



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEL NO. 21 OF 2014

JOHN NJOGU NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Crim. Case No. 1002 of 2013 in the Chief Magistrate's Court at Milimani delivered by Hon. M. Kurumbu, RM on 20th February, 2014)

JUDGMENT

John Njogu Ngugi, the Appellant herein was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars of the offence were that on diverse dates between 10th February and 22nd March, 2013, along Tom Mboya Street in Njengi House in Nairobi, within Nairobi County, with another not before court, with intent to defraud, obtained Kshs. 656,000/= from Stephen Ndungu Karinde by falsely pretending that he was in a position to sell him a motor vehicle Reg. No. KBN 317 G, make Toyota Hiace Matatu, white in colour, a fact he knew to be false. At the end of the trial, the Appellant was found guilty, convicted and sentenced to two years imprisonment. He was dissatisfied with both the conviction and sentence and preferred this appeal.

He was dissatisfied that he was convicted when, although no exhibits were produced, evidence disclosed that all the money paid by the complainant was paid to a company's bank account for which he was not a director. He faulted the learned magistrate in convicting him when the prosecutor had not discharged the burden of proof to the required standard. In addition, he faulted the learned magistrate for shifting the burden of proof on him. Finally, it was his view that his sentence was harsh and excessive in the circumstance.

The Appellant made oral submissions in support of his appeal. He submitted that it was clear that he was not the owner of the subject motor vehicle. He was also not the seller nor was he a director of the company into which the complainant paid the purchase price. He was of the view that the police ought to have charged one, Miss Wanjira who was well known as one of the directors of Mutual Commodity Enterprises Limited which was selling the vehicle on behalf of its owner. According to the Appellant, he assisted the police in arresting the said Miss Wanjira but who was released from police custody in unclear circumstances. He faulted the prosecution for not producing any exhibit showing how the purchase price was paid and mainly, a Copy of Records from the Registrar of Companies to establish who the directors of Mutual Commodity Enterprises Limited were. He alluded that the prosecution was unable to prove that

he is the person who advertised for the sale of the vehicle. He further faulted the prosecution for not calling enough witnesses in proof of their case. He submitted that the prosecution had intimated to the court that they had 3 witnesses to call but closed their case after only the complainant testified. Finally, he submitted that on evaluation of evidence on record, the prosecution did not prove their case beyond reasonable doubt.

Learned State Counsel, Miss Atina opposed the appeal. She submitted that the prosecution had proved that it is the Appellant who obtained the entire sum paid from the complainant. Besides, the complainant was lured into buying the motor vehicle through an advertisement in a daily newspaper which bore a telephone number. The complainant called that number and it was answered by the Appellant. He was directed to go to Njengi House where he met the Appellant who introduced himself as a co-director of Mutual Commodity Enterprises limited, the company that was selling the vehicle on behalf of the owner. All through, the Appellant accompanied the complainant to his bank to withdraw the cash and thereafter deposited it into the account of the selling company. Furthermore, it was factual that the vehicle in question was neither in the name of the Appellant nor the Mutual Commodity Enterprises Limited. Therefore, by presenting himself as a co-director of the company, he knew he was not in a position to sell the motor vehicle. She also urged the court to take into account that although no documents were produced, the evidence of PW1 was entirely corroborated by the Appellant's sworn defence and was sufficient in proving the case to the required standard.

It is trite law that the evidence adduced by the prosecution in a criminal case must always support the particulars of the offence. In the present case, one key fact that the prosecution needed to prove was that the amount obtained and defrauded from the complainant was Kshs. 656,000/=. My calculation of the amounts obtained from the complainant and which could be accounted for by documentation was a total of Kshs. 636,000/=. The same was in tranches of Kshs. 500,000/=: 60,000/= and 76,000/=. Suffice it to say, a further sum of Ksh. 100,000/= was paid by cash and could therefore not be accounted for by documentation. It was then erroneous of the learned trial magistrate to convict the Appellant on the basis that the prosecution proved that the Appellant obtained by false pretences a total sum of Kshs.656,000/=. That of itself is an error that could be corrected through a retrial because, on its own, does not absorb the Appellant from the fact that he defrauded the complainant. It then behooves this court to look into whether or not the case meets the guidelines for ordering a retrial. In the case of **EKIMAT VS REPUBLIC [2005] 1 KLR, 182** the Court of Appeal held that:-

“A retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”

Also in **OPICHO VS REPUBLIC [2009] KLR, 369**, the Court of Appeal stated :-

“In general, a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it.”

From the facts of the present case, and on evaluation of the entire evidence, it is clear that the prosecution discharged its burden in proving all the elements of the offence of obtaining by false pretences. The Appellant was charged with obtaining money by false presentences. The words ***“false pretence”*** are defined under **Section 312 of Penal Code** as follows:

“Any representation, made by words, writing or conduct, of a matter of fact and which the person making it to be false or does not believe to be true is a false pretence”.

Obtaining by false presence on the other hand is provided for under **Section 313 of the Penal Code** as follows:-

“Any person who by any false pretence, 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”.

Under **Section 313**, where a person is charged with obtaining by false pretences, the prosecution must prove the following key elements.

1. That the accused obtained anything capable of being stolen, or
2. Induces any other person to deliver to any person anything capable of being stolen, or
3. Obtains the thing by false pretences and
4. With the intention to defraud.

In the present case, there is no doubt that PW1 on calling the number in the advertisement the call was received by the Appellant. It is the Appellant who ushered him into his office at Njengi House and who introduced himself as a co-director of the company that was selling the vehicle. He then instructed PW1 to deposit the purchase price into the account of Mutual Commodity Enterprises Limited in which he was a director. As fate had it, unfortunately, it turned out that the Appellant was not a co-director of the company. However, it was not the duty of PW1 at the point he was buying the vehicle to establish whether or not the Appellant was a co-director. He paid the monies in the belief that the Appellant was genuinely selling the motor vehicle. Therefore, although there was no formal agreement between the Appellant and PW1, by the conduct of the Appellant, PW1 paid the money into the account of Mutual Commodity Enterprises Limited. The Appellant's representation that he was in a position to sell the vehicle was false because he knew that after the money was paid would not be delivered to the owner of the motor vehicle. He thus made a false representation that he was in a position to sell the motor vehicle to PW1 specifically with the intention of defrauding him. It is true that the bank deposit slips, KRA deposit slips and the agreement were not produced as evidence. However, the Appellant gave a sworn statement of defence in which by word, admitted receiving PW1, informing him that he was selling the subject motor vehicle and more importantly, accompanying him to deposit the money into the account of Mutual Commodity Enterprises Limited. His defence was merely that since he was not a director of Mutual Commodity Enterprises Limited, could not be held accountable for the loss of the money PW1 incurred. Far from this, because it is him who made the representation to PW1 that he was in position to sell the motor vehicle by personally placing the advertisement for sale of the motor vehicle in the newspaper, and thereafter causing PW1 to pay for the vehicle whereas he knew that the vehicle would not be delivered to him as he was not the owner. In the absence of the latter, he had received the money knowing very well that he would not forward it to the owner of the motor vehicle. He was therefore deliberately defrauding PW1. It does not however matter that his business partner Milka Wanjira was not charged. He must on his part carry the burden of his omission and commission.

The circumstances of this court demands that in the interest of justice, a retrial should be conducted. This would serve justice to the complainant and the entire justice system. Unfortunately, the Appellant was charged sometimes in July, 2013. He was convicted on 20th February, 2014. It is expected that he on the verge of completing his sentence. As such, a retrial would not serve any purpose. Accordingly, I order that the Appellant be and is hereby set free unless otherwise lawfully held.

DATED and DELIVERED this 9th day of March, 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2. *M/s Nyaundo for the Respondent.*