



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Madan, Miller & Potter JJ A)**

**CRIMINAL APPEAL NO 22 OF 1979**

**Between**

**JOSEPH NDUNGU KIMANYI .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was convicted of the offence of obtaining money by false pretences, contrary to section 315 of the Penal Code, and sentenced to three years' imprisonment. His appeal to the High Court having been summarily rejected under section 352(2) of the Criminal Procedure Code, he has appealed to this Court. Section 352(2) provides:

Where an appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive, and it appears to a judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may without being set down for hearing, be summarily rejected by an order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint.

A proper perusal of the record in order to certify what is laid down in section 352(2) would have drawn Sachdeva J's attention to exhibit 11, which was admitted in evidence and which the magistrate referred to as a "confessional statement". We will refer to it by the same nomenclature. It came to be made in the following circumstances.

Inspector of Police Anthony Macharia stated that he arrested the appellant and took him to Parklands police station "for investigation". Inspector Macharia contacted Mr John Felix Kariuki, who had lodged the complaint about the money having been obtained from him by false pretences. Mr Kariuki arrived at the police station and confirmed that the appellant was the man involved. Mr Kariuki asked, in Inspector Macharia's office, if he (ie Kariuki) could have a word with the appellant alone. Inspector Macharia went out leaving Mr Kariuki and the appellant in his office. When Inspector Macharia returned to the office later Mr Kariuki showed him the appellant's confessional statement, saying that it has been written by the appellant himself. The appellant did not deny it. The first part of the confessional statement reads as follows:

I Joseph Kimanyi agree that on 7th December 1978 at 1.30 pm we took Shs 150,000 from Mr

Kariuki by false pretences in that I was to double the money, which never materialised. We disappeared from his office at 6.30 pm and took all the money.

The remainder of the confessional statement sets out the appellant's offer to refund the money in monthly instalments.

Section 28 of the Evidence Act provides:

No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person, unless it be made in the immediate presence of,

(a) a magistrate, or ( b) a police officer of or above the rank of, or a rank equivalent to sub-inspector.

When the appellant made his confessional statement he was, as conceded by State Counsel, in the custody of a police officer. The confessional statement was inadmissible in evidence.

In convicting the appellant, the magistrate relied upon the confessional statement. He said in his judgment:

Then there is this confessional statement .... There is no reason to make me doubt that it was the [appellant] who voluntarily wrote the statement and although he was in a police station it was not made to a police officer and the complainant cannot certainly be regarded as a person in authority over the [appellant] and is therefore admissible in evidence. The general purpose of this statement is in fact an admission of the offence. These pieces of evidence therefore support the complainant's evidence that he was swindled by the [appellant] and another man.

We consider that the judge erred in summarily dismissing the appellant's appeal for there was material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right. The confessional statement opened the question whether it was made whilst the appellant was in the custody of a police officer, thus making it inadmissible. In stating that the complainant was not a person in authority over the appellant, we think that the magistrate had in mind the provisions of section 26 of the Evidence Act, which were not relevant.

If the magistrate's attention had been drawn to section 28 we doubt very much whether he would have allowed the confessional statement in evidence; and, without it, he might well have not convicted the appellant. If the confessional statement is removed from "the piece of evidence" (it was a major if not the only substantial piece of evidence), only the complainant's evidence would be left against the appellant; a proposition which the State Counsel accepted. The complainant was not a virtuous virgin. A man of loose conscience; on a previous occasion also he had been involved in a swindle operation for making easy money when he lost Shs 40,000. In our opinion the evidence of the complainant does not come up to the minimum standard which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

We consider it would be unsafe to allow the appellant's conviction to stand. We set aside the order of the High Court dismissing his appeal; we also quash his conviction and set aside the sentence passed against him by the magistrate. The appellant must be set at liberty.

*Appeal allowed.*

**Dated and delivered at Nairobi this 22nd day of October 1979.**

**C.B MADAN**

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**JUDGE OF APPEAL**

**C.H.E MILLER**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**