



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 183 of 2012

ZAKAYO HENRY ANGOIYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 1050 of 2008 of the

Principal Magistrate's Court at Maseno – Mr. S. Ongeru Esq.)

JUDGMENT

The appellant herein was charged with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code.

The particulars of the offences are that on diverse dates between 5th and 13th September 2008 at Maseno Township in Kisumu West District within Nyanza Province with intent to defraud obtained from **Daudi Sibbo Echenje** the sum of Kshs. 10,000/= by falsely pretending that he was in a position to make deed plans and accompanying reports for plots number 934 / 247 and 9341/248 a fact he knew to be false.

After a very long and protracted proceedings the appellant was convicted and sentence to serve two and half 2 ½ years imprisonment. He has appealed citing five (5) grounds as per his supplementary record of appeal, namely:-

- (i) **That the learned Resident Magistrate erred in law and in fact failing to rule that the ingredients of the offence with which accused was charged were not proved to the criminal standard of beyond reasonable doubt.**
- (ii) **That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the accused.**
- (iii) **That the learned trial magistrate erred in law and in fact by arriving at speculative decisions on which there was no evidence**
- (iv) **That he learned trial magistrate erred in law and in fact admitting and relying on exhibits which were not availed to the Appellant at all and/or in good time.**
- (v) **That the sentence imposed is manifestly excessive in the circumstances of this case.**

It was **PW1 Daudi Sibbo Echenje** evidence that on 5th September 2008 he went to the offices of the appellant situated within Maseno town. He wanted some survey exercise to be done on his parcel of land. At the offices Christened "**Western Consultative Agencies**" he met the appellant who agreed to undertake the survey work as he requested. The complainant paid him Kshs. 2,000 out of the sum of Kshs. 10,000 agreed. He was issued with a receipt for the sum of Kshs. 2,000 – exhibit P1.

On 13th September 2008 he paid the balance of Kshs. 8,000 and issued with exhibit P2 (the receipt). After several days the job was never done forcing the complainant to look for the appellant whom he found near Maseno Law Courts. He then went with him to Maseno Police Station where he made the report.

According to PW1 the Land in question was LR number 934 / 246 and 934/248.

PW2 Immanuel Kenga, the document examiner produced exhibits P3 which was a report ascertaining the signatures on the receipts given to the complainant by the appellant. According to his findings, the two signatures on the two sets of receipts were similar.

PW3 Stephen Nyikuli was the investigating officer. On 6th September 2008 he was given the responsibility by the OCS on the case. He arrested the appellant when he was brought to the station. He also recovered two (2) receipt books from the appellant's office which had copies of the two (2) receipts. He further testified that he wrote to the Registrar of Companies inquiry whether **Western Consultative Agencies** was registered. The answer was negative.

When he was put on his defence the appellant gave unsworn evidence. He said that on 5th September 2008 he was at Ebusiralo Ebusatsi at the home of **Wycliffe Osanye Omutsani** who had passed away. He was carrying out construction work.

On 13th September 2008 he was again away at the home of the late Omutsani. Apparently he seemed not to have completed his evidence as he sought adjournment in the process. The adjournment was denied and forced to close his case. This being the first appeal, this court is enjoined to examine the facts and evidence on record with a view to arriving at an independent decision. The pertinent issue raised by the appellant is that the prosecution did not prove its case beyond the required standard and consequently the conviction and sentence ought to be set aside.

The question that needs to be determined is whether the appellant obtained money from the complainant. The complainant evidence is that he went looking for a surveyor and courtesy of his cousin he went to the appellants offices. He told the court that the said office read " **Western Consultative Agencies**", Surveyors, physical planners, Architectural, Draughtsman and paralegal service". The complainant was given receipt number 2 for the sum of Kshs. 2,000 and receipt number 101 for Kshs. 8,000 though it is written Kshs. 2,000 in figures.

Of great significance on the said receipts is the fact that they were issued by the appellant. Although the appellant refused, the report of the document examiner shows that they were issued by one person.

PW3 told the court that they recovered the two (2) receipt books from the shelf which had copies of the two original receipts. The recovery of the receipt books was not denied by the appellant. They were recovered by the police officer in his present.

An issue was raised by the appellant about the qualifications of the document examiner – PW2. According to the appellant counsel, no proper introduction was done so as to show his qualification. The issue of expert witness is well captured under Section 48 (1) of the Evidence Act which states:-

“48 (1) when the court has to form an opinion upon a point of foreign law, or of science or art, or as to identify or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, Science or art or in questions as to identity or genuineness of handwriting or finger or other impressions”.

(2) Such persons are called experts”.

PW2 introduced himself that he was an Assistant Commissioner of Police and has undertaken various courses which include examination of signatures. This was said under oath. With tremendous respect to the appellant, I do not think that by failing to go beyond what he told the court his case was prejudiced.

I do not think for a moment that the prosecution or the police for that matter would get a quack to examine their documents and signed the same on behalf of the commissioner of Police. Needless to say the appellant during cross examination had all the time and opportunity to cross examine him, which apparently from the proceedings he failed to do.

Having reached that conclusion, I do therefore find that the receipts were issued to the complainant by the appellant. He must have presented himself to the complainant as having the ability to provide the surveying services.

Further the main receipt books were recovered from the office of the appellant in his presence. During cross examination of PW3 the appellant did not raise the issue that the offices which they visited did not belong to him.

I further opine that by virtue of making the payments of Kshs. 2,000 and Kshs. 8,000 respectively the same established a contractual relationship between the appellant and the complainant. Unfortunately, the appellant breached the contract by not undertaking the survey work.

The appellant has also argued that the premises which the alleged offence took place was not his. On this score I do agree with the respondent that what was necessary was not the owner of the premises but the owner of the office.

Was the appellant accorded a fair trial? According to the appellant, he was not granted adequate time and was never supplied with the relevant proceedings and statement to be relied on by the prosecution.

I have had a closer scrutiny of the proceedings on record. On numerous occasions for instance on 23rd June 2010 he was supplied with the documents. Also on 17th March 2011 and 14th April 2011. Infact on 17th March 2011 the document examiner was stood down to enable the appellant be issued with the documents.

On 27th April 2011 when the matter was coming up for submission he asked for one week. The matter was adjourned. On 3rd June 2011 the defence case was postponed to 21st July 2011. On that day the appellant raised some objection but was overruled. He proceeded but in the cause of proceedings he said **“ I need the identity card of Daudi Sibò Ejenje. I need some documents which did not come with. I apply for adjournment”**. The same was denied.

As earlier own observed it is evidently clear from the record of the proceedings that the appellant seemed to have heard several applications including those he filed in the high court, with a view of stalling the hearing. From the date when the Ruling on a case to answer was delivered on 3rd June 2011 till 21st July 2011 was more than 1 ½ months for the appellant to prepare himself. Moreover when the complainant testified he did not demand his identity card or any other document from him. My conclusion therefore is that this was another attempt by the appellant to derail the trial of the case. I do not see any good faith which the appellant exhibited.

Consequently, I do find that the appellant was accorded a fair trial. His attempts to apply to the High Court to forestall the proceedings failed beside other applications he made in the process.

Lastly, the issue raised by the appellant was that the sentencing was excessive. I do not agree. The maximum period allowed is three (3) years. The appellant pretended to offer surveyor services which he did not. When he masqueraded as a surveyor he knew the consequences of his action. He led the complainant to believe that he was such a professional. The complainant like all the other gullible Kenyans will always trust that once there is somebody offering the services they need they put their trust on them.

In regard to his alibi, the same does not hold water. Assuming that one was to believe in the said alibi, it was equally possible for him to be in his friends home as well as in the office but on different hours of the day.

In the premises I see no merit in the appeal and I shall proceed to dismiss it.

Dated, signed and delivered at Kisumu this 16th day of July 2012

H. K. CHEMITEI
JUDGE

In the presence of:

..... State Counsel

..... applicant

HKC/ao