REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL CASE NO. 146 OF 2015

REPUBLIC……..…….PROSECUTOR

-VERSUS-

JOHN NJENGA KAMAU …….....……..... ACCUSED

(Being an Appeal from the Judgment of the Chief Magistrate's Court

(Mr. Cherono, SPM) Nairobi delivered on 10th June, 2015 in the

Criminal Case No. 225 of 2010)

JUDGMENT

1. JOHN NJENGA KAMAU the Appellant herein was convicted of two counts of obtaining money by false pretences contrary to section 313 of the Penal Code.

He was sentenced to serve 3 years on probation. The record shows that there were Orders to have the Complainant compensated.

2. The Appellant being aggrieved by the Judgment, filed this appeal on 21st September, 2015 citing the following grounds;

1. The learned Magistrate erred in fact and in law in failing to appreciate that the Prosecution failed to prove to the required standard and proof that the Appellant obtained money by false pretences and in accordance to elements laid down in case law.

2. The learned Magistrate erred in law and in fact in failing to find that the burden of proof rests throughout on the prosecution and in shifting the burden of proof to the Appellant to prove his case though his Defence.

3. The learned Magistrate failed in fact and in law to allow the Accused to give his Defence even after the accused gave a reason as to why the Advocate presenting his Defence could not be present in Court on the said hearing date and consequently allow for an adjournment.

4. That the learned Magistrate erred in law in failing to recognize that guilt must be established beyond reasonable doubt.

5. The learned Magistrate erred in law and in fact by failing to observe the need for the prosecution to satisfy the elements of obtaining money by false pretence as cited in various case

laws.

6. The learned Magistrate erred in fact by stating in his Judgement that the accused was dealing with the complainant and that the manner in which he was handling the transaction was personal and on the other hand, state that the receipt was in the name of the company. This is contradiction of fact arriving at the decision that the court did.

7. The learned Magistrate erred in law by no allowing the Appellant to submit on a no case to answer as well as do a defence on the same once the prosecution had closed its case.

8. The learned Magistrate erred in law and in fact by allowing counsel watching brief for the complainant to have audience before the court.

9. The learned Magistrate erred in law by punishing the appellant on the absence of his advocate and stating that he had opportunity to give his defence but failed to do so.

10. The learned Magistrate erred in fact and law by failing in his Judgment to adhere to the rules of procedure in regards to contents thus did not have the points of determination, decision thereon and the reasons for the decision.

After perusal of the record and the proceedings, I wish to deal with grounds No. 3, 7 and 9 which may dispose of this appeal.

3. It is noted that the hearing in the lower court was handled by three magistrates.

When Mrs. E. Nduva (SRM) took over the matter, one prosecution witness had testified. It was directed on 30th October, 2012 that the matter starts afresh.

Mrs. Nduva was able to take the evidence of two prosecution witnesses before her transfer and Mr. Cherono (SPM) took over the matter.

4. Mr. Cherono eventually heard four (4) more witnesses before the prosecution closed its case.

It is clear that the Appellant was represented by Mr. Nyongesa when the evidence of PW1 and PW2 was taken.

The Coram of 17th January, 2014 before Mr. Cherono does not include the name of Mr. Nyongesa or any other advocate for the defence. The court did not take cognizance of the fact that the appellant was represented. There are no reasons given for his absence or why the court had to proceed in his absence. All that is indicated is this, "**Accused:** *I had a lawyer but I am ready to proceed his absence notwithstanding.*" On this date, two witnesses testified.

5. The matter next proceeded for hearing on 16th May, 2014. Again there is no inquiry about the defence counsel. The record however shows an appearance for counsel for the complainant. On this day, the prosecution closed its case, after calling two witnesses to testify. The court in its Ruling placed the Appellant on his defence on 30th May, 2014; after the Ruling this is what is recorded "**Accused**: *I shall give sworn testament. I have no witnesses".*

6. What followed were several dates for Defence hearing with different advocates coming on record for the Appellant and requesting for time to familiarize themselves with the proceedings.

These were: 9th July, 2014; 26th September, 2014; 2nd December, 2014; 3rd March, 2015 and 7th April, 2015. There were also some mentions in between. When the matter came for hearing on 7th April, 2015 the Appellant informed the court that his lawyer had not arrived but was expected.

7. At 12.05 pm of the same date, the court after waiting for the defence counsel in vain, and owing to the fact that the trial Magistrate was proceeding on transfer, the court declined to grant an adjournment. Thereafter, the record shows this, "***Accused:*** *I have nothing to offer in defence. I reiterate my earlier application that the court should disqualify itself."* "***Court:*** *The accused has indicated he has no evidence to offer. In the result, I order the defence to close its case which I hereby do."*

8. Mr. Cherono (SPM) then proceeded to write a judgement which was delivered on 10th June, 2015.

The above narrative shows what transpired in the trial court with special reference to grounds No. 3, 7 and 8 of the appeal filed by the Appellant.

9. It is noted that when Mr. Cherono (SPM) took over this matter, he proceeded as if the Appellant was unrepresented, when this was not the case. The record is clear on this. In the coram before him upto the close of the prosecution case, there is no mention of counsel for the defence yet there was one before. It is not anywhere indicated that Mr. Nyongesa had withdrawn from acting for the Appellant. Four out of the six witnesses testified in the absence of the defence counsel, with no effort made to have him explain his absence. Advocates are officers of the court and are duty bound to explain their absence.

10. Secondly, when the prosecution closed its case, it is nowhere shown that the Appellant was asked by the court if he had anything to say. Having been represented by an advocate, he could not have lacked something to say and even if he didn't, the question should have still been put to him.

11. Upon being placed on his/her defence an accused person must be explained to, the provision of section 211 Criminal Procedure Code. The said section provides thus;

> "***211 (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***
>
> ***(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."***

12. The explanation must be borne by the court record. The record does not show that the court explained the Provisions of section 211 of Criminal Procedure Code to the Appellant on 30th May, 2014 and/or on 7th April 2015.

13. In as much as the trial Magistrate was proceeding on transfer, caution ought to have been taken to ensure that acceptable procedure was followed in taking the Appellant's defence. The trial court had all the power to summon the defence lawyer to appear and explain his absence or his withdrawal from acting.

14. The substituted charge sheet whose plea was taken on 14th June, 2011 has two accused persons charged in each count. The record shows that the two accused persons appeared in court on 14th June, 2011 and their plea is recorded as follows;

Court 1: Accused 1 – it is not true

Accused 2 – it is not true

Court 2: Accused 1 – it is not true

Accused 2 – it is not true

The appellant was the 2nd accused. It is not clear what happened to the 1st accused. I do not wish to say more on this for obvious reasons.

15. My finding is that the Appellant was denied the right of representation by an advocate of his choice and the Provisions of section 211 Criminal Procedure Code were not complied with. He was denied an opportunity to adequately prepare for his defence on 7th April, 2015 since he had all along expected his counsel to be present. The court should have given him a conditional adjournment to enable him prepare even if it meant taking the defence the next day. This contravened article 50 (2) (c) and (g) of the Constitution. Failure to comply with section 211 Criminal Procedure Code was unprocedural.

16. Since all these were procedural errors I find the proceedings to amount to a mistrial. For the ends of justice to be met, it is imperative that the matter be heard afresh.

17. I therefore allow the appeal and set aside the conviction and sentence with the following orders;

a. The case to be heard by any Magistrate with competent jurisdiction at Nairobi Chief Magistrate's Court besides Mrs. E. Nduva and Mr. E Cherono.

b. The appellant to appear before the Chief Magistrate Nairobi for plea taking on 29th September, 2016.

c. The case should be heard and determined within 9 months and both the prosecution and defence must commit themselves to this.

Delivered and **dated** this ***14th*** day of ***September*** **2016** at **Nairobi.**

H. I. ONG'UDI

HIGH COURT JUDGE