



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 2 OF 2014

DICKSON ORUKO NYAWINDA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

(An appeal from the Judgment and conviction by Hon. S. M. Wahome delivered on the 30th December, 2013 in Criminal case No. 48 of 2010, REPUBLIC VRS DICKSON ORUKO NYAWINDA)

The appellant, DICKSON ORUKO NYAWINDA was charged with the offence of obtaining money by false pretence contrary to section 313 of the Penal code.

The particulars were that;

“On the 7th day of January, 2010 at Mombasa city within Coast Province, the appellant with the intent to defraud obtained from PETER MBOGHO MWANGOMBE Ksh 2,165,500 (two million, one hundred and sixty five thousand, five hundred only) by falsely pretending that he was in a position to supply him with 1000 bags of maize, a fact he knew to be false”.

The appellant pleaded NOT GUILTY and the matter proceeded to full hearing whereby he was found guilty and convicted for the offence. The appellant was then sentenced to serve one year imprisonment. Upon being aggrieved with the said conviction and sentence, the appellant filed an appeal seeking to have all these orders set aside and he be set free.

In his memorandum of appeal, the appellant cited the following grounds (verbatim).

1. That the learned magistrate erred in law and in fact in failing to take into account the fact that the trial/prosecution had not been sanctioned by the Attorney General/Director of Public Prosecution as provided by the law.
2. That the learned magistrate erred in law and in fact in ignoring to take into account all or the entire evidence placed before him and proceeded to rely solely on the evidence presented by the prosecution;
3. That the learned magistrate erred in law and fact when without support referred to DW2 and 3 as coached witnesses and Dw1 as a liar , yet same evidence went uncontested at cross examination.
4. That the learned magistrate erred in law and fact when he failed and or declined to treat the sum received as a whole that is ksh 3,225,000 and instead dealt with partial amount of Ksh 2,165,500 thereby failing to appreciate the whole intention of the transaction.

5. THAT the learned magistrate erred in law and in fact when he ignored the partial supply of 500 bags of maize from the original order of 1500 bags which totally ignored the price per bag and the original agreement thereby misleading himself.

6. That the learned magistrate erred in law and in fact in making a finding that the appellant had intended to defraud the complainant by relying only on withdrawals and not events leading to deposit and the entire transaction as a whole.

7. That the learned magistrate erred in law and in fact when he failed to appreciate that the appellant as an advocate was not in business of selling maize and never indirectly or directly negotiated the transactions or sale.

8. That the learned magistrate erred in law and in fact when he held that no government office or court would be open on 1st January, and that no one would visit the premises and more importantly that no transaction or meeting of an advocate and clients would occur on that particular day and use that to convict.

9. THAT the learned magistrate erred in law and fact when he relied on obvious lies not confirmed or corroborated but advanced by PW1, PW2 and PW3 in convicting the appellant.

10. THAT the learned magistrate erred in law and in fact in basing the conviction on consent recorded and failure to honour the same instead of being satisfied on the ingredients of the offence charged.

11. That the learned magistrate erred in law and in fact when he alleged that the appellant had converted or stolen the money or used the money and further alluded that the appellant made pretences of paying money to his clients to support his wrongful conviction and failed to appreciate that withdrawals led to purchases and supply.

12. That the learned magistrate erred in law and in fact when he wandered outside the offence and its ingredients to accuse the appellant of stealing and conversion and lying and coaching witnesses.

13. That the learned magistrate erred in law and in fact in failing to find that the prosecution had not sufficiently proved its case beyond reasonable doubt when the prosecution failed the following tests by withholding evidence;

(a) Availing the evidence and testimony of Nelly.

(b) Availing the evidence and testimony of Niche commodities or Grain bulk.

(c) Availing the document or evidence of any utterance used by the appellant to confirm existence of maize leading to fraud.

(d) Evidence that the appellant had maize and was not acting as an advocate only.

(e) Evidence of how the complainant received the account number and Evidence of negotiations between the appellant and the complainant

14. The learned magistrate erred in law and in fact in convicting the appellant of the offence of obtaining Ksh 2,165,500 by false pretences which is not true.

15. That the learned magistrate erred in fact when he arrived at the conclusion that the overall intention was to defraud and that there was no maize while the following is admitted:-

(a) That Ksh 3,225,000 was deposited and received by the appellant.

(b) That 500 bags was sold and delivered from the amount deposited

(c) That the appellant never received and or obtained ksh 2,165,500 as a lone figure from the complainant but a total sum of ksh 3,225,000.

(d) That the original agreement defined and agreed and admitted by the parties was that a bag was to be prized at ksh 2,150 for an order of 5000 bags and not 1500 bags.

(e) This only 1500 bags were ordered thereby varying the original agreement;

(f) That the sale agreement showed parties not including the appellant.

This being the first appeal, it is the duty of this Honourable court to look at the evidence that was adduced before the trial court, evaluate and analyse it a fresh to be able to arrive at its own conclusion, while warning itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did to be able to tell their demeanor (see the case of OKENO VRS REPUBLIC (1972) E. A. 32).

The prosecution called four (4) witnesses.

Pw1, PETER MBOGHO MWANG'OMBE, gave evidence that on 7th January, 2010 he was informed by his manager (Pw2 herein) that he had found maize for sale from the appellant. Pw1 talked to the appellant who told him that he had 1,500 bags of maize which he was selling at Ksh 2,150 per bag. Pw1 asked the appellant for his account for payment and he made payment on it twice as follows. He first paid Ksh 2,165,500 and then Kshs 1,059,500 by depositing the amount at Equity Bank, Voi; in the name of D. N ORUKO & COMPANY. Pw1 identified the bank deposit slips to confirm this (Exhibit P1 and 2 respectively). Pw1 sent 3 trailers to collect the maize but they only collected 500 bags of maize. He also identified a delivery note 007 dated 8.1.2010 for 500 bags of south African white maize (Exhibit P3). That, later he tried asking the appellant for the balance of the maize but in vain. He then reported the matter to Voi police station and the accused was arrested.

In cross examination, Pw1 told court that the first time he met the appellant was when he was arrested. He said that he had never been to the appellant's office and had only talked to him when they were with his manager. He said that he got the appellant's account number through SMS from his phone on 7.1.2010 and sent his worker to deposit the money in his account. He never asked about the go down and only learnt later that the appellant was an advocate.

Pw2, EASPER WALELE ALISON testified that he worked for Chaka Distributors as a transport manager. He said that on 6.1.2010 at about 5.30 pm, he was in Mombasa when Pw1 talked to him and asked him to meet Hare at Gapco Petrol station so he could take him to the appellant. He said he met Hare and they went to meet the appellant in his office where he showed them documents of the imported maize that was in Grain Bulk. Pw2 went on to state that the appellant told them he needed some money and he called Pw1 to confirm to him that the appellant had maize. Pw2 also said that Pw1 asked the appellant to send him the bank account No. and he deposited the money on this account with Equity Bank. He said that on 8.1.2010 500 b bags of maize was loaded but after this, they waited for more delivery but in vain. That 1000 bags of maize was never delivered.

Pw3, HARE NDICHO, told court that he deals with cereals. He testified that on 30.12.2009 he was informed by one Nelly, a broker, that he had maize to sell. He went to Nelly and he took him to Shimanzi where he saw maize in the go-down of Grain bulk. That Nelly then took him to the seller of the maize opposite Gapco Petrol station in an office in a storey building which houses Kilindini secondary school. He talked to the seller who demanded that money be deposited in his account before he could release the maize. He then called Pw1 who had wanted to purchase the maize and informed him about it. That PW1 asked for the sellers account No. either at Equity or Barclays bank. The seller gave the Equity account. Pw1 sent Pw2 to Pw3 so he could show him the maize and seller, which he did. That upon asking, Pw2 was shown the importation documents by Pw2, Pw1 deposited ksh 3,220,000 in the seller's account at Equity Bank and on 8.1.2010, only 500 bags of maize was delivered. Pw3 said that a sale of 1000 bags remained and they were never supplied. Pw3 identified the appellant as the said seller. He said that he told him never to call him and switched off his phone. Pw3 told court that on 20th January, 2010, he met

the appellant at NSSF building and he called Pw2 who came with police and they arrested the appellant.

Upon being cross examined by the appellant, Pw3, said that he met the appellant on 4.1.2010. He said that he was never called by the appellant but he was with Nelly when they took him to the go down of Grain bulk to see the maize on 4.1.2010. He also said that the appellant gave him his account number vide [0718 *****] which is his (appellant's)mobile number.

Pw4, NO. 62020 Corporal LAWRENCE SHUMA, told court that he was the investigating officer in this case. That on 12.1.2010, he received a report from PETER MBOGHO MWANGOMBE who informed him that on 7.11.2010 he had got into a business transaction with the appellant to be supplied with 1500 bags of maize. According to the investigating officer , Pw1 told him that he had sent his worker one Hare to Mombasa where he met the appellant who showed him the maize at Shimanzi go-down. They confirmed to him that the maize was there to him. He also sent Pw2 who confirmed to him the existence of the maize. Pw4 testified that the complainant deposited Ksh 2,165,000 into account No. [Particulars Withheld] on 7.1.2010 vide transactions No. DC-51216 and a further ksh 1,059,500 in the same account vide transaction No. 79050 on 7.1.2010. That the complainant then sent his trucks to Mombasa and on 8.1.2010, only 500 bags of maize were loaded on motor vehicle registration No KBJ 847 G /ZC 3297 and delivery note No. 007 dated 8.1.2010 was issued

Pw4 said that the complainant reported that the balance of 1000 bags of maize was never delivered and he reported the matter. That the appellant was arrested on 20.1.2010 and was found with two withdrawal slips dated 15.1.2010 and 19.1.10. He investigated the account No [Particulars Withheld] at Equity Bank, Mombasa and confirmed from the statement that on 7.1.2010 there were cash deposits of Ksh 2,165,500 and ksh 1,054,500 on this account. He charged the appellant with the offence before court. He produced a bank deposit slips for transaction No DC -51216 as exhibit P1, the bail deposit for transaction No. 79050 as Exhibit P2, a delivery note for 500 bags of maize dated 8.1.2010 No. 007 as Exhibit 3, the two withdrawal slips that were found on the appellant dated 15.1.2010 and 19.1.2010 as exhibit P4 and P5 respectively, and a bank statement as Exhibit P6.

The prosecution closed its case and the court found that a prima facie case had been established against the appellant and placed him on his defence.

The appellant opted to give a sworn statement in defence and called two (2) witnesses.

The appellant, an advocate of the High court of Kenya said that he had been practicing as a sole proprietor in Mombasa representing business men and traders dealing with commodities and had never traded in any commodity or with a company of such nature. According to the appellant, on 1st January 2010, his clients RAJAB BAKARI and HASSAN NGARE approached him under a company by name RAJAB CONTRACTORS which had a contract in Voi to supply cereals. The appellant said that he could not deal with the matter as he was headed to court. He said that at 11.00 am, he went back to his office where he found Rajab waiting. That he briefed him that the company had imported maize which they wanted to supply to the prospective buyers. The applicant asked for the documents and Rajab told him that they were with Hassan and the maize at a go-down at Shimanzi. He said that Rajab wanted him to draw an agreement and receive the money on their behalf. The appellant then asked Rajab to negotiate his fees but he told him that they had concluded negotiations on the price. The appellant said that Rajab left and later came back with 5 others among them Pw2, Pw4 and a lady. They informed him that they had negotiated the price of Ksh 2,150 per bag of maize and were ready to enter into an agreement. I then asked the buyers if they had seen the maize. He agreed to give his account number [Particulars withheld] of Equity Bank to his client Rajab Bakari. He also said that the phone No. 0728 *****]which Pw3 said was the one on which the account number was, belonged to Rajab and this is what was sent to Pw1. The appellant said that he only acted on the matter as an advocate and asked the parties if they would sign an agreement which they asked him to draft but was never signed by the parties (Exhibit Dw1). The appellant testified that on 8.1.2010 he was informed and he, Bakari and Hassan confirmed that ksh 3,225,000 was on his account, which he said was enough to pay for 1500 bags of maize. He said that on 9.1.2010, he withdrew ksh 75,000 and he gave to Rajab Bakari who signed the receipt. On 11.1.2010, he was again told to withdraw ksh 1.2 million for payment of a further 1200 bags of maize, which he did and

Bakari again signed for the receipt of the same. And on 15.1.2015, they asked him to withdraw kshs. 650,000/= which he was asked to give to Bakari who signed acknowledging receipt of the same.

The appellant said that Pw1 called to inform him that he had not received 1000 bags of maize but acknowledged receiving 500 bags. That he told him he was not the seller and did not know the source of the maize. He called his clients who informed him that the prices had varied to ksh 2300 per bag hence they were experiencing difficulties. The appellant denied accompanying anyone to the go down or being a director of Niche commodities. He also denied ever being a broker for anyone in a sale transaction. He then said that Pw1 and 2 kept calling him but his hands were tied. And on 21.1.2010 he was arrested by the police, who included Pw4 and charged with stealing by servant, a charge that was later amended to obtaining by false pretences. He admitted that they recorded a consent on 7.6.2010 whereby he was not admitting to failure to deliver but that he had received the money. He denied entering into any deal with intent to steal or defraud and said that if he failed as a lawyer, he should have been taken to the disciplinary commission under the AG's office.

Dw2, JOHN MOSES ODHIAMBO, testified that in December, 2009, he was working as a clearing agent at the port of Mombasa. He said that he met Hassan and Rajab who told him that they wanted to sell their maize and had a client who was insisting on a written agreement through an advocate. That he introduced them to the appellant and Bakari told him that they only wanted the appellants account No which they sent to their client. That after 3 days the appellant told him that the agreement was still in his office and the money was on his account. He said that the appellant told him that Bakari wanted money to go and buy the maize. He was later told by Bakari that they had finalized the matter and were going to load the maize.

Dw3, ALEX OCHIENG ABUYA, testified that early in 2009, the appellant called him to his office where he found him with Olwa and Bakari. That Bakari left and came back to the office with a paper which had an account number which was sent to someone. He said Bakari was very happy and on asking him why, he said that he had a deal for the sale of maize and wanted an advocate to draw an agreement and an account. And after sometime, Dw3 learnt that the appellant had been arrested.

In his judgment, the trial magistrate had this to say;

“.....it is clear to the court that the accused wanted to defraud the complainant and indeed he succeeded. The foregoing is as a result of the following reasons;

(i) The accused received the money for 1000 bags of maize but failed

(ii) To supply or refund the money.

(iii) The accused in his evidence told the court that on 1st January 2010, he was going to court when he met Bakari and Hassan and he told them to wait for him in his office which they did and they later met. The court even repeated the issue of the date on cross examination and the accused insisted that it was on 1st January, 2010. It is a matter of judicial notice that 1st January is always a public Holiday which is an international as heralding the new year. How would an advocate make such a mistake? The reason is simply because he was lying.

(iv) The witnesses called by the accused were dishonest and gave false evidence. Dw2 alluded to December, 2009 while Dw3 committed himself to early 2009. The two defence witnesses were coached because the events in issue relate to January, 2010.

(v) I have no doubt that the accused converted or stole the money or used the money yet he made more pretences that he had paid it to Bakari vide D-exhibit 2. The three acknowledgments are dated 15.1.2011, 11.1.2011 and 9.1.2011. The accused is an advocate an such a good is only possible when a person is deliberately misleading the court. There is nothing in the bank statement to attest to those withdrawals which are

alluded to by the accused.

(vi) The accused as an advocate filed consent in court dated 7th June, 2010, wherein he agreed to pay or refund the ksh 2,165,000 within 4 months starting from 30th June, 2010 to 30th September, 2010. The accused had no intention of making good the promise and has up to date not paid a cent because he intended to defraud the complainant.

Going by the above reasons, I find the defence very wanting and I dismiss it. The evidence by the prosecution is candidI have no doubt that from all the above stated reasons, the prosecution has proved its case beyond any reasonable doubt against the accused and he is convicted as charged with obtaining money by false pretence.”

In determining the appeal, I have re-examined and analysed the evidence on the record by the trial court with regard to the grounds of the appeal and submissions by both counsel. I have established that the following are not in dispute;

- (a) That the appellant received ksh 3,225,000 from Pw1 which was deposited into his account No. [Particulars Withheld] at Equity Bank, Mombasa.
- (b) That the said sum of money deposited was for the purchase of maize as had been agreed upon.
- (c) That Pw1 paid for 1500 bags of maize but was only supplied with 500 bags of maize.
- (d) That to date, Pw1 has never been supplied with the balance of the maize bags (1000) nor refunded the balance of the money he paid for the maize in total.
- (e) That the appellant was involved in the said transaction.

In evaluating and analyzing the record of proceedings that of the trial court, I have also established the following issues for determination.

- (a) Whether the appellant obtained money by false pretending that he could supply 1000 bags of maize to Pw1 of a matter of fact.
- (b) Whether the appellant's defence was plausible.

With regard to the first issue, it is the evidence of the prosecution's witnesses that the appellant received a total of Ksh 3,225,000 from Pw1 through his account with Equity Bank to supply him 1500 bags of maize.

That the appellant only supplied 500 bags of maize and the balance of 1000 bags was never, and has never been supplied to date. It also came out in the prosecution's witnesses evidence that the 1000 bags of maize were worth Ksh 2,165,500 which was paid to the appellant and has never been refunded.

According to the appellant, while he acknowledges having been involved in the transaction, he testified that it was in his capacity as an advocate and was acting for his clients who had gone to him requiring his services.

From the facts which have come out from the evidence of the prosecution's witnesses, it is clear that the complainants grievance is about a balance of maize bags which were not supplied despite having paid for them. The evidence clearly shows that there was a contract, a part of which was breached. This is because, the complainant is confirmed to have paid kshs. 3,225,00 for 1500 bags of maize but only 500 bags of maize was delivered to him.

The 1000 bags of maize which according to the particulars of the charge are claimed to be what the

appellant is alleged to have pretended to be in a position to supply what had not or could not be supplied.

From these facts of the case before the trial court, it cannot be seen that the appellant set out to cheat Pw1, having supplied him with 500 bags of maize, a part of what was agreed in the contract.

The case is one where a party should be seeking specific performance of the contract, by requiring the other to complete his part of the contract or for a refund of the cash for the goods or services that were never delivered.

There were also noted contradictions in the evidence of the prosecution's witnesses. For instance, Pw1 told court that it was manager, Easper Walele (Pw2) who told him that they had found maize for sale from the appellant. Pw2, on the other hand, testified that Pw1 called to tell him to meet one Hare at Gapco petrol station so he could take him to the appellant near Kilindini High school, and that he had maize. The evidence of Pw2 was confirmed by that of Pw3 who said that he was the one who called Pw1 and informed him about the maize the appellant had for sale and Pw1 talked to Pw2 to confirm the existence of the maize.

There was also evidence that Pw2 saw the maize at the go-down at Shimanzi. But from the evidence of Pw2, he only saw the documents but asked Hare to confirm the existence of the maize as he rushed to the port.

With regard to the appellant's defence that he had only acted as an advocate for his client in the transaction, hence the depositing of the said money into his account, I find that this was not adequately displaced by the prosecution evidence.

From the evidence of Pw1, it came out during cross examination that the delivery note (Exhibit P3) which was furnished at the delivery of the 500 bags of maize that it did not set the name of the appellant as a company associated with him.

Also, Pw2 when cross examined told court that the appellant gave him people who took them to the Grain bulk to see the maize. There was no evidence that the appellant went and showed him the maize he was selling at the grain bulk go down.

Pw3 also said that he was taken to Shimanzi and shown the maize at the go-downs of Grain bulk by one Nelly. With the appellant's defence that he was acting for his client Rajab Bakari and Hassan Ngure who were the suppliers of the maize, I find a doubt created in the evidence whose benefit ought to go to the appellant.

It is for the prosecution to prove their case beyond any reasonable doubt, and that doubt never shifts to the appellant, unless this is a law which states so. The trial magistrate's observation that after the appellant named Rajab Bakari and Hussein Ngure as sellers, he ought to have called them as witnesses is wrong, as it was for the prosecution to interrogate them and not the appellant.

To this end, I find that the evidence that was adduced before the trial court did not disclose a criminal offence and the matter ought to have proceeded as a civil suit. I hence find that the prosecution failed to discharge their burden of proof in the case.

For the reasons given herein, I come to the conclusion that the appellant's appeal has merit and succeeds. The conviction against him is hereby quashed and sentence of one (1) year imprisonment upon him set aside. The appellant is set at liberty unless lawfully held.

I also make the following order:

The complainant be and is at liberty to file a civil suit to recover the money paid out for the balance of 1000 bags of maize that were not delivered.

It is so ordered.

Judgement read, signed and dated this 10th March, 2017

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

Mr Magolo for the Appellant

Appellant – Present

C/clerk- Kiarie