



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 180 OF 2014
BETWEEN
CYRUS BARASA WANJALA.....APPELLANT
AND
REPUBLICRESPONDENT

(Being an appeal from the Judgment of Hon Mr. Kwambai, R.M. delivered on 21.11.2014 in Butali Court Criminal Case No. 564 of 2013)

J U D G M E N T

Introduction

1. The appellant herein was arraigned before the SRM's Court at Butali Charged with the offence of obtaining property by false pretence contrary to Section 313 of the Penal Code. The particulars of the offence are that on the 8th day of November, 2010 at Matsakha area, Matsakha Sub-Location in Kakamega North District within Kakamega County, with intent to defraud obtained a cow valued at Kshs.17,000/= , the property of CHRISTINA WAMIRU [by] falsely pretending you will give her the money, an information you knew to be false.
2. The appellant pleaded not guilty and the case went to trial during which the prosecution called 5 witnesses who testified against the appellant.

The Prosecution Case

3. The facts of this case are brief, some are undisputed, others are disputed. The undisputed facts are that the appellant herein who is a cattle trader "purchased" one Fresian cow from the complainant, Christina Adam Wamiru who testified as PW1. This was on 08.11.2010. The appellant in the company of one Joseph Kisa Kasuti, PW2 went to the complainant's home at about 5,30pm. After seeing the cow the appellant agreed to buy the cow at ksh.17,000/=. Because it was late, the appellant could not drive the cow away, but on the following morning the appellant returned to the complainant's home in the morning and drove away the cow. According to PW1, the appellant was to pay the complainant after selling the cow. Again, according to PW1, the appellant never paid the money and went into hiding until 24.08.2013 when he was spotted at Matete Market and reported to the authorities. The appellant was arrested and charged.
4. PW2 was Joshua Oyando, a worker at PW1's home. He confirmed that the appellant went to the home

of the complainant on 08.11.2010 seeking to buy a cow. After agreement the cow was driven away the following morning. PW2 assisted in giving the appellant the cow. According to PW2 the appellant did not pay for the cow, thus forcing PW1 to report the matter to the police. PW2 confirmed that he was present at the complainant's home in the evening of 08.11.2010 and in the morning of 09.11.2010 when the cow was driven away from the home of the complainant by the appellant.

5. Joseph Kisa Kasuti testified as PW3. He buys and sells cows. He testified that on 08.11.2010, he informed the appellant that PW1 had a cow for sale. He accompanied the appellant to the home of PW1 on 08.11.2010 where the appellant agreed to buy a Fresian Cow from PW1. PW3 confirmed that the agreed purchase price was kshs.17,000/= but he could not say how the appellant took away the cow. It was much later that complainant told him the appellant had not paid for the cow. He advised PW1 to make a report to the authorities.

6. During cross examination, PW3 testified that he left PW1 and the appellant still negotiating for the cow on the evening of 08.11.2010. One June Inzayi Senior Assistant Chief of Matsakha Sub-Location testified as PW4. He testified that he was aware when the cow was taken from PW1's home. He also testified that late after PW1 had made a complaint to him. That the appellant had not paid for the cow, he telephoned the appellant who admitted he had not paid for the cow and asked to be given 3 months within which he would pay. When he failed to pay, he was reported to the police. Arrested, charged and arraigned in court. The prosecution closed its case after PW4 testified. Upon careful consideration of the prosecution evidence, the trial court ruled that the appellant had a case to answer and put him on his defence.

The Defence Case

7. The appellant testified as DW1. His only witness, Imbiakha Mbagaya, testified as DW2 while agreeing with the fact of the purchase price for the cow, the appellant testified that on the evening of 08.11.2010, he negotiated with PW1 for purchased of her cow and that on that same evening,. He paid her the sum of kshs.17,000/=. According to the appellant he counted Kshs.17,000/= in cash, gave it to Kasuti to counter check for accuracy, received it back and then gave it to PW1 who took it to the house. On the morning of 09.11.2010 at about 9.00am he re turned to the home of PW1 in the company of DW2 and with PW1's permission and consent, drove away the cow, being helped by PW2 until they reached the road. The appellant stated he was shocked when in August, 2013 he was apprehended on allegations of not having paid PW1 the sum of kshs.17,000/= for the cow he bought on 08.11.2010. The appellant denied committing the offence.

8. DW2, Imbiakha Mbagaya supported the appellant's side of the story only adding that during cross examination that the appellant also asked to count the money before the money was paid to PW1. This was after Kasuti had counted it.

Judgment of the trial court

9. After carefully considering the evidence on record the learned trial Magistrate isolated three issues for determination

- a. Whether the complainant owned any cow;
- b. If the answer to (a) above is in the affirmative, then did the accused purchase the cow and if so, if any consideration was paid.
- c. Whether the accused took the said cow and
- d. Whether the prosecution has proved their case beyond any reasonable doubt.

10. The trial court answered all the questions above stated in the affirmative found the appellant guilty as charged and convicted him accordingly. The appellant was fined kshs.5,000/= in default to serve 3

months imprisonment

The Appeal

11. Though the appellant paid the fine he was dissatisfied with both conviction and sentence and therefore filed this appeal on 05.12.2014 on the basis of 10(ten) grounds. He has questioned the sentence imposed on him by the trial court and has also complained that the learned trial Magistrate failed and/or refused the appellant's defence. The appellant has also pointed out that the prosecution evidence on which the learned trial magistrate based his finding of guilty was not only contradictory but that the evidence of PW4 in particular was hearsay. Finally, the appellant raised the issue of the prosecution's failure to call the arresting or investigating officer to attend court to shed light on why the appellant was arrested and charged. The appellant prays that his appeal and the sentence imposed upon him set aside.

Submissions

12. This appeal was canvassed orally before me on 30.01.2017 though the appellant had filed his written submissions prior to the hearing. During his submissions, the appellant reiterated his defence during the trial and maintained that he paid the entire kshs.17,000/= to PW1. He also maintained that he paid PW1 in the presence of Kasuti who also counted the money before the amount was handed over to PW1.

13. On his part, Mr. Oroni Senior Prosecution Counsel opposed the appeal and urged the court to make a finding that the evidence against the appellant remained shaken throughout the trial and therefore that there is no reasons why the conclusions reached by the trial court should be disturbed. He urged this court to dismiss the appeal on both conviction and sentence.

Analysis and Determination

14. From the record, one of the issue's that arises for determination is whether the appellant paid the kshs.17,000/= to PW1 in exchange for the cow sold to the appellant on 08.11.2010 and delivered on 09.11.2010. The other and more critical issue is whether the ingredients of the offence of obtaining were established.

15. With regard to the first issue, I am satisfied from the evidence on record that the appellant did not pay the sum of Kshs.17,000/=to PW1as alleged by the defence. The appellant told the court in his defence that he counted kshs.17,000/= in cash, passed it on to his colleague Joseph Kisa Kasuti who also counted it before passing the money PW1 in the presence of the said Joseph Kasuti,Imbiakha Mbagayi, Joshua Oyando and PW1herself. Kasuti gave evidence for the prosecution as, PW3 and in part of his evidence in chief Kasuti stated;-

“.....we later went with the accused to the complainant house to negotiate for the cow. The complainant said she wanted kshs.17,000/= for the ashier cow. They argued with the accused. I do not know how he took the cow. But later I met the complainant who told me that she has not been paid, and I advised her to take necessary steps.”

16. During cross examination, Kasuti stated that following in part of the cross examination;-

“you are the one who took the cow. I only took you to her house. When you were given the cow I was not there. I took you to the complainant's house and I left you when you were still negotiating..... I don't know if you paid for the cow, but I believe you have not because you are in court.”

17. During re-examination, Kasuti stated.” I did not see the accused paying for the cow.”

18. Joshua Oyando, PW2 who was also present on 08.11.2010 had this to say about the payment allegedly made by the appellant to PW1;-

“.....These people were Barasa and one called Kasuti. They negotiated for a cow, and when they agreed, Barasa came the following day to collect.; later Barasa never gave the complainant money after selling it. Later after 6 months and on a Saturday I met the accused who told me that he was bringing her money. The complainant said she wanted the entire money i.e. kshs.17,000/= but Barasa said he had a half of it so he opted to see her later. But he failed and started evading us.”

19. So what does the above evidence show? In my considered view the evidence given by both PW2 and PW3 corroborates PW1's testimony that the appellant did not pay for the cow on 08.11.2010 as alleged. From the appellant's sworn testimony and during submissions, Kasuti was a good friend of the appellant and there is no hint from the record that Kasuti was lying against the appellant. Nor does the appellant also suggest that Oyando, PW2 was lying to the court about the payment. In effect the prosecution evidence completely demolished the appellant's contention that he paid for the cow on 08.11.2010. when the appellant cross-examined PW1, her response to some of its questions put to her was;-

“ when you were taking the cow, Kasuti was not there.I only gave you the cow to sell because I knew Kasuti as a trader in cows. I gave the cow on the strength that I knew Kasuti.”

20. From the above, the first issue is settled in favour of the respondent to the effect that the appellant did not pay for the cow as alleged. In any event, PW4 stated that when the appellant was eventually taken to him he(appellant) undertook to pay the money to PW1 within 3 months, but he never did so, thus prompting PW1 to report the matter to the police.

21. The second and more complex issue is whether the ingredients of the offence of obtaining were proved. In other words, and as asked by the trial court, did the prosecution prove the case against the appellant beyond reasonable doubt. Section 312 of the Penal Code, Cap 63 Laws of Kenya defines false pretence in the following terms:-

“312any 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.”

22. Section 313 defines the offence of obtaining by false pretence in the following words;-

“313 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.”

23. So to prove the offence the prosecution has to prove that the appellant made a representation by word or deed, about PW1's cow since a cow is capable of being stolen and that he took the cow with the intention of defrauding PW1 of the cow. The facts are clear in this case. The appellant who is a cow trader went to PW1's home after being led there by Kasuti, PW3 and from the evidence of both PW1 and PW2, the appellant took the cow on the understanding that he would pay PW1 after selling the cow. Though the appellant sold the cow, his intention was not to pay PW1 but to defraud her of her cow. PW2 told the court that six months down the line he met the appellant who was still planning to pay PW1, and even after that, the appellant did not carry out the intention of paying PW1. PW4 also testified that when the appellant was finally apprehended in August, 2013, he was still talking of paying PW1. Then he failed to pay. Clearly the appellant had no intention of paying for the cow. His intention was to defraud PW1.

24. I am therefore satisfied that the prosecution proved its case against the appellant to the required stands.

25. Finally, I have considered each ground of appeal raised by the appellant and find no merit in the same. In particular the appellant's complaint that the trial court did not consider his defence has no basis. In any event, I have myself reconsidered the defence and find that the same did not offer any challenge to

the prosecution case against the appellant.

26. In conclusion, I am in agreement with prosecution counsel that the appellant's appeal lacks merit on both conviction and sentence. In fact the sentence meted out to the appellant was extremely lenient to say the least. The appeal is accordingly dismissed in its entirety. The appellant has right of appeal to Court of Appeal within 14 days.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 14th day of February, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

presentfor Appellant

Mr. Ng'etich (present).....for Respondent

Mr. PolycapCourt Assistant.