REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 259 OF 2018

BETWEEN

OLIVER TERESIA NJOKI KAINIKA.............APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani in Cr. Case No. 31 of 2017 delivered by Hon. T. N. Sinkiyian (SRM) on 7th December, 2018).

JUDGMENT

1. The Appellant, **Oliver Teresia Njoki Kainika** was charged with issuing bad a cheque contrary to **Section 316A (1) (a)** as read with **Section 316A (4)** of the **Penal Code**. The particulars of the offence were that on the 30th day of July, 2015 at Windsor House along Muindi Mbingu Street in Nairobi area within Nairobi County, issued a cheque number 000021 for Kshs. 600,000/= for account number 0044973001 held at Diamond Trust Bank of Kenya Limited Thika Road branch to **Benard Gichuru** with the knowledge that the said account had insufficient funds.

2. The Appellant pleaded not guilty to the charge. Upon trial, she was found guilty of the offence and convicted accordingly. She was sentenced to pay a fine of Kshs. 30,000/= in default serve three (3) months imprisonment. Aggrieved by both her conviction and sentence, she preferred the instant appeal to this Court.

3. The Appellant raised fourteen grounds of Appeal in her Petition of Appeal filed on 21st December 2018 by Kimathi Wanjohi Muli Advocates. They are that:

> ***i. THAT the learned trial magistrate erred in law and in fact by convicting her on an offence which had no basis, was non-existent and based on a defective charge sheet.***
>
> ***ii. THAT the learned trial magistrate erred in law and in fact by placing her on her defence for an offence that was not known in law.***
>
> ***iii. THAT the learned trial magistrate erred in law and in fact by admitting the complaint and charge against her when it was manifestly clear that the same could not be sustained in law.***
>
> ***iv. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the charge could not be sustained if the cheque in issue was a post-dated cheque.***
>
> ***v. THAT the learned trial magistrate erred in law and in fact by considering extraneous facts when convicting her.***
>
> ***vi. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the matter before her was civil/commercial in nature and not criminal since it arose from a loan agreement.***
>
> ***vii. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that she had made part payments to the complainant.***
>
> ***viii. THAT the learned trial magistrate erred in law and in fact by disregarding her submissions and failing to adhere to the***

principles of judicial precedents.

ix. THAT the learned trial magistrate erred in law and in fact by convicting her when the prosecution had not established the key ingredients of the offence.

x. THAT the learned trial magistrate erred in law and in fact by shifting the burden of proof to her.

xi. THAT the learned trial magistrate erred in law and in fact by finding that at the moment a post-dated cheque matures, the temporary relief provided by Section 316A (2) of the Penal Code is spent.

xii. THAT the learned trial magistrate erred in law and in fact by finding that the prosecution proved the offence beyond reasonable doubt.

xiii. THAT the learned trial magistrate erred in law and in fact by failing to afford her a fair trial.

xiv. THAT the learned trial magistrate misdirected herself and applied the wrong principles of law when convicting her.

Summary of Evidence

4. This being a first appeal, this court, as a matter of law, is enjoined to analyze and re-evaluate the evidence adduced by the witnesses before the trial court afresh so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard any of the witnesses and give due regard for that. (See: **Okeno v Republic (1972) EA 32).**

5. The Prosecution's evidence can be summarized as follows: Sometime in May 2015, the Appellant, who was well known to the complainant **PW1, Bernard Humphrey Gichuru,** approached him for a loan of Kshs. 3,000,000/= to enable her fund her maize supply to the National Cereals and Produce Board. PW1 informed his lawyer a Mr. Kihangi who advised him to advance her an initial sum of Kshs. 500,000/= and ask for a post-dated cheque as collateral. The Appellant was to pay back the said amount with an interest of Kshs. 100,000/= failure to which PW1 would charge her a 10% interest compounded monthly. On 18th July, 2015, PW1 and the Appellant entered into agreement on those terms which agreement was duly signed by both of them.

6. Thereafter, PW1 issued the Appellant with a banker's cheque No. 0055731 dated 18th June, 2015 for Kshs. 500,000/=. The Appellant banked the cheque and the said amount was debited from PW1's bank account held at Credit Bank Koinange branch. The Appellant then gave him a post-dated cheque No. 000021 dated 30th July, 2015 for Kshs. 600,000/= as collateral. PW1 banked the post-dated cheque on 18th August, 2015. On 19th August, 2015, he was informed that the cheque had been dishonored since the Appellant's account had insufficient funds. The Appellant did not inform him that she had no funds. He called the Appellant and informed her but she was arrogant. The Appellant only paid back Kshs. 50,000/= through his lawyer and committed to pay the outstanding amount in installments but failed to do so. As such, PW1 reported the matter to the police on 5th January, 2017.

7. PW1 denied signing any Affidavit acknowledging receipt of Kshs. 100,000/= from the Appellant. He stated that his lawyer filed a civil case but informed him that it was dismissed for want of jurisdiction.

8. PW2, Corporal Charles Liru of Central Police Station investigated the case. He summoned the Appellant and she told him that it was a friendly loan. PW2 obtained a search warrant in *Milimani CM Misc. Criminal Application No. 2280 of 17* to enable him investigate PW1's account held at Credit bank as well as the Appellant's account held at DTB bank. He obtained a statement for the Appellant's bank account No.0044973001 for the period 15th July, 2015 to 20th August, 2015. The statement showed that on 19th August, 2015, cheque No. 000021 for Kshs. 600,000/= was dishonoured due to insufficient funds. He also obtained PW1's bank account statement number 21002000802 from Credit Bank Koinange Branch for the period 17th July, 2015 to 31st August, 2015. It indicated that on 18th August, 2015, PW1 deposited cheque for Kshs. 600,000/= which was dishonoured and his account charged Kshs. 500/=.

9. PW2 charged the Appellant with the offence in question. PW2 produced the following documents in evidence: the loan agreement, a copy of the banker's cheque dated 18th June, 2015 for Kshs. 500,000/=, the parties respective bank account statements, an image of the post-dated cheque No. 000021 dated 30th July, 2015 for Kshs. 600,000/= showing it had been dishonoured, the warrants of search and the Appellant's statement.

10. Upon being placed on her defence, the Appellant elected to give a sworn testimony. She stated that she had been in an intimate relationship with PW1 from 2010 to 2012 but they separated in 2015. She recalled that on 18th June, 2015, they met in the office of PW1's cousin who is a lawyer and entered into an agreement in which PW1 lent her Kshs. 500,000/= to fund her business. She was to repay the said amount with an interest of 20%, that is, a total of Kshs. 600,000/= by 30th July, 2015. She gave PW1 a post-dated cheque number 000021 as security which cheque was to be banked on 30th July, 2015. However, the NCPB did not pay her the money she was expecting for her supplies hence she was unable to meet her financial obligations. Further, one of her trucks was involved in an accident in Mai Mahiu and another was repossessed by a bank thereby grounding her business.

11. She paid PW1 Kshs. 50,000/= in October, 2015 and Kshs. 100,000/= in January, 2016 to his lawyer. In March, 2016, PW1 demanded Kshs. 1,823,279.40 from her and instituted Civil Case No. 154 of 2016 against her at Kikuyu Law Courts. However, the case was dismissed in December, 2016 and PW1 ordered to pay her costs. She wanted to pay PW1 in installments and made several proposals for settlement but he refused and demanded to be paid the outstanding amount in full. She was arrested in January, 2018 and met PW1 at Central Police Station. Her uncle offered to pay PW1 Kshs. 200,000/= but he refused and demanded Kshs. 3.6 Million. The Appellant has since filed a civil

case against her in Milimani CMCC No. 7012 of 2018.

12. On cross examination, she stated that she did not inform PW1 that she would pay him back with money from NCPB but that that was her plan. She also stated that she called PW1 before 30th July, 2015 and told him not to bank the cheque. She also informed the lawyer but PW1 did not inform her when he was going to bank the cheque. Further, she stated that in October 2015, she paid Kihangi Kshs. 50,000/= through a cheque and sent him a further Kshs. 50,000/= on Mpesa in 2016 making it a total of Kshs. 100,000/= only. She also stated that she made demands to the procurement manager of the NCPB but only received a sum of Kshs. 126,000/= out of Kshs. 1,160,000/=.

Analysis and Determination

13. Appeal was canvassed by oral arguments. The Appellant was represented by learned counsel, Mr. Kahare whilst the Respondent was represented by the learned State Counsel, Ms. Kimaru. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that the only issue for determination is whether the offence was proved beyond a reasonable doubt.

14. Mr. Kahare submitted that the Appellant was convicted on the basis of a defective charge sheet. He 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 his view therefore, the Appellant's conviction could not be sustained and to support this, he cited the cases of ***Daniel Simiyu Omali & Another v Attorney General & 3 others [2016] eKLR*** and ***Amos Makokha Wanekhwe v Republic [2019] eKLR.*** Counsel further faulted the trial magistrate for failing to consider the part payments made by the Appellant. He therefore urged that the appeal be allowed and the fine of Kshs. 30,000/= paid by the Appellant be refunded to her.

15. Ms. Kimaru opposed the appeal. She argued that since PW1 deposited the post-dated cheque after its maturity date, the Appellant ceased to enjoy the immunity provided by **Section 316A (2)** of the **Penal Code**. Ms. Kimaru further submitted that in any case, the Appellant did not inform PW1 that her account had insufficient funds. She urged that the appeal be dismissed in its entirety for want of merit.

16. 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 misdemeanour if the person –***

a. ***Knows that the account has insufficient funds".***

17. 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 vs. Republic [1971] EA 657 KLR 289)*** the court held that a postdated cheque is not a representation that there are sufficient funds to meet the cheque but, that when the cheque is presented on the future date shown on the cheque, there will be funds to meet it. The Court had this to say:

> ***"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"***

18. From the evidence on record, it is not in dispute that on 18th June, 2015, the Appellant issued PW1 with a post-dated cheque number 000021 for Kshs. 600,000/=. It is also not disputed that the post-dated cheque was to be banked on 30th July, 2015. In essence, the Appellant undertook to pay PW1 the Kshs. 600,000/= by 30th July, 2015. However, when PW1 deposited the post-dated cheque on 18th August, 2015, which was over a month after its due date, it was dishonored due to insufficient funds in the Appellant's bank account. The insufficiency of funds was proven by a bank statement of the Appellant's bank account for the period 15th July to 20th August 2015 which confirmed that the post-dated cheque was dishonored on 19th August, 2015 for that reason.

19. The Appellant herself admitted in her defence that she had insufficient funds at the time the cheque was banked because the NCPB had not paid her the money she was expecting. She however claims that she told PW1 not to bank the cheque and blames him for failing to inform her when he was going to do so. Whether or not this was a plausible ground on which the account did not have funds is not the issue. What is in issue is that the charge could not stand by virtue of Section 316A(2) which states that:

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

20. As was correctly held in the **Abdallah case** (supra), PW1 ought to have made reference to the Appellant before he deposited the cheque so as to certain that the cheque would pay. That way, he would have been assured that the cheque would not be dishonored. I differ with the learned State Counsel, Miss Kimaru that, since the cheque was deposited after the maturity date, the Appellant ceased to enjoy the immunity provided under **Section 316A (1)(a) of the Penal Code**. If such immunity was intended by the draftsmen of the Code, nothing was easier than providing for it. I find therefore, that this a case, *ab initio,* that ought to have failed. The conviction of the Appellant was not safe at all.

21. Moreover, it was demonstrated that partial payment of the debt had been met. Although the amount paid is disputed by the parties, the partial payments subsequently transformed the dispute into a civil one. And truly there exists one where the dispute should be properly ventilated.

22. The Appellant has also faulted the trial magistrate for failing to appreciate that the matter before her was civil and/or commercial in nature and not criminal since it arose from a loan agreement. Under **Section 193A** of the **Criminal Procedure Code**, the fact that any matter

in issue in criminal proceedings is also directly or substantially in issue in any pending civil proceedings is not a bar to criminal proceedings. The latter can only be barred if it is shown that the complainant is acting in bad faith. Although bad faith is not demonstrated in this case, the law squarely barred the institution of the charges by virtue of **Section 316A (1)(a) of the Penal Code**.

Conclusion

23. In view of all the foregoing, I find that this appeal is merited and is allowed. I quash the conviction, set aside the sentence and order that the fine of Ksh. 30,000/ the Appellant paid be refunded to her forthwith. It is so ordered.

Dated and Delivered at Nairobi this 29th Day of April 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Njuguna for the Appellant.

2. M/s Nyauncho for the Respondent.