



REPUBLIC OF KENYA



**Kithaka v Republic (Criminal Appeal 20 of 2020)
[2022] KEHC 11236 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL 20 OF 2020
EM MURIITHI, J
MAY 31, 2022**

BETWEEN

KATHIMBA KITHAKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction the Principal Magistrate's Court at by Tigania (Hon. P.M Wechuli SRM) dated on 6/2/2020 in Tigania Cr. No.1065 of 2016)

JUDGMENT

Introduction

1. The appellant, Kathimba Kithaka was charged with forgery contrary to section 349 of the [Penal Code](#). The particulars were that, on 6/4/2016 at Kianjai market in Tigania west sub county within Meru county with intent to defraud/deceive, he forged a banker's cheque No. xxxx purporting it to be genuine banker's cheque of Miathene Catholic Parish. He faced other related offences in 4 counts as follows:
 - a. a second count of making a document without authority contrary to Section 357(a) of the [Penal Code](#). The particulars were that on the same day and place, with intent to defraud or deceive without a lawful excuse, he made a banker's cheque No.xxxxx purporting it to be genuine cheque issued by Miathene Catholic Parish.
 - b. a third count of uttering a document with intent to defraud or deceive contrary to Section 357(b) of the [Penal Code](#). The particulars were that on the same day and place, with intent to defraud, he knowingly uttered a bankers cheque No. xxxx to one Morris Gitonga which had been made without lawful authority.



- c. a fourth count of issuing a bad cheque contrary to section 316(1)(a)(4) of the *Penal Code*. The particulars were that on the same day and place, he issued a cheque No.xxxx for Ksh.92,000 in favour of Morris Gitonga on account No.xxxxxxxx knowing that Miathene Catholic Parish account had insufficient funds or had been closed.
- d. a fifth count of obtaining money by false pretences contrary to Section 313 of the *Penal Code*. The particulars were that on the same day and place, with intend to defraud, he obtained from Morris Gitonga twenty (20) complete gas cylinders valued at Ksh.92,000 by falsely pretending that a certain cheque which he then produced and delivered to the said Moriss Gitonga was good and valid order for payment of Ksh.92,000.

The trial

2. After he denied the charges, the matter proceeded to trial and the prosecution called 5 witnesses in support of its case.
3. PW1, Morris Gitonga, the complainant, was on 4/4/2016 in his shop when the appellant came to place an order for a gas cylinder. He told him that a complete gas burner and stand was going for Ksh.5,000 but they negotiated until Ksh.4,600. The appellant left but after 2 days, he called him through his mobile phone and said he wanted 20 gas cylinders for merry go round for ladies. The appellant sent a taxi of Mr. Joshua to pick the gas cylinders. The appellant send a boda boda boy to give his wife a cheque of Cooperative Bank titled Miathene Catholic Parish worth Ksh.92,000 and the gas cylinders were loaded into the vehicle. He banked the cheque in his Equity Bank Account but after 3 days, he learnt with shock from the bank officers that the said cheque had bounced. When he unsuccessfully tried reaching the appellant through the phone, he proceeded to the church at Miathene and later to Kianjai parish where he learnt with disbelief from father Clement that Miathene Parish did not exist. It was then that he knew that he had been conned. While he was standing with the MCA, they saw a naked person changing clothes at a dobi. The dobi boy told him that it was a “reverend” who usually changed clothes outside. He gave the dobi his number and reported the matter at the CID. He was later called by the dobi when the appellant went to change his clothes and he came with police officers. They arrested the appellant and went to the appellant’s house. The appellant had 2 IDs, 2 bond for Mwea and he (the appellant) had banked Ksh.80,000 the next day after stealing from him. When the appellant bought the cylinders, he did not give him any receipt. The appellant, whom he did not know prior to this incident, was arrested on 6/4/2018. He later learnt that the appellant was a rice vendor and he lost Ksh.92,000 plus Ksh.2,500. He identified the appellant in the dock.
4. On cross examination, he reiterated that he knew the appellant as he came to his place to make an order. He with 2 CID’s saw the appellant changing clothes with a boxer only. When the appellant was arrested, he was seated inside the dobi. Although the officers were not in uniform, they introduced themselves to the appellant. They went to the shop where the appellant kept rice. He requested for Mwenda to be called as the appellant had given the said Mwenda a fake cheque of Ksh. 20,000. The appellant was using 073xxxxx and one cylinder was found in the appellant’s house, but he had a receipt. In re-examination, he stated that it was the appellant who they saw putting on clothes. It was the appellant who came to his shop and it was the appellant who send for those items.
5. PW2 Emily Karimi, the complainant’s wife testified that she did not know the appellant. On the material day, she went to work at 8 am. PW1 informed her that there was a priest who had placed a gas order. PW1 left to get the gas and told her that a cheque would be brought, by “father.” At around 10-11 am, a boda boda person came with an envelope. Inside it was a cheque addressed to PW1 from Miathene parish for Ksh.92,000. She called PW1 who told her to keep the cheque. On 13/4/2016,



- PW1 informed her that the cheque had bounced and he started following up. PW1 later reported the matter and she concluded that she could not identify the father as she had never seen him.
6. On cross examination, she said she did not see the appellant as he was not the one who had given her the cheque. She equally denied seeing the appellant writing the cheque and maintained that her role was purely to receive the cheque. She stated that the cheque she saw was original and denied seeing the appellant at the shop. In re-examination, she restated that she had received the cheque but it was not her duty to know who had signed it.
 7. PW3 Joshua Ntongai Raariu, a taxi driver, was approached by the appellant, who was then unknown to him, to ferry for him gas cylinders. The appellant called him at 2 pm and sent him to PW1's shop to pick 20 cylinders. He picked the cylinders from PW1's shop, loaded them to his vehicle and took them to Miathene ACK church, where he offloaded them. The appellant then sent him money through his phone, told him to go to Miathene hospital to pick him and take him to Nchiru. On arriving at the hospital, he kept on calling the appellant to no avail and after sometime the appellant switched of his phone, and PW3 left. He subsequently learnt from PW1 that the appellant had drawn a fake cheque. Although he did not know the person he had left the cylinders with, the appellant, who he later knew was a thief, was dressed as a bishop with a bishop collar and a suit. He recorded his statement on 6/9/2014 and identified the appellant in the dock.
 8. On cross examination, he stated that when he was at Miathene at the church, the appellant was not present. The appellant had sent him money using 073xxxxx but also 071xxxxxx was his. He reiterated that he was the one who had carried those items and he came to the police the day the appellant was arrested, and identified him. In re-examination, he stated that the Safaricom number sent him money while the airtel number was used to call him and the appellant was dressed as a pastor.
 9. PW4 Peter Maribe, Equity Bank branch manager, Meru, testified that although PW1's account was proper, when the cheque was deposited, it did not clear, because the owner of the cheque had gone to Cooperative Bank to stop it. He concluded that the return cheque advice showed why a cheque was not honoured. He produced a certified copy of the cheque, an image from the bank, and PW1's bank statement as exhibits in court.
 10. On cross examination, he denied seeing the appellant before. He knew that the cheque was for PW1's account and it was received in their offices, but he could not tell whether it was the appellant who had brought it or not. He said the cheque was brought on 13/4/2016 in his capacity as branch manager and he could handle any matter of the bank. In re-examination, he stated that the records of the bank were there regardless of time and it was not mandatory to call the appellant in the office.
 11. PW5 P.C Andrew Kiptwog DCI Tigania West took over from P.C Muli. He testified that a report was made on 29/4/2016 by the complainant of how the appellant had defrauded him. When the initial investigating officer inquired from Kianjai Catholic parish, he was informed that they neither had a parish at Miathene nor an account with Cooperative Bank, and the cheque was not theirs. He produced the statement of Kianjai Catholic church in line with the provisions of section 33(b) of the [Evidence Act](#), without any objection from the appellant.
 12. On cross examination, he stated that the appellant was arrested before further investigations had been completed at Equity and Cooperative Bank. Although he was not present when the appellant was arrested, he saw him at the station when he was brought. The cheque had a fictitious name and the father in charge denied either knowing the appellant or the existence of Miathene Catholic Parish. He was not aware what was recovered from the appellant as he was not the arresting officer.



13. In his sworn defence, DW1, Kathimba Kithaka, stated that he was not a member of Catholic church. Nothing was recovered from his house though it was searched in his absence. The documents recovered from Cooperative Bank had his original signature, but the document in court did not have his signature. The initial investigating officer, Mr. Muli told the previous prosecutor that this was a case of mistaken identity. He only had one Safaricom phone number 071xxxxxx but 071xxxxx referred to in the statements was not his. He was a rice farmer from Mwea and he had a permit. His church was Brixtone and he was at dobi when he was arrested.
14. On cross examination, he stated that on the material day, he was at Kianjai market and in addition to selling rice, he was also a preacher. He denied forging the Bank document and further denied knowing that one could recover a cheque from one bank and bank in another, and said that did not intend to call Mr. Muli as a witness.
15. DW2 Archbishop Joseph Gatima Mugo from Kirinyaga, testified that the appellant was one of his priests. His church was Brixtone Full Gospel church of Africa and the appellant was a priest there since 2012.
16. On cross examination, he stated that on the material day, he was at home and he did not know either where the appellant was or what he was doing that day.

Conviction and acquittal

17. The appellant was subsequently acquitted in respect to counts 1 and 2. He was however convicted and sentenced in respect to count 3 to 5 years imprisonment. In respect to counts 4 and 5, he was sentenced to 1 year imprisonment in each count and the sentences were ordered to run concurrently.

The Appeal

18. On appeal from the conviction and sentence, the appellant set out 7 grounds of appeal as follows: -
 - a. The trial magistrate erred in law and facts by convicting and sentencing the appellant yet overlooked that the testimony of PW1 and PW2 was very contradicting.
 - b. The trial magistrate erred in law and facts by only considering the prosecution assumptions yet the same veracity, credibility and was of low evidentiary content thus jeopardizing the mechanism of justice of the appellant.
 - c. The trial magistrate erred in law and facts by convicting and sentencing the appellant without re-analyzing that the prosecution had failed to prove this case beyond reasonable doubt.
 - d. That the appellant was a first offender and the appellant perceives that the 7 years concurrent sentence imposed on him results in untold suffering since the charge of obtaining money by false pretence was unjustified.
 - e. The trial magistrate erred in law and facts by convicting the appellant with a defective charge sheet and without taking into account the gross contradiction in the testimony of PW1 and PW2.
 - f. The appellant feels that the evidence tabled by the prosecution was substandard to attract that charges and the charges to hold such a punitive sentence and with no option of a fine.



Submissions

19. The appeal was canvassed by way of written Submissions, which were respectively filed on 5/11/2021 and 16/9/2021. The appellant faults the prosecution for amending the charge sheet after 2 years and alludes to inconsistency of the number of cylinders in both charge sheets. He submits that he only had one ID card and questions why the matter relating to giving Mwenda a cheque of Ksh.20,000 was not brought to court. He submits that he learnt that the said Mwenda was PW1's in law, and thus a family plan. He insists that the boda boda person who brought the cheque ought to have been called to testify. He faults the trial court for admitting the evidence of PW3 who had recorded his statement 2 years prior to the appellant's arrest. According to him, the trial court ought to have asked for data from Safaricom and Airtel to prove that money was sent through phone. He urges the court to allow his appeal and set him at liberty so that he can go and serve God, his family and the nation.
20. The respondent submits that it proved counts 3, 4 and 5 beyond reasonable doubt, and relies on Joseph Mukuha *Kimani v Republic* (1984) eKLR, where the elements of the offence of uttering a false document were enlisted. It submits that from the evidence on record, the appellant, with the intention to defraud PW1, indeed obtained PW1's gas cylinders by false pretences and he did not at all have an intention of paying for them. It rejects the appellant's defence that he was mistakenly identified and urges the court to uphold both his conviction and sentences. It submits that the sentences meted out to the appellant were appropriate, lenient and as per the law, and relies on *Peter Mbugua Kabui v Republic* (2016) eKLR in support of those submissions.

Analysis and determination

21. In determining this appeal, the court is duty bound to re-appraise, review and re-evaluate the facts afresh with a view of drawing its own independent conclusions and findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See *Odhiambo v R* (2008) KLR 565 reiterating *Okeno v. R* (1972) EA 32.

Issues for determination

22. From the grounds of appeal as framed, the following three issues isolate themselves for determination:
 1. whether the charge sheet was defective;
 2. whether the offences were proved beyond reasonable doubt;
 3. whether the sentence was valid for want of an option for fine.

Whether the charge sheet was defective

23. The court shall deal with the issue of defective charge sheet at the outset. The discrepancy in the number of the gas cylinders in the initial charge sheet (68) and the amended charge sheet (20) cannot render the charge sheet defective. This is because the appellant was given an opportunity to plead to the amended charge sheet in a language he understood. He was therefore in no way prejudiced by the said mis-description of the number of gas cylinders, as he clearly understood the charges he was facing and duly pleaded to the same. The function of a charge sheet to communicate the offence in terms of section 134 of the *Criminal Procedure Code* was never compromised.
24. In *Benard Ombuna v Republic* [2019] eKLR, the Court of Appeal elaborated what constitutes a fatally defective charge sheet as follows:
 13. ...[T]his Court appreciated in *JMA vs. R* [2009] KLR 671 that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective so as to render any conviction a nullity has been established, both in



our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in *Willie (William) Slaney vs. State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], held that:-

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

14. Similarly, this Court while faced with the same issue in *Isaac Nyoro Kimita & another vs. R* [2014] eKLR echoed those sentiments as follows:-

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge?” [Emphasis added]
15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”
25. The Court finds that the said disparity in the number of gas cylinders obtained by the appellant from the complainant was trivial and not fatal to his conviction.
26. On whether the amendment of the charge sheet after 2 years was fatal, Section 214 (1) of the *Criminal Procedure Code* provides: -

“Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”After the said amendment, the appellant was called upon to plead afresh to the amended charges, and no prejudice was occasioned to him as a result of the amendment.

Whether the offence of uttering a document with intent to defraud or deceive was proved beyond reasonable doubt

27. That offence is defined under Section 357(b) of the *Penal Code* as follows:- “Any person who, with intent to defraud or to deceive knowingly utters any document or electronic record or writing so made, signed or executed by another person.”



28. In this case, the appellant presented to the complainant a cheque of Cooperative Bank drawn by Miathene Catholic Parish, which he knew was fake. PW1 testified that, "I went to Kianjai parish, which oversees Miathene. I found father Clement. He informed me that Miathene Parish does not exist and the person who wrote the cheque was a conman." The evidence of PW1 was very consistent and well corroborated by that of PW2, PW3 and PW4. PW5 produced a statement from Kianjai Catholic church to show that the said Miathene Parish was actually non-existent.
29. PW2 confirmed receiving the cheque as she had been advised by PW1 that a cheque would be delivered. PW3 testified how he was hired by the appellant to take the gas cylinders. There is a chain of events that link the appellant to the tendering or uttering a fake cheque to enable acquisition of the 20 gas cylinders.
30. The court is satisfied that the prosecution proved beyond any doubt that the appellant did utter a document with intent to defraud or deceive the complainant.

Whether the offence of issuing bad cheque was proved beyond reasonable doubt.

31. This offence is defined under Section 316(1)(a) of the [Penal Code](#) as follows:-

"Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person knows that the account has insufficient funds."
32. When the complainant presented the cheque to Equity Bank, he was informed through the phone 3 days later that the cheque had bounced. It was then that he knew the cheque was bad and he decided to involve the police. PW4 stated that, "I have a copy of a cheque leaf. Statement of Morris Gitonga, and return cheque. The cheque lead is for Cooperative bank, received by Equity Bank(PEx 1). It was for Ksh.92,000. The statement was proper. However when the cheque was deposited it didn't clear. The owner of the cheque went to Coop bank and stopped it.(Statement- PEx 6)." There is no dispute as to who had signed the cheque because the appellant admitted in his sworn defence that he was the one who had signed it.
33. The court therefore finds that the prosecution has proved beyond reasonable doubt that the appellant issued a bad cheque to the complainant.

Whether the offence of obtaining by false pretences was proved beyond reasonable doubt.

34. This offence is defined under Section 313 of the [Penal Code](#) as follows:

"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 misdemeanor and is liable to imprisonment for three years."
35. The three essential elements of the offence as stipulated under aforementioned Section 313 of the [Penal Code](#), that is: (1) obtaining something capable of being stolen; (2) obtaining it through a false pretence; and (3) obtaining it with intent to defraud. False pretence is defined under Section 312 of the [Penal Code](#) to mean:-

"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."



36. The complainant testified that the appellant came to his shop to purchase 20 complete gas cylinders. After negotiating for the price, the appellant sent PW3 to go to PW1's shop and fetch the gas cylinders in order to deliver them to Miathene ACK church. The appellant then sent a boda boda rider to go and deliver a cheque for the payment of the gas cylinders at PW1's shop, which was received by PW2. All along the appellant knew the drawer of the said cheque was non-existent and he was not a priest in any Catholic church. The appellant had no intention of paying for the gas cylinders. It is clear that the appellant, by false pretences intended to defraud the complainant by obtaining 20 gas cylinders from him valued at Ksh.92,000.
37. The Court, therefore, finds that the evidence led by the prosecution witnesses was corroborated and when weighed as a whole with that of the appellant, remained unshaken. This court finds the conviction on the 3rd, 4th and 5th counts was safe.

Counts I & II

38. There was clearly no evidence as to forgery c/s 349 of the [Penal Code](#) and making a document without authority c/s 357(a) of the [Penal Code](#) in Counts I and II were not proved, and the appellant was properly acquitted of the charges therein.

The Sentencing Discretion of the trial court

39. Although section 26 (3) of the [Penal Code](#) permits a trial court to impose a fine as an option to an imprisonment sentence except in cases of minimum sentences, and some provisions expressly prescribes the imposition of a fine or sentence of imprisonment or both, it is all in the lawful jurisdiction of the trial court, and unless it can be shown on the principles for appellate interference with the discretion of the trial court in sentencing, that the sentence was inordinately, low or high or failed to take into account some material fact or took into account irrelevant considerations or it was plainly wrong, the appellate court shall not interfere. See also *Wanjema v. R* (1971) EA 493.
40. Sentencing is in the discretion of the trial court and an appellate court shall not interfere with the sentencing discretion of the trial court merely because it might itself have imposed a different sentence, and the Court of Appeal has been reiterated this position in [Bernard Kimani Gacheru v Republic](#) [2002] eKLR:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

The sentences were valid despite lack of an option of fine.

The sentences

41. As regards Count 3, section 357(b) of the [Penal Code](#) provides that, “Any person who, with intent to defraud or to deceive knowingly utters any document or electronic record or writing so made, signed



or executed by another person, is guilty of a felony and is liable to imprisonment for seven years. The trial court exercised its discretion and sentenced the appellant to 5 year's imprisonment only.

42. For Count 4, section 316A(4) of the *Penal Code* provides that,“ a person who is guilty of a misdemeanour under this section is liable to a fine not exceeding fifty thousand shillings, or to imprisonment for term not exceeding one year, or to both.” The appellant was sentenced to imprisonment for 1 year, without the option of fine.
43. The offence under Count 5 attracts a sentence of imprisonment for 3 years, and the appellant was sentenced to imprisonment for 1 year only.
44. The trial court ordered that the sentences shall run concurrently as appropriate in all cases where the offences are committed in the same transaction. See *Odero v. R* (1984) KLR 61; *Ondieki v. R* (1981) KLR 430 and *Nganga v. R* (1981) KLR 530. The sentences were lawful, and there are no circumstances on the test for appellate interference with discretion of the trial court in sentencing to alter the sentences passed by the trial court.

Orders

45. The appeal is without merit and it is dismissed.

Order Accordingly.

DATED AND DELIVERED ON 31ST DAY OF MAY, 2022

EDWARD M. MURIITHI

JUDGE

Appearances

Appellant in person.

Ms. Nandwa, Prosecution Counsel for the DPP.

