



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 82 OF 2013.

MOSES KIRAITHE MUGO)

SIMON KINYUA KARIUKI) ::::::::::::::::::::::::::::::: APPELLANTS.

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT.

(Being an appeal from the original conviction and sentence of M.N. Gicheru - CM in Criminal Case No. 348 of 2011 delivered on 26th June, 2013 at Kitale.)

J U D G M E N T .

The first appellant, **Moses Kiraithe Mugo**, and the second appellant, **Simon Kinyua Kariuki**, appeared before the chief Magistrate at Kitale charged with obtaining money by false pretences, contrary to section 313 of the Penal Code, in that on the 26th January, 2011 at Kitale township, Trans Nzoia County, jointly with others not before the court and with intent to defraud obtained from Emmah Wanjiku Wachiuri, the sum of Ksh. 710,000/= by falsely pretending that they could sell maize to her, information they knew to be false or untrue.

After trial, both appellants were convicted and sentenced to three (3) years imprisonment each.

Being dissatisfied with the conviction and sentence, both appellants filed the present appeal on the basis of similar grounds contained in he

petitions filed herein on 9th July, 2013 and supplementary grounds filed together with the written submissions and without leave of the court.

At the hearing of the appeal, both appellants appeared in person and relied on the written submissions. The Learned Prosecution Counsel, **M/s. Limo**, appeared for the state/respondent and opposed the appeal by submitting that the appellants were properly convicted and sentenced and that the sentence was lenient.

The Learned Prosecution counsel relied on the lower court record and submitted that there was sufficient evidence against the appellants. She urged this court to dismiss the appeal.

The grounds of appeal have been duly considered by this court in the light of the submissions by both sides. What this court is called upon to do is to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, this court has considered the evidence forming the prosecution case as narrated by the complainant **Emma Wanjiku Wachiuri (PW2)**, the arresting officer, **P.C. Charles Njiru (PW1)**, a casual worker cum turn boy, **Francis Njenga Kung'u (PW3)**, and the investigations officer, **Cpl. Eliud Odhiambo (PW4)**.

The court has also considered the defence raised by the appellants in which they denied the offence and contended that none of them received any money from the complainant. The Learned trial magistrate considered the defence together with the prosecution evidence against the appellants and concluded that the two appellants dealt with the complainant over the subject maize on three occasions i.e. on the 24th, 25th and 26th January, 2011, and that she gave out a sum of Ksh. 710,000/= to their accomplice, part of which was given to a lorry driver/owner identified by the second appellant (Simon). The lorry

driver did not come for the maize and no explanation was offered by any of the appellants.

The learned trial magistrate also concluded that the maize shown to the complainant by the two appellants and their accomplices did not belong to them and that the money was given to a person introduced to the complainant by the two appellants. The learned trial magistrate believed the complainant's evidence and concluded that the two appellants were criminally liable in terms of section 20 of the Penal Code as they ordered and abetted the commission of the offence against the complainant.

Having reconsidered the evidence, this court would have no tangible reason to fault the conclusions reached by the learned trial magistrate for reasons that there was indeed no dispute that the two appellants were part of the group of people who met the complainant on three occasions with a view to undertaking a sale transaction involving maize and in the process represented themselves to the complainant as being capable of supplying and selling to her maize.

Acting on the said representation which later proved to be false and dishonest, the complainant paid out a sum of Ksh. 710,000/= in the instalments of Ksh. 400,000/= and Ksh. 350,000/= but did not receive the maize. The would be vendors including the two appellants vanished in thin air and it then dawned on the complainant that she had been conned.

The charge sheet did not refer to a sum of Ksh. 750,000/= which was paid out by the complainant and instead referred to a sum of Ksh. 710,000/=. the variance in the figure did not however water down the prosecution case.

The defence raised by the appellants was anchored on the fact that they did not themselves or personally receive the money from the

complainant. This may have been so, but there was credible and sufficient evidence showing that they acted in concert with those who received the money and were therefore principle offenders as well.

They were part and parcel of the same criminal transaction which led to the complainant losing such a large amount of money. Their conviction by the learned trial magistrate was based on sound evidence and is hereby upheld.

With regard to the sentence meted out against both appellants by the learned trial magistrate, it was lawful but being first offenders the same is hereby reduced to eighteen (18) months imprisonment. Otherwise, the appeal is dismissed.

[Delivered and signed this 1st day of October, 2014.]

J.R. KARANJA.

JUDGE.