REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 60 of 2005

(From original conviction and sentence in Criminal Case No. 36 of 2002 of the Principal Magistrate's Court at Nyahururu, D. K. Ngomo, P.M.)

GABRIEL MAINA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein was charged with 3 counts of the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code *(Cap. 63, Laws of Kenya)*. The particulars thereof were that on 24th, 26th and 27th November 2001, at Nyahururu Laikipia District, the Appellant together with others not before court obtained Kshs. 500,000/=, 45,000/= and 25,000/= respectively from Joseph Okwaro Kariuki by falsely pretending to venture into the business of buying and selling wheat. Upon considering the evidence, the trial Magistrate convicted the Appellant on all three counts and sentenced him to 3 years on each count. The sentences were to run consecutively.

Aggrieved by both the conviction and sentence, the Appellant appealed to this court on 10 grounds of appeal which I have summarized into 6 namely-

(1) that the learned magistrate erred in convicting the Appellant on the basis of a defective charge,

(2) that the learned magistrate failed to consider the Appellant's defence,

(3) that the learned magistrate erred in convicting the Appellant in the absence of sufficient evidence for there was no written document between himself and the complainant,

(4) that the prosecution failed to call 3 crucial witnesses,

(5) ***that the magistrate failed to consider that the Appellant was also conned by the same people who conned the complainant,***

(6) That his fundamental rights under the Section 77(1) of the former Constitution had been violated.

The Respondent opposed the appeal and urged this court to uphold the conviction and sentence as it was proper and lawful.

The complainant's testimony was to the effect that on 21st November 2001 he was on his way to take his daughter to Nyahururu District Hospital when he ran into the Appellant. The Appellant was in the company of another person whom he introduced to him as John Karanja Kimondo. John Kimondo informed the complainant that he worked with a company known as Coast Hauliers which is based in Mombasa but plies all over the country. He told the complainant that he had a friend who had a factory in Arusha Tanzania for making biscuits and inquired whether the complainant would be interested in buying and selling wheat to that friend. The complainant said that he was interested. As the Appellant was going for a meeting at that time, the 3 of them agreed to meet later. They also agreed that his friend (the factory owner, Fabian Masizi Kidede) from Burundi would attend the meeting.

Later in the day at around 4.00pm, the complainant, the Appellant, John Kimondo and Fabian Masizi Kidede *(Fabian)* met at Muthengera Bar. The Appellant told the complainant that he knew John and Fabian and that they were friends. Fabian informed the complainant that he needed 800 bags of wheat per month or 400 bags every fortnight. The parties agreed that Fabian would be buying a 90 kilogrammes bag at Kshs. 1,700. Fabian told the complainant that he did not transact using Kenyan currency but would use commercial diamonds which he had kept in a matchbox. They were 7 in number and the complainant described them as multi-faced glass like and they looked like stars. Julius Gikonyo Kimondo from Tim Ken International, with whom Fabian had transacted before, was called to analyse the diamonds and confirmed that they were genuine and they were worth Kshs. 2,712,000/=. John Gikonyo produced a bundle of notes. The complainant testified that the notes on top and the back were Kshs. 1,000/= but he did not see the notes in between. John Gikonyo told them that it was Kshs. 200,000/= and it was therefore not sufficient to exchange with the diamonds. He therefore went back with the money and would bring back Kshs. 2,712,000/= on 23rd November 2001 upon which he would be given the diamonds. Fabian remained with the diamonds.

Thereafter, Fabian informed the complainant that he had luggage at the Busia Border. He requested the complainant to advance him Kshs. 800,000/= which he would use to clear his luggage at the border and collect more diamonds. The analyzed diamonds were sealed in the matchbox using cellotape and the complainant, Julius Kimondo and the Appellant signed on it. During this time, the Appellant was urging the complainant to enter into the business telling him that he would get rich quickly. The complainant trusted him because he could see that he knew the others and he had told him that Julius Kimondo was his cousin. The parties agreed to meet on 23rd November 2001 and Fabian took the diamonds with him. The complainant left Julius, the Appellant and Fabian and went home.

On 23rd November 2001, the complainant and the Appellant went to Kawa Falls Hotel. They were then joined by Cyrus Mureithi who had been introduced to the complainant as Fabian's business partner. He told them that he had come on behalf of John Kimondo and that Fabian would join them later, at 11 pm. The complainant thought that the Appellant knew Cyrus well as he greeted him and asked him where Kimondo was. Julius Gikonyo, the man who was supposed to buy the diamonds, arrived. He was carrying a greenish paperbag which had money in it. He showed the parties the money, which was in bundles and said *"mali ndio hii"*. The complainant could not see the notes in between but Julius told them that it was Kshs. 2,712,000/=. He then asked for the diamonds but was told that they were with Fabian and he would come at 11pm. Julius said that he could not wait and had to go to Nairobi as his boss was travelling to Germany. He asked to be called once Fabian arrived.

About 15 minutes after Julius had left, the complainant, the Appellant and Cyrus decided to go to town. On their way, they met with Fabian and informed him that Julius had left. Cyrus then called Julius and informed him that Fabian had come, but Julius said that he would not come back but would instead wait for his boss to return from Germany and the two would come together. Because things had not gone as planned, the complainant then agreed to advance the Kshs. 800,000/= to Fabian to enable him clear his luggage in exchange for the diamonds. The complainant testified that the diamonds were still in the matchbox and he could see that it was still intact. He was asked not to open it until all the money had been paid. He went away and left Fabian, Cyrus and the Appellant together.

On 24th November 2001 the complainant and the Appellant went to Kenya Commercial Bank Nyahururu where and the complainant withdrew Kshs. 500,000/=. they then went to Muthengera Bar and

found Fabian, Julius and Cyrus waiting for them. The Appellant gave the money to Fabian. Fabian however said that the money was not enough but nevertheless took it. On 26th November 2001, he gave Fabian another 45,000/= and Kshs. 25,000/= on 27th November 2001. this was still not sufficient. The complainant borrowed Kshs. 20,000/= from his daughter and withdrew a further Kshs. 12,000/= from his account. He then gave Kshs 20,000/= to Fabian making the total amount of cash that had been given to Fabian Kshs. 600,000/= *(the withdrawal slips were produced as exhibits 3a-3d)*. On both occasions he transacted with Fabian, Cyrus and the Appellant at Baron Hotel in Nyahururu. The complainant was told that Julius Gikonyo, the buyer would come the following week as he was still waiting for his boss to return from Germany.

After that day, none of the parties ever contacted the complainant. When he called Fabian mobile phone, Cyrus would pick up and tell him that they were waiting for Julius and Julius would tell him that he was still waiting for his boss to return. These actions aroused suspicion in the complainant and on 7th December 2001, he went with his son to Madini House to have the diamonds analysed by a geologist. When the geologist opened the matchbox, he found 7 grains of maize. He then reported the matter at Nyahururu Police Station. PW4 Corporal William Sayanga confirmed that the signature on the matchbox belonged to the Appellant and produced results of the handwriting expert *(exhibits 5a-5c)*. The Appellant was arrested in his neighbour's sugar cane plantation where he was hiding.

PW2 was Rose Wanjiku Gathiga. She confirmed that on 24th November 2001, she was working at Muthengera Bar and saw the complainant and 4 persons. She confirmed seeing the complainant handing over a greenish paper bag to the Appellant although she did not see its contents.

The Appellant gave unsworn statement. He confirmed that one John Karanja was his friend and had been introduced to him by his cousin. He denied being part of the group and that he had not met Fabian Kidede, the man who gave the diamonds to the complainant, prior to 21st November 2001. He said that the complainant agreed to sell wheat to Fabian Kidede for Kshs. 700,000/=. He was supposed to help the Appellant buy the wheat. He denied receiving money from the complainant or that he knew any of the persons that the complainant entered into business with, save for John Karanja. He said that the complainant asked to be given the diamonds but Fabian said he would only do so in exchange of a quarter of Kshs. 1.6 million was given to him.

This being a first appeal, the court is required to evaluate the evidence afresh and arrive at its own independent conclusion bearing in mind that it never heard now saw the witnesses testify.

The offence of obtaining by false pretence is provided for under Section 313 of the Penal Code which states-

"313. Any person who by any false pretence, and 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 misdemeanour and is liable to imprisonment for three years."

Section 312 of the Penal Code defines false pretence as-

"Any representation, made by words, writing or conduct, a matter of fact, either past or present, which representation is in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

It is not in doubt that the complainant and the Appellant worked together at the Adult Education Department in Nyahururu. It is also not in dispute that the complainant and the Appellant were both involved in a transaction in which the Appellant lost Kshs. 600,000/= The trial court found it to be a fact that the complainant withdrew Kshs. 582,000/= from Kenya Commercial Bank between 24th and 29th November 2001 as evidenced by the withdrawal slips.

The question in this matter was whether the Appellant knew for a fact that the entire transaction

was fraudulent and that Fabian had no intention of entering into business relationship with the complainant. I think he did so. The trial magistrate also noted this and asked herself in what capacity the Appellant was signing for the diamonds.

The prosecution was required to show that firstly, the Appellant made representations that Fabian Kidede, his cousin John intended to enter into the business of buying and selling wheat with him, that these people were trustworthy to the best of his knowledge, that the complainant would be refunded his money once Fabian sold the diamonds, and that there was no intention of refunding such money. The evidence is clear that the Appellant made representation to the complainant that Fabian was a business man who had a factory for manufacturing biscuits in Arusha Tanzania and he would be interested in purchasing wheat from him. The evidence is again clear that there was no intention by Fabian or any other person to enter into business with the complainant and the entire transaction was intended to defraud him. The Appellant is the one who introduced the complainant to his friend John Karanja who in turn introduced him to Fabian Kidede. In his testimony, the complainant said that the Appellant encouraged him throughout the entire transaction, telling him that the business would make him rich since he had just retired. He also told the complainant that Fabian Kidede was his friend and he was trustworthy. His conduct towards all the parties involved led the complainant to believe that he knew them. The complainant's testimony is credible, that it was the Appellant's conduct that induced him to agree to enter into the said business and to part with Kshs. 600,000/=.

The prosecution was required to show that the Appellant knew that the representations made were false and on the basis of these false representations, induced the complainant to give money to Fabian Kidede. I find and hold that the Appellant knew of the intention to defraud the complainant and participated in the plan to do so by false pretences.

In his defence, the Appellant alleged that he did not know of any such plan. The question however is whether the Appellant was acting in collusion with other parties to deceive the Appellant and therefore knew that that representation was false. The trial court found that the Appellant was part of the conspiracy to defraud the complainant. Her finding was founded on the basis that the complainant was the Appellant's immediate boss and therefore the Appellant knew that the complainant had retired. It was her opinion that the Appellant was targeting the complainant's benefits. The court did wonder in what capacity the Appellant signed the matchbox containing the diamonds or why it was only his mobile phone that was used to communicate with Julius Gikonyo, the diamond buyer, if he had not been a party to the transaction. I find and hold that he was firmly in the conspiracy. The complainant's evidence was corroborated by the other prosecution witnesses and the documentary evidence that was adduced in court.

The Appellant's defence was inconsistent and not believable. Firstly his testimony was that he, like the complainant, did not know Fabian prior to 21st November 2001 yet he later testified that Fabian suggested that he should assist the complainant buy wheat. Secondly, the trial court did not believe that Fabian Kidede did not know the value of his diamonds and that there was an intention to defraud him Kshs. 1 Million. The prosecution also led evidence that the Appellant was hiding in sugar plantation on the day of his arrest. Why did he do so if he was innocent? I find and hold that the offences with which the Appellant had been charged were proved beyond reasonable doubt and the conviction was proper.

The Appellant had challenged the conviction on the basis that the evidence adduced did not support the particulars of the charge. The Appellant was charged with the offence obtaining money by pretending that he would venture into the business of buying and selling wheat. The evidence that was led by the prosecution showed that the money given by the complainant was to enable one Fabian obtain luggage from Busia Town Customs Offices and was not in relation to buying or selling wheat and this money was given in exchange of diamonds. However, the totality of the evidence shows that the intention of the parties was to sell and buy wheat. The money advanced by the complainant was to enable Fabian clear his luggage and get more commercial diamonds to enable him buy wheat from the complainant. Therefore were it not for this agreement, the complainant would not have given his money to Fabian. Section 382 of the Criminal Procedure Code provides that-

"382. Subject to the provisions herein before contained, no finding, sentence or order passed by a

court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge,proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless theerror, omission or irregularity has occasioned a failure of justice."

In view of the foregoing I find that the charges against the Appellant were clear and there was no failure of justice as he understood properly the charges against him and was able to reply to the particulars thereof.

The trial court sentenced the Appellant to serve three (3) years imprisonment on each of the three counts and ordered the sentences to run consecutively. This was in accordance with the provisions of Section 14(1) of the Criminal Procedure Code, *(Cap. 75, Laws of Kenya)* -

"14(1) Subject to subsection (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for the offences, to the several punishments prescribed therefor which the court is competent to impose, and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishment shall run concurrently."

In the case of **ODERO VS. REPUBLIC [1984] 621**, the Court held that in a case where a person has been charged with and convicted of two or more counts involving the same transaction, the practice is to direct that the sentences should run concurrently. The court cited with approval the definition of the same phrase *"same transaction"* as laid down by Sir Joseph Sheridan C. J. *(Kenya)*, Sir Norman Wasley C.J. *(Uganda)* and Sir Henry Webb CJ, *(Tanganyika)* sitting as the Court of Appeal for Eastern Africa after citing that Section 135A of the Uganda Criminal Code *(which was in pari materia with Section 137 of the Kenya Criminal Code)* which both have their origin in the Indian Code, adopted the definition by the courts there *(Indian Courts)*, of the phrase - *"the same transaction"* as -

"if a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose or by the relation of cause and effect, in the opinion of the court as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."

And persons accused of different offences committed in such series may be tried together and that this would include such subsidiary as would make the co-accused *particips criminis* or an accessory after the fact.

In this case, even though the Appellant alone was charged and not his accomplices the money in respect of which the Appellant was charged, was intended for the purpose of enabling the parties to transact the business of buying and selling wheat as agreed on 21st November 2001. The exchange of the fake diamonds directly flowed from that meeting, and was intended to further that business. I therefore find and hold that the acts constituting the offences in the several counts were so connected by proximity of time, community of criminal intent and continuity of action and purpose that the offences were committed in the same transaction. The only question is whether the sentence should have run consecutively as the learned trial magistrate.

Though the offence of obtaining anything from any person under Section 313 of the Penal Code with intent to defraud is declared to be a misdemeanor, and not a felony, and therefore punishable by a term of imprisonment of not more than three years, what the Appellant did to the complainant is deplorable. He knew that the complainant was retiring and had or was to obtain some substantial sum of money for his retirement. He also played upon the complainant's apparent avarice, to get rich quickly, and succeeded in cleaning the complainant of his savings. Though the offences were committed in a series of acts, there was but one transaction alleged purchase of wheat which never was.

The trial magistrate I think considered the sense of loss caused by the Appellant's betrayal, and sentenced the Appellant to the maximum term punishable under the law, and ordered that sentences were

to run consecutively. The further question is whether the learned trial magistrate had the jurisdiction to do so. For the purposes of Section 14(3) a magistrate cannot impose consecutive sentences which in the aggregate exceed his jurisdiction.

The Appellant was tried convicted and sentenced by a subordinate court of the first class, a Principal Magistrate who is authorized by Section 7(1)(a) to pass any sentence authorized by law for any offence triable by that court. Even though judicial precedent suggests that since the acts constituting the offence were so connected in time, and intent, that it can be said to have been one transaction, and the sentence should have run concurrently, the order for the sentences to run consecutively was legally in order.

In the circumstances, the Appellant's appeal fails, and is dismissed.

It is so ordered.

Dated, signed and delivered at Nakuru this 3rd day of May, 2013

M. J. ANYARA EMUKULE

JUDGE