



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

HIGH COURT CRIMINAL APPEAL NO.E11 OF 2021

CORNEL OTIENO ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. B. R. KIPYEGON (PM) IN Criminal Case No.638 of 2018 delivered on 15/2/2021 at Kericho)

J U D G M E N T

1. The Appellant was convicted with the charges of Conspiracy to defraud Contrary to Section 317 of the Penal Code and Cheating Contrary to Section 315 of the Penal Code. He was fined Kshs.500,000/= In Count 1 in default he was sentenced to 2 years imprisonment and in Count 2, he was also fined Kshs.500,000/= in default to serve 1 year imprisonment. The sentences were to run consecutively.
2. The particulars of the first count were that on diverse dates between 2/2/2015 and 31/10/2016 at Kericho township, within Kericho County, the Appellant jointly with others not before Court conspired with intent to defraud Kiprono Arap Chumo of a Motor Vehicle Reg. No. KBZ 193R valued at Kshs.5,000,000/= by pretending that they were in a position to pass to him duly signed and executed transfer forms as well as the original log book.
3. The particulars of Count II are that on diverse dates between 27/2/2015 and 11/10/2016 at Kericho, Township in Kericho Sub-County within Kericho County the Appellant jointly with others, not before Court by means of fraudulent tricks and devices obtained Cash Kshs.1,000,000/= and a further Kshs.3,679,000/= which he deposited to account No.011202000162 at Rafiki Bank in the name of Chacho Enterprise for the purchase of Motor Vehicle Reg. No.KBZ 193R.
4. The Appellant was charged with a total of six counts but he was acquitted of four counts. The prosecution called a total of 8 witnesses and their evidence in summary was the Complainant, Kiprono Arap Chumo met the Appellant in the year, 2014 when he was introduced to the Appellant by a broker called Kiprono who told him that the Appellant was selling Motor Vehicle Reg. KBZ 913R FH Lorry.
5. The Complainant entered into an agreement for the purchase of the lorry and he serviced a loan at Rafiki Bank in addition to paying for the Motor Vehicle, he took possession of the Motor Vehicle and later it was repossessed from him by Auctioneers who had a Court Order from Kisumu Law Courts.
6. In his defence, the Accused Person admitted that he sold the Motor Vehicle to the Complainant and when the Complainant defaulted in payment of instalments at Rafiki Bank and could not be reached on phone, the Appellant filed a case against him in Kisumu being Misc. case No.216 of 2016 where he obtained orders through his Advocate Kennedy Onyango Omollo for repossession of the Motor Vehicle.
7. The Trial Court found that the Appellant conspired with others not before court to defraud the Complainant by selling the Motor Vehicle to the Complainant while at the same time planning to sell the Motor Vehicle to one Mohamed and to repossess it from the complainant and give it to Mohamed.
8. The Court fined the Appellant Kshs.500,000/= in default to serve two years imprisonment in Count 1 and in Count II, the appellant was also fined Kshs.500,000/= in default to serve one year imprisonment. The Appellant was therefore to pay a fine of 1,000,000/= in default to serve 3 years imprisonment.
9. The Appellant has now appealed to this Court against both conviction and sentence on the following grounds:-

(i) That the prosecution failed to recall the Complainant after the charge sheet was amended and yet relied on his evidence to convict

the Appellant.

(ii) That the Trial Court failed to appreciate the content, import and effect of the sale agreement between the Complainant and the appellant and instead casually referred to it as “gentlemen agreement”.

(iii) That the Trial Court misdirected itself in holding that the act of recovering the property through a Court Order amounted to conspiracy to defraud.

(iv) That the Trial Court failed to consider the defense evidence and entertained a claim for breach of contract as a criminal case.

(v) That the Trial Court misdirected itself by ordering the suit property to be restored to the Complainant despite that it was transferred to Ndiriri Mohamed Ndiriri.

(vi) That the Trial Court misdirected itself in holding that the Complainant paid the Loan by instalments of Kshs.140,000/= per month to Rafiki Bank for e years when PW.4, PW.6 and PW.9 confirmed that there were arrears of Kshs.1.6 million paid by the Appellant.

(vii) That the Trial Court misdirected itself by inferring “Common intention to defraud” from failure of Ndiriri Mohamed Ndiriri to appear in Court and further that the investigating officer said Mohamed visited the Police Station with the sale agreement.

10. The parties filed written submissions in the appeal. The Appellant submitted that on 27/2/2015, they entered into an agreement with Kiprono Chumo for sale of Motor Vehicle Reg. No.KBZ 193 R which was at all material times jointly registered in the name of the appellant and Rafiki Bank.

11. The Appellant further submitted that the terms of payment were that the Complainant was to pay a deposit of Kshs.1,000,000/= upon execution of the agreement and the balance within 90 days.

12. Further that the Complainant defaulted and he was at liberty to repossess the Motor Vehicle.

13. The Appellant also submitted that upon default, he instructed his lawyer to file a suit at Kisumu Law Courts and the Motor Vehicle was repossessed and the Complainant lodged a complaint with the Police and he was arrested and charged with this offence.

14. The Respondent opposed the appeal and submitted in writing that the appellant sold a Motor Vehicle to the Complainant and later filed a case to repossess the said Motor Vehicle Reg. No. KBZ 193R by pretending that the Complainant had defaulted in payments for the Motor Vehicle.

15. The Respondent also submitted the Appellant did not apply to recall PW.1 after the charges were amended and he cannot default the trial court for failure to recall the witness.

16. On the issue that the Trial Court failed to consider the sale agreement, the Respondent submitted that the Court considered the same and the said agreement proved that the Appellant was to pay arrears to Rafiki Bank.

17. On the issue of conspiracy to defraud, the Respondent submitted that in the case of Rebecca mwikali Nabutola and 2 others -vs- Republic (Cr. Appeal No.232 of 2012) it was held that to prove a charge of conspiracy to defraud, the elements to be proved are existence of an agreement and intention to defraud. The Respondent said in their submissions that the appellant entered into an agreement with Ndiriri Mohamed for the sale of the Motor Vehicle which he had sold to the Complainant and Ndiriri Mohamed failed to surrender the log book thus the agreement between him and the Appellant was intended to execute an unlawful act.

18. On the issue that the Trial Court did not consider the Appellant’s defense, it was submitted that the Appellant did not produce any evidence to show that he is the one who repaid the arrears. Further, that the fact that the Appellant was discharged on four counts is proof that his defense was considered.

19. On the issue that the transaction was civil in nature it was submitted that there was evidence that the Appellant fraudulently received money.

20. On the issue of the sentence, it submitted that the sentence was merited in view of the seriousness of the offences and finally it was also submitted that the Court was right in releasing the Motor Vehicle to the Complainant who proved that he paid arrears at Rafiki Bank and paid the Appellant a further Kshs.1,000,000/=.

21. This being a first appellate court, it is the duty of this court to re-evaluate adduced before the Trial Court and to arrive at its own conclusion as to whether to support the findings of the trial court while bearing in mind that the Trial Court had the advantage of seeing the witnesses.

22. The issues for determination in this case is as follows: -

(i) Whether the prosecution proved its case to the required standard in Criminal Cases.

(ii) Whether the court entertained a claim of breach of contract in a Criminal Case.

(iii) Whether the Defense by the Appellant was considered by the Court.

(iv) Whether the sentence meted upon the appellant was lawful.

(v) Whether the appeal should be allowed.

23. On the issue as to whether the prosecution proved the case against the appellant to the required standard, the Appellant was convicted with the offences of conspiracy to defraud Contrary to Section 317 of the Penal Code and cheating Contrary to Section 315 of the Penal code.

24. Section 315 of the penal code provides that, ***“Any person who by means of any fraudulent trick or device 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 misdemeanour and is liable to imprisonment for three years.”***

25. Justice Gitari, in ***Floral Gakenia Kabugi versus Republic, (2020) eKLR*** stated that for the offence of cheating contrary to section 315 of the penal code, the prosecution must be able to prove ***“that a person uses a fraudulent means to obtain something capable of being stolen, the person cheating induces the other person and the person cheated pays some money for the goods.”***

26. ***Section 317 of the Penal Code*** provides as follows; ***“Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.”*** In Christopher Wafula Makoha versus Republic (2014) eKLR, Justice Mabeya stated as follows regarding the offence of conspiracy to defraud; ***“In Archibold: Writing on Criminal Pleadings, Evidence and Practice (Supra), the learned writers observe at pages 2589 and 2590 that: - “The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.” From the foregoing, it is clear that the prosecution must prove the existence of an agreement between the accused and some other person to do the act complained of.”***

27. Similarly, in ***Joseph Juma Nyapete & 2 others versus Republic (2016) eKLR***, the high court stated as follows: ***“Put together the two words imply that where a person is charged with conspiracy to defraud, it must be demonstrated that he, together with others, had a common intention by deceit to obtain something from another with the purpose of defrauding the owner. That is to say that it must be demonstrated that the accused together with others agreed by common mind to defraud the complainant. That inference must be made both from the actions of the accused and the evidence tendered in court.”***

28. The standard of proof in Criminal Cases is beyond reasonable doubt. There is evidence that the Appellant sold the Motor Vehicle to the Complainant and he received Kshs.1,000,000/= and further that it was the Complainant who cleared the arrears at Rafiki Bank. The Appellant was not justified to get a Court Order to repossess the Motor Vehicle.

29. On the issue as to whether the court entertained breach of contract in a Criminal Case, it was the Appellant who ought to have filed a suit against the Complainant if the Complainant was in breach of the contract which they had entered into. Instead, the Appellant repossessed the Motor Vehicle without notice to the Complainant.

30. What the Appellant did amounted to a Criminal Offence. Even though the Appellant was acquitted of the other charges, there is evidence that he attempted to defraud the Complainant after entering into a contract for sale of Motor Vehicle Reg. No. KBZ 193R.

31. On the issue as to whether the defence by the Appellant was considered, the record is clear that the Trial Court gave the Appellant’s evidence consideration at page 67-68 of the Judgment.

32. The fact that the Appellant was acquitted on 4 of the Counts is also proof that his defence was considered by the Court and he was exonerated on those four counts.

33. On the issue as to whether the sentence was lawful, the Appellant was given an option of a fine. I find no reason to interfere with the exercise of discretion by the Trial Court. The Court of Appeal in ***Bernard Kimani Gacheru versus Republic (2002) eKLR*** 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.”***

34. I find that the appeal lacks in merit. However, the Appellant has been in custody for over seven months since he was sentenced on 15/2/2021. I have also considered that the Motor Vehicle was returned to the Complainant. The Appellant also produced medical evidence that he is diabetic. I consider that he has learnt that Crime does not pay.

35. I reduce the sentences to the period already served and I order that the Appellant be set free unless lawfully held for any other reason.

36. I further order that the Appellant hands over the log book to the complainant within 30 days of his release from prison.

Delivered, dated and signed at Kericho this 1st day of October, 2021.

A. N. ONGERI

JUDGE