REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 119 of 2017

ABIUD KITUI WANAKAI………………...….......………………..APPELLANT

VERSUS

REPUBLIC …….……………………………………………..…….RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 287 of 2009 delivered by Hon. J. Kamau, RM on 1st and 8th September, 2017).

JUDGMENT

Background

1. Abiud Kitui Wanakai, hereafter the Appellant, was charged in seven counts as follows; In counts I and II he was charged with obtaining money through false pretences contrary to Section 313 of the Penal Code. The particulars of the offence were that on 6th November, 2007 within Nairobi Area Province, with intent to defraud obtained Kshs. 645,000/- from Mary Wanjiku Mumu by falsely pretending that he would sell a newly imported motor vehicle Toyota Corolla AE110 to the said Mary Wanjiku Mumu, a fact he knew to be false or untrue.

2. The particulars of Count II were that on diverse dates between 22nd November, 2007 at Yaya Court in Nairobi within Nairobi Area Province with intent to defraud, obtained Kshs. 655,000/- from Charity Nazaria Marigu by falsely pretending that he would sell a newly imported motor vehicle make Toyota Corolla AE 110 to the said Charity Nazaria Marigu, a fact he knew to be false or untrue.

3. Count III related to the offence of operating a regulated tourist enterprise without a valid Tour Operator Licence contrary to Section 3(1) as read with sub-section 3(2) of the Tourist Industry Licence Act, CAP 3(1) of the Laws of Kenya. It was alleged that on 4th February, 2008 with others not before the court at Yaya Court within Nairobi Province did carry out a regulated tourist enterprise namely a motor vehicle hire business under the name of Wheels and Hells Co. without a valid tour operating licence as stipulated in Legal Notice 80 of 1998.

4. The Count IV related to the offence of Trading without a trading licence contrary to Section 5(4) of the Trade Licensing Act CAP 497 of the Laws of Kenya in that on 4th February, 2008 with others not before court at Yaya Court in Nairobi within Nairobi Area Province was found running a motor vehicle hire business without a trade licence.

5. In Count V he was charged with trading without a trading licence contrary to Section 5(1) as read with Section 5(4) of the Trade Licence Act CAP 497 of the Laws of Kenya. The particulars of the offence were that on 4th February, 2008 with others not before court at Yaya Court in Nairobi within Nairobi Area Province was found running a second hand motor vehicle sale business without a trade licence.

6. In Count VI he was charged with the offence of operating a second hand motor vehicle dealer's business without the second hand motor vehicle dealers licence contrary to Section 4(1) as read with Section 4(4) of the Second Hand Motor Vehicle Purchase Tax Act CAP 484, Laws of Kenya. It was alleged that on 4th February, 2008 with others not before court at Yaya Court in Nairobi within Nairobi Area Province was found operating a second hand vehicle business under the name Procure (K) Ltd. without the second hand motor vehicle dealers licence.

7. In Count VII he was charged with being engaged in carrying on trade, occupation or business within the jurisdiction of the council while such premises are not licenced for the purpose of carrying on such trade, occupation or business contrary to by-law 3(1) and punishable under by law 12(1) of the City of Nairobi Licensing of Premises and Trades by-laws 2007. It was alleged that on 4 th February, 2008 at around 10.50 a.m. at Yaya Court in Nairobi within Nairobi Area Province, did engage in or carry on trade, occupation, business by name of Procure Kenya Limited at premises while such premises were not licensed by the council for the purpose of carrying on such trade, occupation or business.

8. The Appellant pleaded not guilty to all the offences but at the conclusion of his trial he was found guilty in all counts. He was sentenced as follows; in Count 1- a fine of Kshs. 100,000/- or serve 1 year in jail with the added condition that he shall compensate Mary Wanjiku Kshs. 575,000/- in default serve two years in jail, in Count 2- a fine of Kshs. 100,000/- or serve 1 year in jail with the added condition that he shall compensate the complainant Charity Nazaria Kshs. 355,000/- in default serve 1 year in jail and in Counts III to VIII he was discharged under Section 35(1) of the Penal Code.

9. The Appellant was dissatisfied with both the conviction and sentence against which he proffered the present appeal. He set out his grounds of appeal in his Petition of Appeal filed on 14th September, 2017. In summary, they are that; (i) the elements of the offence under Section 313 were not proved beyond a reasonable doubt, (ii)the trial magistrate misdirected herself by failing to appreciate the evidence of PW2 that due to a successful civil claim against him she had been reimbursed some monies thus substantially altering the nature of the charge, (iii)that his defence was not properly considered (iv) the burden of proof was shifted to the Appellant, (v)the learned magistrate misapplied the law by ordering compensation which remedy falls under a civil suit, and (vi)the sentence was manifestly harsh and excessive in the circumstances and illegal.

Evidence

10. The prosecution's case was that the Appellant obtained money from unsuspecting customers promising to import vehicles on their behalf. In the present case, the victims were **PW1, Mary Wanjiku**, and **PW2, Charity Nazaria,** both nurses at Kenyatta National Hospital. They testified that they paid the Appellant the sums of money stated in the respective charges to facilitate the importation of Toyota Corolla AE110s but that the Appellant did not fulfill his obligation of delivering the vehicles to them. Instead, he started eluding and evading them until they finally involved the police who upon investigations charged him in the present matter. Their evidence was corroborated by **PW3, Joseph Mbathi Maina**, who was privy to the dealings between his wife, PW1 and the Appellant.

11. The Appellant was also charged with various offences related to the carrying out of a business illegally and **PW4, Dr. Meshack Nyamiaka** testified that the Appellant sub-leased a portion of his office in 2007 and that he was involved in a car hire business that was unsuccessful leading the witnesses to suffer losses. Further, that the Appellant left the premises after he failed to pay his share of the amenities and rent for two months.

12. **PW5, No. 61759 PC John Kuria** was both the investigating and arresting officer. He summed up the prosecution case and preferred the charges against the Appellant.

13. After the close of the prosecution case, the court ruled that a prima facie case had been established to warrant the Appellant tendering a defence. He opted to adduce a sworn statement of defence and did not call any witnesses in support thereof. He testified that he was the proprietor of Procure Kenya Ltd and that he was working with a partner, one Samuel Nyanjong. That in 2008 he left the country for six weeks and when he returned he was arrested. He then found out that his partner had withdrawn the company's funds and left for South Africa and had thus evaded arrest. He added that he had since tried to pay the complainants and that the matter was therefore civil in nature.

Submissions

14. The appeal was canvassed by way of written submissions. Those of the Appellant were filed on 31st May, 2018 by Simba and Simba Advocates. A Mr. Odongo advocate was physically present for him in court. The Respondent's submissions were filed by learned State Counsel, Mr. Momanyi on 12th July, 2018. I shall refer to the submissions in body of the judgment.

Determination

15. I have accordingly considering the evidence on record and the respective rival submissions before concluding that the issues that arise for determination are as follows;

i. Whether the all the charges were properly drafted.

ii. Whether the principle of double jeopardy was violated.

iii. Whether the offences were proved beyond a reasonable doubt.

iv. Whether the sentences passed were harsh and excessive.

Defective charges.

16. The issue of whether or not the charges were properly drafted was not canvassed by either party. But this being the first appellate court, is conferred with the onus of re-evaluating the evidence on record afresh and arrives at its own conclusions. See **OKENO V REPUBLIC (1972) EA, 32.**

17. It is whilst undertaking this noble task that the court noted that counts IV and VI ought to have failed for want of proper draftsmanship. With regards to count IV the offence charged is one contrary to Section 5(4) of the Trade Licencing Act, CAP 497 which could not stand as the provision does not set out an offence and is purely a penalty provision. Thus, a finding by the trial court that an offence was committed and the subsequent conviction was a total misdirection on proper application of the law. I do find and hold that the conviction thereof was unsafe.

18. Count VI related to the offence of operating a second hand motor vehicle dealer's business without a second hand motor vehicle dealers licence contrary to Section 4(1) as read with Section 4(4) of the Second Hand Motor Vehicle Purchase Act, CAP 484. Section 4(1) does not set out an offence and simply a provision exempting such dealers from payment of purchase tax. There is no Section 4(4) to the Act as was stated in the charge. The sum total of this is that the Appellant was charged with a non-existent offence. Equally therefore, the conviction in this count was also unsafe.

19. I wish to underscore the fact that despite the fact that the appeal appeared focused on the entire conviction and sentence, the Appellant, in his submissions strictly narrowed down to Counts I and II both being offences under Section 313 of the Penal Code. I opine that this was informed by the fact that the Appellant was discharged in all the subsequent offences under Section 35(1) of the Penal Code. It nevertheless, still behooves this court to reevaluate the entire evidence and make an independent finding. My reevaluation of the evidence drives me to conclude that no evidence was led in establishing Counts III to VII. It begs the basis on which the Appellant was convicted for the offences. Again, I find and hold that the conviction in Counts III, V and VII was equally unsafe.

Whether the principle of double jeopardy was violated

20. The Appellant submitted that the principle of double jeopardy was violated due to the undertaking of proceedings against him both in the criminal and civil cases. According to his counsel, the matter was purely civil as he had made partial payments of the debts owing. He relied on **R *v.* Chief Magistrate's Court at Mombasa ex p. Ganijee & another [2002] 2 KLR 703** and **Joseph Wanyonyi Wafukyo *v.* Republic[2014] eKLR** to buttress this submission.

21. The principle of double jeopardy in criminal justice would fall in instances of *autrefois acquit* and *autrefois convict.* That is to say that you cannot be tried for an offence for which you have already been convicted or acquitted. See Section 138 of the Criminal Procedure Code. This principle aligns with the definition attached to it in the **Black's Law Dictionary, 9th Edition** as,

> ***"the fact of being prosecuted twice for substantially the same offence"***.

22. This principle, does not apply in the present case as no other criminal proceedings had ever been instituted against the Appellant in respect of the subject matter herein. Furthermore, under Section 193A of the Criminal Procedure Code, the mere fact that a civil suit exists in respect of the subject matter is not a bar to institution of criminal proceedings. The same reads;

> ***"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a round for any stay, prohibition or delay of the criminal proceedings***."

23. And so, what was paramount was for the prosecution to prove that the case was proved beyond a reasonable doubt. Besides it is clear that the criminal proceedings preceded the civil matter as the Appellant took plea on 14th February, 2008 whilst civil proceedings commenced sometime in the year 2010. It is up to the Appellant to opt to settle the latter, if not defend it. I therefore totally differ with him that the instant proceedings were an abuse of the court process. It is a case that can clearly be distinguished from that of **Joseph Wanyonyi Wafukyo *v.* Republic(**Supra**)** in that Gikonyo J. in arriving at his decision found that the matter at hand was one of a purely civil nature and criminal proceedings could not be instituted. He delivered himself thus:

> ***"…I must state that, the legal framework which governed the transaction in controversy; makes the transaction a purely civil action, thus removing it from the realm of criminal law…, and provides for a complete mechanism for and the relief in the event the transaction becomes void."***

24. It is true that the transactions between the Appellant and the complainants were commenced by sale agreements, but the agreements did not give a waiver from institution of criminal proceedings as in the above case. Respectively, the institution of charges against the Appellant was lawful. It was not intended to punish or oppress him but to regulate order in the society.

Whether the cases proved beyond a reasonable doubt.

25. Having found that the conviction in Counts III to VIII was unsafe, means that this issue respects to Counts I and II only. Both charged one offence of obtaining money by false pretences. This court defined the offence in **Francis Mwangi & another *v.* Republic[2015] eKLR**, as follows:

> ***"From the definition, the basic ingredients of the offence can be summarized as follows:-***
>
> > ***1) The act of obtaining something capable of being stolen.***
> >
> > ***2) Obtaining the thing by false pretences.***
> >
> > ***3) Obtaining the thing with intent to defraud.***
>
> ***The definition of false pretence on the other hand is given under Section 312 of the Penal Code as follows:-***
>
> > ***"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."***

The operative word under Section 312 is representation which is applicable in the following circumstances:-

1) A representation by words, writing or conduct.

2) A representation in either past or present.

3) A representation that is false.

4) A representation made knowing it to be false or believed not to be true."

26. The Appellant submitted that the Appellant was in the business of car importation and that the parties signed car sale agreements that were executed and attested by an advocate. That in view of the fact that he did not deny taking the complainant's money, the issue was whether the representation was either past or present and was false. According to the counsel, the agreements between the Appellant and the complainants related to future payments whereas under Section 313 of the Penal Code, a representation should either be present or past. As such, it was urged that the court should find and hold that a key element of the offence was not established. The cases of **Oware *v.* Republic[1989] KLR 287, John Njogu *v.* Republic[2016] eKLR** and **R *v.* Dent[1975] 2 All ER 806** were cited in this regard.

27. In addition to the above, counsel for the Appellant argued that the prosecution ought to have established that the Appellant, after taking the complainants' money did not intend to import the vehicles. It was argued that although the Appellant did not perform his part under the contracts, it was due to circumstances beyond his control. Further, the same arose from a commercial transaction whose redress cannot be in a criminal trial but a civil suit.

28. Mr. Momanyi on the other hand submitted that the offence of obtaining money by false pretences was proved to the required standard. He pointed to the evidence of PW1 and PW2 who were the victims of the offence which he stated was corroborated by that of PW3, PW4 and PW5 in that respect.

29. There is no doubt that the offence of obtaining by false pretences cannot relate to a future representations as was held in **R *v.* Dent [1955] 2 All ER 806** that:

"…,we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law."

30. The court also went ahead to state that:

"It is clear from the authorities that the law does not seek to divide the future meticulously from the present… It has so far not been necessary to determine where the dividing line between present and future is to be drawn. The reason for this is, we think, that there can in the nature of things be few promises intended to be performed immediately which do not import some statement about the promissor's readiness to perform his promise

…

The point about readiness depends of course on the circumstances of the case. It is not inevitably excluded by the fact that the promise is to do an act some time ahead, for the act may be one which makes it necessary to get ready some time before…; for the Lord Chief Justice had earlier in his judgment adopted as the governing principle the statement …. That a promise to do a thing in future may involve a false pretence that the promissor has the power to do that thing".

31. From the foregoing decision, a division between the present and future representation may not be clearly demarcated and that therefore the circumstances of a case should determine whether the representation amounts to a false pretence in the present notwithstanding a future connotation.

32. With that in mind the court must now reevaluate the circumstances of the case before it. PW1 testified that she met the Appellant on 5 th November, 2007 when they discussed the importation of a motor vehicle. On the following day she went back in the company of PW3 and after discussions they agreed on a sum of Kshs. 645,000/- which included comprehensive insurance and all importation charges. She proceeded to Equity Bank where she paid the amount agreed on into an account number 0180291251512 belonging to Procure Kenya Ltd. She produced an account statement detailing the transaction. She testified that on the same day she went back to the Appellant's office where she was shown a sale agreement which she signed and PW3 acted as a witness. She recalled that the name on the agreement was Wheel and Heels Co. Ltd instead of Procure Kenya Ltd but when she enquired as to the discrepancy she was informed that it was the same company and a receipt was issued by Procure Kenya Ltd. She received the agreement on 9th November, 2007. PW1 then detailed how the Appellant thereafter became elusive leading her to report the matter to the police.

33. PW2 on her part testified that she met the Appellant on 12th November, 2007 after being introduced to her by PW1. They discussed her purchase of a vehicle and an agreement was signed for a price of Kshs. 655,000/- between her and Procure Kenya Limited. She testified that she made two payments on 22nd November 2007 (Kshs. 297,000) and 30th November, 2007(Kshs. 357,500). She produced bank statements evidencing the same. She testified that on 23rd November, 2007 she gave the Appellant 10 days to deliver the vehicle. This did not come to fruition and she too reported the matter to the police.

34. In making a determination on what nature of representation the instance case discloses, I seek guidance in Lord Wilberforce's speech in **British Airways Board *v.* Taylor[1976] 1 WLR 13** in which he said:

> ***"My Lords, the distinction in law between a promise as a future action, which may be broken or kept, and a statement as to existing fact, which may be true or false, is clear enough … Everybody is familiar with the proposition that a statement of intention may itself be a statement of fact so capable of being true or false. But this proposition should not be used as a general solvent to transform the one type of assurance with another: the distinction is a real one and requires to be respected, particularly where the effect of treating an assurance as a statement is to attract criminal consequences."***

35. It is clear that the signing of the contracts between the Appellant and the complainants was more than a statement of intentions and was by itself a statement of the fact that the Appellant would deliver the vehicles to the complainants in the stipulated time frame. This was clearly a present representation as the promise to deliver was given in real time upon the payments to him. There was no statement or an agreement that the vehicles were to be delivered in a future time. Needless then to state is that the circumstances of the case fall within the scope of the definition of the offence under Section 212 of the Penal Code. I cannot belabor to restate that the Appellant did obtain the sums of money paid to him through false pretences. He conducted himself as if he was in a position to perform his portion of the obligation, namely to deliver the vehicles whereas he knew he would not.

36. The sum total of my findings is that Counts I and II were proved beyond a reasonable doubt and the conviction thereof was safe. However, for the afore stated reasons, I quash the conviction in Counts III to VIII.

37. With respect to sentence, counsel for the Appellant submitted that the offence of obtaining money by false pretences is a misdemeanor which should attract a fairly lenient penalty. That instead, the trial court imposed a fine of Kshs. 200,000/- or a jail term of two years and further ordered that the Appellant pays compensation of Kshs. 930,000/- in default serve three years jail term which was manifestly harsh, unlawful and in contravention of the Penal Statute. He relied on the case of **Francis Mwangi & another *v.* Republic [2015] eKLR** to buttress this submission.

38. Section 313 of the Penal Code provides that;

> ***"Any person who by any false pretense, and with intent to defraud, induces any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write any name or impress or affix any seal upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, is guilty of a misdemeanor and is liable to imprisonment for three years."***

39. It is my view that in the circumstances, the penalty imposed was not only lenient but reasonable. In as much as the law provides for compensation, I set aside the order for the same having regard that a civil suit was commenced under which redress for the amounts due was successfully canvassed. It is so ordered.

DATED and DELIVERED this 11th day of October, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Odongo for Appellant.

2. Miss Nyauncho for the Respondent.