Shiundu v Republic (Criminal Appeal E044 of 2022)
[2023] KEHC 2708 (KLR) (Crim) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2708 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E044 OF 2022

PM MULWA, J

MARCH 31, 2023

BETWEEN

CYNTHIA MUYOTI SHIUNDU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Kibera Criminal Case No. 4343 of 2016 – Hon. R.M. Kitagwa, SRM)

JUDGMENT

1. The appellant, Cynthia Muyoti Shiundu, was charged on one count of obtaining money by false pretenses contrary to section 313 of the *Penal Code* and two counts of issuing bad cheque contrary to section 316 A (1) (a) 4 of *Penal Code*.

2. The Appellant denied the charges and, upon full hearing and trial of the facts in dispute, the trial court found the Appellant guilty on all three Counts and convicted him. Consequently, in respect to Count I, the Appellant was fined kshs. 300,000 in default 2 years' imprisonment; while in Counts II and III, the Appellant was sentenced to pay a fine of Kshs. 30,000/= on each count, and in default to serve 6 months' imprisonment. Aggrieved by both her conviction and sentence, she preferred the instant appeal to this court. The Appellant raised thirteen grounds of appeal in her Memorandum of Appeal filed on 30th March 2022.

3. At the hearing, both parties chose to prosecute the appeal by way of written submissions which they duly filed.

4. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this court to come to its own conclusions thereon. This

principle was aptly expressed in *Okeno vs. Republic* [1972] EA 32 by the Court of Appeal for East Africa thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

5. I have given due consideration to the grounds of appeal, the evidence adduced before the trial court and the rival submissions made by both parties as well as the authorities cited. I have also read the judgment of the trial court.

6. Having done so, I find that the issues for my determination is whether the evidence tendered before the trial court established the offences under sections 313 and 316A of the *penal code* as preferred against the appellant beyond any reasonable doubt and if so, whether the sentence meted out against the appellant were harsh or manifestly excessive.

7. The offence of Obtaining Money by False Pretenses is provided for in Section 313 of the *Penal Code*, which stipulates that:

> " Any person who by false pretense and with intent to defraud, obtains form 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 misdemeanor and is liable to imprisonment for three years."

8. From the definition, it is clear that for the prosecution to sustain a conviction on a charge of obtaining by false pretenses, it must prove beyond any reasonable doubt that the accused person did the following:

    i. The act of obtaining something capable of being stolen.

    ii. Obtaining the thing by false pretenses.

    iii. Obtaining the thing with intent to defraud.

9. The first element of the subject offence that needed to be proved is whether the Appellant obtained something capable of being stolen. From the record, there is evidence that the Appellant obtained money from PW1. The Appellant also conceded to having received the monies. Without belabouring the point, it was evident that the Appellant received money from PW1, which was something that was capable of being stolen. However, the taking of the money did not solely constitute the offence and it was for the prosecution to prove that the same was obtained through false pretences and with intention to defraud.

10. The other ingredient for the offence of obtaining money by false pretences is to demonstrate that there was false pretense.

11. A false pretense is defined in section 312 of the *Penal Code* as follows:

> " 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 pretense."

12. In the case of *Oware v Republic* (1989) KLR287 the Court of Appeal sitting in Nairobi held that: -

> " A representation as to a future event cannot support a charge of obtaining money by false pretences."

13. The Oware case referred to *R v Dent* (1975) 2 All ER, 806 at page 807 in which the court stated that: -

> " A statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law."

14. As was seen hereinabove, the Appellant admitted having received the sum of Kshs 1,000,000 from PW1. The question was whether he obtained the said monies by false pretences and with an intention to defraud PW1.

15. In the circumstances, it cannot be said that the Prosecution proved beyond reasonable doubt that Appellant obtained monies from the Complainant by false pretences. Likewise, it cannot be said in the circumstances that the intention of the Appellant in accepting payment from the Complainant was to defraud her. In my view, the defence offered by the Appellant in the lower court was reasonable in the circumstances and it did rebut the ingredients of obtaining by false pretences and obtaining with intention to defraud.

16. As rightly submitted by the Appellant, the above definition connotes that the offence of obtaining by false pretences does not relate to future events.

17. With regard to the two counts of issuing bad cheque contrary to section 316 A (1) (a) 4 of *Penal Code*, the Appellant submitted that she was convicted on the basis of a defective charge sheet. She argued that under Section 316A (2) of the *Penal Code*, the offence in question cannot arise in case of a post-dated cheque such as the one issued by the Appellant. In her view therefore, the Appellant's conviction could not be sustained and to support this, she cited the cases of *Oliver Teresia Njoki V Republic* criminal appeal 259 of 2018. She therefore urged that the appeal be allowed and the fine of Kshs. 360,000 paid to be refunded to her.

18. The state opposed the appeal. According to the learned prosecution counsel it is not in dispute that the cheques did not mature. Further, it was their submission that there is no evidence on record that the Appellant did inform PW1 that her account had insufficient funds. They thus urged that the appeal be dismissed in its entirety for want of merit.

19. Section 316A (1) (a) of the *Penal Code* provides as follows: -

> " Any person who draws or issues a cheque on an account is guilty of a misdemeanor if the person –
>
> a. Knows that the account has insufficient funds".

20. Section 316A (2) of the *Penal Code* further provides that Subsection (1) (a) does not apply with respect to a post-dated cheque. In the case of *Abdalla v Republic* [1971] EA 657 KLR 289 the court held that:

> " 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...That the Appellant, in giving the post-dated cheque, was not representing that he had sufficient funds to meet it is clear from the undisputed facts. That he asked the treasurer not to present it without prior reference to him, which was not done, so as to give him an opportunity of making arrangements with his bank to meet the cheque"

21. From the evidence on record, PW1 testified that on 1/11/2016 she was issued with two cheques, cheque No. 00070 for kshs. 650,000 dated 7/10/2016 and cheque No. 00072 for kshs. 500,000 dated 8/10/2016 marked as MFI 1 and MFI 2 respectively and both were dishonored due to insufficient funds in the Appellant's bank account.

22. The Appellant testified in her defence that the agreement she had with the appellant was to make postdated cheques as security which she did.

23. Section 316A (2) of the *penal code* states that:

> " Subsection (1)(a) does not apply with respect to a post- dated cheque."

24. In the premises, the above section is clear and there can be no doubt that the learned trial magistrate erred in his conclusion that the Prosecution had proved beyond reasonable doubt that the Appellant had issued bad cheques.

25. I now proceed to determine whether the matter before hand was of civil or criminal in nature. The Appellant faulted the trial magistrate for failing to appreciate that the matter before her was civil in nature and not criminal since it arose from a loan agreement.

26. It suffices to say, it was demonstrated that partial payment of the debt had been met after the cheques were dishonored by the bank. An agreement which the parties entered into was produced in court as an exhibit indicating that the appellant would issue two postdated cheques in the sum of Kshs. 1,150,000. The evidence on record shows that this agreement was not honored. Further, DW1 testified that she had repaid PW1 a sum of Kshs. 250,000. In my view, this made it a partial fulfillment of the written agreement. Undisputedly, the agreement having been dishonored meant that one party had gone against a written contract. That in my view, shifted the nature of the matter from criminal to civil. And truly there exists one where the dispute should be properly ventilated.

27. In *Joseph Wanyonyi Wafukho v Republic* [2014] eKLR Gikonyo, J. held that:

> " criminal process is never a substitute ... to be used to settle civil claim or to avail in a commercial transaction undue or collateral advantage over the other. That kind of practice is fraudulent demented abuse of the court process, should always be avoided by the parties, resisted and forcefully suppressed by the courts of law, whenever it manifests itself before court."

28. Having carefully evaluated all the evidence attending the case on record and from my foregoing observations it is clear that sufficient evidence was not tendered to prove the charges of obtaining by false pretences and issuing bad cheque against the appellants.

Final Orders

i). The appeal is merited and is allowed.

ii). I quash the conviction, set aside the sentences and order that the fine of Ksh. 360,000/ the Appellant paid be refunded to her forthwith.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT MILIMANI THIS 31ST DAY OF MARCH, 2023

.....

P.M. MULWA

JUDGE

In the presence of:

Ms. Karwitha – Court Assistant

Ms. Mugo holding brief for Mr. Wambugu for Appellant

For State: Ms. AKunja

Appellant: Present