testified that he interrogated the complainant and their witnesses recorded statements. He also stated that he visited the offices of the Youth enterprise Development fund in Lodwar where he was informed that the appellant used to be an employee but the employee had since been terminated. He said that he recovered various documents issued by the appellant to the complainants, letters and mpesa statements showing that the appellant indeed transacted with the complainants and ended up receiving a sum of Kshs 1,196,000/=.

Determination

8. At the close of the prosecution case the trial magistrate was satisfied that a prima facie case had been established and put the appellant person on his defence. In his defence, the appellant stated that the charges against him are no true, stating that he never took any money and that he was being framed up. In the case of *Ruwala v R* (1957) EA – 570 where the court held;-

> " On first appeal, a conviction or an acquittal by a judge or magistrate siting without a jury, the appellant is entitled to have the appellate court's own consideration and views of the evidence as whole and its own decision thereon.

9. It has the duty to rehear the case and reconsider the material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. when the question arises which witness is to be believed rather that another, and that question turn on manner and demeanor, the appellant court must be guided by the impression made on the judge or magistrate who saw the witnesses, but there may be other circumstances, quite apart from the manner and demeanor which may show whether a statement is credible or not which may warrant a court in differing from the judge of magistrate even on a question of fact turning on the credibility of witnesses which the appellant court had not seen."

10. Whether before the court of first instance or on appeal the significance of burden of proof has to feature prominently to establish the case against the appellant which led to conviction and sentence. On the standard and burden of proof the weight is as to the extent explained by Thomas Starkie in a Practical Treatise of the law of evidence where the learned author observed as follows;

> "What circumstances will amount to proof can never be matter of general definition,.... On the one hand, absolute metaphysical and demonstrative certainty is not essential to proof by circumstance. It is sufficient if they pro moral certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt.. on the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accuse, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act on upon that conviction in matters of the highest concern and importance to his interest." See also R v Compton (2013) A Crim R177 at 36 (Peek J), Mkendeshwo V R (2002) 1KLR 461, Sawe V R (2003) KLR 364 ....suspicion, however strong cannot infer the basis of inferring guilt which must be proved by evidence beyond reasonable doubt, Ouma V Republic (1986)KLR 619."

11. After evaluating the prosecution and the defence case, the trial magistrate found the appellant guilty and sentenced him to serve 2 years imprisonment for each count. All sentences to run concurrently.

12. Aggrieved by the said finding, the appellant appealed to this court against the conviction and sentence imposed and raised eight grounds of appeal, which in my view can be couched into one, namely;

    i. That the learned magistrate erred in law in concluding that the prosecution had proved its case beyond reasonable doubt.

13. This court will therefore, undertake evaluation and scrutiny of the record and to draw it is own conclusions weighing in on the grounds of appeal and the legal reasoning by the trial magistrate. In this respect I find the guidelines in comparative case *In Re Winship* 397 US 358 (1970) succinctly of relevance. That:

> "First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened. The intensity of this belief- the degree to which a fact finder is convinced that a given act actually occurred can of course, vary. In the regard, a standard of proof represents an attempt to instruct the fact finder concerning he degree of confidence our society thinks he should have in the correctness of factual conclusion for a particular type of adjudication. Although the phrases, "preponderance of the evidence" and "proof beyond reasonable doubt" are quantitatively imprecise they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusion the standard of proof influences the relative frequency of these two types of erroneous outcomes. If for example the standard of proof for a criminal trial where a preponderance of the evidence rather than proof beyond reasonable doubt, there would be a smaller risk of factual errors that result in convicting he innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcome, the choice of the standard to be applied in a particular kind of litigation should, in a rational worked, reflect an assessment of the comparative social disutility of each."

14. The test to be applied in determining this appeal will mirror the above principles. Both the appellant and Counsel for the DPP filed written submissions. I have carefully considered the submissions by the appellants and submissions by the learned state counsel and the relevant law and authorities.

15. In the case *John Maina Mathaiya v Republic* [2016] eKLR, the court pronounced itself as follows:

> " To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty."

16. The important question that this court seeks to answer is whether or not the appellant offered any other explanation that could exonerate him from the offence or whether there exist any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered.

17. Section 312 of the *Penal Code* defines false pretence in the following terms:-

> " 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. The operative word under Section 312 is "representation" which is applicable in the following circumstances: -

    i. A representation by words, writing or conduct.

    ii. A representation in either past or present.

    iii. A representation that is false.

    iv. A representation made knowing it to be false or believed not to be true.

19. The High Court of Botswana in *Lesholo & Another v The State* dealing with an offence of this nature held that: -

    i. To prove the offence of obtaining by false pretence, the accused must by a false pretence, with intend to defraud, obtain something of value capable of being stolen from another person. The prosecution must prove the false pretence together with a fraudulent intention in obtaining the property of the person cheated.

    ii. A false pretence has been held to be a representation by the accused person which to his knowledge is not true. A false pretence will constitute a false pretence when it relates to a present or past fact or facts. It is not a false pretence if it is made in relation to the future even if it is made fraudulently. Where however, the representation speaks both of a future promise and couples it with false statements of existing or past facts the representation will amount to a false pretence if the alleged existing facts are false.

    iii. .....The representation must be made with the specific purpose of getting money from the complainant which he/she would not have given had the true facts been revealed to him.

20. The offence of obtaining by false pretence means knowingly obtaining another person's property by means of a misrepresentation of fact with intent to defraud. For the offence of obtaining by false pretences to be committed, the prosecution must prove that the appellant had an intention to defraud and the thing is capable of being stolen. An inducement on the part of an accused to make his victim part with a thing capable of being stolen or to make his victim deliver a thing capable of being stolen will expose the accused to imprisonment for the offence.

21. The essential question is, does the defence offered by the appellant in the lower court raise doubts as to his guilty? Does it rebut the above ingredients? Is it reasonable in the circumstances? Again this court as said before in *John Maina Mathaiya v Republic* [2016] eKLR that whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of Brennan J in the United States Supreme Court decision in Re Winship where the court stated:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction.....Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"

23. The explanation given by the appellant was in my view not reasonable nor did it rebut the clear evidence adduced by the prosecution. He claimed that he doesn't even know one of the victims and that one Mr. Ekadeli owes him money. He also stated that he never took Kshs 379,000/= from Florence Elikwel and that in fact it was the said Florence and the area chief who conspired to steal from the community. He said that he was being framed so that his career could be spoiled and that others who obtain money could escape. I find that difficult to believe and, in any event, it was never clear why he could be framed. The said explanation, is a mere excuse and a mere afterthought.

24. After weighing the explanation offered by the appellant and the prosecution evidence, I find that the prosecution evidence is truthful, credible and probable as opposed to the defence offered by the appellant. The appellant's defence did not raise any reasonable doubts on the prosecution case.

25. Having considered the circumstances of this case, the prosecution evidence and the defence advanced by the appellant, I am persuaded that the conviction was justifiable. The explanation offered by the appellant is in my view does not cast reasonable doubt on the prosecution case. I find that there was reasonable basis for holding that the appellant was guilty as charged and I find no reason to interfere with the learned Magistrates findings.

26. Regarding the sentence imposed, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principles or if the court exercised its discretion capriciously. (see *Bernard Kimani Gacheru v Republic*, (2002) eKLR, *Mokela v The State* (135/11) (2011) ZASCA 166, , further in *Ogolla s/o Owour v Republic* (1954) EACC 270.

27. Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.

28. I have carefully considered the facts of this case, the nature of the offence and the above principles and the mitigating factors and I have also considered the purpose of sentencing and the principles of sentencing under the common law and the sentencing policy guidelines. The appellant was jailed to two years for each count, both sentences to run concurrently.

29. I find that the said sentence is not excessive and I order that the appellant proceeds to serve the remaining balance of his jail term. The upshot is that this appeal against both conviction and sentence fails and the same is hereby dismissed.

Right of appeal 14 days

DATED AND SIGNED AT ELDORET THIS 2ND DAY OF MAY, 2023

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Edward Kakoi for the State

Appellant present in person