REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 29 OF 2016

REPUBLIC……..PROSECUTOR

VERSUS

SHARIF MOHAMMED HIJA…….....…….....ACCUSED

JUDGMENT

A. INTRODUCTION

1. The appellant, Sharif Mohammed Hija ("Appellant"), was presented before the Chief Magistrate's Court in Kiambu charged with three counts of obtaining money by false pretences, one charge of being in possession of papers for forgery contrary to section 367(a) of the Penal Code and one charge of being in possession of narcotic drugs contrary to section 3(1) as read with section 2(a) of the Narcotic Drugs and Psychotropic Substances Control Act.

2. As the particulars of the offence are one of the issues that arose on appeal, it is important that I reproduce the particulars of the five counts below:

a. Count 1 charged the Appellant with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars were that on the 23rd day of February, 2014 at Thika Road Mall of Kasarani District within Nairobi county, with intent to defraud, obtained cash – Kshs. 100,000 from John Karanja Wanjiru by falsely pretending that he was in a position to double the money, a fact he knew to be false.

b. Count 2 also charged the Appellant with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars were that on the 25th day of February, 2014 at Highland Hotel in Nairobi central within Nairobi county, with intent to defraud, obtained cash – Kshs. 252,000 from John Karanja Wanjiru by falsely pretending that he was in a position to double the money, a fact he knew to be false.

c. The third count also charged the Appellant with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars were that on the 27th day of February, 2014 at Highland Hotel in Nairobi central within Nairobi county, with intent to defraud, obtained cash – Kshs. 88,000 from John Karanja Wanjiru by falsely pretending that he was in a position to double the money, a fact he knew to be false.

d. The fourth count was being in possession of papers for forgery contrary to section 367(a) of the Penal Code. The particulars were that on the 6th day of March, 2014, at Highlands Hotel in Nairobi central within Nairobi county, without lawful authority or excuse the Appellant knowingly had in

his possession two bundles of papers intended to resemble and pass as special papers such as provided and used for making bank currency notes.

e. The last count charged the Appellant with being in possession of Narcotic Drugs contrary to section 3(1) as read with section 2(a) of the Narcotic Drugs and Psychotrophic substances Control Act No. 4 of 1994. The particulars were that on the 6th day of March, 2014, at Highlands Hotel in Nairobi central within Nairobi county, the Appellant was found in possession of Narcotic drugs namely Cannabis measuring 2 kgs with a street value of Kshs. 500 in contravention of the Act.

f. The Appellant was first arraigned before the Learned Honourable S. K. Arome on 07/03/2014. He pleaded not guilty to the first four counts but pleaded guilty to the fifth count. Hon. Arome entered a plea of not guilty on the first four counts and recorded a plea of guilty on the fifth count. However, the facts were not read because the Appellant's advocate, Mr. Nyaberi said that he wanted to discuss with his client (the Appellant) first. On 29/04/2014, the Appellant changed his plea to one of not guilty. The case then proceeded for a fully-fledged trial on all the five counts. The Prosecution called six witnesses and, after the Appellant was put on his defence, he testified under oath. The Learned Trial Magistrate convicted the Appellant on all five counts. He sentenced him to two years imprisonment on each of the first four counts and six months in the fifth count and ordered that the sentences run concurrently.

g. The Appellant is dissatisfied with his conviction and sentence and has appealed to this Court. The Petition of Appeal raised seven grounds of appeal as follows:

a. The Learned Trial Magistrate erred in law and in fact by convicting the appellant when no iota of evidence existed to warrant such conviction existed to warrant such conviction and sentence.

b. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant on contradictory uncorroborated and evidence that is hanging not proven beyond reasonable doubt.

c. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant without making any analysis by bringing up issues for determination of the evidence tendered vis-à-vis the finding in his judgment.

d. The Learned Trial Magistrate erred in law and in fact by contravening section 169 of the criminal procedure code in its entirety thereby making his judgment bad in law.

e. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant by dismissing the Appellant's firm and unchallenged defence without according him any reason for such dismissal.

f. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant on vague, irrelevant and poorly unsupported evidence contrary to section 65(5) & 8 of the Evidence Act Chapter 80 Laws of Kenya.

g. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant on a defective charge sheet.

h. Mr. Nyaberi argued the appeal on behalf of the Appellant. He consolidated some of the grounds of appeal. He classified the issues into four and I have adopted his classification which provides a road-map for the Court to deal with the issues presented in this appeal:

a. In the first place, he argued, quite vigorously, that the judgment given by the Learned Magistrate did not conform to section 369 of the CPC. He thus consolidated grounds 3 and 4.

b. Secondly, Mr. Nyaberi consolidated grounds 1 and 2 and argued that there was no evidence at all to warrant a conviction in this case. Where there was evidence, he argued, it was contradictory and

uncorroborated and not proven beyond reasonable doubt. Ground 6 belongs to this group as well. I have divided this ground into two:

i. One, whether there was sufficient evidence to convict on Counts 1, 2 and 3; and

ii. Two, whether there was sufficient evidence to convict on Counts 4 and 5.

c. Thirdly, Mr. Nyaberi argued that the Learned Magistrate was wrong to convict on a defective charge sheet in Count 4 and 5.

d. Lastly, Mr. Nyaberi argued that the Learned Magistrate was wrong in dismissing the Appellant's defence without proper analysis.

Mr. Kinyanjui argued the appeal on behalf of the State. He resisted each of the grounds of appeal and argued that the conviction was safe and based on available evidence and reached in conformance with applicable law.

B. THE DUTY OF THE FIRST APPELLATE COURT

7. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

8. Since, in my view, the classification of the grounds of appeal in to four grounds as stated by Mr. Nyaberi traverse the entirety of the trial in the lower court, I will use them as the pivot to the totality of the evidence presented in the Court below in fulfilling my obligation to re-evaluate and reconsider all the evidence presented and reaching my own conclusions. I will now do so *in seriatim*. First, I will briefly rehash the evidence presented.

C. THE EVIDENCE PRESENTED IN THE TRIAL COURT

9. The evidence presented at the trial court was in four segments. First, the Complainant testified at length about his interactions with the Appellant. His narrative was that he was introduced to the Appellant by another friend, Caleb. Caleb had told him that he had a vehicle to sell and called the Complainant to Thika Road Mall to inspect the vehicle. On getting there, the Complainant saw the vehicle – and more. He noticed huge amounts of cash inside the vehicle. Curious, he inquired about the wads of cash in the vehicle. Caleb apparently told him that his friend, the Appellant, who was with him worked for De La Rue, the company tendered to produce money in Kenya and that he can "multiply" money in bills. Suffice it to say that Caleb apparently told the Complainant that the Appellant is able to take bills of Kshs. 1000 and use a certain chemical he gets from his place of work to re-produce two of the same bill. To demonstrate the veracity of the claims, the Appellant asked the Complainant to give him Kshs. 1,000. The Appellant took the Kshs. 1000 bill, went inside the vehicle, did the "operation" and emerged with three Kshs. 1000 bills – proof that the original bill had produced two more of same amount. Needless to say, the Complainant's curiosity was turned to interest.

10. When the Appellant told him that he would be in a position to reproduce any sums of money he had, the Complainant was hooked. The Appellant offered to multiply any more money the Complainant had and, eager to increase his money, the Complainant agreed to meet the Appellant the following morning at the same place. The Complainant says he had Kshs. 60,000 and he borrowed Kshs. 40,000 from a friend,

Cesar, to make a total of Kshs. 100,000 which he handed over to the Appellant for this "miracle operation."

11. Apparently, the "operation" was not successful on that day. The Appellant needed to get more "chemicals" to multiply the amount. Since this had to be bought from Westlands and the two were at Thika Road Mall, the Appellant tied the bills which were in process in a polythene paper and handed them over to the Complainant for safe-keeping until the Appellant would procure the correct chemicals. This, apparently, was done to further induce the Complainant as to the authenticity of the process.

12. The following day, 24/02/2014, the Appellant called the Complainant. He had a problem, he said. He found out that the chemical he needed to process the bills was very exorbitant at a price of Kshs. 2.5 Million. Might the Complainant have Kshs. 300,000 which he could multiply? Obviously blinded by the dream of doubling Kshs. 300,000 in addition to the Kshs. 100,000 he had previously given the Appellant, the Complainant went about looking for the money. From the evidence, it would appear that he borrowed Kshs. 150,000 from Ceasar and Kshs. 40,000 from Samuel Gitau and Kshs. 40,000 from Moses Wambu. It is not clear where he got the rest of the money, but he testified, in line with the charge sheet, that he took Kshs. 252,000 to the Appellant on 26/02/2014. It is this amount of Kshs. 252,000 that forms the basis of Count 2.

13. That same evening, the Appellant called again and said that in view of the fact that the "chemical" needed to process the amounts was in fact Kshs. 3 Million and not Kshs. 2.5 Million as the Appellant had earlier thought, the Appellant urgently needed Kshs. 100,000 more. The Complainant said he had no money but promised to look for it.

14. Two days later, the Complainant was able to get Kshs 88,000 to take to the Appellant: Kshs. 80,000 borrowed from Wanjiru Ndungu and Kshs. 8,000 borrowed from Doreen. He took the amount to the Appellant confessing that he was unable to make the total amount of Kshs. 100,000 that the Appellant wanted. This amount of Kshs. 88,000 forms the basis of Count 3. According to the Appellant's testimony, this was on 28/02/2014.

15. Suffice it to say that after this the Appellant became evasive and would not answer the Complainant's calls. It became apparent to the Complainant that the joke was on him: he had been conned the entire sum he had handed over to the Appellant. The Complainant then reported to the Police where a sting was arranged to draw out the Appellant where he was arrested.

16. The second segment of the Prosecution case was supporting evidence from three witnesses who say the lent the amounts to the Complainant. Ceasar Wachira Kanyi testified that he gave the Complainant Kshs. 40,000 on 23/03/2014 and a further sum of Kshs. 150,000 at a later date. His bank statement produced as evidence (Exhibit 1) showed withdrawals of Kshs. 30,000 on 24/02/2014 and Kshs. 150,000 on 25/02/2014. He testified that he had Kshs. 10,000.

17. Samuel Gitau Wambui, another friend to the Complaint testified that he lent the Complainant Kshs. 30,000 to the Complainant. His produced Bank Statement showed that he had withdrawn Kshs. 34,000 on 24/02/2014 – although his oral testimony said he had withdrawn Kshs. 35,000. (Complainant's testimony and statement is to the effect that he raised Kshs. 40,000 from Samuel).

18. Finally, Esther Wanjiru Irungu testified that she lent the Complainant the sum of Kshs. 80,000 on 28/02/2014. Her bank statement from Equity Bank (Exhibit 7) shows a withdrawal of Kshs. 40,000 on 28/02/2014. Two more statements from Cooperative Bank (Jumbo Junior Access Accounts) show two withdrawals in the sum of Kshs. 20,000 each on the same day (28/02/2014). These were produced as Exhibits 9 and 10.

19. The third segment of evidence is the evidence leading up to the arrest and charging of the Appellant. This was the evidence of John Maingi – the arresting officer and Vincent Njoroge – the Investigating Officer. John Maingi narrated how he went in the company of the Complainant to arrest the Appellant at Highland Hotel in Nairobi. The Appellant had been set up to believe that he was going to meet the

Complainant alone to receive more funds. John Maingi accompanied the Complainant, sat a few tables away at the Restaurant and arrested the Appellant. He testified that he found him with a Khaki paper which had black pieces of paper – which were produced as Exhibits 3 and 4 and which formed the substratum of count 4 facing the Appellant. He also testified that he found the Appellant with plant material which was later analysed and found to be bhang.

20. The Investigating Officer, Vincent Njoroge, shored up the Prosecution case giving formal evidence about how the Complainant reported to the Police, the plans to arrest the Appellant and producing the bank statements and the three contrabands – the pieces of paper for making counterfeit money and the report from the Government chemist on the bhang allegedly found on the Appellant during his arrest.

21. The fourth segment of the evidence was the sworn testimony of the Appellant. He denied ever meeting the Complainant before the date of his arrest. His testimony was that he went for a meal at Highland Hotel on that day and then the Complainant came and they started having a conversation about football which was showing on the TV screen. Two other gentlemen then came and told him he was under arrest. It was the Complainant, the Appellant insisted, who walked in with a black paper bag which he was later told contained evidence against him. His story, then, consisted of a plain denial: he did not know the Complainant; he had never received any monies from him; and his arrest was a total frame-up.

22. After considering the evidence tendered, the Learned Trial Magistrate found the Complainant's narration of events "candid and true" and believed him. As for the Appellant's narrative, the Learned Trial Magistrate summarised his view thus:

> In any event, Complainant had no bad blood with the accused and it cannot be true they just met on 05/03/2016 (sic) when accused was arrested.
>
> Complainant had already made a report to the station earlier on, and even given an escort to arrest the accused. I see no reason why Complainant would meet a stranger in a hotel then have him arrested on trumped up charge, and I dismiss the Accused's defence.
>
> Though it was important for the police to produce a call data to show accused and complainant had communicated, I still find there is enough evidence to convict the accused on the five counts.

D. DID THE MAGISTRATE'S COURT JUDGMENT COMPLY WITH ARTICLE 369 CPC AND IF NOT WHAT ARE THE IMPLICATIONS?

23. The Appellant's advocate first attacked the form of the judgment. He argued that section 169 lays the basic minimum of what a judgment must contain.

24. Section 169 of the CPC provides that:

> (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

25. The judgment here, Mr. Nyaberi submitted, does not conform to the requirements of section 169 for the following reasons:

> a. First, Mr. Nyaberi argued that the judgment was not properly dated. The judgment was to be given on 22/03/2016 but the actual judgment was read on 14/04/2016. Mr. Nyaberi says that what happened on 22/03/2016 is a mystery. In any event, the judgment on record is undated. To his mind, this is a fatal error as it prejudices the Appellant and therefore is incapable of being cured under section 382 of the CPC.
>
> b. Second, it is Mr. Nyaberi's firm belief that the judgment does not present a single issue for

determination. It did not state the issues under consideration and the grounds for reaching particular decisions. Consequently, Mr. Nyaberi was of the opinion that there is no judgment for execution.

c. Third, Mr. Nyaberi argues that the Learned Magistrate does not give any reasons at all for convicting on counts 4 and 5 as he simply does not mention them until the final paragraphs when he convicts.

d. Fourth, according to Mr. Nyaberi, the Learned Trial Magistrate utterly failed to address himself on the evidence presented.

e. In reviewing the court record, it would appear that Mr. Nyaberi has a point with respect to his first point in this regard. In reviewing the record of the trial, the following appear clear. The actual judgment read in Court is undated and it seems unclear when it was delivered. The proceedings show that the parties before the Learned Trial Magistrate on 11/02/2016 and the Learned Trial Magistrate reserved 03/03/2016 as the date for the judgment. On that day, the Learned Trial Magistrate postponed the reading of the judgment to 22/03/2016. There is no record of what happened on 22/03/2016. We then have the judgment and the post-judgment proceedings which are both undated.

f. Additionally, a careful analysis of the judgment reveals that it is true the Learned Trial Magistrate failed to delineate all the issues that needed to be analysed before reaching a conclusion. In particular, it would appear that the Learned Trial Magistrate failed to specifically direct himself in his judgment on the following two issues:

g. For the three counts of obtaining by false pretences, the Learned Magistrate failed to set out the elements required to be proved for the crime to be established and how they had been satisfied in this specific case.

h. For counts 4 and 5, the Learned Trial Magistrate failed completely to analyse the evidence and give decisions for his conclusion. He does not, at all, discuss the exhibits which form the substratum of the offences.

28. As I discuss below, I do not think the Learned Trial Magistrate failed to analyse the Defence evidence and give reasons for his rejection thereof as the Appellant argues on appeal.

29. The question that I must now answer is what the effect of non-conformance with section 169 of the CPC would be. Happily, the Court of Appeal has addressed this issue a few times. The emerging jurisprudence on the issue is clear that non-compliance with the requirements of section 169 does not automatically result in the trial process being vitiated. In ***Hawaga Joseph Ansanga Ondiasa V R Criminal Appeal No. 84 Of 2001*** where the appellant asked the court to set aside his conviction at the trial saying that that court had not complied with section 169 Criminal Procedure Code. In declining to do so, the Court of Appeal held that:

> It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure Code, this would not, of itself mean that the conviction of the appellant was wrong or <u>is to beinvalidated</u>.

30. Similarly, in ***Samwiri Senyange V R [1953] 20 EACA*** the Court of Appeal had stated:

> Where there had not been a strict compliance with the provisions of sections 168 and 169 of the Criminal Procedure Code, that will not necessarily invalidate a conviction and the court will entertain an appeal on its merit in such a case if it can be done with justice to the parties.

31. My conclusion is that there will be no miscarriage of justice if the non-conformance with section 169 was remedied at this stage through a re-evaluation and reconsideration of the case. Given this Court's

duty as a first appellate court, these failures to comply with section 369 of the CPC will need to be remedied in the judgment here. This is because our standard of review in criminal cases is, in essence, *de novo* review. In other words, the technical failures of the judgment itself do not, in this particular case, vitiate the trial itself.

E. WAS THERE SUFFICIENT EVIDENCE TO CONVICT ON THE FIRST THREE COUNTS OF OBTAINING BY FALSE PRETENCES?

32. The Appellant insists that "no iota of evidence as presented to warrant a conviction and if there was, it was contradictory and uncorroborated and not proven beyond reasonable doubt." His first line of attack is that the total sums of money allegedly obtained from the Complainant simply do not add up. The total amount disclosed in the charge sheet is Kshs. 440,000 – yet the amounts given in evidence does not reach that amount. Mr. Nyaberi argues that failure of the amounts proved in evidence to add up to the amount in the charge sheet is fatal. This is because, Mr. Nyaberi further argues, the Complainant gave evidence explaining the source of funds which were allegedly obtained by the Appellant. Yet, there is a gap between the funds alleged to have been borrowed and the total amount allegedly obtained. Having failed to prove the source of the funds, Mr. Nyaberi argues, the appeal must succeed.

33. It is important to examine the figures carefully:

a. The Complainant testified in his examination-in-chief that he had Kshs. 60,000 of his own and that a friend of his – who turned out to be Caesar Kanyi – gave him Kshs. 40,000 to make the Kshs. 100,000 he gave the Appellant on 23/02/2016. This was the basis of count 1.

b. For count 2, the charge sheet alleged that the Complainant gave the Appellant Kshs. 252,000 on 25/02/2016. The Complaint's evidence, however, was that he gave out the amount on 26/02/2016. His testimony was also that he got Kshs. 150,000 from Caesar Kanyi; Kshs. 40,000 from Samuel Gitau and Kshs. 40,000 from another friend who, we can deduce from the cross-examination, was Moses Wambu. The total amount of these sums is Kshs. 190,000. The Complainant does not say where the remaining amount of Kshs. 62,000 came from.

c. For count 3, the charge sheet reads that the Appellant obtained from the Complainant the sum of Kshs. 88,000 on 27/02/2014. The Complainant's testimony was that he, in fact, gave out the money on 28/02/2016. He explained that he got the funds from WanjiruNdungu (Kshs. 80,000 in two batches of Kshs. 40,000 each) and Doreen (Kshs. 8,000).

d. On the basis of the Prosecution evidence itself, count 2 is unsustainable. The Complainant could not explain how he raised part of the Kshs. 252,000 he allegedly gave to the Appellant. It is unsafe to fill the gap with theories to aid the Prosecution as it is to leave it un-interrogated as the Learned Trial Magistrate did here. This is based on the amounts only.

e. However, I do not think that analysis is correct for the other two counts as Mr. Nyaberi argued. Instead of analyzing the amounts raised and paid for each count separately, Mr. Nyaberi would have the Court aggregate the total amount allegedly obtained (Kshs. 440,000) and then once the individual sums alleged to have been sources of the aggregate amount do not add up, conclude that all the three counts must fail. The more appropriate approach is to take each count on its own and test to see if the amounts stated in evidence tally for that count and not to do it globally. Under this approach, the source of the funds allegedly given to the Appellant for Count 1 and Count 3 match.

f. There is a little bit of contradiction with respect to Count 1 as Mr. Nyaberi pointed out. At some point during the cross-examination, the Complainant said:

"On 23/02/2014, I had Kshs. 60,000 in my possession. Caesar gave me Kshs. 40,000. On 24/02/2014, he did not give me any money. On 25/02/2014, he gave me Kshs. 150,000. On 23/02/2014, the only amount I gave out was Kshs. 60,000. On 24/02/2014, I received Kshs. 40,000 from Samuel Gitau. I did not give it out. On 25/02/2014, I received Kshs. 150,000 from Caesar."

37. From this Mr. Nyaberi argues that there is a contradiction whether the Complainant gave Kshs. 60,000 or Kshs. 100,000 on 23/04/2014 since the complainant seems to be saying during cross-examination that he had only Kshs. 60,000 on 23/02/2014.

38. Mr. Nyaberi also pounces on other discrepancies:

> a. On Count 3, as pointed out, the date on the charge sheet is 27/02/2014 while the testimony of the Complainant was that he gave the Kshs. 88,000 on 28/02/2014.
>
> b. On Counts 4 and 5, according to the charge sheet, the offences were committed on 06/05/2014 yet according to the testimonies of the Complainant as well as PW 5 and PW6, the Appellant was already in custody on 05/03/2014. Mr. Nyaberi raises the spectre that there is a possibility that the Complainant was dealing with another person and not the Appellant.
>
> c. Third, Mr. Nyaberi points out that the phone number given in the Complainant's statement which is admitted as evidence differs from the actual phone number of the Appellant by one digit: The phone number in the statement is: 0724521252 while the Appellant's phone number is 0724521251.
>
> d. Back to Count 2, PW3 (Samuel Gitau) testified that he withdrew Kshs. 35,000 but his Bank Statement – produced as Exhibit 2 – shows a withdrawal of Kshs. 34,000.
>
> I should start by pointing out that these discrepancies are well established. The question is what their impact should be. Mr. Nyaberi argues that in the first place, the discrepancies in dates render the charge defective as the evidence given is at variance with the charge sheet. In the second place, he argues that the discrepancies are so material that they mean that the whole Prosecution evidence is unreliable and is unsafe to sustain a conviction.
>
> I will now address this issue. I agree with Mr. Nyaberi that it was incumbent upon the Learned Trial Magistrate to address these discrepancies and make a determination on their impact on the credibility of the Prosecution witnesses. The Learned Trial Magistrate failed to do this and, instead, adopted an all or nothing approach where he chose to believe the Complainant wholesale and, in like manner, disbelieve the Appellant. Where there are contradictions and discrepancies such as are present here, this approach is not appropriate because it does not inspire confidence that the Trial Court took into consideration all the evidence in the case.
>
> ao. This is not to say that the Trial Court must repeat blow-by-blow the evidence presented in court and make findings on every aspect presented however peripheral. It is, instead, to say that the Trial Court must, in its judgment, show that it applied its mind in the proper manner to all the material issues which must be determined – including its reasons for its acceptance or rejection of the testimony of respective witnesses as well as resolution or evaluation of any discrepancies in those testimonies – and include these in the summary of all material evidence presented in the judgment.As Nugent J (as he then was) put it in a much cited South African case (***S v Van der Meyden*** ***1999 (1) SACR 447*** **(W) at 450)**:
>
> What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.

42. Having said this, however, I have still concluded that had the Learned Trial Magistrate used the right approach and applied his mind in the proper manner to all material evidence – warts and all – he would still have been entitled to find the Complainant's version of events to have been, in the main, established beyond reasonable doubt. This is to say that a proper assessment of the evidence will yield the conclusion that the evidence by the Prosecution witnesses – including the Complainant – was, seen in totality, sufficient to establish the Prosecution's theory of the case as backed by the facts presented, as true.

43. I say so for the following reasons:

a. First, I would hold that the apparent contradictions and inconsistences in the testimony of the Prosecution witnesses were not material.

b. Second, I would hold that these contradictions and inconsistencies do not, overall, impact on the credibility and reliability of the evidence.

an. I have reached the conclusions above for the following reasons:

a. The variance of the dates on the charge sheet in Count 3 and the testimony of the Complainant: This is an insubstantial discrepancy which can be explained either by the venial inattention of the officers who drafted the Charge Sheet or the failure of the Complainant to recollect details. In my view, however, this difference of one day does not impact on the Complainant's narrative.

b. The incorrect date on the Charge Sheet: On the obviously incorrect date on the charge sheet respecting Counts 4 and 5, I would hold the same as above. The testimonies of PW1, PW5 and PW6 are unanimous that the arrest actually happened on 05/03/2014 and that the date on the charge sheet (06/05/2014) was a typographical error. Additionally, both the statements of PW1 and PW5 are clear about the date. Complainant was dealing with another person and not the Appellant.

c. The variance of the Appellant's phone number: The variance of the Appellant's phone number by a single digit in the written statement of the Complainant is also, in my view, an immaterial inconsistency which can easily be explained by a common error in transcribing the number from one's phone on to the statement.

d. The amount of money withdrawn by PW3: The difference of Kshs. 1000 in amount withdrawn by PW3 (Samuel Gitau) (He testified that he withdrew Kshs. 35,000 but his Bank Statement – produced as Exhibit 2 – shows a withdrawal of Kshs. 34,000) can also, not be described as material. Indeed, Mr. Gitau's testimony was collateral to demonstrate that the Complainant had borrowed money from friends to satisfy the demands made by the Appellant.

e. The amount of money given by the Complainant on 23/02/2014: Finally, on the question whether the Complainant gave Kshs. 60,000 or Kshs. 100,000 on 23/04/2014 since he seemed to say during cross-examination that he had only Kshs. 60,000 on 23/02/2014, I have concluded, after close scrutiny of the record, that there was no contradiction at all. Instead, a misunderstanding arose when the Complainant was answering the question. The context shows that what he meant was that he had Kshs. 60,000 of his own and he gave it out on that day but that he borrowed a further Kshs. 40,000 which he added to the Kshs. 60,000 he had.

as. However, while there was sufficient evidence which, despite the immaterial contradictions, was credible and reliable, I am not persuaded that it should have led to the conviction on charges of obtaining by false pretences in Counts 1, 2 and 3. I have already concluded that the inability of the Complainant to account for how he got funds that added up to the figure of Kshs. 252,000 in Count 2 was fatal to the conviction in that Count. I would, therefore, find the conviction on Count 2 unsafe on that ground.

at. There is, in my view, another reason why the conviction in that Count as well as Counts 1 and 3 cannot stand. It is that one of the elements of the crime was not established.

au. Counts 1, 2 and 3 are grounded on the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The offence of obtaining through false pretences is established in section 313 of the Penal code as reproduced below:

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 misdemeanour and is liable to imprisonment for three years.

48. For a person to be convicted under this section, in my view, the Prosecution must prove at least five elements:

a. That the Accused made a representation of existing or past fact to the Complainant. The false representation *must* relate to a matter of fact, *either* past or present, but *not* in the future, see ***R v Dent [1955] 2 AllER 806; Albert Alexander Age v The State [1979] PNGLR 589 &Green v R (1949) 79 CLR 353***;

b. That the representation was false;

c. That the representation was intended to deceive i.e. the Accused must have acted knowingly with intent to cheat or defraud;

d. That the Complainant was, in fact, deceived by the representation. The prosecution *must* prove that the complainant parted with the property as a result of the representation acting on his/her mind, see, for example,**R v Laverty [1970] 3 AllER 432; (1970) 54 Cr App R 495**; and

e. That the Accused thereby obtained something capable of being stolen.

In my view, the evidence on record clearly establishes that the Prosecution was able to prove beyond reasonable doubt four of the five elements:

a. The Appellant made representations that he was able to multiply the funds which he received;

b. Those representations were demonstrably false;

c. The context and the conduct of the Appellant after the receipt of the funds indicate that he intended the representation to deceive the Complainant into parting with his money. Indeed, the representations were specifically intended to do so.

d. The Appellant obtained something of value – money – as a result of the representations.

In my view, however, the Prosecution has not, in this case, established a crucial element in order to convict for obtaining by false pretences: that the Complainant was, in fact, deceived and parted with the money as a result of false pretences. I say so, first, because it seems clear from the description of the encounter between the Complainant and the Appellant, that the venture that the Complainant thought they were entering into is a criminal offence. It is a criminal offence to alter currency or to make counterfeit money – which is the precise venture the Appellant claimed to be able to do and the precise venture the Complainant thought they were entering into. If so, can the handing out of currency to be used to make counterfeit currency be said to have been induced by false pretences? I do not think so. In my view, the Complainant knew exactly what he was getting into: an illegal and criminal deal. For him to claim that he believed that the multiplied money that he expected from the venture was “genuine” is incredulous.

In my view, there is a public policy reason to hold the categorical view that one cannot establish this element of obtaining by false pretences where the underlying venture over which property was obtained was a criminal offence or an activity which is against public policy: it will discourage parties from conspiring to enter into illegal and criminal ventures if the parties understand that it is unreasonable to place reliance on the refund of their property or funds if the deal goes sour as here. One cannot reasonably rely on a representation that they will benefit from an illegal or criminal activity.

In my view, therefore, the Prosecution did not establish the crime of obtaining by false pretences in Counts 1, 2 and 3. I would therefore quash the convictions entered by the Trial Magistrate with

respect to the three counts.

I found it unnecessary to address one other ground raised by Mr. Nyaberi on appeal to wit that the documentary evidence produced in the case was produced in violation of the Evidence Act. Here, Mr. Nyaberi was talking about the bank statements that were produced to show that PW2, PW3 and PW4 had withdrawn money which they said they had given to the Complainant.

Mr. Nyaberi did not spend too much time on this aspect of his appeal. That is, perhaps, for a reason. He was the counsel on record when the documents were identified for production and when they were finally produced by the Investigating Officer, PW6. In neither instances did he object to their production into evidence. Indeed, he did initially object to the production of two of the exhibits (Exhibits 2 and 3) on account of the fact that the Witness had not identified them and therefore there was no sufficient authentication of the statements. That witness (Wanjiru Irungu) was subsequently recalled to the witness stand with the acquiescence of Mr. Nyaberi and she identified the witness which were then duly admitted into evidence.

Having failed to object to the production and admission of the documents into evidence, it is too late for Mr. Nyaberi to raise objections to their admissibility now. His argument is that section 65(5) – 65(8) are couched in mandatory terms and they were not complied with in the production of the bank statements. This is an argument which he should have properly raised before the Trial Court so that that Court could make a finding on law on its admissibility. Having failed to do so, the Appellant did not preserve that question for appeal and it is doubtful whether it can be raised for the first time here.

However, given my findings and holding above respecting Counts 1, 2 and 3, I need not reach this question in the present case.

F. WAS THERE ENOUGH EVIDENCE TO CONVICT ON COUNTS 4 AND 5?

57. The Appellant's first salvo against Counts 4 and 5 is the discrepancy in dates between the charge sheet and the evidence tendered. Mr. Nyaberi was of the view that this discrepancy was fatal. The Learned Trial Magistrate did not think so. I do not either, for the reasons I gave in the section above.

58. The discrepancy in dates was, in the first place, an inconsistency which should be approached like other contradictions in a criminal trial. Using that approach, I have already concluded above that the discrepancies were not so material and substantial as to effete the credibility of the Prosecution case as a whole.

59. I would therefore hold that this is an apt case for the application of section 382 of the Criminal Procedure Code to cure the discrepancy in dates. While the charge sheet should have read 5th March, it read 6th March. This error was no doubt occasioned by venial inattention by those who were framing the charges. I am persuaded that this error did not undermine the Appellant's ability to defend the charge in the Trial Court and it has not occasioned him a failure of justice.

60. The substantive question that remains is whether there was sufficient evidence to convict on these two counts. Respecting Count 4, the Appellant insists that his version of the story is correct: that it is the Complainant who came into the Highland Hotel carrying a black paper bag where the pieces of paper which are the basis of count 4 were found. He says that the Complainant admitted as such in his evidence and that the statement of PW5 – the investigating Officer – proves as much.

61. I have reviewed the evidence and the trial record carefully and anxiously. I have been unable to find support for the position Mr. Nyaberi took that both the Complainant and PW5 said that when the Appellant was arrested, it was the Complainant who had, in his possession, a black paper bag which had the contraband materials.

62. Perhaps, the section of the testimony of the Complainant that Mr. Nyaberi was referring to is the one

found in the middle of page 11 of the Record of Appeal where the Complainant states as follows:

> After that he [Appellant] was not picking the calls (sic). I sent him a message that I would sell a car and raise Kshs. 60,000. He now called on realizing there was money coming his way. This was on 04/03/2014. On 05/03/2014, I went to Kasarani Police Station and made a report. I drove the DCI's vehicle so I usually have armed police escort. On 05/03/2014 I told him I had raised Kshs. 60,000. I wrapped papers. I asked him to meet me at Highlands. APC John Maingi was behind me. I held the baggage on my hand. I sat somewhere in the hotel and my colleagues sat at another table. He came in and we sat. That when he was arrested. I did not remain with any of the papers. I had asked him to come with the papers on 05/03/2014 so that I can assess the progress. He came with them. He was also found with some drugs.

63. What emerges from this account is that there were, in fact, two packages: the Complainant wrapped papers and carried them in his hands to create the illusion that he had Kshs. 60,000. Apparently, this was so that the Appellant could see it from far and not suspect anything. Then, there was the second package which was in the possession of the Appellant – and which the Complainant had asked him to bring as evidence that the process of "multiplying" money was proceeding apace. The paragraph reproduced above, seen in context of the trial is unmistakable and yields no other meaning to the testimony of the Complainant.

64. The Complainant's testimony in this regard is directly corroborated by that of PW5 who testified that (at page 20 of the Record of Appeal):

> I arrested the suspect and took him to Kasarani…I searched him after arrest. He had a khaki paper. This is the substance I talked about…[The Witness then identified Exhibits 3, 4 and 5]

65. Mr. Nyaberi complained that the Witness did not record an inventory of the goods recovered from the Appellant. He is right. Best practices indicate that this should have been the correct procedure upon booking the Appellant. However, I do not believe the fact that a formal inventory was not created is enough to nullify the charges here in the face of direct evidence by two witnesses on the point.

66. Most of the analysis on Count 4 above also applies to Count 5. The Appellant has not really resisted this Count in any specific way save to hoist his denial to his general defence which I discuss below. He denies that he was not found in possession of the material during his arrest. However, the evidence by PW5 on this point was straightforward and remained unassailed after cross examination. Indeed, the Appellant appeared keen to only impeach the evidence on Count 4 and did not particularly raise any questions on the possession of the contraband in Count 5. As I show below in the analysis of the Defence evidence, seen in totality, the Trial Court was justified to convict on this Count as well had it adverted its mind to the evidence on record.

G. DID THE TRIAL COURT ERR BY DISMISSING THE APPELLANT'S EVIDENCE?

67. I have already given enough clues to the inevitable answer to this question. The Trial Court heard two diametrically opposed versions of the case. The Prosecution's narrative was anchored by the Complainant. I have already held that despite some contradictions and discrepancies the narrative held out as credible and reliable. Whether the narrative can be said to have been proven beyond reasonable doubt is a question that can only be answered when the totality of the evidence is taken into consideration. Hence, it is imperative for a Trial Court to consider the evidence by the Defence and weigh it against the Prosecution evidence and make an appropriate finding.

68. The Appellant here complains that the Learned Trial Magistrate gave short shrift to the Defence evidence and dismissed his "firm and unchallenged defence without according him and reason for such dismissal."

69. I do not think the Learned Trial Magistrate failed to consider the Defence evidence. He simply did not believe the Appellant and he said so. He also stated that he found it improbable, in the circumstances,

that complainant would go to a hotel and seek to frame a perfect stranger on such charges. There would simply be no motive for that. These are two reasons given by the Learned Trial Magistrate for disbelieving the Defendant.

70. I would only add that it would have been useful for the Learned Trial Magistrate to state the legal standard he was using to weigh the Defence evidence against the Prosecution evidence. The Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable. A consequence of the very heavy burden placed on the Prosecution to prove each and every element of a crime beyond reasonable doubt means that the Defence is only required to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance. The test is not whether it is improbable but if it can be said to be so improbable that it cannot reasonably possibly be true. (See ***S v Shackell (4) SA 1 (SCA)***).

71. In the instant case, even utilizing this exceedingly favourable test for the Defence, it is not possible to say that the Defence version of events has reasonable inherent probability that it is true. All considered, I would agree with the Learned Trial Magistrate that the Defence's version is highly improbable. In reaching this conclusion, like the Learned Trial Magistrate, I have not only weighed the Defence evidence against that offered by the Prosecution in totality but I have also considered two other crucial pieces of evidence:

a. First, the absence of a motive for the Complainant as one of the factors in determining the probabilities or improbabilities of this case; and

b. Second, the evidence shows that the Complainant first reported the matter to the Police on 04/03/2016 a day before the Appellant was arrested. It would, therefore, have been impossible for the Complainant to have guessed, with clairvoyant precision, that he would meet the Appellant, a perfect stranger, at a hotel in Nairobi. The fact that the Complainant had made a report and named the Appellant as the perpetrator makes the Appellant's version of events virtually improbable.

bt. Finally, Mr. Nyaberi complained that the Trial Court should have been a lot more circumspect of the Prosecution case because the evidence was of a single witness. I wish to say two things about that.

bu. First, there is no general requirement in our law that a single witness cannot testify about the commission of a crime sufficiently to warrant a conviction. Differently put, there is no general requirement that evidence must be corroborated. Section 143 of the Evidence Act is quite clear:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

74. Therefore, there is no validity to the grievance by the Appellant that there was only a single testifying witness who saw the monies being given to the Appellant – the Complainant. That may be so but the law does not require more than that one witness as long as that witness is credible and reliable. Here, because we have already addressed some of the contradictions and inconsistences in the case and held that they were immaterial to dent the credibility and reliability of the witnesses' narrative, it is important to reiterate that a court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. This may happen even though certain aspects of that evidence may be unsatisfactory. The question is whether those aspects which are unsatisfactory are material enough to affect the Court's evaluation of the inherent probabilities that the witness' narrative is true. The law requires the witness to be satisfactory. It does not require the witness to be perfect.

75. Second, in ***DPP v Kilbourne*** ***1973 ALL ER 440*** **447H,** Lord Reid defined corroboration as follows:

The word 'corroboration' is not a technical term of art, but a dictionary word bearing its ordinary meaning….Corroboration is therefore nothing other than evidence which 'confirms' or 'supports' or 'strengthens' other evidence….. It is, in short, evidence which renders other evidence more

probable. If so, there is no essential difference between, on the other hand, corroboration and, on the other, 'supporting evidence'

76. I have reproduced this Lord Reid's famous definition of corroboration to resist Mr. Nyaberi's suggestion that there was no corroboration in this case because no one other than the Complainant saw the Complainant handing over the monies to the Appellant. However, there is other credible supporting evidence which, seen together with the evidence by the Complainant, strengthens the Prosecution narrative. The evidence by PW2, PW3 and PW4, for example, is meant to strengthen the Complainant's story that he gave money to the Appellant on given dates. The evidence of PW5 on the Appellant's arrest, likewise, confirms some aspects of the Complainant's narrative as does the evidence of PW6 where the Witness confirms that the Complainant had reported the matter to the Police before the arrest of the Appellant. In my view, even though corroboration was not required in this case, the other available evidence strengthens the Prosecution case and pushes it along in to the zone of beyond reasonable doubt.

H. APPEAL AGAINST SENTENCE

77. The circumstances upon which an appellate court will interfere with a sentence lawfully imposed by a trial Court are circumscribed. It will only do so if it is evident that the trial Court acted on wrong principles or overlooked some material factor or the sentence is illegal or is manifestly excessive or lenient as to amount to a miscarriage of justice. Lastly, an appellate Court can interfere with sentence a Trial Court has imposed a sentence that is demonstrably unfit in the given circumstances. *It is not enough that the appellate Court would have imposed a different sentence if it was sentencing in the first place. See:* ***Ogalo s / o Owora vs. R [1954] 24 EACA 70.***

78. In this case, I cannot say that any of these factors are present. The Learned Trial Magistrate addressed himself to all relevant factors and it cannot be said that he acted on any wrong principles. Further, the sentence of two years imprisonment for the offence cannot be said to be excessively harsh or lenient given the seriousness of the offence and its potential impact on the society. I note that the original sentence imposed was for two years imprisonment for each of the first four counts and six months imprisonment for the fifth count. Consequently, even with the reversals of conviction in the first three counts, I will leave the sentence originally imposed intact: The Appellant shall serve imprisonment for two years for Count 4; and 6 months for Count 5. Both sentences to run concurrently.

I. CONCLUSION, DISPOSAL AND ORDERS

79. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, Counts 1, 2 and 3 cannot stand. Convictions in those counts are hereby quashed and the sentences set aside. The Appellant is acquitted in respect of those three counts.

b. For the reasons stated above, and the appeal in respect of Counts 4 and 5 is dismissed and the convictions in Counts 4 and 5 are hereby affirmed.

c. The sentence imposed by the Trial Court of two years' imprisonment on Count 4 and six months imprisonment on Count 5 is affirmed. The sentences will run concurrently.

80. Orders accordingly

Dated and delivered at Kiambu this 24th day of November , 2016.

……

JOEL NGUGI

JUDGE