



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E001 OF 2020

PETER NYAKUNDI MOSEAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. J. Munguti Principal Magistrate in Senior Principal Magistrate's Court at Migori Court Criminal Case No. 457 of 2019 delivered on 18/9/2020)

JUDGMENT

The appellant, **Peter Nyakundi Mose**, was found guilty and convicted by Hon. Munguti, on two counts of obtaining money by false pretences, contrary to Section 313 of the Penal Code.

In Count 1 the particulars of the charge are that on 3/7/2019 at Migori Town in Suna West Sub County, with others not before the court, with intent to defraud, obtained from **Tiberius Kebaso Nyakundi** the sum of Kshs. 75,000/= by falsely pretending that he was in a position to supply cereals on his behalf, a fact he knew to be false.

In Count III the particulars of the charge are that on 25/7/2019, in Migori town, with others not before the court, with intent to defraud, obtained from **Michael Omondi Odongo** Kshs. 20,400/= by falsely pretending that he was in a position to supply cereals on his behalf, a fact he knew to be false.

Upon conviction, he was sentenced to serve three (3) years on each count and the sentences were to run consecutively.

The appellant is aggrieved by the trial court's judgment and preferred this appeal through the firm of Abisai & Co Advocate.

In the petition of Appeal, fourteen (14) grounds were raised and they can be summarized into the following nine (9) grounds: -

- 1. The learned Magistrate erred in fact and in law in failing to appreciate that the Respondent failed to prove to the required standard that the Appellant actually acquired money from the Complainants;**
- 2. The learned Magistrate erred by failing to find that the Prosecution failed to establish ownership of mobile phone allegedly used in the crime and no evidence was produced to prove that the said phone belonged to the accused person;**
- 3. The learned trial Magistrate erred in fact and law by failing to find that all the prosecution witnesses could not actually confirm that it was indeed the Appellant who had used the said phone to call and obtain money from the complainants;**
- 4. The learned trial Magistrate erred in law by admitting into evidence prosecution documents produced by persons other than the makers of the said DOCUMENTS contrary to the law of Evidence;**
- 5. The learned Magistrate erred in law by filling in gaps in the prosecution case and interpreting any doubt cast in the prosecution case in favour of the prosecution and against the Appellant thus arriving at a wrong determination;**
- 6. The learned Magistrate erred and proceeded on the basis of discredited and unreliable evidence thus arriving at a wrong decision;**
- 7. In the further result, the learned Magistrate erred by disregarding and failing to take into account credible and reliable evidence presented by the Appellant and his witnesses;**

8. The learned trial Magistrate erred in law and fact in failing to give due consideration to the contents of the Appellants' submissions and more specifically the authorities on referred to therein.

9. The judgment was contrary to the weight of evidence.

The appellant therefore prays that this appeal be allowed, conviction be quashed, sentence set aside and he be set at liberty forthwith.

The court directed that the appeal be canvassed by way of written submissions and **Mr. Abisai** filed his submissions on 16/3/2021 where he reiterated the grounds of appeal. It was also submitted that there was no evidence to prove that the money in question was withdrawn through the alleged sim cards or any registered sim card as the Mpesa data where the money was withdrawn was not produced in court to confirm the identity numbers of those who withdrew the said money; that there is no proof that the appellant bought the phone nor was it proved that the sim card was registered in his names, Peter Nyakundi Mose or that he ever used the phone in question; that if PW2 knew the appellant, it is questionable why he did not record the suspect's name in the OB at the time the report was made; that the court erred in admitting evidence by persons other than the makers of the documents in contravention of the Evidence Act; that an expert from Safaricom was the right person to give evidence on the transactions in question; that the court failed to take into account the appellant's defence and mitigation thus sentencing the appellant to a harsh and excessive sentence; that the evidence was not subjected to a hand writing expert; that his rights under Article 31 of the Constitution were violated since PW4 searched his home without a search warrant.

Learned Counsel for the State **Mr. Kimanthi**, supported the Appeal both on conviction and sentence. He filed his submissions in court on 19/3/2021. Counsel submitted that PW1 and PW2 sent money to one Nashon Odhiambo and Obina Nyambane respectively and they are not the appellant; that the charges are based on a phone found in the appellants' sitting room but the liaison person from Safaricom was not called and the phone was not connected to the appellant; that PW1 and PW2 were called by somebody and told to deposit money in Mpesa but they could not confirm whether or not it was the appellant; that the prosecution failed to prove who the recipients of the money were; that the appellant testified that the phone found in his house belonged to his employee, Alex Otieno; that a card in the name of Francis Masese MD, Keboye Investments was found in the appellants house with the name of Nashon Odhiambo of telephone 0740836006, the recipient of Kshs. 75,000/= in Count 1. There was however, no recovery of the sim card belonging to Nashon Odhiambo or Obina Nyambane; that though there is suspicion that the appellant was involved in committing the offences, suspicion is not enough to be a basis for a conviction.

Lastly, counsel urged that the Safaricom print out produced by the investigating officer should have been produced by the Safaricom Liaison person who would have shed light on the Mpesa transactions. On sentence, counsel urged that since the offences formed one transaction the sentence should have been ordered to run concurrently.

This being a first appeal, this court is under a duty to re-examine, assess and analyse all the evidence that was tendered before the trial court afresh and make its own independent conclusions. The court must make allowance for the fact that it neither saw nor heard the witnesses testifying. (See **Okeno vs= Republic (1972) EA 32**).

PW1 Tiberia Kebaso Nyakundi, a businessman in Migori Town recalled that on 3/7/2018, he received a call from cell phone 0729063328 and the caller said he was Nyambane who claimed to be a bursar at Agenga Secondary School and wanted them to do business together; that he wanted 120 bags of maize, 100 bags of beans and 20 bags of Ndengu. The buyer sent him number 0740836006 as the number of the supplier of the goods. He was called by person who said that his goods had been reached and he should sent money on the said number and he did sent to one Nahashon Odhiambo. After sometime, he was told his 20 bags of Ndengu were headed to Migori and he sent Kshs. 50,000/=. He waited but the goods never arrived and he reported to the Police and after two weeks, he was called by the police and found accused arrested.

PW2 Michael Omundo Odongo a businessman in Migori recalled that on 11/6/2019, he received a call from a person who claimed to be a bursar of Agenga High School. The person used phone number 0702644063 and was informed that the principals were away in Mombasa and that his job was to deliver maize which would be supplied by Obina Nyambane of Sirare; that the person told him to talk to Nyambane on 0728296421 and he was asked for petrol to take maize to Nyatike they agreed to meet at Masaba junction. He sent the person 20,400/= on 0728296421, the phone of Obina Nyambane. The person asked for more money for Ndengu and maize. He went to wait for Obina at the junction as agreed but he was told to go to Suba Kuria and later that phone went off. He reported to the police. He recorded a statement and was surprised to find that the culprit was the appellant who used to frequent his shop.

PW3 PC Milton Mwanzi, on 29/7/2019 accompanied the DCIO to Soko Mjinga in Migori where he arrested the appellant in a bar. Upon searching him, found him, with some cards; AP Insurance Card bearing the name of Peter Nyakundi Mose, NHIF Card, ID Card, and another ID in the name of Rusina Kwamboka and other cards in his names; card in the name of Paul Cheruiyot with mobile number 07100387544 and Safaricom card plate of number 0768841139; card of Kemboy Investment with name of Francis Masese; and the back had name of Victor Imela telephone number 0724900916 with Mpesa Kshs. 2030 and the name of Nashon Odhiambo of Telephone number 0740836006 with Mpesa pin 2030 and others. They prepared an inventory and later proceeded to the appellant's house in Osingo Sub location which they searched and recovered two Safaricom sim cards and a Nokia X - 2 but it did not have a battery.

PW4 CP Luke Rotich was the investigating officer in the matter. On 4/7/2019, the DCIO introduced him to PW1 and he commenced investigations. He got interested in the name of Nahashon Odhiambo and that of the bursar which he forwarded to Nairobi for further investigations. It was found that the number of Nahashon Odhiambo was registered under identity card number 20386077 and it showed that it communicated with complainant's number severally; that the bursar's name was registered in the name of Emmanuel Yuda Budigira and that it had communicated with the complainant's number. They traced the house of the appellant as the place the two numbers were being used. They found that the owner was the appellant whom they knew. They found that the number 356103056774914 had been used in the phones registered in the names of Nahashon and Budigira. He concluded that it is accused who conned the complainants. Later, two other complainants claimed to have been conned; that all the complainants identified the appellant as a person they knew well.

The appellant opted to make an unsworn statement in his defence. He denied having conned the complainants; that the black phone found in

his house belonged to his employee, Alex Otieno.

DW2 Rose Atieno Nyakundi, the appellant's wife recalled that on 29/4/3019, police went to her home with the appellant who was under arrest. They searched the house and took several items and that Alex asked for his phone but police chased him; that police also took a neighbour's phone.

DW3 Daniel Ray Nyakundi, aged ten, (10) the appellant's son was at home when the appellant was arrested and that the police took a phone belonging to Alex, and also took Onyango's phone which was being charged.

Even though the State supported the appeal, it is the duty of this court to consider the evidence from its own perspective and the law and make its own findings. The appellant faced charges of obtaining money by false pretences contrary to Section 313 of the Penal Code. The section read 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.”

In **Samat Bhima Keswala vs Republic (1992) EKLK**, Aganyanya J, held as follows:-

“the offence of obtaining by false pretences has seven possible ingredients which have to be proved beyond doubt before an accused person is convicted: They are

- (a) a false representation;**
- (b) which is made;**
- (c) by words or writing or conduct;**
- (d) of a matter of fact;**
- (e) either past or present;**
- (f) with knowledge of the falsehood or without belief that their presentation is true, and**
- (g) the representation causing the giver to part with the thing obtained.”**

In **United Arab Emirates vs Amanda Jane Allan (2012) EWHC Adni 712**. It was held:-

“As a matter of common law, a representation must be capable of being expressed as a statement of the past or present. A statement which amounts only to a statement as to the future may have effect as a contractual promise, but it will not come within the legal classification of representation.

In **Oware vs Republic (1989) KLR 287**, the court of Appeal said that:-

“a representation as to a future event cannot support a charge of obtaining money by false pretences.”

In this case, there was a false representation to the complainants that they were going to do a business deal of supplying goods to a school. That representation caused the complainants to purportedly pay for the goods which were being delivered to them. The fraudster told the complainants that the goods were being transported from Sirare and so they had to pay for them. The goods never arrived nor did the persons referred to as delivering goods exist. The fraudster obviously intended to defraud the complainants because after they sent the money by Mpesa. He stopped answering their calls and went underground. The promise to the complainants related to a future event hence did not amount to representation of the past or present.

The next question is therefore whether it is the appellant who defrauded the complainants:-

In my view, the prosecution brought before this court a half-baked case. The complainants have no idea who called them on phone to offer them the lucrative deals that turned out to be con. The only evidence that would have tended to link the appellant to the offence is the recovery in his possession of a card written at the back, the name of Nahashon Odhiambo of telephone number

0740836006, Mpesa pin 2030. It is the said number on which the person who stole from the complainants called and on which the money was sent. Further evidence was taken that the police found two sims serial numbers 356103056774914 and 356103056774922 with the appellant and they found that serial number 356103056774914 had been used by the two phones registered in the names of Nashon and one Budigira. Though the investigating officer produced the Safaricom printout showing the transactions in issue, the investigating officer has no expertise to interpret the said print out. No reason was given why the Safaricom liaison officer who is well versed in such transactions was not called as a witness. The police did not go further to investigate the existence of Nashon Odhiambo and Budigira if at all they existed and their connection to the appellant if at all.

In his judgment, the trial Magistrate tended to shift the burden of proof on the appellant when at page 60 of the Record of Appeal, the court said:-

“The phone whose imei number 356103056774914 was recovered from accused’s home and his claim that the phone belonged to his worker cannot stand because he has the option of availing the alleged worker to confirm the phone was his and in any event, anyone can use a phone to transact if it has no password.”

It was the duty of the prosecution to establish whose phone was found in the appellant’s house. Which they did not. The police never tried to find out whether Alex Otieno, the alleged appellants worker exists and if indeed the phone was his. The appellant has no burden to prove his innocence.

In the end, I find that the appellant indeed is a prime suspect in this matter but the police left many gaps in their case and hence helped him to get off the hook with ease. But if he is a person who is involved in such schemes, it will not be long before he is caught. I hope the police will do a better job next time.

In the end, I do find that the prosecution did not prove their case to the required standard. The conviction was made in error and it is hereby quashed and the sentence is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of June, 2021.

R. WENDOH

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Kimanthi State Counsel

Ms. Nyauke court assistant

Appellant in person