IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 266 OF 2011

BETWEEN

KOSSAM UKIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya

at KISUMU (Lady Justice ABIDA ARONI) dated 29th September, 2011

in

(HCC No. 15 OF 2011)

****

JUDGEMENT OF THE COURT

INTRODUCTION

1. The Appellant, ***Kossam Ukiru***, comes before us on a second appeal against his conviction on one count of cheating contrary to ***Section 315 o***f the Penal Code. It had been alleged that on diverse dates between 12th December, 2007 and 21st December, 2007 at Nubian village, in Kisumu District within Nyanza Province, the appellant, jointly, with others not before the court, by means of fraudulent trick, induced ***Stephen Nabwana Akunda*** *"(the complainant)"* to pay Kshs. 200,000/= to themselves. Upon his conviction, the appellant was sentenced to serve 3 years imprisonment which is the maximum sentence for the offence. His appeal to the High Court ***(Aroni, J.)*** was dismissed, hence this second appeal.

ISSUES

2. As this is a second Appeal, only matters of Law may be raised - see ***Section 361 (I) (a)*** of the Criminal Procedure Code. See also the case of ***Njoroge -v- Republic [1982] KLR 388.*** The issues of law raised in the Memorandum of Appeal, drawn up by the appellant in person and argued by him in his written submissions, are:-

1. ***The evidence of PW3, who was a minor, was taken without administering a voire dire***

examination.

2. ***The charge sheet was defective,***

3. ***Breach of Articles 25 (a) and (c), 29 (f), 49 (f) (i) (h) and 50 (2) of the Constitution of Kenya 2010.***

4. ***Failure to comply with sections 200 and 211 of the Criminal Procedure Code.***

5. ***Failure to call essential witnesses.***

We shall examine the issues raised in the above grounds, but first we set below the concurrent findings of fact made by the two courts below.

FACTS

3. Sometime before 12th December, 2007, the appellant, while in the company of another, approached the complainant at his business premises in Kisumu City and told him that they could double his money. The desire to make money in the complainant was aroused. He therefore convinced his wife ***Pascalia Nabwire Abara*** *(PW2) (Pascalia),* to give him Kshs. 200,000/= from proceeds of a loan she had secured. He then informed the appellant that he had the money to double. On 12th December, 2007 the appellant went to his (complainant's) house where he was given a total of Kshs. 200,000/=. He was then accompanied by one ***Kibisu.*** The appellant and his companion wrapped what appeared to be money together with pieces of white paper in black polythene paper to which they injected a chemical and put a heavy object on the bundle. They instructed the complainant to turn the bundle at intervals of 30 minutes. It would appear that the duo then left. At 4.00 p.m, the appellant's companion returned to the complainant's house with a chemical which he alleged would clear the doubled money. He seems to have left again. At 7.30 p.m the said companion returned to the appellant's house but when the complainant tried to remove the chemical from the bundle, it exploded and the appellant's companion left ostensibly to obtain more chemicals but never returned.

Inquiries made by the complainant from the appellant by mobile phone only elicitated demand for more money and promises which were fruitless. The complainant realized he had been coned and reported the matter to Kondele Police Station.

4. Pascalia confirmed to the trial court that she indeed obtained a loan of Kshs. 300,000 and gave Kshs. 200,000/= thereof to the complainant. She also confirmed that at the material time, the appellant and his companion made frequent visits to her home and had discussions with the complainant. On inquiring from the complainant the purpose of the visits and discussions, the complainant told her that the appellant was in the business of doubling money. Later the complainant told her of the efforts to contact the complainant which bore no fruit, hence the complaint to the police.

5. The prosecution also called ***Brian Abara Tabu*** *(PW3) (Brian)* who testified that he is a nephew of Pascalia and was staying with her and the complainant in Kisumu when the appellant and his companion visited them. On one occasion he witnessed the complainant and the appellant counting money which was in denominations of Kshs. 1000/=. He later learn't that the complainant had lost money.

6. In his sworn statement in defence the appellant acknowledged that he knew the complainant but denied receiving money from him.

7. On the above evidence, the learned trial Magistrate ***(Muneeni (PM),*** found the appellant guilty of cheating, convicted him and sentenced him as already stated. His appeal to the High Court was, as stated, dismissed.

ARGUMENTS

8. The appellant before us relied upon written submissions which amplified the issues we have identified above.

9. ***Mr. Abele***, the learned Assistant Director of Public Prosecutions, supported the appellant's conviction and sentence contending, in the main, that the variance in the charge with respect to the date of commission of the offence was immaterial and was curable under the provisions of ***Section 382*** of the Criminal Procedure Code. On the complaint regarding failure to call essential witnesses, Learned counsel submitted that necessary witnesses were called who proved the charge to the required standard. On the complaint that ***section 200*** of the Criminal Procedure Code was not complied with, Mr. Abele indeed conceded that the trial was commenced by ***Onginjo, (PM)*** and was taken over by *Muneeni (PM)* but contended that the appellant was represented by counsel and the record indicated that ***Section 200*** of the Criminal Procedure Code was indeed complied with. On the complaint that there was breach of constitution provisions, learned counsel submitted that that complaint was misconceived as, in his view, there was no such breach.

ANALYSIS

10. (i) We have carefully considered the record, the grounds of appeal and the submissions of both sides. The Appellant argued that the charge sheet was defective in that it alleged he was taken to court on 13th October, 2008 while the record of proceedings indicated that he was in fact presented in court on 2nd January, 2008. Further that the same is not stamped and was substituted without his knowledge and without pleading to the same.

(ii) We observe that the charge sheet indeed contained those defects but agree with the learned Assistant Director of Public Prosecutions that the same did not occasion a failure of justice and the appellant, who was represented, suffered no prejudice by reason of the defects. In any event in our view the defects were curable under the provisions of **Section 382** of the Criminal Procedure Code.

(iii) The record further shows that on 13th October, 2008 when the complainant completed his evidence in chief, the prosecution applied to amend the charge to substitute the sum therein of Kshs.280,000/= with Kshs.200,000/=. Despite opposition from counsel for the appellant, the learned trial magistrate allowed the amendment. Before recording the amendment, the record shows as follows:-

" It is not necessary to take plea. Accused still denies the charge."

It is not clear whether the learned trial magistrate recorded what came from the appellant or from his counsel. In our view, the statement that "***the accused still denies the charge"***, is likely to have been made by counsel or was the response of the appellant to inquiry made by the court. The appellant was represented and did not seek to recall the complainant as, in our view, he felt no need to take such a course since all that had changed was the figure in the charge sheet upon which evidence had been led. The ground of appeal challenging the charge sheet therefore fails.

11. (i) The second issue raised by the appellant relates to breach of various Constitutional provisions. The Appellant was charged in December, 2007, and found guilty, convicted and sentenced on 28th January, 2011. The Constitution of Kenya 2010 was promulgated on 27th August, 2010. So, part of the trial of the appellant happened when the new dispensation was in place.

(ii) **Article 49 (1) (e) (i)** and **(h)** relates to rights of arrested persons. The appellant was arrested and charged before the promulgation of the Constitution of Kenya 2010. The rights of arrested persons under the said Constitution were not made retroactive and could therefore not form basis for complaint. In our view, even if the same were applicable, breach thereof would not vitiate the appellant's trial but would probably found an action for compensation for such breach. In any event our perusal of the record does not show breach of those rights.

Article 49 (ii) (f) relates to an arrested person being brought to court as soon as reasonably practicable

but not later than twenty four hours after being arrested. The appellant was represented during the early stages of his trial but did not allege breach of his fair trial rights under the Constitution.

(iii) **Article 49 (1) (h)** relates to right to bond or bail on reasonable conditions pending trial unless there are compelling reasons not to do so. This complaint was not well taken as the record shows that the appellant was in fact released on bond of Kshs. 500,000/= with a surety of the same amount. The same was however, later canceled when the appellant absconded. We detect no breach of the appellant's right to a fair trial and his complaint in that regard fails.

(iv) **Article 50 (2) (j)** relates to right of access to evidence to be relied upon at the trial. The record indeed shows that the appellant's counsel on 11th February, 2008 applied for witness statements and a copy of the charge sheet. The trial magistrate then made an order to that effect. The record does not show that the appellant revisited the issue any other time. There is also no evidence that the prosecution continued to deny the appellant or his counsel access to witness statements after the order of the learned trial magistrate. Our conclusion on this aspect of the appellant's complainant is that even if there may have been such denial of access to witness statements, such denial did not prejudice the appellant who, as we have stated, was represented by counsel.

12. Was the procedure for taking the evidence of PW3 flouted?

Another way of putting it is whether there was violation of ***section 19 (1)*** of the Oaths and Statutory Declarations Act - when the evidence of PW3, a minor, was accepted. The short answer to this complaint is that there was no such violation. We have come to that conclusion because PW3 was 16 years of age and at the time, was a student at Butula Boys High School in form two. PW3, in our view, was not a child of tender years for purposes of the Oaths and Statutory Declarations Act. As was stated in ***Kinyua -v- Republic [2002] 1 KLR 256,*** there is no statutory or judicial definition of the phrase ***"a child of tender years for purposes of the law of evidence."*** It is left to the discretion of the judge or magistrate to assess whether a young witness is a child of tender years or otherwise. Under the ***Children Act, Cap 141*** of the Laws of Kenya, a child of tender years means a child under the age of ten (10) years. PW3 was aged 16 years of age at the time he testified. His age was established before he testified and the learned trial Magistrate determined that he understood the nature of an oath. On our part, we detect no improper exercise of discretion. Given our view on the issue, the appellant's complaint that PW3's testimony was not properly accepted, is without merit and we reject that ground.

13. On alleged failure to comply with the provisions of ***Section 200*** of the Criminal Procedure Code, we observe that Onginjo (PM) commenced the trial of the appellant and heard all the three witnesses for the prosecution and then left the station. Muneeni (PM) then took over the hearing of the case. The record shows that on 14th September, 2010 the learned Magistrate recorded:-

" Accused – present

Mr. Oguso advocate

Court: accused informed case part heard

and the provisions of Section 200 CPC.

Mr. Oguso:

We ask to proceed from where the other court left." Section 200 of the Criminal Procedure Code reads:-

"200 (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -

(*a) deliver a judgment that has been written and signed but not delivered by his predecessor or.....*

(2) ….....

(3) 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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

The record shows that Muneeni (PM) informed the appellant of the above provisions upon which his counsel informed the court that the case proceeds from where the other court left . In our view, there was adequate compliance with the provisions of ***Section 200 (3)*** of the Criminal Procedure Code aforesaid. The record does not show that the appellant by himself or through his counsel requested for recall of any witness who had previously testified. In our view the appellant's complain that the provisions of the above section were not explained to him suggests want of candour on his part. His complaint in that regard is rejected.

14. The appellant also complained of the failure of the prosecution to call essential witnesses to wit: the arresting and investigating officers. It is evident that indeed the person who arrested the appellant was not called to testify and so was the investigating officer. We however, detect no prejudice to the appellant by that failure. It is not in dispute that the appellant was indeed arrested and the reason for that arrest is not also in doubt. Further, the complainant, his wife and son in their testimony demonstrated the ingredients of the offence eventually found proved before the trial court. In any event, as a general rule, whether a witness should be called by the prosecution is a matter within their discretion unless ulterior motive is shown to be the reason for failure to call the witness or unless the witnesses presented disclose a weak case in which case, of course, the trial court would be expected to acquit the accused. See ***Section 143*** of the Evidence Act and the case of ***Bukenya and others -v- Uganda [1972] EA 549***.

In our view, there was no ulterior motive for not calling the arresting and investigating officers as witnesses. Indeed the record shows that various adjournments were granted to avail them without success. We are also of the view that the omission to call the said witnesses did not cause a failure of justice in the circumstances of this case. The ground of appeal relating to failure to call essential witnesses, therefore also fails.

15. The appellant also complained that the provisions of ***Section 211*** of the Criminal Procedure code were not explained to him. According to the appellant, the trial Magistrate should have recorded that she informed him of his right to give evidence on oath or otherwise or remain silent and also call witnesses. In his view, merely recording that she had complied with the provisions was not enough. In our view, this complaint is without substance. We say so, because the record shows that when it was the turn of the appellant to respond to the case presented by the prosecution, the learned trial magistrate recorded:-

" Section 211 of CPC complied with sworn evidence. Witnesses – Nil"

After this the appellant is recorded to have given a sworn statement and his counsel then closed his case.

In our view, the appellant is hanging on straws. He was ably represented by counsel and unambiguously elected to give a sworn statement when the provisions of ***Section 211*** were explained to him. After that statement, his counsel informed the trial court that that was the close of the appellant's case. We do not think that failure to record the exact words of ***Section 211*** of the Criminal Procedure Code in any way prejudiced the appellant. There was, in our view, no failure of justice and the appellant's complaint in that regard lacks merit and we reject it.

16. The last cluster of issues raised by the appellant related to breach of ***Articles 25 (a), (c) and 29 (f)*** of the Constitution of Kenya, 2010. The Appellant raised the issue because, in his view, the sentence imposed upon him of 3 years infringed his rights under those provisions. He also invoked ***section 26*** of the Penal Code for the same reason. The Appellant argued that his imprisonment for 3 years amounted to torture and cruel, inhuman or degrading punishment. We observe that the sentence of 3 years was the maximum sentence under ***Section 315*** of the Penal Code. However, the sentence was not unlawful. As the section under which the appellant was charged provided the sentence, it cannot be described as cruel, in-human or degrading nor does it amount to torture. We are also alive to the caveat in ***Section 361 (I) (a)*** of the Criminal Procedure Code, that severity of sentence is an issue of fact and is therefore outside our jurisdiction as a second appellate court. The Appellant's complaint with regard to sentence is accordingly without merit and we reject it.

CONCLUSION

The upshot is that the appeal is not meritorious and must be dismissed in its entirety. It is so ordered.

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

F. AZANGALALA

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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