



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 53 OF 2016**

**[From Original Conviction and Sentence in Criminal Case No. 3143 of 2012 of The Chief Magistrate Court at Thika]**

**JOHN IRUNGU CHEGE..... APPELLANT**

**-V E R S U S-**

**REPUBLIC..... RESPONDENT**

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

1. This is the judgment of the **Criminal Appeal No. 53 of 2016, JOHN IRUNGU CHEGE** – the Appellant herein. He was charged of preparing to commit a felony contrary to **Section 308 (2)** of the **Penal Code**.

The particulars thereof were that on the **12<sup>th</sup> July, 2012** at **Tabby House** in **Thika town** within **Kiambu County** jointly with another not before court was found in presence of **One Nokia mobile phone shell X2 stacked with mud** in circumstances which indicated that he was so armed with intention to commit a felony namely cheating.

2. He pleaded **not guilty**.

The Trial ensued.

The accused accordingly convicted and imprisoned to **7 years imprisonment**.

3. Being aggrieved and dissatisfied he has appealed against both the conviction and the sentence.

4. He set out several **Grounds of Appeal**:

1. **The** Trial Magistrate erred in both law and fact by convicting me on the charges of preparation to commit a felony without noting that the prosecution’s evidence was incurably erroneous, ridden with fundamental flaws, shallow and shoddy.

2. **That** the Learned Trial Magistrate misrepresented distorted and over simplified the context of the whole proceeding in this case.

3. **That** the Trial Magistrate erred in fact and law by failing to put into consideration my defense which challenged the prosecution case and outweighed the same.

4. **That** the prosecution evidence was unreliable the conviction was unsafe and unsatisfactory, the sentence was either wrong in the principle or manifestly excessive.

5. He further filed a further supplementary Grounds of appeal.

6. However, upon perusing on the charge sheet under which the Appellant was charged, the particulars as set out, shows that it was incurably defective. In that, the offence of preparing to commit a felony contrary to **Section 308 (2)** of the **Penal Code** but in the particulars it proceeds to say:

**“.....was found in possessing one Nokia mobile phone shell stacked with mud so armed, with intention to commit a felony namely cheating.”**

It is obvious that cheating is not a felony. This therefore, makes the charged sheet incurably defective.

The prosecution for the respondent, conceded this appeal due to the defective in the charge sheet as earlier stated.

Accordingly, therefore this appeal succeeds and the conviction herein be and is hereby quashed and the appellant set free, unless otherwise lawfully held.

7. Orders accordingly.

**JUDGMENT WRITTEN AND SIGNED BY:**

**C. B. NAGILLAH**

**JUDGE**

**JUDGMENT DELIVERED, DATED AND COUNTERSIGNED AT KIAMBU IN OPEN COURT BY:**

**THIS 18<sup>TH</sup> DAY OF MAY 2017**

**JOEL NGUGI**

**JUDGE**

**In the Presence of:**

.....**for Appellant**

.....**for Respondent**

.....**for Court Assistant**