IN THE COURT OF APPEAL

AT NAKURU

(Coram:Hancox, Nyarangi JJA & Platt Ag JA)

CRIMINAL APPEAL NO. 150 OF 1985

BETWEEN

NYAMBANE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nakuru, Omolo J)

JUDGMENT

The appellant, was charged before the second class district magistrate at Narok with obtaining Kshs 105,000 from one Charles Mugesi by false pretences contrary to section 313 of the Penal Code. The false pretence alleged in the particulars of the charge was that the appellant "was in a position to buy him" (meaning the complainant) "a motor vehicle at a cheaper price at Nairobi."

It was this payment in the charge sheet which gave rise to the first ground in the memorandum of appeal to this court and formed the main basis of the submissions of Mr Otumba on behalf of the appellant. He submitted that the transaction which took place between his client and the complainant and which spread over the several days from September 12th to 16th, 1984, involved a mere promise, a statement of future intention, and therefore did not amount to a false pretence as to an existing fact as defined in section 312 of the Penal Code. The courts, Mr Otumba said in effect, should not be astute to ascribe to the criminal law matters which in reality only amounted to breaches of civil contracts or agreements, for which there existed adequate remedies by way of a suit.

There was a document in very simple terms which was called an agreement and produced in the appellant's trial marked "A", and which merely recorded that the complainant had given Kshs 105,000 to the appellant "so that he can go and buy a motor vehicle from his friend". There was expert handwriting evidence from C/I Bett that one of the signatures on the agreement, which he had compared with specimen signatures, the validity of which Mr Otumba also attacked, was that of the appellant. This agreement arose from a conversation between the parties, who were friends of long standing, which took place on September 12, 1984, in the course of which, so the complainant testified, the appellant said that a friend of his was selling a Peugeot 504, which was going cheap at Kshs 105,000, instead of Kshs 170,000 for a new car. The appellant promised to bring the car's owner. All three of them then travelled to Narok in the complaint's car to enable him to raise the Kshs 105,000 at his bank.

The complainant's bank manager was amenable to this loan, the money was obtained, tied with string and hidden in the ceiling of the bedroom in the complainant's house. All this was done in the presence of, and

indeed with the assistance of, the appellant. Thereafter they returned to Nairobi, agreed that the appellant should have the engine of the complainant's car tuned up and that the appellant should come with the car the complainant was intending to purchase, first at 8.00 pm on the 15th and then at 7.00 am on October 16th. When the appellant did not turn up with either car on either of these occasions, the complainant began to entertain suspicions regarding the *bona fides* of the appellant and requested another friend, Peter Awoni (PW 3) to drive him to Narok, leaving a message to that effect for the appellant.

The appellant duly arrived at Narok late on September 15, and on the 16 asked for, and was given, the Kshs 105,000, plus his commission, whereupon the agreement to which we have referred to was signed by each. They drove back to Nairobi and that was the last the complainant saw of the appellant until October 20, when he ran him to earth in the Turet hotel at Nakuru. The complainant apparently had information as to the car which the appellant then had, a Peugeot 504, Number KWL 653, about which there has been much subsequent argument, involving several counsel, in this case. On his arrest the appellant offered to return the money to the complainant, but this was refused.

Mr Otumba submitted, when arguing his second ground of appeal, that there was insufficient evidence for the trial magistrate, and subsequently the High Court (Omolo Ag J), to find that the Kshs 105,000 had been paid over to the appellant. He said that no foundation had been laid for the reception of the handwriting evidence, as illustrated, for example, by Spry J (as he then was) in *Hassan Salum v Republic* [1964]EA 126 at pages 127 and 128, that neither Aloni nor the watchmen corroborated or supported the complainant's evidence of this and that the learned judge's finding in this respect was erroneous. Accordingly it boiled down to one person's word against another, for the appellant, in his unsworn defence, denied taking any money from the complainant, or signing any agreement.

We are inclined to agree with Mr Otumba's comments regarding the handwriting evidence. As Spry J said, the features of similarity between the known and the questioned handwriting or signature should precede in evidence the opinion of the expert. However we are unable to agree with him that there was no evidence supporting that of the complainant. Both Aloni and the watchman said they saw with their own eyes that a quantity of money, which was tied, (though neither could say how much money) was removed from the ceiling by the complainant and handed over to the appellant, and that they both then signed a document. Neither witness was successfully challenged in cross-examination and we think that both the magistrate and the judge were entitled, and indeed right, to find on the complainant's evidence, as so supported, that Kshs 105,000 was paid to the appellant on September 16, 1984. We should be reluctant to disturb these concurrent findings of fact on a second appeal unless there were compelling reasons, which do not exist in this case, for us to do so.

There were, equally, concurrent findings of fact, which we are equally loath of disturb, that the money was paid over against a representation that the appellant had a friend who was selling a Peugeot 504 car cheaply at Kshs 105,000. Mr Etyang, for the republic, submitted that there was infact "no friend and no car". Again there was ample evidence to support the concurrent findings of fact by both lower courts that their representation was false.

This brings us back to ground 1, namely the point as to whether the representation was one of an existing fact, or was merely a promise or statement of intention *de futuro*. True it is that almost every representation of fact involves a statement of intention, though the converse is not necessarily so. In *R v Dent* (1955) 2 AER 806, a case decided on section 32 of The Larceny Act 1916, which was before the law was altered in England to create the new offence of obtaining by deception by the Theft Act 1968, (so that the statutory provision there being considered was similar to section 313 of the Penal Code) theCourt of Criminal Appeal had this to say; at page 807:

"Dishonesty is not *per se* a criminal offence: and the point that has been argued before us and which is the subject of the deputy chairman's certificate is that a statement of intention, whether expressed or implied, is not a statement which can amount to a false pretence for the purpose of the criminal law.

And at page 808:

"Every promise by a person as to his future conduct implies a statement of intention about it, though not every statement of intention amounts to a promise; but it would manifestly be absurd to hold that when such a statement of intention does amount to a promise, the accused has committed no offence and that when it does not amount to a promise, he has. No distinction can be drawn for this purpose between "I will do it" and "I intend to do it".

"There are two qualifications to be noted. The first is that a promise as to future conduct may be coupled with a false statement of existing fact, and that the words in the statutory definition are "A promise …… is not by itself a false pretence."

Finally the court said, (with reference to the older *R V Bates & Pugh* (1848) 3 Cox's Criminal Cases 201), at page 809 of the report:

The words "ready willing to pay" indicate the second qualification. Readiness and willingness to pay may suggest a statement about future conduct. It is clear from the authorities that the law does not seek to divide the future meticulously from the present. If a man says: if you give me the goods now, I will hand over $10, while as a matter of chronology payment follows after delivery as a matter of business it is all one transaction. It has so far not been necessary to determine just where the dividing line between present and future is to be drawn. The reason for this is, we think, that there can in the nature of things be few promises intended to be performed immediately which do not import some statement about the promissor's readiness to perform, that is he has an existing fact the power and means to perform his promises.

That in our view fits the present situation. By telling the complainant that he had a friend who was selling a Peugeot 504 car very cheap and promising, in effect, to bring its owner and arrange the sale of it to the complainants, the appellant was representing that he had the power and the means to obtain the car for the complainants at the stated price, or, as it is stated in the particulars of the charge set out at the beginning of this judgment, that the appellant was in a position to buy (the complainant) a motor vehicle at a cheaper price in Nairobi. Though the events occurred over several days, they were clearly all one transaction: see *R v Dent* (*supra*).

Further support for this view is to be found in the court's decision of *Joseph Mwatha Gitonga v Republic*, Criminal Appeal 14 of 1984, which considered a false pretence that the appellant had a farm to sell, coupled with a statement that there would be collections of money for the intending shareholders. It may also be that the evidence alternatively established the offence of theft by agent, in that the money could be deemed under section 271 of the Penal Code to have been the property of the complainant, but the point was not argued before us.

However, as we have said, there was ample justification for the concurrent findings of fact, by both the lower courts, that the representation was made and it was false. There was thus in our view a false pretence as to an existing fact which the appellant made to the complainant in order to obtain the Kshs 105,000.

Being of this view we entertain no doubt that the conviction was correct both in fact and in law and that the learned first appellate judge's decision dismissing the appeal against it was also correct. We accordingly dismiss this second appeal by the appellant against his conviction. As we explained to Mr Otumba, we have no jurisdiction to entertain ground 3 of the memorandum of appeal, which was against the sentence.

That, unfortunately, is not an end of the matter because there remains the vexed question of the motor vehicle KWL 653, which was the subject of an application by the republic before the Chief Justice on February 17, 1986, and was referred by him to the full bench which was then about to continue the hearing of the main appeal. We gave leave to Mr Etyang to argue the issue before us, but as we indicated during the course of his submissions, there was no evidence that the vehicle, which was produced as an Exhibit, was the one which was being contemplated by the appellant in September, 1984, still less than the Kshs 105,000 paid over by the complainant on the 16th of that month was used by the appellant to

purchase it.

Accordingly this case is not the same as *Timothy Enoch Oboko v Republic*, Criminal Appeal 130 of 1983 in which the property referred to in the charge had been stolen and the appellant prosecuted to conviction, so that the court could order that the proved stolen property should revisit in the owner either section 178(1) of the Criminal Procedure Code or section 25(1) of the Sale of Goods Act, (cap 31). Neither is the situation covered by section 311 of the Penal Code in which different offences are mentioned. Here the property mentioned in the charge was the money and not the vehicle KWL 653. While we agree with Mr Etyang that the judge's order regarding the vehicle was, for the reasons we have just stated, wrong in law, we also agree with Mr Otumba that the magistrate had no jurisdiction to make the order substituting the complainant as the registered owner of the vehicle (as the log book shows) instead of George Ongera, in the first place.

Even if it were possible for us to ascertain to whom the vehicle KWL 653 belonged we would have no jurisdiction to make any order in respect of its destination. It is, in any event, not possible to ascertain this fact, because, although we adjourned the appeal as part heard on September 25, 1985 for the production of the documentary Exhibits VIII to XI, (or Exhibits 8 (1) to (viii) these have not been forthcoming. We sympathize with Mr Etyang and the police, to whose custody the vehicle was committed by Omolo Ag J S. Further order of September 26, 1985 for the invasions position in which they are placed, but the rival claims to it are matters which should be the subject of civil proceedings, and do not fall within the jurisdiction of this court on a second criminal appeal, save only to state that the orders of both the learned judge and of the district magistrate with regard to the vehicle KWL 653 were made without jurisdiction and to order that they be set aside.

Appeal dismissed.

Orders accordingly.

Dated and Delivered in Nakuru this 25th day of March 1986.

A.R.W.HANCOX

.....

JUDGE OF APPEAL

J.O.NYARANGI

.....

JUDGE OF APPEAL

H.G.PLATT

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR