



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 248 OF 2010**

**ERASTUS KIEMA GICHUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 145 of 2008 (Hon. Stella Muketi) on 1<sup>st</sup> October, 2010)*

**JUDGMENT**

The appellant was charged with one count of obtaining by false pretences contrary to **section 313** of the **Penal Code** and two counts of issuing a bad cheque contrary to **section 316 (1) (a)** of the **Penal Code**.

In the first count, it was alleged that on 26<sup>th</sup> day of September, 2007 in Nyeri township of the then Nyeri District, in the then Central Province, the appellant obtained a motor vehicle registration number KQY 803 (Mitsubishi Lancer) valued at Kshs 60,000/= from Duncan Wamae Mugwe by falsely pretending that he was in a position to buy it a fact he knew to be false.

In the second count it was alleged that on 4<sup>th</sup> day of November, 2007 at Nyeri town in the then Nyeri District within the then Central Province, the appellant issued a bad cheque No. 002888 for Biashara Sacco for Kshs 21,000/- to Duncan Wamae Mugwe knowing that his account No. 6432 had insufficient funds.

Finally, in the third count, on 16<sup>th</sup> day of November, 2007 at Nyeri town within Nyeri District of the then Central Province the appellant is alleged to have issued a bad cheque No.002889 for Biashara Sacco for Kshs 21,000/- to Duncan Wamae Mugwe knowing that his account No. 6432 had insufficient funds.

At the conclusion of the trial, the court acquitted the appellant of the 1<sup>st</sup> count but convicted him of the 2<sup>nd</sup> and 3<sup>rd</sup> counts. He was fined Kshs. 30,000= and in default to serve four months in prison on each of those counts.

The appellant appealed against the decision of the trial court and in his petition of appeal, he raised the following grounds:-

1. The learned magistrate erred in law and in fact in convicting the appellant of the offence charged when there was no adequate evidence to prove the charges.

2. The learned magistrate erred in law and in fact in finding that the appellant issued bad cheques when there was no evidence to support that finding.
3. The learned magistrate erred in law and in fact by relying on the evidence of PW1, PW2, PW3, PW4 and PW5 which was not cogent enough to support a conviction.
4. The learned magistrate erred in law and in fact in admitting evidence, which was inadmissible;
5. The lower court erred in law and in fact in accepting and relying on evidence which ought not to have been received and/or admitted.
6. “The learned chief magistrate erred in law and in fact by appreciating that the evidence of the appellant was cogent, truth and justified.”
7. The learned magistrate erred in law and in fact in not appreciating the inconsistencies in the testimony of prosecution witnesses.
8. The judgment of the trial court was against the weight of the evidence.

The appellant asked this court to allow the appeal, quash the conviction and set aside the sentences.

Since this is a first appeal, this court is under the obligation to reconsider the evidence and evaluate it afresh with a view to coming to its own conclusions independent of the factual findings of the magistrates’ court. I am cautious, however, that it is only the trial court that saw and heard the witnesses first hand and thus was better placed to assess such aspects of the evidence as their demeanour. In **Okeno versus Republic (1972) EA 32**, the Court of Appeal had this to say on this issue:-

*“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates’ findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”*(See page 36 of the decision thereof).

Six witnesses gave evidence on behalf of the prosecution and the first of these witnesses was the complainant, **Duncan Wamae Mugwe (PW1)**. He testified that on 18<sup>th</sup> September, 2007, he sold his motor vehicle, registration number KQY 803(Mitsubishi) to the appellant at a price of Kshs. 60,000/=. On that particular day he handed over the vehicle together with its registration book to the appellant on the understanding that the latter was to pay for it in two weeks’ time.

The appellant subsequently issued him with post-dated cheques drawn on the appellant’s account with Biashara Sacco; these cheques were No. 00888 for the amount of Kshs 21,000/= and No. 002889 for the amount of Kshs 21,000/=. The complainant produced a copy of a sale agreement dated 29<sup>th</sup> September, 2007 in which the terms of sale of the vehicle were incorporated.

The complainant presented the cheques to Biashara Sacco for payment but he was informed that the appellant’s account had insufficient funds. In the absence of consideration, the complainant demanded for the vehicle from the appellant but the latter could not produce it. Fearing for the loss of his vehicle, the complainant reported the matter to the police.

The investigations officer, **Corporal Rose Wanjiru (PW2)** interrogated the complainant who presented her with two cheques, allegedly drawn by the appellant on diverse dates for the respective sums of Kshs 21,000/= each. The complainant also gave her a copy of the log book for his motor vehicle; this logbook

had been retrieved from Biashara Sacco where the appellant had apparently offered it as security for a loan.

The investigations officer obtained warrants of search and proceeded to investigate the appellant's account at Biashara Sacco. She established that the appellant held an account No 0063200029 with Biashara Sacco; she retrieved a statement on that account for the period between 31<sup>st</sup> October, 2007 and 10<sup>th</sup> December, 2007. According to that statement, the appellant's account had a balance of Kshs. 219 as at 5<sup>th</sup> November, 2007 and only Kshs 87 as at 16<sup>th</sup> November, 2007.

This witness also took specimen signatures of the appellant and his known handwriting together with the two cheques to the document examiner for examination. From the examination report it was established that the appellant had written the two cheques. The investigations officer was informed by the Sacco that the complainant was not paid when he presented the cheques for payment because there were insufficient funds in the appellant's account.

The police officer who received the complainant's complaint was **Gerald Mwangi Mwathi (PW3)**; he was then based at the CID office, Nyeri and it is him who assigned the complainant's case to **Corporal Rose Wanjiru (PW2)**. The officer testified that he recovered the complainant's vehicle, at Blue Valley Estate and even after towing it to the police station the appellant complained to the Divisional Chief Investigations Officer that the witness had illegally detained his vehicle.

**Rose Wangare (PW4)**, the Biashara Sacco's manager at Nyeri testified that on 4<sup>th</sup> November, 2007, one of the cashiers at the Sacco brought her an "in house cheque" with instructions that the complainant wanted to withdraw the sum of Kshs 21,000/- from the appellant's account. When she checked in the appellant's account there was only Kshs 219. She therefore asked the cashier and the complainant to return the cheque to its owner.

On 16<sup>th</sup> November, 2007 the same cashier came with a different cheque but of the same amount of Kshs 21,000/=. As of that date the appellant's account had a balance of Kshs 174/= only. Once again she advised that the cheque be returned to the owner. The witness also confirmed that police officers investigated the appellant's account with the Sacco and in the course of the investigations she gave out the statement of the appellant's account. The witness testified that the Sacco ordinarily did not stamp cheques whenever they are presented for payments and that if there are no funds in the account the bearer would be advised to return the cheques to its drawer. She confirmed that the appellant was one of their customers.

The police officer who arrested the appellant was **Corporal Lenox Barasa (PW5)**. It was his evidence that when the complainant made his complaint he presented the two cheques written and signed by the appellant together with a copy of the log-book stamped with Biashara Sacco's stamp and a sale agreement.

This witness testified that it was the complainant who pointed out the appellant to the officers. He also testified that the appellant wrote specimen signatures while in his presence. The specimen signatures and the cheques were forwarded to the document examiner for examination.

The document examiner **Emmanuel Kenga (PW6)** produced a document examination report made by his colleague John Muinde. According to his report, which was admitted in evidence, the specimen handwriting and signatures were made by the same person who wrote and signed cheques.

In his evidence, the appellant gave a sworn statement and admitted having issued the two cheques to the complainant; however, he also claimed that he had made some cash payments to the complainant in settlement of the money owed to him.

The appellant also admitted that he held an account with the Biashara Sacco but that he could not recall the balances at the time he issued the cheques.

When this appeal came up for hearing Mr Gori for the appellant and Mr Njue for the state opted to have the appeal determined by way of written submissions, which I have duly considered in determination of this appeal.

The appellant was charged under **section 316A (1) (a)** (not section 316(1) a) as indicated in the charge sheet) of the **Penal Code** states as follows:-

### **316A. Bad cheques**

*(1) Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person*

*(a) knows that the account has insufficient funds;*

*(b) ...*

*(c) ...*

*(2) ...*

*(3) ...*

*(4) A person who is guilty of a misdemeanour under this section is liable to a fine not exceeding fifty thousand shillings, or to imprisonment for term not exceeding one year, or to both.*

There was sufficient evidence that there were two cheques that were drawn and signed by the appellant requiring Biashara Sacco to pay certain sums to the complainant. These cheques, numbers 02888 and 002889 were produced and admitted in evidence and both **Corporal Rose Wanjiru (PW2)** and **Corporal Lenox Barasa (PW5)** testified that these cheques were presented to them when the complainant lodged his complaint to the police.

That the cheques were also drawn and signed by the appellant was a fact that was proved beyond reasonable doubt. The cheques together with the specimen handwriting and signatures of the appellant were submitted to the document examiner to establish whether they were drawn and signed by the appellant. **Emmanuel Kenga (PW6)**, who presented the report of the document examiner's findings, confirmed that indeed this was the case. The document examiner's report was uncontroverted.

The appellant himself admitted in his defence that he drew the cheques to the order of the complainant but that he could not remember how much money he held in his account at the time he drew these cheques.

The cheques were presented for payment at Biashara Sacco by the complainant except that every time he presented these cheques for payment he was informed that the appellant's account did not have sufficient funds to honour them. This information was corroborated by the manager of the Sacco at Nyeri, **Rose Wangare (PW4)**, who testified that though the cheques were not stamped, they were presented for payment by the complainant on two separate occasions. It was her evidence that unlike other banks or financial institutions, it was not the Sacco's custom to stamp the cheques if there were no sufficient funds in the drawer's account to honour them.

As much as it was proved and even admitted that the appellant had drawn and signed the cheques, his counsel appeared to question, in his submissions, whether those cheques were cheques as contemplated in **section 316A** of the **Penal Code**.

The term "cheque" is not defined in the Penal Code but its definition is given in **section 73** of the **Bills of Exchange Act (Cap 27)**. It states:-

### 73. Cheque defined

*(1) A cheque is a bill of exchange drawn on a banker payable on demand.*

Literally, and it is unnecessary to belabour the point that a cheque is a bill of exchange and payable on demand. A “bill of exchange” is in turn defined under **section 3** of the same Act. It says:-

### 3. Bill of exchange defined

*(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.*

There is no dispute that the “cheques” in issue were written and signed by the appellant. They expressed an “unconditional order” directed at the Biashara Sacco requiring it to pay the complainant determinable sums on specific or determinable dates.

In my humble view, those cheques fit all the characteristics of what constitutes “a cheque” as defined **sections 3** and **73** of the **Bills of Exchange Act**. In any event, I cannot find from the record any suggestion or evidence to the contrary.

It was also submitted on behalf of the appellant in his defence that the money in issue was paid by way of cash and several petty cash vouchers were produced in an attempt to prove these contentions. Curiously, however, those documents were never put to any of the prosecution witnesses including the complainant himself when they were cross-examined by the appellant. More importantly, however, subsequent payment by cash to a drawee of a cheque on an account that does not have sufficient funds at the time the cheque is presented for payment does not appear to be a defence to an offence under **section 316A(1)(a)** of the **Penal Code**.

There was consistent evidence that the appellant’s account did not have sufficient funds on two occasions when the complainant presented the cheques for payment. **Corporal Rose Wanjiru (PW2)** testified that she obtained search warrants which enabled her to investigate the appellant’s account at Biashara Sacco. Her investigations established that the appellant’s account did not have sufficient funds at the material time; a statement of this particular account which was extracted and admitted in evidence proved this to have been the case. The Sacco’s manager, **Rose Wangare (PW4)**, corroborated this evidence when she testified that the appellant’s account was short of sufficient funds and that she gave this information to the police when they investigated the account.

It must be noted that, although the legal burden is always on the prosecution to prove its case against an accused person, the appellant himself admitted that he was not certain of the availability of funds in his account at the time he drew and signed the cheques.

With all these evidence, I am satisfied that the learned magistrate came to the correct conclusion that the prosecution established beyond reasonable doubt that the appellant had issued bad cheques contrary to **section 316 (A) 1(a)** of the **Penal Code** and he was therefore properly convicted.

As far as the sentence is concerned **subsection (4)** of **section 316(A)** is clear that a person convicted under any of the foregoing provisions including **subsection (1) (a)** is liable to a fine not exceeding Kshs 50,000/= or to imprisonment for term not exceeding one year or to both fine and imprisonment. The appellant was fined Kshs 30,000/= and in default to serve months imprisonment on each of the two counts he was convicted of. The sentences were within the limits prescribed by the law and there is no basis upon which they can be faulted or disturbed.

I have, in the circumstances, come to the inevitable conclusion that there is no merit in the appellant’s appeal and I hereby dismiss it. It is so ordered.

Signed, dated and delivered in open court this 14<sup>th</sup> day of December, 2015

Ngaah Jairus

**JUDGE**