



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 29 OF 2017**

**DANIEL MUSAU MULI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 23 of 2017 by Hon. S. K. Ngii (SRM) on 31/05/17)*

**J U D G M E N T**

1. **Daniel Musau Muli alias Prince Musau**, was charged thus:

**Count 1: Cheating** contrary to **Section 315** of the **Penal Code**. Particulars of the offence were that on diverse dates between **4<sup>th</sup> January, 2017** and **6<sup>th</sup> January, 2017** at **Stress Free Resort** at **Mutomo Township** in **Mutomo Sub-County** within **Kitui County** by means of fraudulent tricks induced **Onesmus Munyalo Mutua** to serve him hence delivered (21) 500ml Tusker beers, (36) 300ml Snap beers, (7) 500ml Guinness beers (GK), (4) 500ml Balozi beers, (1) 500ml Pilsner beer, (1) litre of bottled water, (1) packet of 1 litre Mango Juice and (1) 500ml Soda all valued at **Kshs. 12,480/=** purporting that he was to pay using Mpesa Till Number **191345** a fact he knew to be false.

**Count 2: Cheating** contrary to **Section 315** of the **Penal Code**. Particulars of the offence were that on diverse dates between **4<sup>th</sup> January, 2017** and **6<sup>th</sup> January, 2017** at **Stress Free Resort** at **Mutomo Township** in **Mutomo Sub-County** within **Kitui County** by means of fraudulent tricks induced **Mercy Kalundu Kisilu** who was a room attendant to book him a two days room at Stress Free Resort for **Kshs. 2,000/=** purporting that he was to pay using Mpesa Till Number **191345** a fact he knew to be false.

**Count 3: Cheating** contrary to **Section 315** of the **Penal Code**. Particulars of the offence were that on diverse dates between **4<sup>th</sup> January, 2017** and **6<sup>th</sup> January, 2017** at **Stress Free Resort** at **Mutomo Township** in **Mutomo Sub-County** within **Kitui County** by means of fraudulent tricks induced **Mwanduka Musango** who was a kitchen attendant at Stress Free Resort to serve him hence delivered two chicken, three chips, one half kilogram of meat and ugali all valued at **Kshs. 3,280/=** purporting that he was to pay using Mpesa Till Number **191345** a fact he knew to be false.

**Count 4: Stealing** contrary to **Section 268** as read with **Section 275** of the **Penal Code**. Particulars of the offence were that on diverse dates between **28<sup>th</sup> November, 2016** and **6<sup>th</sup> December, 2016** at **Mtwapa Township** in **Mtwapa Sub County** within **Kilifi County**, stole five cheque leaves of **NIC Bank** in the name of **Evans Musila Mutua** valued at **Kshs. 1,000/=** the property of **Evans Musila Mutua**.

**Count 5: Personation** contrary to **Section 382** of the **Penal Code**. Particulars of the offence were that on the **6<sup>th</sup> day of January, 2017** at **Mutomo Police Station** in **Mutomo Sub-County** within **Kitui County** with intent to defraud **George Nthenge Mwangangi** falsely represented himself to be **Evans Musila Mutua** a fact he knew to be false.

**Count 6: Making a False Document with Intent to Defraud** contrary to **Section 347(d)(i)** as read with **Section 349** of the **Penal Code**. Particulars of the offence were that on **6<sup>th</sup> January, 2017** at **Stress Free Resort** at **Mutomo Township** in **Mutomo Sub-County** within **Kitui County** with intent to defraud **George Nthenge Mwangangi** the owner of Stress Free Resort fraudulently forged a **NIC Bank** cheque of **Evans Musila Mutua** of **Kshs. 17,765/=** without his authority purporting that the cheque was to clear the bill owed at Stress Free Resort a fact he knew to be false.

**Count 7: Uttering a False Document** contrary to **Section 353** as read with **Section 349** of the **Penal Code**. Particulars of the offence were that on **6<sup>th</sup> January, 2017** at **Stress Free Resort** at **Mutomo Township** in **Mutomo Sub-County** within **Kitui County**, knowingly and fraudulently uttered a forged cheque of **NIC Bank** in the names of **Evans Musila Mutua** to **George Nthenge Mwangangi** purporting it was a genuine cheque a fact he knew to be false.

2. After being taken through full trial he was found guilty, convicted on Counts 3, 5, 6 and 7 and sentenced to pay a fine of **Kshs. 50,500/=** on each Count and in default he was required to serve **one (1) year imprisonment**. The sentences meted out were to run consecutively.
3. Aggrieved, he appeals on grounds that evidence adduced was contradictory and uncorroborated; the forensic document examiner did not testify so as to be cross examined; the charge sheet in Count 6 was defective and ordering the sentence to run consecutively was erroneous.
4. Facts of the case were that PW1 **Stella Nyambura Munene**, interacted with an individual known as **Prince Musau** on social media. Subsequently they met on **3<sup>rd</sup> January, 2017** and they slept at her house. On **4<sup>th</sup> January, 2017**, the following day she took him to Stress Free Resort. They were served by PW3 **Mwandulo Musango**. They had drinks and ate food. The Appellant who described himself as **Prince Musau** booked a room. They spent a night at the Resort and the Appellant promised to pay the following day. In the evening, he booked a room at the Resort, PW2 **Mercy Kalondu Kisilu** the person in charge of the rooms allowed him to sleep at the room following an understanding that he would settle the bill in the morning. On **5<sup>th</sup> January, 2017** upon being asked for the money the Appellant promised to pay through an Mpesa Till Number.
5. On **5<sup>th</sup> January, 2017**, PW4 **George Mwangangi** the proprietor of the Resort went to his place of business and found an outstanding bill. He met the Appellant, the customer responsible for the bill who was still in the room. He promised to pay the bill but he did not. PW1 undertook to ensure the bill which stood at **Kshs. 17,000/=** was paid.
6. At about **8.00 a.m.**, PW4 received a call from the Appellant who sought to deposit a cheque on an account if he held one at **KCB**. He went to the bank and found the Appellant whom he took to the police station. He had a student identification card which bore the name **Daniel Musau** as opposed to **Evans Mutua** the account holder of the cheque leaf. Due to the disparity of the names he declined to accept the cheque.
7. PW5 **Corporal David Uka** investigated the matter and charged the Appellant.
8. Upon being put on his defence the Appellant stated that he got acquainted to a lady who worked as a reporter with the County FM through a whatsapp group. They agreed to meet therefore he travelled to **Mutomo** her place of preference on **3<sup>rd</sup> January, 2016** and met PW1. They slept at her house and in the course of the night she volunteered information regarding her financial constraints that she requested him to address. The following day she took him to Stress Free Restaurant. Each of them drunk four (4) bottles of beer. **Onesmus** who served them demanded settlement/payment of the bill prior to handing over to **Mwanduka** (PW3) a bill that he (Appellant) settled.
9. Prior to **Mwanduka** leaving he settled the bill that they incurred. Thereafter **Onesmus** who took over allowed service by order basis. In the meantime, PW1 would leave the table and converse with strangers pointing at him. He became suspicious and decided to secure a room for purposes of accommodation at the Restaurant for which he paid **Kshs. 2,000/=**. He slept at the lodging and woke up the following day. The following day they had drinks and food that he paid for. He however disagreed with **Stella** following her questionable conduct. Prior to leaving **Onesmus** pointed out that there was a problem. He took him to Paris Hotel where **George** (PW4) alleged that he had not paid money. He went back to Stress Free Bar to find **Stella** to support him. While there he paid for two (2) bottles of Tusker through Till No. **191345**. **George** called the police who arrested him. At the DCIO's office, he encountered some officers who had cheque leaves that they alleged were obtained from him. They took possession of his cellphone. He urged that **Onesmus** did not testify because he knew that he paid the bill.
10. The Appeal was canvassed by way of written submissions which were highlighted that I have taken into consideration.
11. This being a first Appeal, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).
12. On Count 3 the Appellant was accused of using fraudulent tricks to induce **Mwanduko Musango** a kitchen attendant to serve him with food stipulated in the particulars of the offence purporting to pay through Mpesa Till Number **191345** a fact he knew to be false. The value of the food was given as **Kshs. 3,280/=**.
13. PW3 **Mwanduka Musango** stated that the bill the Appellant and PW1 incurred was a total of **Kshs. 17,665/=**. He continued serving them following an assurance that the Appellant would pay the money. The explanation he gave was that he attempted to transfer money from his Bank Account to his Mpesa Account but was not successful. On the **6<sup>th</sup> January, 2017** the Appellant bought two bottles of Tusker and used Mpesa to pay the bill.
14. The Appellant does not dispute having taken the food and drinks. His argument is however that he paid the bill. However, there is evidence adduced of the Appellant having signed a cheque in the sum of **Kshs. 17,756/=** that had been issued to Stress Free Resort dated **6<sup>th</sup> January, 2017**. According to PW4 **George Mwangangi**, he intended to deposit the cheque on his account. In his defence the Appellant denied having possessed the cheques but alleged that the police officer, PW5, asked him to sign on the cheque which he did.
15. The Prosecution's case that he did not pay bills, some of the food having been sold by **Mwanduko** was confirmed by PW1 who was in his company. The fact that he issued a cheque in the sum of **Kshs. 17,765/=** a total sum stated to have been incurred at the Restaurant was proof of the fact of having failed to pay for the food he ate valued at **Kshs. 3,280/=** which was part of the total sum.
16. The Appellant succeeded in persuading the Complainant, **Mwanduko** to serve him with chicken, meat, chips and ugali, this was advantageous to him but he gained the same unfairly as he failed to pay for it. Eventually he wanted to issue a cheque that did not belong to him. This amounted to cheating.
17. The Appellant is stated to have represented himself as **Evans Musila** a fact he knew to be false with intent to defraud **George Nthenge**

Mwangangi. Section 382 of the Penal Code provides thus:

*“(1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour.*

*(2) If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof, he is liable to imprisonment for seven years.”*

18. PW4 **George Mwangangi** found a huge unpaid bill at his Bar and Restaurant. He spoke to the customer stated to have incurred the bill who introduced himself as **Prince Musau** an employee of **ECO Bank Uganda** and promised to pay through Mobile Banking. This did not happen. The following day, he was notified the bill had shot to **Kshs. 17,000/=**. PW1 undertook to ensure the sum was paid.

19. The following day he was notified of a person intending to deposit a cheque on his account. The bank required his consent to give the customer his account number. He proceeded to the bank and found the customer. He took the customer to the police station. It turned out that the cheque leaf bore the name of **Evans Musila Mutua** while the Appellant's student identity card that was found had the name **Daniel Musau**, and that the Appellant signed the cheque in his presence.

20. In his defence the Appellant denied having been in possession

of the cheque leaves. He urged that the police were the ones in possession of them.

21. To establish the signatory of the cheque the police took specimen signatures of both the Appellant and **Evans Musila Mutua**. **Martin Kitayi** a Forensic Document Examiner examined and compared the questioned signatures and established that the signatures on a cheque No. **0000691** dated **6<sup>th</sup> January, 2017** for the sum of **Kshs. 17,765/=** in the name of Stress Free Resort was authored and signed by the Appellant. The Account Holder of the number on the cheque was however **Evans Musila Mutua**. The stated **Evans Musila Mutua** was excluded as the signatory of the cheque.

22. **Evans Musila Mutua** was the Complainant in Count IV but he never turned up to testify therefore the Court acquitted the Appellant of the charge. The fact that the stated **Evans Musila Mutua** recorded a statement and provided specimen signatures was evidence that he was alive. Section 382(1) of the Penal Code provides thus:

*“(1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanor.”*

A representation can be made by words, conduct, can be in writing and the person doing it must be fully aware that it is false (See Section 312 of the Penal Code).

23. The Appellant herein did sign the cheque that was issued to Stress Free Resort owned by PW4. Evidence was adduced of an identification report which proved that the Appellant was known as **Daniel Musau Muli** but not **Evans Musila Mutua**. This means that when the Appellant appended his signature on the cheque purporting to be the signatory he represented in writing a fact he was fully aware was false. This was personation.

24. With regard to Count 6 it is urged that the charge was defective and despite the fact that the trial Court noted that fact by expressing itself thus:

*“I note however that the drafter of the offence made technical errors in framing the statement of the offence.”*

It proceeded to convict the Appellant. The Appellant was charged with the offence of **Making a False Document with Intent to Defraud** contrary to Section 347(d)(i) as read with Section 349 of the Penal Code. The alluded to provision of the law provides thus:

*“347. Any person makes a false document who—*

*(d) signs a document—*

*(i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing; or*

*349. Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.”*

25. The principle governing charge sheets is that an Accused should be charged with an offence known in law (see **Sigilani vs. Republic (2004) 2 KLR**).

The particulars of offence ought to disclose the offence an Accused person is charged with so as to enable him to defend himself. A charge should not cause confusion to the Accused person. In the instant case, the learned trial Magistrate noted the defect at the point of drafting the Judgment and instead of convicting the Appellant with the offence he faced he found him guilty, convicted him of the offence of **Forgery** contrary to Section 345 as read with Section 347(d)(i) and 349 of the Penal Code. His argument was that he was not prejudiced. In the case

of **Bernard Ombuna vs. Republic (2019) eKLR** the Court of Appeal stated that:

***“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 ...”***

26. In the instant case there is no way the Appellant would have understood whether he was being accused of making a false document or forgery. He was ultimately convicted of the offense of forgery having not been given an opportunity to defend himself on that line therefore it was prejudicial to him.

27. On the 5<sup>th</sup> Count, the Appellant was alleged to have uttered a forged cheque to **George Nthenge Mwangangi** at the Stress Free Resort. According to PW4, he received a call from a customer enquiring about his bank account with **KCB** with a view of depositing a cheque. He was prompted to go to the bank where he found the individual at the door of the Bank and took him to the police station. While at the police station he found that the Appellant's name differed with the name on the cheque leaf. I have aforefound that the Appellant was found with a cheque in the name of **Evans Musila Mutua**. He had appended thereon a signature. By doing so he made the document to be what in fact it was not. His intention as proved was to use it to pay a bill of **Kshs. 17,765/=** to Stress Free Resort, the indicated payee, which was stated to belong to **George Mwangangi**.

Utter is defined by the **Penal Code** as:

***““utter” means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with, or act upon the thing in question;”***

This was an attempt to use the cheque to settle what he owed hence purporting the document to be genuine in the state it was presented.

28. It is contended by the Appellant that failure to call some witnesses to testify was detrimental to the Prosecution's case. In particular, **Onesmus Munyoki** the cashier at the Resort and **Evans Musila Mutua** and the Government Analyst. In the case of **Bukenya vs. Uganda (1972) EA 549** it was stated thus:

***“... There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent .... While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”***

**Onesmus Munyoki** was the Complainant in the 1<sup>st</sup> Count who sold drinks worth **Kshs. 13,480/=**. Having failed to testify the Appellant was acquitted on that Count. **Evans Musila Mutua** whose name appeared as the Complainant in Count 6 recorded a statement, submitted his sample signatures for forensic examination but at the close of the Prosecution's case he had not testified.

29. The Court was notified of the financial constraints of the stated **Evans** who was to travel from **Mombasa** on the **23<sup>rd</sup> March, 2019** on that date, the Court granted the Prosecution a last adjournment therefore the case was closed without their evidence. **Onesmus** was stated to have left employment.

30. It is further urged that failure of the two (2) witnesses to testify was not deliberate therefore it cannot be concluded that their evidence would have been adverse to the Prosecution's case. If indeed **Onesmus** declined to testify because he was of the view that the bill was paid nothing would have been easier than testifying for the defence.

31. With regard to the Government Analyst, **Section 77** of the **Evidence Act** provides thus:

***“(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***

***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***

***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”***

32. The trial Court allowed production of the document examiner's report having believed that it was genuine. The authenticity of the document was not questioned and the Appellant did not raise any objection to production of the stated report.

33. In the case of **Naomi Bonareri Angasa vs. Republic (2018) eKLR** the Court stated as follows:

***“... Once the presumption of authenticity under Section 77(2) ... is met the document is admissible but the trial Court may, suo moto or upon request by the accused person, call for the maker of such document to appear in Court for cross examination on the form or content of the report. In Joshua Otieno Oguga vs. Republic KSM CA Criminal Appeal No. 183 of 2009 (2009) eKLR***

*the Court of Appel considered the same issue and held that:*

***“That in short means that if the Appellant wanted a medical report to be produced by a doctor, he had to apply to the Court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by P.C. Ann Kambui as she did...”***

34. I do note that the Appellant was the one urging the Court to order the Prosecution to close their case. He did not ask the Court to ensure the Document Examiner was called to testify. Therefore, considering the circumstances that prevailed, there was nothing wrong with the Investigating Officer who had been granted a last adjournment producing the document pursuant to **Section 77** of the **Evidence Act**.

35. The trial Court is faulted for falling into error by not reaching a finding that evidence adduced was contradictory and uncorroborated. In particular, the Appellant urged that the evidence of PW1 and PW3 in respect of the chronology of occurrence of events were different which meant that the two (2) were lying. In the case **Alfred Twehangane vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UG CA 6** it was stated that:

***“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”***

Each witness recounted what transpired in their own narratives. The substance of the case was that the Appellant used tricks to obtain the food and drinks that he partook with PW1 and thereafter failed to pay. The fact of having taken the food, drinks and lodging services is not denied, therefore contradictions, if any, were not grave. They did not affect the substance of the case.

36. In **DPP vs. Kilbourne (1973) 1 ALL ER 440; (1973) AC 720 (1916) 2 KB 658**, Chief Justice Read stated that:

***“Evidence on corroboration must be independent testimony which affects the Accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only had the evidence that the crime has been committed but also that the prisoner committed it.”***

The evidence of PW1, whom the Appellant dismisses as his possible accomplice who may have testified to shield herself was corroborated by evidence of PW2, 3 and 4 and that of the cheque issued by the Appellant.

37. The learned trial Magistrate is faulted for ordering consecutive sentences.

38. **Section 14** of the **Criminal Procedure Code** provides thus:

***“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.***

***(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.***

***(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—***

***(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or***

***(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.***

***(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”***

39. In the case of **Peter Mbugua Kabui vs. Republic (2016) eKLR** the Court of Appeal stated that:

***“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be***

*excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful" We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same."*

40. The Court was seized of the jurisdiction to impose consecutive sentences therefore the trial Magistrate did not fall into error.

41. From the foregoing the Appeal succeeds partially. On Count 6, I do quash the conviction and set aside the sentence imposed.

42. On Counts 3, 5 and 7 the Appeal lacks merit and is dismissed. I therefore affirm conviction and sentence imposed by the trial Court.

43. It is so ordered

**Dated, Signed and Delivered at Kitui this 20<sup>th</sup> day of June, 2019.**

**L. N. MUTENDE**

**JUDGE**