REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: AZANGALALA, GATEMBU & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 363 OF 2012

BETWEEN

KOSSAM UKIRU ….. APPELLANT

AND

REPUBLIC …... RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Kisumu (Chemitei, J.)

dated 26th September, 2012

in

HCCRA. NO. 173 OF 2010)

****

JUDGEMENT OF THE COURT

INTRODUCTION

1. The appellant, ***Kossam Ukiru,*** was charged in the Chief Magistrate's court Kisumu, with one count of cheating contrary to ***section 315*** of the Penal Code. The charge carried the following particulars:

> ***"Cossam Ukiru on the 1st day of December, 2007 at Manyatta Estate in Kisumu City within Nyanza Province, by means of fraudulent tricks obtained Kshs.167,000/= (One hundred and sixty seven thousands) from ISSAC AGAMU."***

2. The appellant pleaded not guilty but after full hearing the learned Resident Magistrate ***(R.B.N. Maloba)*** found him guilty as charged, convicted him and sentenced him to three ***(3)*** years imprisonment. He was not satisfied with that conviction and sentence and so he appealed to the High Court against both conviction and sentence.

3. That appeal was heard by a single Judge of the High Court ***(H.K. Chemitei, J)*** who, after hearing it, dismissed the appeal both on conviction and sentence. He the appellant was still dissatisfied and hence

this second appeal premised on eight grounds set out in his memorandum of appeal dated 6th June, 2014.

ISSUES RAISED

4. The eight grounds however raise the following issues

1. ***Defective charge***
2. ***That the evidence did not support the charge***
3. ***Failure to consider the appellant's defence of alibi.***
4. ***Breach of rights under Articles 49, 50 (2) (4), 25 (a) and (c) and 29 (f) of the Constitution of Kenya 2010.***

In substantiation of the above issues the appellant relied upon written submissions which he had earlier submitted and were on the record.

5. For the respondent, Mr. ***Abele*** the learned Assistant Director of Public Prosecutions, supported the conviction of the appellant and the sentence meted out to him. On alleged defect in the charge sheet counsel submitted that he detected a conflict with regard to the date the offence happened and that on the charge sheet but hastened to add that the defect was curable under the provisions of ***section 214, 90 (2)*** and ***382*** of the Criminal Procedure Code.

6. Related to the complaint with respect to the defect in the charge, the appellant also complained about variance between the charge sheet and the evidence and conflict in evidence adduced by the witnesses. Mr. Abele unfortunately was silent on this complaint, no doubt, we think because no issue of law was involved.

7. On breach of the appellant's fair trial rights under ***Articles 49, 50 (2) (4)*** and ***25 (a)*** and ***(c)***, counsel submitted that the complaint was without substance as these provisions were not in force when the offence was committed.

8. On the alibi defence, Mr. Abele contended that the same was introduced late in the defence when the prosecution had no opportunity to interrogate it. Notwithstanding the belated introduction of the alibi defence, counsel submitted that the same was considered by both courts below and was properly rejected.

9. On sentence, Mr. Abele was of the view that although the same was the maximum provided for in law, it was deserved since the appellant was a repeat offender.

FACTS

10. We have axioulsy considered the record, the submissions made to us and the law. The case which was presented before the trial court was in summary as follows: The complainant, Issac Agamu Ngurase ran a business in Kisumu City. As a businessman, money is an important tool. In the month of September, 2007 the complainant claimed that the appellant approached him claiming that he worked with Dela Rue company which was in money minting business and he would do the same for him. The complainant was interested in the appellant's offer and in the month of December, 2007 he gave him Kshs.167,000/=. The appellant was then accompanied by a person who was not charged. According to the complainant, the appellant's attempt to double the said sum at the complainant's house failed and the appellant requested to go with the money to his laboratory to complete the process. Thereafter the appellant, after initial promises to return the money, ceased to communicate with the complainant thereby prompting the complainant to complain to the police.

11. ***Maureen Agamu*** *(PW2) (Maureen),* the complainant's wife, testified that she witnessed the complainant hand over the said sum to the appellant and saw him carry the money away presumably to complete the process of ***"doubling."***

12. ***Isaya Kisigane Agamu*** *(PW4) (Isaya)* is the son of the complainant and Maureen and testified that

he saw the appellant and his companion several times with the complainant who later informed him that he had lost money to the visitors.

13. Cpl ***Ben Sichenga*** *(PW5) (Cpl Sichenga)* investigated the case. He interviewed the complainant and visited the appellant's house where he recovered a motor vehicle which the appellant used during his visits to the complainant. The motor vehicle was later photographed by Cpl. ***David Ongwenyi*** *(PW3) (Cpl Ongwenyi)* which photographs and his report were produced at the trial.

14. In his sworn statement, the appellant denied committing the offence alleging that he was in Nairobi when the offence was committed. He called ***Edwin Olango Odimba*** *(DW 1) (Odimba),* who testified that the appellant visited his shop in Nairobi where he sells computers on 1st December, 2007; made an order for computer's and collected them on 22nd December, 2007.

15. After considering the entire evidence summarized above, the learned Resident Magistrate found the appellant guilty as charged, convicted him and after considering mitigating factors and the law, sentenced him to three (3) years imprisonment as already stated. In doing so, the learned Resident Magistrate stated, ***inter alia***:-

> ***"..... However, whichever way, I do find that Accused was directly involved in this offence. The complainant's evidence which I accept is that it was Accused who negotiated the transaction with him (complainant) before hand. He did not have money and promised to get in touch with him once he got or came by some. Later Accused came and did a sample for him using Kshs.200/= note and thereafter he came to his house and he gave him Kshs.167,000/= in the presence of his wife PW2 Maureen Agamu. That being the case, I do not agree with the defence counsel's submission that the mere fact money have (sic) been carried by somebody else out of the complainant's house raises doubt on the prosecution's case. In any case the Accused person at that time and it is stated by the witnesses that it was him who requested to go and wash or clean the money elsewhere......***
>
> ***All considered, I do find that the Prosecution have established that Accused used fraudulent tricks to obtain Kshs.167,000/= from the complainant by making false promises that he could double this amount. Accused found guilty and is convicted accordingly....."***

16. The appellant felt dissatisfied with that conviction and sentence. He challenged it in the High Court vide High Court Criminal Appeal No. ***173 of 2010.*** The appeal was heard by H.K. Chemitei J, who after full hearing, dismissed it as already stated. In doing so, he delivered himself as follows:-

> ***"All the facts point out towards the fact that the appellant defrauded the complainant. Whether it was 1st December, 2007 or 21st December, 2007 in my mind does not change the fact. As earlier own (on) observed the use of motor vehicle registration number KAY 445 L was material evidence to show that indeed the appellant participated in the fraud."***

17. With regard to alleged conflict on the date of the offence in the charge sheet ***vis – a vis*** the evidence, the learned Judge, after setting out the relevant provisions of the law, concluded thus:-

> ***"These two passages (sections 214 (2) and 382 of the Criminal Provisions Code) goes (sic) against the appellant (sic) arguments that the date in the charge sheet was at variance with that stated by the complainant and his witnesses. I do find that the transaction took place within the same space and time argued by the complainant and his witnesses."***

In the end the learned Judge dismissed the appellant's appeal.

ANALYSIS

18. Being a second appeal, our mandate as donated by the provisions of ***section 361 (1) (a)*** of the Criminal Procedure Code ***(Cap 75 Laws of Kenya),*** is to consider only issues of law. (See ***Njoroge -Vs-***

Republic ***[1982] KLR 388)***. See also the case of ***Omboko -Vs- Republic*** ***[1983] KLR 191*** for the proposition that as a general rule, the court of appeal sitting as a second appellate Court will not normally disturb concurrent findings of fact of the two courts below unless those findings are based on no evidence or are based on a pervertion of evidence (See ***M'ruingu -Vs Republic*** ***[1983] KLR 455).***

19. On the 1st issue raised by the appellant which relates to the charge, the appellant complained that the charge contains errors and omissions in that the date on the charge sheet conflicted with the date the offence was allegedly committed according to the evidence of the complainant and his wife Maureen. In our view, the variance complained of could not make the charge sheet defective since as drawn it had no intrinsic defect. The alleged variance is in consonance with the appellant's other complaint regarding the charge that the evidence did not support the charge. True, there was a discrepancy with regard to the date indicated in the charge sheet as the date of commission of the offence and that given in the evidence of the complainant and Maureen. The two courts below considered the same discrepancy and both held that the same did not vitiate the trial. The learned Resident Magistrate stated:

> ***"I note the discrepancy in the date mentioned by PW2, the wife of the complainant but to me this is minor and cannot render the entire prosecution evidence doubtful."***

The learned Judge of the High Court on his part said:-

> ***"I do agree with the appellant on this core. But does it go to the root of the offence?***
>
> ***Absolutely not. All the facts point towards the fact that the appellant defrauded the complainant. Whether it was 1st December, 2007 or 21st December, 2007 in my mind does not change the fact."***

20. We concur with the findings made by the two courts below with regard to the discrepancy concerning the date in the charge sheet and the date given in evidence. We are of that view because, in our view, the variance did not cause any prejudice to the appellant as to occasion a miscarriage of justice or a violation of his fundamental right to a fair trial. There is in any event, subsection (2) of ***section 214*** of the Criminal Procedure Code which reads:-

> ***"214 …........***
>
> **…..........**
>
> 2. ***Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge sheet need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."***

21. The appellant also raised the discrepancy in the description of the perpetrator of the offence in that there was doubt as to whether the offence was committed by Cossam Ukiru, Kossam Ukiru or Kosam Ukiru. In our view, we think this complainant was not serious. The complainant and his witnesses were not in doubt as to who they were referring to as the perpetrator of the offence. The error in the description of the appellant in the charge sheet was in our view, not material and the two courts below were right in ignoring it. In any event we have the provisions of ***section 137 (d)*** of the Criminal Procedure Code which read:-

> ***"137 -***
>
> -
>
> -
>
> d. ***the description or designation in a charge or information of the accused person or of another***

person to whom reference is made therein, shall be reasonably sufficient to identify him without necessarily stating his correct name …....”

In the case before us, the description of the appellant in the charge sheet was reasonably sufficient to identify the appellant and it mattered not that he was variously referred to as ***“Kossam” “Cossam”*** or ***“Kosam.”***

22. The third cluster of issues raised by the appellant was that his defence was not considered and was rejected without reason. Our perusal of the record shows that the appellant in his defence set up an alibi. He stated that on the dates the offence was allegedly committed, he was away in Nairobi where he was shopping for computers for his business in Kisumu. The trial court said as follows on that defence:-

> ***“ …. whereas an Accused person who raises an alibi as a defence does not have the burden of proving it he must nevertheless raise it early enough so that it can be tested by the Prosecution.***
>
> ***In the present case, Accused did not raise his alibi until the time he was put on his defence and considering the totality of evidence on record as narrated by the first two Prosecution witnesses, Isaack Agamu Ngurase PW1 and Maureen (PW2) and their son Isaya Kisigane Agamu (PW4) I would conclude that the defence raised herein is an afterthought and/or devoid of merit. I note further that there were no receipts, bus tickets to confirm the alleged trial from Kisumu to Nairobi and back at the material times in question.”***

And the learned Judge of the High Court said:-

> ***“His defence of alibi that on the material day he was in Nairobi does not hold water. In any event this ought to have been raised early in the proceedings (See <u>Kiarie -Vs – Republic</u> [1984] KLR 739.)***
>
> ***The appellant has not produced any receipt showing that he travelled by Public means which he claimed to have done. His witness did not help things either. In any event there is no evidence that the appellant dealt with computers or at all.”***

23. It is clear from the bits and pieces of evidence referred to above that the appellant's defence of alibi was indeed considered by the two courts below and was rejected, in our view, properly. We are fully alive to the principle that an accused person who sets up an alibi defence does not assume any burden to prove the same (See ***<u>Karanja -Vs- Republic</u> [1983] KLR 501)***. In this case however, the two courts below rejected the appellant's alibi defence on the basis first; that it had not been raised at the earliest opportunity in the proceedings and second; that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it.

24. The fourth cluster of complaints relates to alleged breach of the appellant's rights under Articles: ***25 (a) & (c) 29 (f)*** and Articles ***49 (1) (e), (i)*** and ***(h); 50 (2) (j)*** and ***4*** of the Constitution of Kenya 2010.

i. Article 49 (1) (e) (i) and (h) relates to rights of arrested persons and Article 50 (2) (i) and (4) relates to right to a fair hearing. Breach of rights allegedly committed prior to the trial of the appellant is, in our view, improperly raised before us. Such breach, if proved, would probably attract remedies in civil law. We say no more on that aspect of the appellant's complaint.

ii. Article 50 (2) (j) protects the rights of an accused person to be informed in advance of the evidence the prosecution intends to rely upon, and to have reasonable access to that evidence and sub-article (4) prohibits the use of evidence obtained in violation of any right or fundamental freedom in the Bill of Rights enshrined in the Constitution of Kenya 2010. In our view, alleged breach of sub-article 4 of Article 50 does not merit our consideration because save for merely

alleging breach, the appellant did not identify the pieces of evidence which were improperly obtained.

iii. On alleged breach of Article 50 (2) (j), the appellant contended that the prosecution declined to disclose to him witness statements and copies of photographs, receipts and other documents produced at the trial. Our perusal of the record indeed shows that on 14th March, 2008 counsel for the appellant applied for witness statements. However, the same record reveals that when the trial took off on 11th August, 2008 neither the appellant nor his counsel raised the issue. Even when the photographs and inventory were produced, the appellant raised no objection to their production on the ground that he had not had access to the same. Similarly when the appellant prosecuted his appeal before the High Court, he did not complain about the failure to have access to witness statements and other documents produced at the trial. In the premises, we think, it is now too late for the appellant to make that complaint.

(iv) Article 25 (a) protects the freedom from torture and cruel, inhuman or degrading treatment or punishment while sub-article (c) protects the right to a fair trial. Article 29 (f) guarantees the right not to be treated or punished in a cruel, inhuman or degrading manner. The appellant made this complaints because, in his view, the sentence meted out to him contravened those provisions. The appellant was sentenced to imprisonment for three (3) years. Under section 315 of the Penal Code under which he was convicted and sentenced, the maximum sentence is three (3) years imprisonment. The sentence imposed upon the appellant, although the maximum, was nevertheless lawful. The record further shows that the appellant was a repeat offender. Even if he was not, as a second appellate court we would not interfere since by, dint of the provisions of section 361 (1) (a) of the Criminal Procedure Code, severity of sentence is a question of fact. We have otherwise not detected any breach of the appellant's rights under Article 25 (a) (c) or Article 29 (f) of the Constitution 2010. In any event the appellant was tried, found guilty, convicted and sentenced before the Constitution of Kenya 2010 was promulgamated on 27th August, 2010. His complaints rooted in that Constitution are therefore clearly misconceived.

CONCLUSION

We have said enough to show that this appeal cannot succeed as we find no merit in it. We hereby dismiss it in its entirety.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2014

F. AZANGALALA

…...............................

JUDGE OF APPEAL

S. GATEMBU KAIRU

…...............................

JUDGE OF APPEAL

S. ole KANTAI

…................................

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.