



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 14 OF 2019

GEOFFREY KIPROTICH KIPLAGAT alias JEFF ROTICH.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama

Ravine Criminal Case no. 902 of 2017 delivered on the 15th day of February, 2019 by by Hon. J.L. Tamar, PM]

JUDGMENT

1. The appellant who was sentenced to imprisonment for two years on 15th February 2019 for the offence of obtaining money by false pretence contrary to section 313 of the Penal Code with particulars that “on the 18th day of February 2017 in Eldama Ravine town, Koibatek sub County within Baringo County with intent to defraud obtained from Toniok Lemiso Four Hundred thousand shillings (Ksh.400,000/=) by falsely pretending that he will supply a total of 130 bags of dry maize to one Toniok Lemiso, a fact he knew to be false.”
2. The appellant appeals from the sentence in a petition entitled “**Appeal for Non-custodian**” as follows:

“I the under-mentioned do humbly beg leave to make an application to make an appeal and pray to his lordship to meliorate and allow me to apply for a non-custodial sentence.

I was sentenced to a two (2) year sentence without a fine for the offence of obtaining money contrary to section 313 of the penal Code in the criminal case No. 902 of 2017 upon me by Hon. Tarmar, Principal Magistrate, Eldama Ravine Court on the following grounds:

1. *That my lordship, I humbly beg this **court to look into my case afresh and giving me an alternative sentence.***
2. *That my lordship, I pray the honourable court to grant me a custodian sentence in order to be allowed to be with my family because they depend on me because I am the breadwinner*
3. *That my lordship, I pray this honourable **court to consider giving me a fine.**”*

4. The appellant filed written submissions restating his prayer for non-custodial sentence as follows:

Appellant

I have written submissions. I do not wish to add anything.

DPP

Appeal is opposed.

Appellant convicted upon obtaining by false pretence contrary to section 313 of the Penal Code and sentenced to serve two (2) years on 15/2/19.

Pw1 testified that he was a maize dealer who buys maize from all over the Country and sells to millers in Nairobi. On 18/12/2017,

he was called by a driver by the name Kemboi who introduced him to the appellant.

Pw1 never went to appellant but they talked on phone through the appellant's phone number 0716947049.

He told the complainant that he had 130 bags of maize each giving at 3100/=. The appellant negotiated with the complainant and they agreed that the complainant should deposit Ksh.400,000/=. He gave his accused no. as 1126785121 in the names of Kiplagat Kimeli. That was a KCB account for Eldama Ravine. The complainant deposited the money in that account on 18/2/17.

Pw2 was Kiplagat Kimeli. He testified that the appellant was his friend for last 3 years. Appellant requested him to use his account to receive money from his customer from Nairobi as his account was dormant. Pw2 agreed of a sum of Ksh.400,000/= was deposited in the account of Pw2. Pw2 withdraw the money and gave the money to the appellant. The sum of Ksh.400,000/=. The appellant was given at Bakery Hotel at Eldama Ravine which was confirmed by Pw3 who saw money exchange had between complainant and the appellant but she did not know how much money.

After the complainant deposited money in the said account, he tried to reach the appellant in several time, but the phone had been switched off. He reported the matter to the police, after which Pw2 in whose account the money was deposited was arrested. Pw2 was later released when it became clear that the appellant had used his account to defraud the complainant.

Pw5 is the Investigating Officer. On investigation he found that the complainant had deposited Ksh.400,000/= in the account of Pw2 and he produced a deposit slip as evidence. He requested for date for reference confirmed that Pw2 did not at any time communicated with the complainant and they did not knew each. The appellant was the one in constant communication. The communication was between nos.0716947049 (for the appellant) and 0726241570(for the complainant).

The Investigating Officer established that they communicated nine (9) times on 18/2/17, the same dated that the money was deposited in the account of Pw2 but later after the money was deposited to appellant switched off his phone.

After 18/2/17 appellant went into hiding and was arrested on 24/12/17, 10 months later.

The complainant herein has never received his money even after it was clear that the appellant received his money. It is clear that the appellant intended to defraud the complainant being the reason why he did not insist to use his account for deposit of the money.

The date of arrest was 24/12/2017. The evidence is overwhelming. The complainant lost his money which he has never recovered.

Appellant

I do not in response have anything to add."

5. At the hearing, the appellant relied on the said submissions and the DPP in opposing the appeal made oral submissions as shown in the record of proceedings as follows:

"WRITTEN SUBMISSION

My lordship I kindly make the following submissions in report of the petition of appeal of leniency under the following mitigation circumstances.

- 1. That I am a first offender and I humbly pray that may the honourable Court consider the appellant as a first offender.*
- 2. That I am the bread winner in my family my aged parents and my siblings who depended on me now depends on my aged parents who are not able to provide all their basic needs.*
- 3. My lords I pray that may the honourable Court consider the period I spend while in remand which is Two (2) months. My lords since I have no previous records I pray that may this honorable Court allow me a non-custodian sentence or set me free at liberty and I promise to be an upright citizen and show lawful acts that may not cross purpose with laws of the land. That the honorable Court to consider my humble submissions and set me free*
- 4. That my lords my wife got an accident and she is now disabled and the fact that am in prison for two years makes it impossible for her to manage raising my children therefore I pray that this honorable Court allow me a non-custodial sentence so as I can assist my family.*
- 5. That my lord I am sickly and most of the nutrition and herbal medicines I normally use are not easily available in prison.*
- 6. I kindly pray for a second chance to build up the nation through my skills and provide for my family now that I have learned my mistake of which they emanated from the use of alcohol and influence of bad company which I promise to shun and be a good citizen.*
- 7. That I have learned my mistakes, and I have gone through harsh conditions in prison facility I promise this honorable Court that I*

will not engage myself to bad company that has led to conviction and separation from my family.

8. I promise to be an upright citizen and show lawful acts that may not cross purpose with laws of the land.

9. My lords since I have no previous records I pray that may this honourable Court allow me a non-custodian sentence and I promise to be an upright citizen and show lawful acts that may not cross purpose with laws of the land.

10. That the honorable Court may re-consider my Appeal and quash this conviction and sentence so that I may be set at liberty or given a non-custodial sentence.”

Determination

6. Although, there was no appeal from the conviction, I have, as a first appellate court in the spirit of **Okeno v. R** (1972) EA 32, considered the evidence before the trial court afresh to form my own conclusion before considering whether to uphold the conviction, and consequently, the sentence imposed by the trial court.

Evidence of obtaining money

7. PW1 produced the pay-in slip dated 18.02.2017 for ksh.400,000/- into KCB account 1126785121 in the name of one Paul Kiplagat Kimeli (PW2) who had given the appellant his bank account to use for deposit purposes, a fact that the said Kimeli (PW2) confirmed in testimony indicating that he had withdrawn the money from his account and given it to the appellant. Call data from Safaricom mobile service provider showed the appellant in multiple conversation (9 times same day 18/2/2017 according to investigating officer Pw5) with the complainant Pw1 culminating with the deposit of the money when the Safaricom mobile number used by the appellant was switched off. An employee of the Ravine Bakery a tea shop where the witness Pw2 said he had given the money to the appellant confirmed receiving the two and serving them with tea in a private room requested by PW2 and then witnessing the exchange of money which the appellant had put into his pocket and sock but did not know how much money was exchanged.

False pretence

8. The appellant had no maize to sell to the complainant Pw1. He had asked PW4 whether he had maize he could buy and the latter had told him that had a client who had 23 bags. The appellant was not in a position to supply 130 bags which he said he purported to sell to the complainant. It was a clear case of false pretence.

Identification of the appellant

9. The appellant admitted in cross-examination that he knew PW2 and that he had met him on 18/2/2017 but he denied having received any money from him. The prosecution witness identified the appellant and no reasonable doubt is raised as to his evidence that he gave the appellant money being true. The appellant in his defence only said he buys and sells clothes and he did not deal with buying and selling of maize, but this is no ground for holding that a reasonable doubt is raised to the evidence that he obtained money under a pretence that he was able to supply 130 bags of maize. Indeed, his friend (PW2) a maize dealer, whom the appellant confirmed to know, said the appellant was a maize broker who used to connect him to maize farmers. The complainant PW1 and the maize dealer PW2 confirmed receiving communication regarding the maize transaction and deposit of purchase money from the same mobile phone number of the appellant. He was also identified by his friend a cattle dealer who testified that the appellant had asked him whether he had maize which he the appellant could buy and was a witness to the appellant asking the witness Pw2 to allow him use his account number and to seeing them later on the material date 18/2/2017 near KCB bank and that when he tried to call the appellant he could not be reached.

10. I find that the prosecution proved its case for the offence of obtaining money by false pretences against the appellant, beyond reasonable doubt. The appellant was properly convicted for the offence of obtaining by false pretence contrary to section 313 of the Penal Code.

Sentence

11. An offender under section 313 of the Penal Code is liable to imprisonment for three (3) years. The sentence of imprisonment for two (2) years is wholly lenient having regard to the value of money stolen at Ksh.400,000/- (**Mathai v. R** (1983) KLR 422) and the probable sentence on conviction for the offence. There is no ground for thinking that the trial court did not consider the status of the offender as a first offender and his mitigation on the grounds of health, and I, consequently, do not have any justification under the test in **Wanjema v. R** (1971) EA 493 to interfere with the sentencing discretion of the trial court.

Orders

12. For the reasons set out above, I do not find that the trial court was in error in any way in the conviction and sentence of the appellant for the offence of obtaining money by false pretence contrary to section 313 of the Penal Code, and the appeal is pursuant to section 354 (3) of the Criminal Procedure Code dismissed.

Order accordingly.

DATED AND DELIVERED THIS 4TH DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.