REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 147 OF 2016

TOBIAS WANJALA KALENDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case number 873 of 2014 in the Principal Magistrate's Court at Sirisia – K. Mukabi (RM))

JUDGMENT

1. The Appellant herein, **Tobias Wanjala Kalenda** was charged with his co-accused in count I with the offence of conspiracy to defraud contrary to **section 317** of the **Penal Code**. The brief facts as per the charge sheet were that on the 13th day of August, 2014 at Menu Coffee Factory in Namwela location within Bungoma County they jointly conspired with intent to defraud Menu Coffee Factory of Kshs. 600,000/- by use of delivery invoice No. 408 and 409 worth Kshs. 600,000/- (six hundred thousand shillings) falsely pretending that a consignment of fertilizer worth Kshs. 600,000/- (six hundred thousand) had been delivered to Menu Coffee Factory.

2. In count II, the Appellant was charged alone with the offence of obtaining money by false pretence contrary to **section 313** of the **Penal Code**. The particulars were that on the 13th day of August, 2014 at Menu Coffee Factory in Namwela village Namwela sub location, Namwela Location within Bungoma County he fraudulently obtained from Menu Coffee Factory Kshs. 600,000/- (six hundred thousand shillings) by falsely pretending that he delivered a consignment of fertilizer worth the Kshs. 600,000/- (six hundred thousand) a fact he knew to be false.

3. The matter was reported to the DCIO's office in Bungoma West and an inquiry launched into the claims. The Appellant and his co-accused were arrested and subsequently charged. The case was heard on merit and at the close of the trial, the Appellant and his co-accused were acquitted in count I. The Appellant was found guilty in count II, and ordered to pay the Complainant the entire amount of Kshs. 600,000/- in monthly installments of Kshs. 30,000/- and in default to serve three years imprisonment.

4. Being dissatisfied with the outcome of the case, the Appellant preferred the present appeal advancing fourteen (14) grounds of appeal the gist of which impugned the manner in which the trial court interpreted the law and the evidence presented before it.

5. The Appellant argued the appeal through learned counsel Mr. Benchiri who submitted on each of the grounds and urged the court to find that the prosecution failed to prove the case against the Appellant and to find that the appeal has merit.

6. Learned state counsel Mr. Oimbo opposed the appeal on behalf of the state and submitted that the prosecution had proved the case against the Appellant. He urged the court to dismiss the appeal and uphold the conviction and sentence.

7. This being the first appeal, I have perused the lower court record and re-evaluated the evidence tendered at the trial to make my own findings and draw my own conclusion on whether the evidence was sufficient to form a basis for the Appellant's conviction. I took care in my re-evaluation to give allowance for the fact that I did not have the advantage that the trial court had of seeing and hearing the witnesses as they testified and gave due consideration thereof.

8. On whether the trial court misinterpreted the evidence adduced before it in convicting the Appellant, Mr. Benchiri submitted that the trial court failed to consider that the variances in the evidence tendered by the prosecution rendered the evidence inadmissible. Further that the failure to call crucial witnesses occasioned an injustice to the Appellant. He urged that the prosecution failed to prove the offence against the Appellant beyond reasonable doubt.

9. In opposition, Mr. Oimbo submitted that the variances were minor and did not go to the root of the case. He urged that **section 382** of the **Criminal Procedure Code** provides that if discrepancies are not fundamental and do not prejudice the Appellant they cannot cause an appeal to succeed. To buttress his argument, he referred the court to the case of **Benson Mburu Njau vs. Republic Criminal Appeal No. 104 of 2006 [2007] eKLR**.

10. On the number of witnesses, Mr. Oimbo submitted that the prosecution is not restricted to any particular number of witnesses to obtain a conviction. That the witnesses availed were sufficient to prove the prosecution's case.

11. It is therefore important to determine whether the alleged variances and inconsistencies in the evidence tendered by the prosecution created a reasonable doubt in their case whose benefit should have been accorded to the Appellant.

12. The charge sheet on the record indicates that the Appellant committed the offence on 13th August, 2014 at Menu Coffee Factory. PW1 Bramwel Maruti, the Chairman of Menu Coffee Society produced a contract form dated 13th August, 2013 through which the society entered into a contract with a company called Golden Goal for the supply of 206 bags of fertilizer. He stated that the company belonged to Tobias Kalenda, the Appellant herein, and that the tender was for the period between 2013 and 2014. PW1 produced bank statements, a cash sale receipt, an L.P.O. and a quotation. He asserted that during the society's meeting of 19th May, 2014, the secretary manager produced delivery notes signed by the Appellant's co-accused Robert Mamai, which indicated that the fertilizer was delivered. However, upon inquiring from the storekeeper Dores Siboe, they learnt that no supplies of fertilizer were delivered.

13. There are two bank statements on the record, dated 14th May, 2014 and 21st July, 2015 respectively. Both statements show that on 28th August, 2013 the bank paid Golden Goal Agrodealers a sum of Kshs. 600,000/- out of the society's bank account. Further, the cash sale receipt on record which is dated 10th July, 2013 from Golden Goal Agro Dealers and Hardware acknowledged payment of a sum of Kshs. 600,000/- vide a cheque number 031904.

14. The testimony of PW2 Samuel Maende gave a different story. He conceded that a tender was given to the Appellant for the supply of fertilizer in the month of March, 2014. He however stated that he learnt that the Appellant supplied 84 bags of fertilizer costing approximately Kshs. 216,000/- on 9th March, 2014. He did not state how or from whom he received the information. PW4 Maruti Wangwa, corroborated the testimony of PW2 that the Appellant supplied only 84 bags of fertilizer, but that the fertilizer was worth Kshs. 260,000/-. PW3 Andrew Mamai also confirmed that the Appellant was indeed given a tender for the supply of fertilizer but that the fertilizer was never supplied to the society. That the tender was for the supply of 206 bags of fertilizer at a cost of Kshs. 600,000/-.

15. From the evidence on record, it is therefore not in doubt that the alleged offence occurred sometime between the year 2013 and 2014. Further that the Appellant was given a tender to supply 206 bags of fertilizer worth Kshs. 600,000/-.

16. The charge sheet indicated that the offence occurred in 2014 at Mena Coffee Factory while the evidence tendered by the prosecution witnesses including the Bank Statements indicated that the Appellant obtained the sum of money in the year 2013, and precisely the 28th of August, 2013. I note however that this did not occasion any injustice to the Appellant since the tender contract produced before the trial court shows that the contract was for the year 2013/2014. In any event, the discrepancy is one curable under **section 382** of the **Criminal Procedure Code** which provides thus:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice."**

17. On whether the offence was proved against the Appellant, **section 313** of the **Penal Code** under which he was charged provides thus:

> **"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 misdemeanor and is liable to imprisonment for three years."**

18. False pretence is defined under **section 312** of the **Penal Code** as any representation, made by words, writing or conduct, of a matter of fact, either past of present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true.

19. The evidence tendered demonstrated that the Appellant was paid the sum of Kshs. 600,000/- for the supply of 206 bags of fertilizer. Clause 3 of the Tender Contract produced in court states that suppliers must meet the deadlines to supply and deliver the required items and materials. Clause 4 further stipulates that materials and items must be accompanied with delivery notes and invoices that tally with what has been delivered, within the quotations. Clause 5 provides that only supplied and delivered items shall be paid for through cheque, hence suppliers must provide official details.

20. A delivery note was produced before the trial court and which was issued by G-Goal Hardware on 19th August, 2013 indicating that 206 bags of fertilizer were supplied to the Complainant society. There is also on the record an invoice from Golden Goal Agro Dealers & Hardware prepared by Tobias Wanjala the Appellant herein dated 10th July, 2013 for the payment of a sum of Kshs. 600,000/- for the supply and delivery of the fertilizer. There is also on record a cash sale receipt from Golden Goal Hardware dated 22nd October, 2013 for the payment of a sum of Kshs. 600,000/- for the supply and delivery of 206 bags of fertilizer. The bank statements on the record indicate that a sum of Kshs. 600,000/- was withdrawn from the Society's account and paid to the Appellant.

21. In his defence testimony, the Appellant admitted that he was indeed paid the sum of Kshs. 600,000/- by the Complainant society but that the sum was part payment for transport services he previously rendered to the society, and that the society still owes him Kshs. 175,000/- in arrears. He urged that he never supplied fertilizer and was only a transporter. He contended that the cash sale receipt, delivery notes and invoices produced in court were not from his company. He however admitted that he received a banker's cheque from the society but did not sign anywhere that he received the cheque. Further that he deposited the cheque in his account and the cheque was drawn from Co-operative

Bank.

22. DW2 Eric Baraza Wanyonyi, a member of the Complainant society, testified in examination in chief that a sum of Kshs. 600,000/- was paid to the Appellant for transporting coffee. Upon cross-examination by the Prosecution, he testified that the society's investigations revealed that fertilizer was never supplied. However, on cross-examination by Counsel for the 2nd accused, he stated that 84 bags of fertilizer were delivered in 2014 and received by the chairman and secretary manager.

23. DW5 Edwin Simiyu, who was the chairman of the tender committee from the year 2014 to May 2015, testified in cross-examination that before payment is made there must be authorization by the committee, and that the Appellant was paid on 8th September, 2014. According to the bank statements however, the payment was made on 28th August, 2013.

24. A scrutiny of the evidence on record demonstrates that the prosecution proved that the Appellant obtained the sum of Kshs. 600,000/- from Menu Coffee Society. Further that the sum of money was transferred from the Society's bank account to an account held by Golden Goal Company, owned by the Appellant. The payments were for the delivery of a supply of 206 bags of fertilizer. The Chief Executive Officer, PW3 Andrew Mamai, who was tasked with acknowledging receipt of supplies and signing the delivery notes, testified that the 206 bags of fertilizer were never supplied. The Prosecution witnesses also tendered evidence to show that the Appellant was a supplier of both coffee and fertilizer.

25. The upshot is that the offence of obtaining by false pretence was proved by the Prosecution against the Appellant to the required standard. At the time of obtaining the sum of money, he had made no supplies of fertilizer yet the delivery notes and invoices indicated that the payment was for the delivery and supply of 206 bags of fertilizer.

26. One of the Appellant's grounds of appeal was that his defense and submissions were not considered. However, a look at the judgment delivered shows that the trial court considered both the Appellant's defense and submissions in analyzing the evidence to arrive at its conclusion that the prosecution had proved the case against the Appellant to the required standard.

27. On the complaint that crucial witnesses were not called, it is trite that no particular number of witnesses are required for the proof of any fact in the absence of any provision of law to the contrary as provided under **section 143** of the **Evidence Act**. This provision was reaffirmed by the Court of Appeal (Githinji, Musinga & M'inoti JJA) in the case of **Erick Onyango Ondeng' vs. Republic Criminal Appeal No. 5 of 2013 [2014] eKLR**.

28. This court cannot ascertain the value of the evidence which would have been tendered by the Prosecution witnesses who were not availed or state for a fact that they would have added to the evidence already on record, which as demonstrated, was sufficient to prove the charge against the Appellant. In the premise therefore, I find that it has not been shown that the failure to call certain witnesses did not occasion an injustice to the Appellant's case.

29. The rest of the grounds of this appeal pertain to how the trial court applied the law with respect to the evidence tendered by the prosecution. Mr. Benchiri submitted on behalf of the Appellant that **Article 50(4)** and **157** of the **Constitution** were not complied with during the trial. He urged the court to find that the charges were instituted by an incompetent institution and that this constituted an abuse of court process. He contended that the learned trial magistrate failed to explain the substance of the judgment to the Appellant in line with **section 168** of the **Criminal Procedure Act** and further that he misinterpreted the provisions of **section 31** as read with **section 329A** of the **Criminal Procedure Code** and in particular that a Victim Impact Statement was applicable in this case.

30. In opposition, Mr. Oimbo submitted that the charges were indeed drafted by the police but that they were instituted by the Director of Public Prosecution (DPP). He asserted that the matter was prosecuted by a police officer because it was prosecuted in the transition period following the promulgation of the 2010 Constitution. That before the 2010 Constitution, the DPP would gazette police officers of the rank of inspector to prosecute a matter on behalf of the office of the DPP.

31. In analyzing this second consolidated ground of appeal, I will first delve into the issue of the transitional practice employed in prosecuting matters instituted before the promulgation of the **2010 Constitution**.

32. The Appellant referred the court to **Article 157** of the **Constitution** which establishes the office of the DPP. The powers of the DPP are provided under **Article 157(6)** which provides that the DPP shall exercise state powers of prosecution and may:

> **a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.**
>
> **b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**
>
> **c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)**

33. To give effect to **Article 157** and the relevant provisions relating to the office of the DPP, parliament enacted the **Office of the Director of Public Prosecutions Act No. 2 of 2013**. **Section 20(1)** of the Act provides that the DPP may, by a notice in a Gazette, delegate any powers or functions conferred upon the office to a prosecution assistant. **Subsection 2** thereof provides that a prosecution assistant shall be a person:

> **a. appointed as such by the Director as stipulated in subsection 1;**

b. not qualified to be appointed as prosecution counsel but with relevant experience and expertise; and

c. currently serving in the National Police Service and exercising prosecutorial powers as is, was, or shall be delegated by the Director.

A Prosecution assistant is defined under **section 2** to mean an officer in the National Police Service gazetted as a public prosecutor.

34. The 2010 Constitution therefore grants the DPP power to gazette a police officer with the relevant experience and expertise as a prosecution assistant to exercise prosecutorial powers on his behalf. Further, under the old Constitution, police officers of the rank of Inspector could be gazetted to prosecute matters on behalf of the state. From the record it is evident that the police officers who prosecuted the matter were of the rank of Inspector. The Appellant's argument that the charges were instituted by an incompetent institution are therefore baseless and misguided.

35. On the irregularity of the judgment, the Appellant complained that the substance of the judgment was not explained to him as provided under **section 168** of the **Criminal Procedure Code** which provides for the mode of delivering judgment. **Section 168(1)** of the **Criminal Procedure Code** provides thus:

"The judgment in every trial in a criminal court in the exercise of its original jurisdiction shall be pronounced, or the substance of the charge shall be explained, in open court either immediately after the termination of the trial or at some subsequent time, of which notice shall be given to the parties and their advocates if any:

Provided that the whole judgment shall be read out by the presiding judge or magistrate if he is requested so to do either by the prosecution or the defence."

36. There are two limbs in **section 168(1)**: "the judgment in every trial in a criminal court in the exercise of its original jurisdiction shall be pronounced" and "the substance of the charge shall be explained". The use of the word "or" in **section 168(1)** makes the two limbs disjunctive and expresses a choice between the two which are mutually exclusive possibilities. See – **Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others, Presidential Petition 1 of 2017 [2017] eKLR**. It is therefore clear that there are two limbs of the section, and which must be applied disjunctively.

37. I note from the record that the judgment in this matter was delivered in open court on 27th May, 2016 by Hon. K. Mukabi on behalf of Hon. F. N. Kyambia in the presence of the Advocate for the Appellant. It is clear from the record that the judgment complied with **section 169** of the **Criminal Procedure Code** as it contained all the key requirements namely: points of determination, the decision thereon, reasons for the decision, and it was dated and signed. I therefore find that the judgment was compliant with the legal requirements of its content and mode of delivery.

38. The Appellant took issue with the fact that the Trial Magistrate sought the preparation of a victim impact statement before imposing the sentence on him. **Section 329C(1)** of the **Criminal Procedure Code** allows a court, if it considers it appropriate to do so, to receive and consider a victim impact statement at any time after it convicts and before it sentences an offender.

39. A victim impact statement is defined under **section 329A(a)** of the **Criminal Procedure Code** in the case of a primary victim, to mean a statement containing particulars of any personal harm suffered by the victim as a direct result of the offence. The definition of a primary victim relevant to this case as defined under the section is a person against whom the offence was committed.

40. The victim impact statement is also provided under the **Victim Protection Act No. 17 of 2014**. The Act was enacted to give effect to **Article 50(9)** of the Constitution which mandated parliament to enact legislation providing for the protection, rights and welfare of victims of offences. Under **section 2** of the Act a victim impact statement is defined to mean a statement by the victim, or where incapacitated, the victim's representative, on the psychological, emotional, physical, economic or social impact of the offence committed against the victim. It includes any recording, summary, transcript or copy thereof. A victim is defined under the section to mean any natural person who suffers injury, loss or damage as a consequence of an offence.

41. Section 12(1) of the **Victim Protection Act** provides that a victim of a criminal offence may make a victim impact statement to the court sentencing the person convicted of the offence, in accordance with **section 329C** of the **Criminal Procedure Code** and that statement may be considered by the court in determining the sentence of the offender.

42. A reading of **section 329** of the **Criminal Procedure Code** and the provisions of the **Victim Protection Act** demonstrates that a victim impact statement is not mandatory but the court may receive and consider it if it considers it appropriate. Further that it is applicable where an offence has been committed and the impact is an economic one as in the instant case. The argument by Mr. Benchiri that the trial court misinterpreted the **section 329** of the **Criminal Procedure Code** in considering the victim impact statement is therefore a misguided apprehension of the provisions of the section, and has no basis.

43. Taking the evidence on record in totality, I am satisfied that the learned Trial Magistrate properly convicted the Appellant based on sound evidence. Consequently, this appeal is found to have no merit and is dismissed. The conviction and sentence imposed upon the Appellant are hereby confirmed.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 17TH DAY OF JANUARY 2019.

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S. N. RIECHI

HIGH COURT JUDGE