



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 9 OF 2015

HASSAN ABDI ADENAPPELLANT

-VERSUS—

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. T.B. Nyangena**- Principal Magistrate dated 10th June 2014 in Nanyuki Chief Magistrate's **Court Criminal Case No. 558 of 2012**)

JUDGMENT

1. **HASSAN ABDI ADEN**, the appellant, and **AYUB MUTWIRI CHARLES** were charged before Nanyuki Chief Magistrate's court with the offence of **Obtaining money by false pretence, contrary to section 313 of the penal code Cap 63**
2. After trial they were both convicted as charged and were sentenced to pay a fine of Ksh.100,000 and in default to serve 18 months imprisonment. This appeal has been preferred by Hassan Abdi Aden who was dissatisfied with that conviction and sentence.
3. The prosecution's evidence in a nutshell was that the appellant in the company of Ayub Mutwiri Charles (who was also known as Karani) and third person who went by the name father Mugambi (but whose real name was Kimathi) obtained from John Mwirigi , the complainant Kshs. 700,000 by falsely pretending that they would sell him a lorry.
4. According to the complainant, it all began in October 2011 when the complainant met the appellant whom he was made to believe was an Ethiopian in the company of those two other persons, that is Karani and father Mugambi. The meeting took place at a Meru Hotel called Three Steers. They met severally thereafter. The complainant stated that the three persons showed him pictures of a lorry which they offered to sell to him at Kshs. 1.5 million. He did not retain the picture of the lorry. The three informed the complainant that the lorry was held at the Ethiopian boarder by Kenya Revenue Authority (KRA) for nonpayment of KRA's dues. That although the three requested the complainant to pay Kshs. 1 million to facilitate the clearance of the lorry at the boarder, the complainant offered to pay Kshs. 700,000. On 10th January, 2012 they all met in Timau at a bar and hotel called Kasurwa. Complainant had requested P W 2 John Muthomi, to accompany him as his witness. Complainant stated:

"I gave Muthomi (P W 2) the money to count. Karani counted the Ksh. 700,000.... Karani gave father Mugambi the money"

5. There was no written agreement about this exchange of money. The appellant and father Mugambi left and went to Nanyuki to deposit the money. Complainant was left with Karani who later disappeared from the Kasurwa bar and hotel leaving the complainant and his witness Muthomi. Complainant was unable to reach the three through their mobile telephone.
6. Complainant never got the lorry or the refund of the money he paid to the three. It is following that the complainant made the complaint to the police and the appellant and his co-accused Mutwiri were arrested, tried and convicted at Nanyuki Chief Magistrate's court.
7. P W 2 John Muthomi confirmed he accompanied the complainant to meet the three persons in Timau. He confirmed he passed on the Kshs. 700,000 to Karani. It is important to note that although the typed proceedings indicate that P W 2 said he passed on to Karani Ksh. 200,000, the actual fact is that the written proceedings in the learned Magistrate's handwriting shows that he said he passed onto Karani Kshs. 700,000. The mention of Kshs. 200,000 is in my view typographical error. P W 2 further stated that Karani passed the money onto father Mugambi who in turn passed it on to the appellant.

P W 2 on being cross-examined stated:

"I cannot remember how the Ethiopian (Appellant) was dressed. There was no mark on him that I could remember. I cannot remember that his teeth were rotten."

8. P W 3 Corporal Festus Musyimi, the investigating officer of the complainant's case said he arrested the Appellant after he was identified by the complainant.
9. The Appellant gave unsworn statement for his defence. He denied involvement in the offence and even denied knowing or dealing with the complainant. He said on the day he was arrested the police went to his house looking for a Somali person. When they saw him, the person in their company failed to identify him as the person involved in the offence. Nonetheless he was arrested and charged.
10. I am aware as the first appellant court this court is obligated to weigh conflicting evidence and draw its own inference and conclusions bearing in mind that that I have neither seen nor heard from the witnesses, see **GABRIEL KAMAU NJOROGE – V- REPUBLIC [1982-88]**.
11. I have considered the appellant's grounds of appeal and after so doing the same present the following issues to be considered:
 - a. **Whether the prosecution proved its case to the required Criminal Standard;**
 - b. **Whether the learned trial Magistrate erred in arriving at a finding contrary to the evidence.**
12. The first issue captures four grounds of the appellant's appeal. In those grounds appellant stated that prosecution failed to prove its case beyond reasonable doubt; its witnesses gave contradictory evidence; that the appellant was not properly identified; and that the complainant did not file a complaint at the police station against appellant.
13. Although the state oppose the appeal and submitted that P W 1 and 2 gave evidence which showed that the appellant was amongst those that falsely represented to the complainant (**P W 1**) that they had a lorry for sale and in that regard received from the complainant Kshs. 700,000/=, I will examine the evidence presented before the trial court to ascertain whether that was indeed so.
14. The complainant stated that he withdrew Kshs. 700,000 from his bank account which he holds at CFC Bank in Meru. The prosecution did not produce a withdrawal slip or bank statement to indeed prove that complainant did withdrawal the money he said he paid to the three persons as part payment for a lorry. That in my view was crucial and vital evidence that should have been availed to the court. This is the evidence that the charge against the appellant hanged on. It was essential to prove the complainant had the money he said he paid the three persons. Why was it

not proved by documentary evidence which was available?

15. On the day the money was said to have been given to the three persons there is inconsistency in the prosecution's evidence on whether or not Muthomi counted before handing it over to Karani. According to the evidence of the complainant on the material dated he handed over Kshs. 700,000 to Muthomi to count. The evidence of Muthomi to the contrary stated that he handed over the money to Karani.

16. The prosecution's evidence also had problems on the manner of identification of appellant before his arrest. There needs to be noted that there was no identification parade mounted up in respect of the appellant. The complainant stated in evidence:

"I identified the first accused (the appellant). I was not present when the accused persons were arrested.

.... There is a time Mwethiopian wanted to pay me Kshs. 50,000. He was arrested the second time from his house."

17. The investigating officer Corporal Fesuts Musyimi stated;

"I was accompanied by my colleague to Meru where we were shown the house of one of the accused The complainant called us and led us to the Ethiopian's (appellant) house and identified him to us."

18. If the complainant stated he did not identify the accused persons, who included the appellant, how then could the investigating officer state that it was the complainant who identified the appellant.

19. It will be recalled as reproduced above that the complainant said appellant, on being arrested offered to repay him Kshs. 50,000. The investigating officer on this stated:

"father Mugambi Karani (accused 2) and Mwenda offered to refund the money. Accused one (appellant) was not amongst them"

There is no doubt there is inconsistency in that evidence.

20. There was also inconsistency on the exact date the report of this offence was made to the police by the complainant. The complainant stated

"I reported to the police on 17/2/2012".

The investigating officer on the other hand said:

"I checked the OB and found that he (complainant) had reported on 17/2/12. Sorry the report was made on 2/2/2012."

How can there be such diversity on the date the offence was reported to the police? Was it indeed reported as stated?

21. When the complainant paid the money to the three people he stated that appellant and Father Mugambi took the money to Nanyuki. That they went leaving behind Karani in his and Muthomi's presence.

22. Muthomi on the other hand stated:

"They said they were to deposit at the bank in Nanyuki then come back we go (sic) for the lorry."

Muthomi did not mention that Karani was left behind by appellant and Father Mugambi when they went to Nanyuki. That contrary evidence is yet an example of inconsistent evidence.

23. When the complainant and Muthomi were left behind in Timau and when it seems they realized they waited too long for those who had gone to deposit the money to return they tried to call on phone those persons but they could not be reached. After a while those persons switched off their phones. Complainant also said he got to know the appellants real name when he sent him money through the 'Mpesa' mobile money transaction.

24. There was no basis laid out by the prosecution where by the complainant explained how he obtained the telephone number to which he sent money through Mpesa and more vitally whether the complainant before crime the was committed had spoken to the appellant using that same phone number. This would have eliminated the suspicion, which I entertain even as I reconsider the trial court's evidence that the complainant was not involved in the crime. Additionally prosecution should have led evidence to show the telephone numbers used by the complainant belong to the three the accused persons before court.

25. On whether appellant was correctly identified before being arrested and charged, I need to state that the appellant appeared before me and at the request of his Learned counsel, Mr. Chweya, opened his mouth and I did note that all his frontal teeth were stained. Muthomi (**P W 2**) on being cross examined stated when referring to the appellant:

"I cannot remember that his teeth were rotten."

This is a person **P W 2** spent some time with as they discussed the lorry to be sold to the complainant. He could not in my view have failed to note that appellant's teeth were rotten or stained when he was in his company.

26. The inconsistencies and lack of proper identification all lead me to find that the appellant's case may have been a case of mistaken identity. He was arrested because he was from the Somali community which closely resembles Ethiopian community in my view. No wonder appellant in his unsworn statement said:

"Police officers came to my house with one person. I did not know but (sic) who was looking for a Somali person. My neighbour referred him to me. The police asked him whether am (sic) the one and he was not sure."

27. It is because of the above that I find the Learned trial Magistrate erred in finding that the ingredients of **Section 313 of cap 63** were proved against the appellant. There was no proof beyond reasonable doubt that appellant was amongst those that falsely pretended with intent to defraud the complainant or that he was amongst those that received money from the complainant. As stated above there was also no proof that the complainant had the money he said he paid to those that defrauded him.

28. For the above reason the conviction against Hassan Abdi Aden is quashed and his sentence is hereby set aside. I order that Hassan Abdi Aden be refunded the fine he paid. To that extent the appellant's appeal succeeds.

Dated and Delivered at Nanyuki this 4th February, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

For state

For Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE