



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HIGH COURT CRIMINAL APPEAL NO. 29 OF 2014

PETER KIMANI NGURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of M. Munyekenye SRM delivered on 28th January 2014 in Criminal Case No. 2162 of 2012)

J U D G E M E N T

1. On 6th October 2012, Francis Sanya Manyulu (**The Complainant or PW1**) fell victim to the trick of a fraudster. In the process he lost goods worth Kenya Shillings Twenty Nine Thousand Six Hundred (Kshs 29,600/-) and cash of Kenya Shillings Fourteen Thousand (Kshs. 14,000/-) only. Two months later, Peter Kimani Ngure (**The Appellant**) was arrested in connection with the said fraud and subsequently charged with the Offence of Cheating contrary to section 315 of the Penal Code. After Trial, he was convicted and sentenced to three (3) years imprisonment. This Appeal is against that conviction and sentence.
2. The Complainant is the owner of a Hardware Shop at Funyula Town under the name and style of Ochando Hardware and Bicycle Spares. On 6th October 2012, he thought that he had been visited by a promising customer. The “Customer” told him that he had been sent by one Mary Naliaka (herein Naliaka) to buy some goods on her behalf. The person gave him a list of items that were allegedly required by Naliaka. From this list the Complainants’ Store only had items in the value of Kenya Shillings Twenty Nine Thousand Six Hundred (Kshs. 29,600/-) . In the meantime the “Customer” who told the Complainant that he was waiting for some money walked out of the shop and when he returned he told the shopkeeper that all the M-PESA agents in Funyula did not have sufficient money to pay him. At that point he asked the Complainant (PW1) for his telephone number so that Naliaka could transfer to him some money on his M-PESA Account. M-PESA is a mobile phone based money transfer run by Safaricom and which has received global acclaim as a way of giving millions of people access to the formal financial system in an otherwise largely cash based society [source: Wikipedia]. Shortly thereafter the Complainant (PW1) received a short message on his telephone confirming that he had been credited in the sum of Kenya Shillings Fifty Thousand Two Hundred and Fifty (Kshs. 50,250/-) from Naliaka.
3. Happy that he had received the money, the Complainant (PW1) released goods worth Kenya Shillings Twenty Nine Thousand Six Hundred (Kshs. 29,600/-) to the person and issued a receipt for that amount. As he had received more money than the items he could supply, the Complainant (PW1) at the request of the “Customer” gave to the “Customer” cash of Kenya Shillings Fourteen Thousand (Kshs. 14,000/-). This was supposed to be the difference between the value of the goods he had in stock and the amount paid to him by Naliaka. Upto that point a good sale was about to be complete and the Complainant asked his shop Assistant Edwin Ouma Ooko (PW2) to

- help him load the items to the “Customer’s” waiting car registration Number KAX 823 V.
4. It was soon after the “Customer” left that the Complainant (PW1) realized he had been Cheated out of his property and money. This was after he unsuccessfully attempted to pay out some money from his M-PESA Account. On enquiring from the Customer Care of the Service provider, he was informed that he did not have sufficient funds. He then noticed that his M-PESA Account had been blocked. At this point he suspected that his account had been tampered with. The Customer Care advised the Complainant that the amount of Kenya Shillings Fifty Thousand Two Hundred and Fifty (Kshs. 50,250/-) purportedly sent to him by Naliaka was not in fact credited to his Account.
 5. At this point the Complainant visited Busia CID office and lodged a complaint. The police informed him that the telephone number “+254 716237509” allegedly belonging to Mary Naliaka had been used elsewhere to commit some other crime. After about two (2) months he was called by a Police Officer and informed that the person who had conned him had been arrested and was at Nambale Police Station. On visiting Nambale Police Station, the Complainant identified the person who had come to his shop as the Appellant.
 6. PC Sammy Nzau (PW3) is attached to Funyula Police Station and he is the Officer who investigated the complaint herein. He requested for a Forensic Examination of the Complainant’s M-PESA Account from the Directorate of Criminal Investigation. In a Mobile Forensic Examiner’s Report dated 29th January 2013, the Forensic Investigator confirmed that the Complainant (PW1) received the following message on 6th of October 2012;-

CS02AN956 Confirmed. You have received Kshs 50,250.00 from MARY NALIKA 254716237509 on 6/10/12 at 12.01 AM New M-PESA balance is Kshs 70,945.00

It was the evidence of Sammy Nzau (PW3) that the telephone number that allegedly belonged to Mary Naliaka was not registered.

7. That on 5th September 2012 (This date is probably incorrect!) the Police Officer received information that the person he had been looking for had been arrested and was at Busia Police Station. It was the evidence of the Police Officer that the Complainant identified the suspect at the police station and further that the Complainant informed him that he knew the suspect before the incident.
8. In Defence the Accused stated that his name was Bob Ngome Nyongesa. He denied the charges and says that in the month of September 2012 he was arrested in Busia town, and taken to Busia Police Station. The day following he was charged in Criminal case No. 1715 of 2012 for the Offence of Obtaining Goods by False pretenses. The Court trying that Offence released him on bond. He said that when the Busia Court moved to a new Court House he did not attend Trial. He later learnt that warrants of arrest had been issued against him and when he was on his way to attend the next hearing he was arrested at Nambale and new charges preferred against him. He denied the offence and said he does not know any of the Prosecution witnesses. He further added that the police brought this charge against him because some Police Officers bear a grudge against him.
9. That is the evidence that this Court will reevaluate in order to draw its own conclusion. As it does so it must bear in mind that unlike the Trial Court, the Appellate Court does not have the advantage of seeing and hearing the witnesses and due diligence must be given for this. **[Okeno – vs- Republic [1932] EA 32.**
10. In the Petition of Appeal dated 13th February 2014, the Appellant raises the following three (3) grounds:-
 - a. **The Learned Trial Magistrate erred in law and in fact in arriving at conviction of Appellant for offence under section 315 of Penal Code of cheating whereas there was no evidence at all in support of such conviction.**
 - b. **The Learned Trial Magistrate erred in law and in fact in putting into consideration hearsay evidence which evidence is exclusionary.**
 - c. **The Learned Trial Magistrate erred in law and in fact in failing to take into account the defence by appellant which defence was water fight (sic) and thereby arrived at an**

erroneous finding

11. From his written submissions the arguments by the Appellant can be discerned as follows. He queries why PW1 would agree to receive payment through M-PESA when he does not run an M-PESA shop. He also submitted that he was not Naliaka, who was the person who allegedly sent the money via M-PESA to the Complainant and in whose name the receipt for goods sold was issued. He further argued that the Safaricom printout did not show that the transaction took place and whether the allegations of the Complainant were true. That further it was not proved that Mary Naliaka does not exist.
12. In opposing the Appeal the State Counsel emphasized that the Complainant lost money and property through the fraudulent message. That PW1 and PW2 positively identified the Accused as the perpetrator of the fraud as it took place in broad daylight. As to the sentence, the State submitted that it was lenient as Accused was a repeat offender.
13. There seems to be overwhelming evidence that the Complainant (PW1) was duped into believing that some Kenya Shillings Fifty Thousand Two Hundred and Fifty (Kshs. 50,250/-) had been received in his M-PESA Account from one Mary Naliaka. The Mobile Forensic Examiner's Report confirms this. It has also been proved that there was no real money transfer made to the Complainant's M-PESA Account in the said sum and it is for that reason that the Complainant (PW1) was unsuccessful in sending out money soon thereafter. There is evidence by PW1 and PW2 that PW1, on the strength of the alleged M-PESA credit, gave out goods worth Kenya Shillings Twenty Nine Thousand Six Hundred (Kshs. 29,600/-) and cash Kenya Shillings Fourteen Thousand (Kshs. 14,000/-) to the person allegedly sent by a Naliaka. There is then evidence by PW3 that a suspect who is the Appellant was arrested by police at Busia. That person is alleged to have been positively identified by PW1 as the person who Cheated him out of goods and money.
14. In my view the crux of the matter is whether the person arrested by the police was positively identified by PW1 and/or PW2 as the person who visited the shop of the Complainant (PW1) on 6th October 2012 and defrauded the Complainant (PW1). I say so because other than the evidence of identification, the Prosecution did not lead any other evidence that suggested that the person who conned PW1 in the presence of PW2 was the Appellant.
15. The Appellant was arrested about two (2) months after the incident at Funyula. The police officer (PW3) did not tell the Court that he was arrested because of any evidence linking him to the incident at Funyula. For instance the Suspect was not connected to motor vehicle Registration No. KAX 823 V which was said to have been used by the conman on that day to ferry away the Goods. The police were however satisfied that the Suspect was the said fraudster because in the words of PW3 :-

“The Complainant identified the Accused at the Police Station”.

16. On the aspect of identification the Trial Magistrate held as follows:-

“Having carefully considered the evidence on record, I find that PW1 and PW2 positively identified the Accused. The evidence of the two witnesses shows that the Accused spent a considerable amount of time at the Hardware shop. It was during the day where adequate lighting was there. The Complainant was called to Police Station when the Accused was arrested and he managed to positively identify him”.

17. It was the testimony of PW1 that he did not previously know the person who visited his shop. This is what he said in cross examination:-

“I knew you the day you came to my shop. When you were arrested I found out your name”.

There is no evidence that he indeed knew that person prior to 6th October 2012. For that reason there would be some doubt as to the truthfulness of the evidence of PW3 when he says this about his conversation with PW1 in respect to the suspect:-

“He also informed me that he knew him before”.

As to PW2 who was the shop Assistant to the Complainant and who saw the person who conned the Complainant on the material day, he too did not have prior knowledge of the person.

- 18.No doubt the circumstances in which the fraud at Funyula took place favoured positive identification of the Suspect. The transaction took place at about 11.00 a.m. in broad daylight. The process of ordering for the items, negotiating payment by M-PESA and collecting the goods provided sufficient opportunity for PW1 and PW2 to positively see the person they were dealing with. But because the two persons did not have prior knowledge of this person the exercise of identification of the Suspect was singularly important. Whenever it is necessary that a witness be asked to identify a suspect, the Police must strictly adhere to the procedure set out in The Force Standing Orders on identification parades. What did the police do on this important aspect of the investigation?
- 19.In respect to PW2 it would seem that he was not given any opportunity of identifying the subject. Only when testifying did PW2 identify the Accused. As is often said Dock Identification which is not preceded by identification in a properly arranged and conducted Identification parade is of little value.
- 20.As to PW1 (the Complainant) he says that he identified the Suspect while at Nambale Police Station. There is no iota of evidence that this identification was done as prescribed by The Police Force Standing Orders which govern the arrangement and conduct of parade identification. In fact no identification parade was arranged at all! It is for this reason that the identification at the Police Station and the witnesses’ subsequent Dock Identification are not helpful in establishing the guilt of the Appellant. The manner in which the witness allegedly identified the suspect is the weak point in the Prosecution case.
- 21.The upshot is that I am unable to find evidence that connects the Appellant with the crime. And for reasons I have given, I am unable to concur with the Learned Trial Magistrate that PW1 (the Complainant) and PW2 positively identified the Accused. The result is this Court finds that the conviction was unsafe and must now quash it. The sentence imposed upon conviction is set aside. The Appellant shall be released unless held for some other lawful cause.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 5TH DAY OF MARCH 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

KADENYI.....COURT CLERK

IN PERSONFOR THE APPELLANT

OWITI.....FOR THE RESPONDENT