



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.70'B' OF 2014

JOEL OKETCH WATANGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

**[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM BONDO PM'S COURT:
BY M. M. NAFULA - SRM**

IN CRIMINAL CASE NO.999 OF 2013.]

J U D G M E N T

1. The appellant was convicted and sentenced to 3 years imprisonment for the offence of Obtaining money by false pretence contrary to Section 313 of the Penal Code. The particulars of the offence were that on diverse dates and time between 14th and 20th May 2013 at Bondo District within Siaya County, jointly with others not before court with intent to defraud obtained money Kshs.6,060, Kshs.5,066, Kshs.5,066 and Kshs.3,000 from Joseph Obiero Asero the sum of total Kshs.19,198 through mobile phone Mpesa transaction by falsely pretending that he would secure him a chance for a loan (Helb – Higher Education Loan).

2. He was thus convicted and sentenced to 3 years imprisonment. He has filed this appeal citing several grounds. The brief facts of this case however are that PW1, the complainant has his son PW2, a 3rd year Law student at Mount Kenya University. He told the court that he was approached by the appellant who told him that he knew one Morris Evans Omollo who worked at HELB (higher Education Loan Board) and he could help him process the loan for purposes of PW2's education. He told PW1 that the said Evans Omollo needed some facilitating fees amounting to Kshs.20,000/= so as to process the loan.

3. PW1 then proceeded to remit money via Mpesa, phone No.0702-524860 registered in the name of Morris Evans Omollo. The aggregate amount was remitted in 7 transactions. However efforts to reach the said Mr. Evans Omollo proved futile and the phone went answered. He smelt a rat and reported the matter at Bondo Police Station.

4. PW2 the student told the court of how the appellant came to his home and discussed the issue of how he was going to help him acquire the loan.

5. PW3 CPL. Harun Mwangi was the investigating officer. The great significance of his investigation is the production of the Safaricom data which showed how the appellant would receive money via Mpesa from Evans as soon as the complainant remitted to the latter's phone.
6. In his defence the appellant denied the charges by giving unworn testimony. He denied any knowledge of the alleged Evans.
7. The state conceded to this appeal on the grounds that the trial court failed to comply with Section 200 of the Criminal Procedure Code. This argument was what the appellant's counsel relied on in his submissions and according to him this was a mandatory requirement.
8. From the court's proceedings it is clear that on 9/7/14 when this matter came up for hearing the learned trial magistrate Honourable M. M. Nafula did proceed since the prosecution had only one witness. Previously the matter had been handled by Honourable B. R. Kipyegon who had apparently left the station.
9. Before proceeding with the other issues of the appeal it would be worthwhile to determine this legal principle. Section 200(3) and (4) of the Criminal Procedure Code states as follows:

“(3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

“(4) where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a re-trial.”
10. The understanding of this court is that sub-section 3 almost makes it mandatory for the trial court to notify the accused person of such right of recalling the witnesses. However sub-section (4) qualifies sub-section (3). One must show that by the trial magistrate failing to notify him of the right as provided under Sub-section (3) he has been prejudiced.
11. In the matter at hand I do not see any prejudice suffered by the appellant. He initially had clearly had clearly cross-examined PW1 and he proceeded to cross-examine PW2 and PW3 without any difficulty. Consequently I do not think that there would be need to order any re-trial herein.
12. The other issues raised by the appellant in his supplementary petition are to do with the discrepancies in the evidence by the prosecution. I have carefully perused the same and I do not find any such discrepancy. The evidence of PW1 and PW2 was not controverted. More importantly is the evidence of PW3 who produced the Safaricom Mpesa printout. It is very clear that no sooner had PW1 transferred the money to Evan's number the said Evans transferred it almost immediately to the appellant's account.
13. The appellant was unable to candidly explain how the money from Evans's phone found itself again to his account. In short the alleged Evans was an accomplice in the matter and the whole process was perpetrated by the appellant. The appellant did not deny that he knew the complainant nor his son.
14. His defence was not so weighty as to outdo that of the prosecution witnesses. I find it very evasive and outright lies.
15. Consequently I do not find this appeal meritorious. The appellant who is a teacher found a gullible parent eager to educate her son and who was struggling to raise his university fees. He ought to have been more sympathetic and not plan to rip off a student. The appeal is hereby dismissed.

Dated and delivered this 6th July, 2015.

H. K. CHEMITEI

J U D G E