



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CRIMINAL APPEAL NO. 31 OF 2013

BETWEEN

PETER WALEMBA ISAYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from the Judgment and order of the High Court of Kenya at Kakamega (Kimaru & Chitembwe, JJ.) dated 26th September, 2012

in

HCCRA. MO. 199 OF 2010)

JUDGMENT OF THE COURT

1. The appellant, **Peter Walembe Isaya**, and his wife Julia Adhiambo Makhokha were charged with twelve counts of the offence of obtaining by false pretences contrary to section 313 of the Penal Code, of the Laws of Kenya. The particulars of the offences were that between August 2004 and July 2005, at Kakamega town, they jointly with others not before court, with intent to defraud, obtained cash from numerous complainants by falsely pretending they were in a position to refund the amounts with interest at 20% per month a fact they knew to be false.
2. Julia Adhiambo Makhokha was convicted on counts one, two, four, eight and ten and fined.
3. The appellant was convicted on count eight only and fined Kshs. 50,000.00 and in default to serve one-year imprisonment.
4. They were both aggrieved and appealed to the High Court on grounds that there was insufficient evidence before the trial court to support the convictions. Their appeals were dismissed in a judgment delivered on 26th September 2012. When dismissing the appeals, the High Court (Kimaru & Chitembwe, JJ.) took the view that the appellant and his wife Julia Adhiambo Makhokha were engaged in the business of “a pyramid scheme, a ponzi scheme or a fraudulent

scheme” and that they had “obtained money from the complainants under the guise that they would give a handsome return to their “investment”” when they “knew that there is no business in the world where one would get a return of 20% interest on an investment per month.”

5. Dissatisfied, the appellant and Julia Adhiambo Makhokha appealed to this Court. However, by a notice of withdrawal of appeal filed in this Court on 9th July 2015 under rule 68(1) of the Rules of the Court, Julia Adhiambo Makhokha withdrew her appeal. The result is that the only question before us is whether the conviction and sentence of the appellant with respect to count eight is sustainable.
6. The particulars of the offence under count eight were that on 12th January 2005, at Kakamega town in the then Kakamega District of the Western Province the appellant and his wife Julia Adhiambo Makhokha jointly with others not before court, with intent to defraud obtained cash of Kshs.200,000.00 from Alfonse Ombayo Shisiebo by falsely pretending that they were in a position to refund the said amount of money with 20% per month interest to the said complainant a fact they knew to be false.
7. Before the trial court, Alfonse Ombayo Shisiebo (PW2), a retired police officer, testified that the appellant visited him in January 2005 and informed him that he and his wife had opened an investment company, Jujuma Enterprises; that he showed him his office and invited him to invest in the company; that he accepted the offer, withdrew Kshs.200, 000.00 from Post Bank and invested the same in the company; that the appellant gave him a receipt for the money; that he was to receive Kshs. 40,000.00 every month as interest; that after receiving Kshs. 40,000.00 from the appellant once, the appellant did not thereafter make any other payment to him; that he then reported the matter to the police and has never been able to recover the balance of his investment. He produced a withdrawal slip from Post Bank and the receipt for the investment made as exhibits.
8. The evidence of PW 2 was supported by that of his wife, Hellen Makokha Ombayo, (PW3), who stated that she accompanied her husband PW 2 to the offices of the appellant where he gave the appellant Kshs. 200,000.00 out of the Kshs. 207,000.00 that they had earlier withdrawn from Post Bank and got a receipt for it.
9. In his defence, the appellant, a police constable, stated that in July 2005 he was working at Vihiga Police Station when a colleague, sergeant Naibei, requested him for assistance with regard to investigations at Jujuma Enterprises where a search was conducted in his presence but in the absence of his wife. He denied having received any money from the complainant.
10. The trial court found as a fact that count 8 was proved to the required standard.
11. During the hearing of the appeal before us, Mr. Andrew Mshindi, learned counsel for the appellant, submitted that the lower courts failed to properly evaluate the evidence; that had they done so they would have found that the evidence of PW1 and PW 2 was not consistent regarding the amount allegedly withdrawn from Post Bank; that the ingredients of the offence for which the appellant was convicted were not proved; that to sustain the charge the prosecution had to prove ‘obtaining’ as well as ‘intention to defraud’; that even if the appellant represented to the complainant that he would in future pay interest on the amount invested, that could not amount to a false pretense as a representation must relate to the past or present. In that regard counsel referred us to the High Court decisions in **Joseph Wanyonyi Wafukho vs. Republic [2014] eKLR** and **Francis Mwangi and another vs. Republic [2015] eKLR** and the decision of this Court in **Mathlida Akinyi Oware vs. Republic Criminal Appeal No. 12 of 1989 CA, Nairobi** and urged that the necessary ingredients of the offence with which the appellant was charged were not proved.
12. Counsel concluded his arguments by submitting that the trial was conducted before two magistrates and when the second magistrate took over the trial, section 200(3) of the Criminal

Procedure Code was not complied with.

13. On those grounds, Mr. Mshindi urged us to allow the appeal.

14. Miss Kimani, learned prosecution counsel, conceded the appeal on grounds that section 200(3) of the Criminal Procedure Code was not complied with in light of which it was not necessary, she argued, to consider the other grounds of the appeal.

15. We have considered the appeal and the arguments by learned counsel.

16. Section 313 of the Penal Code under which the appellant was charged provides that:

“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.”

17. The expression “False pretence” is defined under section 312 of the Penal Code as:

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

18. From the facts, the alleged false pretence attributed to the appellant relates to a representation that the complainant would receive an interest of 20% at some future date. The alleged false pretence therefore related to a representation as to a future event. In **Abdallah vs. Republic [1970] E A 657**, the appellant borrowed money from a club and in exchange gave a postdated cheque which was dishonoured on presentation. He was charged with the offence of obtaining by false pretence and convicted. On appeal, the Court of Appeal at Dar es Salaam had this to say;

“The charge in respect of this count alleges that in giving this post-dated cheque the appellant was “falsely pretending that he had sufficient funds in his personal account” to meet the cheque. In our view the giving of a post-dated cheque is not a representation that there are sufficient funds to meet the cheque. It is a representation that when the cheque is presented on the future date shown on the cheque there will be funds to meet it. This is a representation as to a future event and cannot support a charge of obtaining money by false pretences, if the drawer of the cheque in fact has an account at the bank.”

19. In **Mathlida Akinyi Oware vs. Republic** (supra) the representation complained of was that the appellant was in a position to buy some khangas for the complainant based on which the complainant gave money to the appellant. The Court stated that there was no evidence that when the appellant informed the complainant that she was in a position to buy some khangas from the complainant she was not in a position to do so. In those circumstances, the Court observed ***“Her inability or failure thereafter to buy some khangas for the complainant related to an event in the future which cannot support the offence of obtaining by false pretences.”***

20. In the present case, there was no evidence that when the appellant made the representation that he would pay interest at 20% per month, he was not in a position to do so. Indeed the evidence presented was that he did in fact subsequent to receiving the investment pay what the complainant called interest of one month of Kshs. 40,000.00 but thereafter failed to continue doing so.

21. It may well be that the business the appellant was engaged in is one to be frowned upon, but had

the lower courts properly evaluated and analyzed the evidence, they would have come to the conclusion that the ingredients of the offence with which the appellant was charged were not proved.

22. Finally, there is the question of non-compliance with the provisions of section 200(3) of the Criminal Procedure Code. The record shows that B. M. Nzakyo, RM heard the evidence of five witnesses, after which the conduct of the trial was taken over by P. O Ooko, RM, who heard the remaining witnesses. Section 200(3) provides that:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

23. There is no evidence that that provision was complied with on takeover by the succeeding magistrate. It was incumbent upon the court to inform the appellant of his right to have any of the witnesses recalled. [See **Bob Ayub vs. Republic [2010] eKLR**]. Accordingly, the State correctly conceded the appeal on that ground.

24. For those reasons, the appeal succeeds. The conviction of the appellant on count 8 is hereby quashed and the sentence of fine or imprisonment in default is hereby set aside.

Dated at Kisumu this 19th day of October, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR