



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 52 OF 2018

BONIFACE KIMANI KARANJA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 231 of 2013 delivered by Hon. B. M. Ochoi (PM) on 8th March, 2018).

JUDGMENT

Background

1. The Appellant, **Boniface Kimani Karanja** was charged with seven (7) counts. In count 1, he was charged with obtaining money by false pretence contrary to Section 313 of the Penal Code. The particulars of the same were that on 8th October 2012 at K-Rep Bank Kilimani branch in Nairobi within Nairobi County with intent to defraud obtained from Rachael Murugi Mugo Kshs. 5,000,000/= by falsely pretending that he had won a tender to supply fish to the Ministry of Fisheries, a fact he knew to be false.
2. In counts 2, 3, 4, 5, 6 and 7, he was charged with issuing bad cheques contrary to Section 316A (1) (a) (4) of the Penal Code. The particulars of the offences were that on the 30th day of November 2012 at Nairobi area within Nairobi county, he issued cheque leaves number xxxxx of Kshs. 950,000/=, 00145 of Kshs. 950,000/=, 00146 of Kshs. 950,000/=, 00147 of Kshs. 950,000/=, 00148 of Kshs. 950,000/= and xxxxx of Kshs. 250,000/= respectively, in favour of R. M. Mugo and Company on account number[xxxx] held at Chase Bank Kenya Limited Embakasi branch knowing that the same account had insufficient funds.
3. The Appellant pleaded not guilty to the charges. Upon conclusion of the trial, he was found guilty on all counts. In count 1, he was sentenced to serve three (3) years imprisonment whereas in counts 2, 3, 4, 5, 6 and 7, he was fined Kshs. 50,000/= in default to serve one (1) year imprisonment for each count. He was aggrieved by both his conviction and sentence and preferred the instant appeal to this court.
4. The Appellant raised seven (7) grounds of Appeal in his Petition of Appeal filed on 29th March 2018. He was aggrieved; that he was convicted despite the contradictions in the complainant's testimony regarding the reason for giving the Appellant the sum of money in question; that he was convicted on the evidence tendered against Joy Fish and Integrated Farm; that the trial court did not consider his submissions on no case to answer when making a ruling in that regard; that his defence that no tender was presented to the complainant was not considered; that the judgment seems to have been written in 2015 while the case came to a close in 2016 showing that the same was premeditated; and that the trial court failed to consider the sum of Kshs. 800,000/= already paid to the complainant when issuing a very harsh sentence.

Evidence

5. This being a first appeal, this court is enjoined to analyze and re-evaluate the evidence adduced by the witnesses and arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard any of the witnesses. (See **Okeno v Republic (1972) EA 32**).
6. The Prosecution's evidence can be summarized as follows: On 8th October, 2012, the Appellant went to **PW2, Rachael Murugi Mugo's** office at Maendeleo House and told her that he had won a tender with the Ministry of Fisheries for supply of fish fingerlings in various parts of the country but needed a further Kshs. 5,000,000/= to enable him do so. He showed her the said tender as well as a schedule of the various places where he was to supply the same. PW2 was impressed with the deal. As such, they proceeded to K-Rep Bank in Kilimani, Nairobi where she withdrew Kshs. 5,000,000/= in cash and gave him on the understanding that he would pay back the entire amount by 26th October, 2012. They also agreed that the Appellant would give her some money which she would then invest in his company as her shares so that they

grow the business together.

7. On 26th October, 2012, the Appellant informed her that he had wired the entire amount to her account through RTGS. However, upon checking her account she discovered that there was no such deposit. Later on 30th November, 2012, the Appellant gave her two banking slips showing that he had deposited six (6) cheques totaling Kshs. 5,000,000/= to her account number [xxx] held at Barclays bank Hurlingham. Five of the cheques were for Kshs. 950,000/= while one was for Kshs. 250,000/=.

8. On 6th December, 2012, she received a call from Barclays bank Hurlingham Branch informing her that the six (6) cheques had bounced due to insufficient funds in the drawer's account. She went and collected printed copies of the bounced cheques which were certified by the branch. They were five cheques number xxxxx, xxxxx, xxxxx, xxxxx and xxxxx for Kshs. 950,000/= each together with one cheque number xxxxx for Kshs. 250,000/= all dated 30th November, 2012 from A/C of Joyfish and Integrated Farm. She reported the matter to Kiambu CID Headquarters. She also made some inquiries at the Ministry of Livestock and Fisheries and was informed that the Appellant was not one of their suppliers.

9. **PW1, Wilson Maina Gichuhi** was a Deputy Director of fisheries in the department of fisheries at the Ministry of Agriculture, Livestock and Fisheries. He stated that there were no records showing that the Appellant dealt with his department. His name was not on the list of fisheries hatcheries which are certified to supply fish fingerlings in the country.

10. **PW3, Chief Inspector Daniel Gutu** a forensic documents examiner examined the signatures on the certified copies of the bounced cheques. He concluded that the Appellant signed the bounced cheques. He prepared a report on 23rd August, 2013 which he produced in evidence. **PW4, Generose Karimi Njue** was the Barclays Bank investigating manager at the time. She provided necessary documents required to facilitate investigations to the investigating officer, PW7. **PW6, Cleophas Kirwa Melly** was the manager of Security at Chase Bank. He confirmed that account no. [xxxx] held by Joyfish and Integrated Farm was opened by the Appellant. He also confirmed that from the statement of that account, it had no funds during the period when the bounced cheques were issued.

11. **PW5, Margaret Wangui** an assistant registrar of companies confirmed that according to their records, the Appellant was the proprietor of Joyfish and Integrated Farm Company. The nature of the company's business was fish farming. **PW7, Inspector Njue Anthony Kariuki** investigated the case together with his colleague Corporal David Kibabii. He charged the Appellant with the offences in question upon compiling the evidence. He produced all the documents obtained in the course of the investigations.

12. Upon being placed on his defence, the Appellant elected to give unsworn evidence. He admitted that he received the money from PW2 but the same was not for supplying a tender as indicated by her. He stated that on 8th October 2012, he called PW2 who was well known to him to discuss the possibility of a getting a loan from her. They agreed to meet in her office at Maendeleo House. He explained to her that he needed a loan of Kshs. 5,000,000/= which was to be used in operations at his farm. They agreed that he would pay her back the money with interest although there was no written agreement to that effect. PW2 gave him the entire sum in cash. He gave her postpaid cheques as security for the money and they agreed on when the same would be encashed.

13. He stated that he was arrested two months later. He added that he intended to pay back the money but was unable to do so because his business collapsed and his stock disappeared upon his arrest and consequent remand. Upon being released, he embarked on rebuilding the farm and was intending to start paying PW2 from October 2016 when he started harvesting.

14. In the trial court's judgment, the learned trial magistrate found that all the ingredients of the offences charged were proved beyond reasonable doubt and convicted the Appellant accordingly.

Analysis and determination

15. This Appeal was canvassed by way of oral submissions. The Appellant appeared in person whilst the Respondent was represented by learned State Counsel Mr. Momanyi. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that there is only one issue for determination namely whether the offences were proved beyond reasonable doubt.

16. **As regards count 1**, the Appellant submitted the charge was not proved beyond a reasonable doubt whereas the learned state counsel Mr. Momanyi submitted that the prosecution proved the offence to the required standard hence the Appellant's conviction was safe.

17. **Section 313 of the Penal Code** 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.”

18. From the above provision, it is evident that the following are the essential elements of the offence:-

i) *The act of obtaining something capable of being stolen.*

ii) *Obtaining the thing through false pretence.*

iii) *Obtaining the thing with intention to defraud.*

19. There is in doubt that the Appellant obtained a sum of Kshs. 5,000,000/= from PW1 on 8th October 2012. He admitted this fact in his defence. It is therefore manifest that the Appellant obtained something that is capable of being stolen. The court would only grapple with the question of whether the same was obtained through false pretences and/or with the intention to defraud PW1.

20. "False pretence" has been defined under **Section 312 of the Penal Code** 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."

21. PW2 stated that she gave the money to the Appellant on the understanding that he would give her back the entire sum by 26th October 2012. When the said date reached, the Appellant told her that he had wired the entire amount to her account through RTGS but it turned out to be a lie since there was no such deposit in her account. Later, on 30th November 2012, the Appellant informed her that he had deposited six (6) cheques totaling Kshs. 5,000,000/= to her account number [xxxx] held at Barclays bank Hurlingham. The cheques were however dishonoured due to insufficient funds in the Appellant's account and the Appellant did not tender any plausible explanation for the same. He alleged that he gave PW2 six (6) postdated cheques which they agreed on when would be encashed.

22. There was sufficient evidence to establish that the Appellant had no clear intention of paying back the money obtained from PW1. His defence that the cheques were postdated was displaced by the counter deposit voucher tendered in evidence by PW4 to the effect that the Appellant personally deposited five cheques number xxxxx, xxxxx and xxxxx for Kshs. 950,000/= each together with one cheque number xxxxx for Kshs. 250,000/= dated 30th November, 2012 at Barclays bank Bunyala Road branch on 30th November, 2012. The cheques bounced and it was sufficiently established through the evidence of PW6 that the Appellant's account at Chase bank from where the funds were to be drawn did not have sufficient funds at the time. It was merely a false representation made to dupe PW1 into believing that he had the intention of paying back the money. I am therefore satisfied that the Appellant obtained the money from PW1 through false pretences.

23. Further, PW2 explained that the Appellant obtained the money from her under the pretext that he needed it to enable him supply fish fingerlings in various parts of the country pursuant to a tender that he had purportedly won with the Ministry of Fisheries. He even went to the extent of showing her the purported tender document as well as a schedule of the various places where he was to supply the same. The Appellant gave her the schedule of supply which was produced in evidence. It was however established by PW1 beyond any reasonable doubt that there were no records showing that the Appellant had ever dealt with the department of fisheries. His name did not appear on the list of fish hatcheries certified to supply fish fingerlings in the country. As such, it is clear this was a false representation made by him with intention to defraud PW2 of the sum of Kshs. 5,000,000/= obtained from her.

24. The Appellant submitted that the trial court failed to consider his defence that no tender document was presented to PW1. I have examined the trial court's judgment and established his entire defence was properly considered and found to be unbelievable particularly in view of the weight of the evidence adduced by the prosecution. In the premises, I am satisfied that the prosecution established beyond reasonable doubt that the Appellant obtained money from PW1 by false pretence contrary to **Section 313** of the **Penal Code**. I will not therefore interfere with his conviction in count 1.

25. As regards counts II, III, IV, V, VI and VII, **Section 316A (1) (a)** of the **Penal Code** provides that:-

"Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person –

a. Knows that the account has insufficient funds".

26. PW1 stated that on 30th November, 2012, the Appellant gave her two banking slips showing that he had deposited cheque number xxxxx, xxxxx, xxxxx, xxxxx, xxxxxx and xxxxx totaling Kshs. 5,000,000/= to her account number [xxxx] held at Barclays bank Hurlingham. According to the records provided by PW4, the cheques dated 30th November, 2012 were deposited by the Appellant at Barclays bank Bunyala Road branch Nairobi on the same day. The same were however dishonoured due to insufficient funds in the drawer's account. The records from the Companies' registry adduced by PW5 established that the Appellant was the proprietor of the drawer company namely Joyfish and Integrated Farm.

27. Further, the bounced cheques together with the specimen and known signatures of the Appellant were submitted to PW3 who established that they were indeed drawn and signed by the Appellant. There was also consistent evidence by PW6 that the account no. [xxxx] held at Chase bank operated by the Appellant did not have sufficient funds at the time when the cheques were presented for payment. This was proved beyond reasonable doubt by the statement of that particular account which was admitted in evidence.

28. In view of all these evidence, I am satisfied that the prosecution established beyond a reasonable doubt that the Appellant issued bad cheques contrary to **section 316 (A) 1(a)** of the **Penal Code**. His conviction on counts 2, 3, 4, 5, 6 and 7 was therefore safe. The sentences imposed were also merited and will be upheld.

29. Further to the foregoing, the Appellant in his submissions challenged the fact that the trial court's judgment was indicated as having been delivered in 2015 when the trial was still ongoing. He argued that this showed that the trial court had premeditated the outcome of the case. It is obvious that the same was merely a typographical error which has no effect on the substance of the judgment.

30. He also alleged that he gave a sworn defence but the trial court indicated that he had given an unsworn statement. A perusal of the trial court's record reveals that this is not factual because the Appellant opted to give an unsworn defence and was not cross examined by the prosecution.

Conclusion

31. In view of all the foregoing, I find that this appeal lacks merit and is dismissed in its entirety. The Appellant's conviction in respect of all the counts is upheld accordingly. I also uphold the sentence in counts II, III, IV, V, VI and VII. As regards the sentence in count I, the Appellant faulted the trial court for sentencing him to three (3) years imprisonment without giving him an option of a fine. He also claimed he was sickly and custodial sentence was deteriorating his health.

32. In my view, the maximum sentence imposed was harsh and excessive. Although the Appellant made good some payment of Ksh. 800,000/, this was done after the trial. It did therefore lessen his culpability but could have mitigated for a lesser sentence. Therefore, taking into account the circumstances of the case, I set aside the three years jail term and substitute it with two years imprisonment. The period of ten months the Appellant was in remand custody shall be taken into account to constitute part of the sentence. It is so ordered.

DATED and DELIVERED THIS 13TH DAY OF MAY, 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant in person.*
2. *Momanyi for the Respondent.*