REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEALNO 20 OF 2016

JOSEPH MWAI NDUATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 568 of 2014 in the Senior ResidentMagistrate's Court at Taveta delivered by Hon E.M. Kadima (RM) on 8th January 2016)

JUDGMENT

1. The Appellant herein, Joseph Mwai Nduati and Kennedy George Otieno (hereinafter referred to as "PW 2") were charged with six (6) different Counts.

2. In Count I, they had been charged with obtaining by false pretences contrary to 313 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the5th day of July 2014 at Voi township within Taita Taveta County, jointly with others not before the court, with intent to defraud ,obtained from Lucy Nduta Ngugi (hereinafter referred to as "PW 1") assorted door locks valued at Kshs603,500/= by falsely pretending that certain cheque number 000188 which they then produced and delivered to her was a good and valid order for the payment of Kshs603,500/- upon the Family Bank Makueni branch situated at Wote town.

3. In Count II, they were charged with making a document without authority contrary to Section 357 (A) of the Penal Code. The particulars of the charge were that on the aforesaid date and place, jointly with others not before the court, with intent to deceive/defraud, without lawful authority or excuse made a Purchase Order Serial No 00325 dated 5th July 2014, purporting to be a genuine purchase order issued by St James Catholic Mission Makueni.

4. In Count III, they were charged with uttering a false document contrary to Section 358 of the Penal Code. The particulars of the charge were that on the aforesaid date and place, jointly with others not before court, knowingly and fraudulently uttered a forged Purchase Order Serial No 00325 dated 5th July 2014 to PW 1 purporting to be a genuine purchase order from St James Catholic Mission Makueni.

5. In Count IV, they were charged with making a document without authority contrary to Section 357 (A) of the Penal Code. The particulars of the charge were that on the 9th day of July 2014 at Voi township within Taita Taveta County, jointly with others not before court, with intent to deceive/defraud without lawful authority or excuse made, a Purchase Order Serial No 00330 dated 9th July 2014 purporting to be genuine purchase order issued by St James Catholic Mission Makueni.

6. In Count V, they were charged with uttering a false document contrary to Section 358 of the Penal

Code. The particulars of the charge were that on the 9th day of July 2014 at the aforesaid place, jointly with others not before court, knowingly and fraudulently uttered a forged Purchase Order Serial No 00330 dated 9th July 2014 to PW 1 purporting to be a genuine purchase order from St James Catholic Mission Makueni.

7. In Count VI, they were charged with attempting to obtain goods by false pretences, contrary to Section 313 of the Penal Code as read with section 389 of the Penal Code. The particulars of the charge were that on 12th July 2014 at the aforesaid place, jointly with others not before court, with intent to defraud, attempted to obtain PW 1 one hundred and forty (140) pieces of steel door locks valued at Kshs 823,100/= by falsely pretending that a certain cheque leaf Serial No 000189 which they then produced and delivered to PW 1 was a good and valid order for the payment of Kshs 823,100/= upon the Family Bank situated at Makueni, a fact they knew to be false.

8. On 19th May 2015, the Prosecution sought to have PW 2 made a Prosecution witness. The Learned Trial Magistrate Hon E.M. Kadima allowed the said application and discharged him under Section 87A of the Criminal Procedure Code Cap 75 (Laws of Kenya).

9. At the conclusion of the trial, the Learned Trial Magistrate convicted the Appellant on all six (6) Counts. He, however, observed that Count VI ought to have been an alternative count since the offence of obtaining by false pretences had been established under the main Count. He therefore absolved the Appellant of punishment for Count VI on the ground that the same would have amounted to double jeopardy.

10. In respect of Count I, he fined him Kshs 300,000/= or in default to serve two (2) years imprisonment. For Count II, he fined him Kshs 300,000/= or in default to serve five (5) years imprisonment. For Count III, he fined him Kshs 300,000/= or in default to serve three (3) years imprisonment. For Count IV, he fined himKshs200,000/= or in default to serve two (2) years imprisonment. For Count V, he fined him Kshs 200,000/= or in default to serve three (3) years imprisonment. He directed that all the sentences were to run consecutively.

11. Being dissatisfied with the said judgment, on 29th September 2016, the Appellant filed his Petition of Appeal. He relied on five (5) Grounds of Appeal. He filed his Amended Grounds of Appeal and Written Submissions on 1st August 2017. He filed his Supplementary Written Submissions on 1st November 2017. The Respondent's Written Submissions were filed on 11th October 2017.

12. When the matter came up on 1st November 2017 both the Appellant and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

13. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

14. After perusing the Appellant's and the State's Written Submissions, this court was of the view that the issues that had been placed before it for determination were as follows;

> **1. Whether the Charge sheet was incurably defective;**

2. Whether the prosecution proved its case beyond reasonable doubt

3. Whether the sentence was severe, harsh and manifestly excessive to warrant interference by this court.

15. This court therefore deemed it prudent to address the said issues under the following distinct heads.

I. CHARGE SHEET

16. Amended Ground of Appeal No (3) was dealt with under this head.

17. The Appellant submitted that the Charge Sheet against him as drafted was not proper hence defective. He submitted that dates on the six (6) Counts were at a variance and contrary to the evidence on record and further that the particulars of the charge bore the name of Kennedy George Otieno who was PW 2 herein.

18. On its part, the State pointed out that when the Appellant first took plea he had been charged alongside PW 2 but that on 19th May 2015, PW 2 was discharged after the Prosecution made an application under section 87 (a) of the Criminal Procedure Code to turn him into a State Witness. It was its contention that this was done in the presence of the Appellant and hence not amending the Charge Sheet to remove PW 2 did not make the charge sheet defective.

19. A charge sheet does not become defective merely because the evidence that has been adduced during trial does not prove the facts in the charge sheet. If the evidence that is presented in court does not prove any offence, the trial court is obligated to acquit an accused person as envisaged in Section 210 and Section 215 of the Criminal Procedure Code as the prosecution will either have failed to demonstrate that a *prima facie* has been established or to prove its case beyond reasonable doubt.

20. As the Appellant rightly pointed out, the Prosecution ought to have amended the Charge Sheet by removing PW 2's name from the Charge Sheet and given him an opportunity to plead to the charges afresh as envisaged in Section 214 (i) of the Criminal Procedure Code. Having said so, the State also correctly submitted, errors in the charge sheet can be curable if they do not cause an accused person to suffer any prejudice.

21. Section 382 of the Criminal Procedure Code provides as follows:-

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

22. In the absence of any demonstration by the Appellant of what prejudice he suffered by having PW 2's name in the Charge Sheet, this court was not persuaded to find that the Charge Sheet as drafted was defective.

23. In the circumstances foregoing, Amended Ground of Appeal No (3) was not merited and the same is hereby dismissed.

II. PROOF OF THE PROSECUTION'S CASE

24. Amended Grounds of Appeal Nos (1), (2) and (4) were dealt with under this head as they were all related.

25. The Appellant averred the Prosecution's case was full of contradictions and hence failed to prove its case beyond reasonable doubt. He pointed out that PW 1 testified that she handed over all the goods to George Otieno and it was he who signed the delivery note and that she never met him.

26. He also contended that there was a contradiction in the evidence of PW 4 who had established that the transaction occurred on 9th July 2014 yet the delivery note was signed on 8th July 2014.

27. Further, he stated that PW 2 told the Trial Court that the said George and one Wilberforce sent him with an envelope to Joe Timber Hardware which contained the items they needed and which items would be given to him. He averred that PW 2's evidence showed that PW 1 was not present when the goods were collected and that he handed over the envelope to PW 1's employees and not to her personally as was corroborated by Danson Njoroge (hereinafter referred to as "PW 3").

28. He contended that there was also a contradiction as to whether the transaction was on 11th July 2014 when PW 1 said he was arrested or 12th July 2014 when PW 3 said he was arrested, a fact that was corroborated by the Investigation Officer No 87870 PC Paul Mwangi (hereinafter referred to as "PW 4") or 10thJuly 2014 when PW 2 said he was given an envelope by Wilberforce. He denied that he was the one who gave PW 1 the envelope as had been contended by PW 4 which he said contradicted PW 1's evidence.

29. He pointed out that PW 1 told the Trial Court that the serial Number of the Cheque that was given to her was 000188 was dated 7th July 2014 but that PW 4 testified that cheque was dated 9th July 2014. He further pointed out that this cheque though presented by PW 1, the same was not marked for identification neither was it produced as exhibit.

30. He further submitted that although PW 4 testified that the cheques belonged to Lawrence Macharia Karanja Account Number 018000029736 who he said had reported the loss of his cheque book, neither he nor a person from Family Bank was called to testify to prove this fact. He also asserted that there were contradictions as to who served them at the hardware shop and the said Doris Waithira was also never called as a witness in the case. He further pointed out the driver of the Probox Motor Vehicle was also not called as a witness in the case herein.

31. He relied on the case of **Dinkerrai Ramkrishna Pandya Vs. Republic Appeal No. 106/1950 EACA 93** where the court stated as follows;

> **"It is difficult to distinguish the truth from untruth and as who was telling the truth and who was telling lies where evidence is contradicted."**

32. He also placed reliance on the case of **Muiruri Njoroge and Others vs Republic Appeal No. 185 of 1987**where the court stated as follows;

> **"A court does not act on assertions unless such assertions are proved by evidence before the court."**

33. He relied on the case of **Bukenya Versus Uganda (1972) E.A. 549** where the court held that it was imperative for the prosecution to call the eye witness. He also relied on the cases of **Kiarie vs Republic (1984) KLR 739**and**Miller Vs. Ministry of Pensions (1947) 2 ALL ER 372**in support of his case.

34. On its part, the State argued that the Prosecution had proved its case by presenting cogent and consistent evidence. It pointed out on 4th July 2014, PW 2 called PW 1 and enquired about certain goods. She received a Purchase Order from St James Catholic Mission on 5th July 2014 and on 7th July 2014,PW 2 came to collect the goods and gave out a cheque. On the said date, PW 2 was issued with a delivery

note that he signed.

35. It stated that PW 2's evidence was corroborated by that of PW 1 and PW 3 that he was the one who went to the shop to collect the goods. It contended that PW 1's assertions that she received cheque number 000188 from Family Bank for Kshs 603,500/= and that the same was returned corroborated PW 4's testimony.

36. It submitted that PW 1 and PW 3 saw the Appellant at PW 1's shop which was proof that he was part of crew that was involved in a racket intended to defraud PW 1 of goods under the guise of working for St James Catholic Mission. It also stated that PW 3 confirmed that the Appellant and his colleagues came in a Probox Motor Vehicle Registration Number KBP 206F.

37. It submitted that the fact PW 1 and PW 2 contradicted each other on the date of arrest was a minor contradiction and the same was cleared up by PW 2 and PW 4 as 12th July 2014 and the circumstances leading to the arrest of the Appellant. It relied on the case **Josephat Wagura Macharia vs Republic (2013) eKLR** where the Court of Appeal held that discrepancies on date of arrest or offence are not considered material in a case if it does not cause prejudice to an accused person or if it is inconsequential to the conviction and/or sentence. It also relied on the case of **Joseph Maina Mwangi vs Republic Criminal Appeal No 73 of 1993**where the Court of Appeal held that the discrepancy is curable under section 382 of the Criminal Procedure Code.

38. It averred that there was no need to have brought an agent from Family Bank to testify as the court had issued an order for investigations to be carried out on the account. Pursuant to that order PW 4 produced a print out of the account statement. Further Corporal Sang confirmed that St. James Catholic Mission did not exist thus confirmed fraud on the Appellant's part.

39. It was its contention that although DW 2 testified that the Appellant was admitted at Kenyatta Hospital on 28th June 2014, he did not confirm the duration for which the Appellant was admitted. It pointed out that DW 2 confirmed that when he went to visit the Appellant on 10th July 2014, he found that the Appellant had been discharged but did not know when he was discharged. Further he could not confirm the whereabouts of the Appellant after 28th June 2016.

40. It contended that if indeed the Appellant had suffered a stroke on 28th June 2016 and was discharged from hospital on 10th July 2014, he could not have been fully functional to have travelled by bus to Tanzania on 12th July 2014 for business.

41. It submitted that the contradictions by the prosecution witnesses were minor and did not absolve the Appellant as his alibi defence was weak. It therefore urged this court to find that the Prosecution proved its case beyond reasonable doubt.

42. There was a lot of confusion as to whether PW 2 was one and the same person as George Otieno due to a similarity in their names. There was also a lot of confusion in the dates. Be that as it may, according to PW 1, George Otieno and PW 2 were two (2) different people, a fact that was clarified in the proceedings in the lower court.

43. In her evidence, PW 1 stated that George Otieno was the one who signed the delivery book and collected the goods on a date that was not clear to this court. However, she did state in her testimony that George, Otieno and Mwai, the Appellant herein, went to her hardware shop on 8th July 2014.

44. In his evidence, PW 2 did not allude to having gone to the hardware shop at any given time with the Appellant herein. He stated that the people who had sent him to the hardware were George and Wilberforce and he was only introduced to the Appellant by Wilberforce who informed him that they used to work together. PW 2 said that at no one time did he ever speak to the Appellant herein but that he met the Appellant and the said Wilberforce later on the same date 11th July 2014at the Voi Stage. He said

that he met the Appellant herein for the first time on 10th July 2014.

45. It was not clear from the proceedings on which date, George made further orders of goods. However, when PW 2 returned to Voi on 12th July 2014, he met Wilberforce and the Appellant herein. Wilberforce sent him to a lady at the hardware shop to collect more goods. He described her to PW 2. While at the hardware shop, a Motor Vehicle carrying people who he came to find out were police officers came and asked him whether he was the one who had collected goods from the hardware shop on 10th July 2014 and he answered in the affirmative.

46. The said police officers asked him to lead him to the trio. He called Wilberforce who sent a Probox. He packed the goods and boarded the same together with police officers. As they were going to Mogas Filling Station, the Appellant approached the said Motor Vehicle. He said that he asked him whether he had succeeded but that when he saw people he did not know in the said Motor Vehicle, he ran but was arrested. PW 2 was emphatic that it was the Appellant who had asked him to show bravery as he went to the hardware shop and that he used to work with George and Wilberforce.

47. The evidence of how the Appellant herein was arrested was not consistent. Whereas PW 2 testified that Wilberforce hired the Motor Vehicle and that the Appellant was arrested near Mogas Filling Station after the said Motor Vehicle stopped, PW 4 stated that the Appellant hired the said Motor Vehicle in which he and George were being ferried in together with the goods. When they saw the police officers, they alighted and started running. George escaped but the Appellant was arrested.

48. Clearly, the evidence on how the Appellant was arrested was so inconsistent sufficient to have made this court entertain doubt as to what really transpired on the said date. Corporal Sang who was with PW 4 was not called as a witness to corroborate PW 4's evidence regarding the Appellant's arrest.

49. In any event, he was a crucial witness as he was the one who investigated the Account at Family Bank. Failure to call Corporal Sang or Lawrence Macharia Karanja as witnesses left a gap as it was not clear to whom the said Account belonged to.

50. Whereas Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives the prosecution discretion on the number of witnesses to prove a fact, failure to call a crucial witness can deal a fatal blow to the prosecution's case. In this case, no explanation was advanced to demonstrate why they were Corporal Sang and Lawrence Macharia were not called as witnesses and more so because PW 4 adduced evidence on behalf of Corporal Sang yet it was not said that Corporal Sang could not be traced to come and adduce evidence before the Trial Court.

51. Going further, the bank statement that was adduced in evidence to demonstrate that the bank account from which a cheque had been drawn belonged to Lawrence Macharia was a computer printout. Section 106B of the Evidence Act Cap 80 rendered the said document inadmissible as evidence before the Trial Court.

52. Section 106B of the Evidence Act provides as follows:-

> **1. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible….**
>
> **2. ….**
>
> **3. ….**

4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

1. identifying the electronic record containing the statement and describing the manner in which it was produced;

2. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

3. dealing with any matters to which conditions mentioned in subsection (2) relate; and

4. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

53. The Bank Statement which was generated from the computer as a print-out from the computer did not also meet the threshold of the requirements of adducing electronic evidence in accordance with the aforesaid Section and consequently, the Learned Trial Magistrate ought not to have relied on the same to link the Appellant to the same. In addition, failure to call the Account holder rendered the Prosecution's assertions that the said Account belonged to the said Lawrence Macharia Karanja unproven.

54. Looking at the evidence in totality, save for the fact that PW 2 said that Wilberforce told him that he worked with the Appellant, there was no evidence that was adduced before the Trial Court to demonstrate that the Appellant obtained PW 1's goods by false pretences. This is because, the orders were made by the said George who according to PW 1 also collected the goods the first time which goods but which goods, PW 2 said he was the one who collected the first time. The inconsistencies and contradictions were not of the nature that this court would have ignored.

55. It did appear to this court that PW 2 and the Appellant were not being fully truthful. Whereas the Appellant was under no obligation to prove his innocence and his defence did not sound convincing at all, the Prosecution was obligated to present cogent and believable evidence. PW 2's testimony that the Appellant and Wilberforce did shopping for him when he was a "total stranger" to them, the fact that he was told to be brave when dealing with customers and did not become suspicious of such dealings, the fact that he collected goods for "strangers" on two (2) occasions yet he had been called for a painting job raised a lot of doubt in the mind of this court regarding his role in the entire dealings.

56. The Appellant herein may or may not have been a party to the conmanship that was perpetrated in PW 1's hardware shop. However, save for his arrest details which were very scanty and contradictory, there was very little evidence that linked him to the offences herein. Indeed, from the way the evidence was adduced, this court will really never know his role in the matter herein as the evidence was inconsistent and not cogent.

57. Indeed, the contradiction in PW 1's evidence that he accompanied PW 2 to the hardware shop on 8th and 11th July 2014 contradicted that of PW 2 who was emphatic that he met the Appellant for the first time on 11th July 2017. Further, he stated that the Appellant was arrested near Mogas Filling Station as he was enquiring whether he had succeeded. This also contradicted PW 4's evidence which was that the Appellant alighted from the vehicle that was ferrying goods from PW 1's shop thus making this court very hesitant to conclude that the Prosecution's case was water-tight.

58. Indeed, this court could not say with certainty whether or not the Appellant could have travelled to Voi after suffering a stroke and being discharged from hospital as had been contended by the State

because doing so,would be speculative. It is trite law that mere suspicions no matter how strong are not sufficient to convict an accused person. Water-tight evidence must be presented by the Prosecution to prove its case.

59. Accordingly, having considered the evidence that was adduced before the Trial Court, this court came to the firm conclusion that the Prosecution did not prove its case to the required standard in criminal case, which is standard of proof beyond reasonable doubt. No evidence was adduced to demonstrate that the work that the Appellant did with Wilberforce was linked to the offences that were committed at PW 1's hardware shop. There was also no evidence to show that he made documents without authority or that he uttered false documents as was contained in the several Counts that he faced because PW 1's evidence seemed to point to George Otieno as having been the person who did committed the aforesaid offences. In her view, the Appellant was an accomplice because he was at her hardware shop on 7th July 2014.

60. In the premises foregoing, this court found that Amended Grounds of Appeal Nos (1), (2) and (4) were merited and the same are hereby allowed.

III. SENTENCE

61. The Appellant averred that the sentence imposed on him was harsh and excessive in light of the prevailing circumstances and the weight of the evidence adduced. On its part, the State submitted that the sentence was not excessive but within the trial magistrate's discretion and prayed that the same remain in force.

62. In view of the finding that the Prosecution did not prove its case beyond reasonable doubt, this court did not find it necessary to delve into the question of whether or not the sentence that was imposed upon the Appellant by the Learned Trial Magistrate was severe, harsh and manifestly excessive as the same had been rendered moot.

DISPOSITION

63. The upshot of this court's decision was the Appellant's Petition of Appeal that was lodged on 29th September 2016 was successful. Accordingly, this court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

64. It is so ordered.

DATED and **DELIVERED** at **VOI** this **18th** day of **January** 2018

J. KAMAU

JUDGE

In the presence of:-

Joseph Mwai Nduati - Appellant

Miss Anyumba - for State

Susan Sarikoki– Court Clerk