



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Cockar, Omolo & Akiwumi JJ A)**

**CRIMINAL APPEAL NO 115 OF 1991**

**GICHANGA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from a conviction and sentence judgment order or as the  
case may be of the High Court of Kenya at Nairobi

(Mr Justices Porter and Mwera) dated 18th November, 1991

in HC CR A 518, 388 & 681 of 1990)

**JUDGMENT**

The appellant was convicted by the Senior Resident Magistrate on two counts of conspiracy to defraud contrary to section 317 of the Penal Code and one count of stealing by an agent contrary to section 283 (b) of the Penal Code. The particulars of these counts are that the appellant and other persons named in the counts as the case may be.

“On diverse dates between 19th November, 1986 and 12th February, 1987 at Mombasa within the Coast province jointly conspired together to defraud the National Cereals and Produced Board of Kshs 27 million by falsely purporting that 1.5 million new gunny bags worth the said amount of Kshs 27 million had been delivered to the said National Cereals and Produce Board, Mombasa Depot on account of orders given to M/s Yamao Ltd and Nchoke Ltd.

On diverse dates between 19th of November, 1986 and 3rd of April, 1987 at Mombasa within the Coast province jointly conspired together to defraud the National Cereals and Produce Board of Kshs 24.9 million by falsely purporting that 1.4 million new gunny bags worth the said amount of Kshs 24.9 million had been delivered to the said National Cereals and Produce Board Mombasa Depot on account of orders given to M/S Lotus Commercial Complex Ltd and Kenya Phonic Travels and Safaris Ltd.

On or about the 28th day of May, 1988 at Mombasa within the Coast Province, stole Kshs 10,865,225/= which had been entrusted to him by M/s Kenya Phonic Travels and Safaris Ltd for

him to apply for the purpose of procuring and supplying a part of an order of 2.9 million new gunny bags to the National Cereals and Produce Board, Mombasa Depot, on behalf of the said M/S Kenya Phonic Travels and Safaris Ltd”.

He was sentenced to the maximum term of three years imprisonment laid down for the first two offences to run concurrently, and seven years imprisonment for the third offence. In exercise of his statutory right of appeal, the appellant appealed to the High Court against the convictions and sentences. It is clear from the record that the learned Senior Resident Magistrate was faced at the trial with a considerable amount of oral and documentary evidence which was in no sense diminished when the matter came before the High Court on appeal.

The High Court in its lengthy judgment reviewed most thoroughly, the facts presented to the trial court and set out various portions of the trial court's findings in its own judgment. In the result, the High Court reached the same conclusion as the trial court in respect of its convictions on the offences of conspiracy to defraud and affirmed them, though reducing the concurrent sentences passed from three to two and a half years. As regards the conviction of the trial court on the offence of stealing by agent, the High Court came to a contrary conclusion and acquitted and discharged the appellant. It is the High Court's affirmation of the trial court's convictions on the conspiracy charges and sentences imposed by the High Court, that has provoked the further appeal to this Court.

Before we embark on a consideration of this appeal and the complaints raised against the judgment appealed from, we must remind ourselves of our proper role as a second appellate court. Section 361 (1) of the Criminal Procedure Code limits appeals to this Court on issues of law only thereby, conferring a right on a party aggrieved to appeal against a decision of the High Court in its appellate capacity on a matter of law. It follows that there is no right of appeal to this Court on a matter of fact or what is regarded as such. The facts involved in the trial court's convictions and which the High Court also independently found to be proved, can be summarized as follows. The appellant purported to deliver to the complainant in this case, the National Cereals and Produce Board which I shall henceforth refer to as “the Board”, 2.9 million gunny bags, and upon applications being made to it, placed orders with four firms namely, Nchoke Ltd on 4.9.1986, Yamao Ltd on 24.9.1986, Lotus Commercial Complex Ltd on 4.8.1986, 1811.1986 and 5.3.1987, and Kenya Phonic Travels and Safaris Ltd on 19.11.1986, to supply the Board with 500,000, 1,000,000, 1,500,000 and 500,000 gunny bags respectively, to be delivered at the Board's depot at Mombasa, and at agreed prices for each gunny bag. None of these firms which, apart from Lotus Commercial Complex Ltd, seemed to have been incorporated in 1986 specifically to tender for the supply of gunny bags to the Board, had at the time, any gunny bags to deliver to the Board. The answer to their predicament soon appeared in the person of Jennifer Gaya (PW 5) who also happened to be the proprietor of one of these firms namely, the unlikely Kenya Phonic Travels and Safaris Ltd. She offered to supply to the Board on behalf of the other firms with the gunny bags required of them for a commission. But since she had none at all herself, she sought in December 1986, the assistance of the appellant in this respect. The appellant pretended that he had the gunny bags and on 6.1.1987, and 5.2 1987, took Jennifer Gaya to various warehouses in Mombasa where he showed her huge quantities of gunny bags said to be over 2.9 million in number, and which he claimed were his and which he could deliver to satisfy the orders to supply gunny bags to the Board. The appellant by a letter dated 16.2.1987, from Mombasa Development Ltd of which he was not only its Managaing Director but also its Chief Executive Officer, undertook to deliver the gunny bags required. The letter was, however, actually signed by the appellant's brother. On her part, Jennifer Gaya's advocates by their letter dated 19.2.1987, and addressed to the appellant, undertook to pay the appellant for the bags if delivered. But it is clear from the evidence adduced at the trial and accepted by the trial Court as well as by the High Court, that the appellant had no such gunny bags to deliver. However, in order to carry the deception to its logical conclusion and to make the Board believe that gunny bags which had not in fact, been delivered to its depot, had been delivered, and thereby, induce the Board to pay for the delivery of such gunny bags, it became necessary to embark on the next step in the deception. Documents known as purchase advices were prepared by certain officials of the Board at its Mombasa depot who were charged as fellow conspirators of the appellant, to certify that the gunny bags involved had in fact, been delivered to the Board's depot. The headquarters of the Board in Nairobi acting upon these purchase advices, issued cheques for the payment of the gunny bags alleged to have been delivered. The first set of purchase

advices dated 12.2.1987, falsely showed that 1.5 million gunny bags had been delivered 500,000 of them by Nchoke Ltd and 1 million by Yamao Ltd. The second set of purchase advices dated 3.4.1987, falsely showed that 1.4 million gunny bags had originally been delivered to Mombasa Development Ltd but subsequently, altered because Mombasa Development Ltd itself, had no orders to supply the Board with gunny bags, to show that 900,000 and 500,000 gunny bags had been delivered by Lotus Commercial Complex Ltd and Kenya Phonic Travels and Safaris Ltd respectively.

As a result of the first set of purchase advices, the sum of Kshs 27 million was paid by the Board to Jennifer Gaya through her advocates on behalf of Nchoke Ltd and Yamao Ltd. Significantly, the sum of over Kshs 18 million out of this, found its way into the hands of the appellant as the one who would deliver the 1.5 million gunny bags to the Board. This payment was by way of five bankers cheques sent by Jennifer Gaya's advocates. The plan was that the appellant was to use the money paid to him to then buy the gunny bags, as it were, after the event. The second set of purchase advices was to have yielded a payment of Kshs 24.9 million but this did not occur since the Board was then in financial difficulties and could only give a cheque for Kshs 5 million in part payment for the 1.4 million gunny bags alleged to have been delivered by Lotus Commercial Complex Ltd and Kenya Phonic Travels and Safaris Ltd. This amount was shared equally between the proprietor of Lotus Commercial Complex Ltd and Jennifer Gaya. The significant fact, however, still remained that the gunny bags alleged to have been delivered by these two firms, were originally stated in the second set of purchase advices to have been delivered by the appellant's firm, Mombasa Development Limited. The second set of purchase advices were subsequently, amended to tell another lie, that the gunny bags concerned had actually, been delivered by Lotus Commercial Complex Ltd and Kenya Phonic Travels and Safaris Ltd.

The conclusion which the trial court arrived at from these facts and which were independently arrived at also by the High Court, were that the conspiracy to defraud the Board as charged, could not in the face of the facts established and accepted as true, have been perpetrated without the active participation of the appellant as well as those charged with him as his fellow conspirators whose role was to certify that gunny bags which had not in fact, been delivered to the Board's Mombasa depot, had been so delivered. Furthermore, the object of the conspiracy which is not too difficult to discern, was to induce the Board by falsely purporting that gunny bags had been delivered to its Mombasa depot, to part with money, over Kshs 18 million of which, actually got into the hands of the appellant. What more ample proof of the appellant's guilt can there be than this?

The facts which we have summarized and upon which the prosecution of the appellant on the two counts of conspiracy were based, were examined by two Courts which were in agreement. It has been necessary for us on this second appeal, to consider whether the concurrent findings of fact by the two courts below could be supported and whether applying the relevant law to those facts, the convictions were sound. We have no hesitation in coming to the conclusion as we have indeed, already indicated, that the concurrent findings of fact by the two courts below can be supported. But were the convictions soundly based? Before answering this question, it would be necessary to first consider the points of law which the appellant has raised in the present appeal. These are set out in five grounds which can be summarized as follows: They are:

- (a) That the appellant was only acting on behalf of his company, Mombasa Development Ltd, and so the company and not him, should have been charged with the offences on which he was convicted.
- (b) The Board could not be induced to part with its money by false pretences if any.
- (c) The appellant was convicted in respect of acts alleged to have been committed in 1988 whilst the acts of false pretences if any, were committed in 1987 when the Board was induced to pay for non existent gunny bags.
- (d) Why should the appellant be convicted of the offences of conspiracy when Jennifer Gaya had conceded that she herself, had delivered the gunny bags to the Board.

(e) And lastly, that the appellant not having received any money from the Board and his conviction of the offence of theft by agent having been set aside by the High Court, his convictions on the conspiracy charges could not stand.

These grounds can be disposed of fairly quickly. On the facts that were accepted by the two courts below, the appellant in January and February, 1987, showed Jennifer Gaya more than 2.9 million gunny bags which he claimed were his and which he would deliver to the Board's depot in Mombasa. These bags were in fact not his and so no bags were delivered by him to the depot to fulfill the orders placed with Yamao Ltd, Nchoke Ltd, Lotus Commercial Complex Ltd or Kenya Phonic Travel Safaris Ltd to supply the Board with 2.9 million gunny bags. The trial court having warned itself of the dangers of convicting the appellant on the uncorroborated evidence of accomplices such as Jennifer Gaya, came to the conclusion, apart from the evidence of Jennifer Gaya, that the appellant must have been part of the conspiracy. This was on the basis that there was evidence which was accepted, *inter alia*, that the appellant did not own the 2.9 million gunny bags which he showed Jennifer Gaya as belonging to him; that he was in fact, paid over Kshs 18 million in respect of 1.5 million gunny bags falsely alleged to have been delivered to the Board; and the otherwise unexplainable purchase advices submitted to the Board including those made out first in the name of Mombasa Development Ltd, that 1.4 million gunny bags had been delivered by Mombasa Development Ltd to the Board when this was not so. Upon these facts, and other acts, which were the concurrent findings of the two Courts below, not only is the role of the appellant in the conspiracy clearly shown, but also that the appellant cannot hide behind the skirt of the Mombasa Development Ltd for his very personal acts. It is true that the Board being an abstract body, cannot be as such, induced by false pretences to take a certain course, but this could be so if it can be shown that appropriate servants or agents of the Board acting, in good faith, were induced by false pretences, to take a certain course of action injurious to the Board.

However, with respect to the offences of conspiracy, the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money. Both courts below answered that question on the facts accepted by them, in the affirmative. We think that they were clearly entitled to do so. The two charges of conspiracy related to acts committed between November 1986, and 12th February 1987, when the first set of purchase advices of the latter date were made and between November 1986, and 3rd April 1987, when the second set of purchase advices of the latter date were made. There was ample evidence already referred to and which we need not recite again, which establish the appellant's role in the conspiracy charges and upon which he was found guilty, as having been committed during the periods specified therein. The appellant was not as he has argued, convicted of acts committed in 1988.

Did Jennifer Gaya as the appellant has urged, deliver the gunny bags herself to the Board? In her cross examination she did say that she had delivered 2.9 million gunny bags to the Board, but considered in its proper context, it meant no more than this that the appellant on 6th and 7th February 1987, took Jennifer Gaya in the company of employees of the Board, Bakari, Kirimi and Wachira to the godowns where he alleged his gunny bags were, and that what Jennifer did was no more than to say that the gunny bags in the godowns were the ones she would deliver to the Board. At the time, actual delivery of the gunny bags had still to be made. What is more, no gunny bags were counted and if as it turned out, the gunny bags did not belong to the appellant in the first place, and were as it happened, never actually taken into possession by the Board, then no gunny bags were ever delivered to the Board and whether Jennifer Gaya said so or not does not really matter. What matters is whether the appellant took part in the conspiracy as charged. As we have already observed, there was ample evidence which was accepted by the two courts below, that he played a key role in the conspiracy. In fact, his company seems to be the one that gained most financially from the conspiracy. The last ground needs only to be stated to be rejected. The appellant it is true, received monies from Jennifer Gaya but the High Court was not satisfied that the appellant had not properly accounted for them particularly when the evidence of the prosecution in respect of the charge of theft by agent, was the uncorroborated evidence of a clear accomplice, Jennifer Gaya. The basis and the facts relied upon in respect of this charge, are quite different from those forming the basis and evidence in respect of the conspiracy charges. Indeed,

the conspiracy was accomplished in point of time, before the money obtained therefrom, was ever paid over the appellant. Whilst the conspiracy can be likened unto a group of ill intentioned people planning to cause injury to a third innocent party through deceit, the theft by agent can be likened unto a falling out among thieves. The two matters are quite distinct and the appellant's acquittal on the charge of theft by agent cannot affect his previous acts of conspiracy.

We think it worthwhile in conclusion, to set down portions of the judgment of the High Court which summarizes well the matters in issue in this appeal and with which we entirely agree:

“It is on p 22 of the judgment of the learned trial magistrate that he sets out the position as he saw it. He thought on the evidence before him that what was intended by the conspiracy was for delivery to be purported to be made of non existent gunny bags to National Cereals and Produce Board Mombasa so that purchase advices could be drawn, the money paid over, and the sacks then obtained and delivered, and he considered the matter and found that even this lowest way of putting the matter alleged against the appellants was a conspiracy to defraud, and we entirely agree with him.

We also agree with him that this was actually what happened in this case, but that the deal went sour and the sacks were never bought. We do not think that this was fanciful conclusion existing only in the mind of the learned trial magistrate as we have been invited to do: it is the fairest and lowest way of putting the facts proved in the court below bearing in mind the interest of the appellants.”

The High Court then in agreement with the findings of the trial court, and its holding on the crime of conspiracy, went on to state the facts and the law as follows:

“And therein lies the basis upon which these appellants were convicted of the conspiracy charges. The learned trial magistrate put it that at the very least, as we have stated above, the intention was to obtain payment from National Cereals and Produce Board Nairobi headquarters for bags which had not yet been supplied, so that then the bags could be purchased and delivered to National Cereals and Produce Board Mombasa. For such payment to be obtained it was necessary for the purchase advices to be prepared, and these are uncompromising forms which make it quite clear what information is required. The information given in the forms was untrue, we are satisfied of that, as was the learned trial magistrate, and we are not prepared to accept explanations that that happened by negligence, influence or accident as we have said above. It follows then that the various certifications can only have been in conformity with an established plan, for otherwise there would have been no reason for these false declarations to have been made in such a way as to support Mr Gichanga's original claims as to the gunny bags. Without that support the whole affair would have got nowhere.

Turning now to consider the nature of conspiracy, it must not be forgotten that the Penal Code provides for a number of types of conspiracy, as in ss 393, 394, 395, 57, 117 157, 224 and (the section we are considering) 317.

There is a difference between s 317 and the other section, because no specific criminal offence is mentioned. That is why the learned trial magistrate can say, as he did, that even if the original intention was to complete the deal, that is not relevant, because the way in which the deal was to be set up amounted to deceit, defrauding the National Cereals and Produce Board. Quite clearly if the National Cereals and Produce Board Nairobi had been aware that the gunny bags had never been delivered, it would never have crossed the minds of its concerned officers to issue cheques and come to, on the face of it enforceable, agreements with the people concerned. And it was the behaviour of these appellants which made it possible for National Cereals and Produce Board Nairobi to think that the gunny bags had been delivered, and therefore to take incorrect action. It can be seen that the whole system of purchase advices, depends upon correct certifications, and that for National Cereals and Produce Board Nairobi to think that the gunny sacks had been delivered and therefore to take incorrect certifications, and that for National Cereals and Produce

Board's officers to tell lies in the certificates as we are satisfied they have done deliberately, is a certain recipe for disaster, the very disaster the system these people operate is designed to guard against. It does not need the panoply of a full hearing by a senior resident magistrate, and of an appeal by two High Court judges to point that out. It is obvious to all, particularly those who operate the system.

What is missing from the prosecution case, as has been pointed out by most of the appellants, is evidence of a meeting, or an occasion upon which an agreement between all these people could have taken place.

What the learned trial magistrate has found in this case is that there must have been such an agreement, and he has found it briefly because everyone needed to fulfil a part in the deception clearly practiced on National Cereals and Produce Board Nairobi.....and that could not be so unless all knew what was being done and agreed to be a part of it. The agreement has been inferred from the facts, as in, for instance, *Ongodia v Uganda* [1967] EA 137 (and see also *Archbold* 42nd Edition at para 28 – 4 *et seq*). And that agreement has been carried out, in that the purchase advices were put into such form by the officers concerned with the intent of deceiving National Cereals and Produce Board Nairobi, with the support of Mr Gichanga who pretended that sacks were available so that enquiries could be temporarily diverted as they were in fact.”

We have also considered the written submission filed by the appellant and the conclusion we have come to is that the grounds of law urged by the appellant have no merit and the convictions of the appellant on the counts of conspiracy were soundly based. We also see no reason, to interfere with the sentences substituted by the High Court. In the result, the appellant's appeal against his convictions and sentences is dismissed.

Dated and Delivered at Nairobi on this 16<sup>th</sup> day of July, 1993

**A.M COCKAR**

.....

**JUDGE OF APPEAL**

**R.S.C OMOLO**

.....

**JUDGE OF APPEAL**

**A.K. AKIWUMI**

.....

**JUDGE OF APPEAL**