



No. 469/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 237 OF 2013

ISAACK KIMEU MUTUKUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Cr. Case No.133 of 2011 by Hon. E.K. Too Ag, R.M. on 17/9/2013)

JUDGMENT

1. **Isaack Kimeu Mutuku**, the appellant was charged with the two(2) counts:-

- i. Obtaining goods by false pretences contrary to **Section 313** of the **Penal Code**. Particulars thereof being that on diverse dates between 3rd January, 2011 and 5th January, 2011 at **Machakos Township** in **Machakos District of Eastern Province**, with intent to defraud obtained from **Sahra Ngina Phillip** a total of 139.5 bags of maize grains valued at Kshs. 236,000/= the property of the said **Sahra Ngina Phillip** by falsely pretending that you were in a position to pay for the said maize on 10th January, 2011 a fact you knew to be false.
- ii. Issuing bad cheque contrary to **Section 316A (1)** of the **Penal Code**. Particulars thereof being that on 10th January, 2011 at **Kifaru Grain Millers** in **Industrial** area within **Nairobi** area with intent to defraud issued cheque No. 000042 for Kshs. 236,000/= drawn from KCB Mashariki Account No. 1121530419 to **Sahra Ngina Phillip** for the payment of maize supplied knowing that the said account number 1121530419 had insufficient funds.

2. He was tried , convicted and sentenced as follows:-

Count 1 – two (2) years imprisonment

Count 2 – one (1) year imprisonment

Sentences were to run concurrently.

3. Being aggrieved by the conviction and sentence he appealed on grounds that the learned magistrate erred in law and fact in;

- i. Failing to appreciate that there was nothing false in the transaction between the complainant and the accused ;

- ii. Treating the case as a criminal one whilst it was entirely of civil nature and therefore using wrong jurisdiction;
 - iii. Failing to consider the appellant's evidence which clearly disproved any criminal element or intention in the transaction between the complainant and the accused;
 - iv. His evaluation of evidence and in particular when he failed to consider that the element of the offence of false pretence was not proved beyond reasonable doubt;
 - v. His evaluation of the entire evidence and in particular his application of the law of false pretence; and
 - vi. The sentence was excessive considering that the accused had offered to refund the money and other important factors, circumstances in relation to the accused person and his status in life and contribution to the social economy of the nation.
4. The facts of the case were that on the 3/1/2011 the appellant approached PW1, **Sarah Ngina Phillip** a business woman who deals in cereals. He represented himself as the owner woman of **Kifaru Grain Millers**. He offered to purchase from her maize. PW1 sourced for some other maize and supplied the appellant a total of 157.32 bags of maize valued at Kshs. 252,800/=. He paid Kshs. 16,800/= leaving a balance of Kshs. 236,000/=. On the 10th January, 2012 the appellant issued a cheque No. 800042 in the sum of 236,000/=. The drawer was **Kifaru Grain Millers**. The drawee, PW1 deposited the cheque on her bank account but it bounced on the grounds that there were insufficient funds on the account. The matter was reported to the police. Investigations were carried out that culminated into the appellant being charged.
 5. In his defence the appellant stated that he was arrested at midnight while at his factory at industrial area. Admitting that indeed he had been supplied with the maize worth 236,000/=. He offered to pay the sum as the cheque he issued had bounced but they declined to accept. He stated that he had requested the complainant to hold the cheque but she refused. He expressed his desire to pay the complainant the money.
 6. By consent of both counsels the appeal was to be canvassed by way of written submissions. **Mr. Kisongoa** learned Counsel for the appellant submitted that the first count was defective as what was obtained was bags of maize but not money. The defect could not be cured because the thing or property described was not what appeared in the particulars of the offence. With regard to the 2nd count he argued that there was no evidence from the bank to prove that the cheque was bad. No intention of the offence was proved. Proof adduced was for a case of a civil nature.
 7. When the matter came up on the 1/12/2014, learned counsel for the State **Mrs Abuga** asked the court to fix a date for judgment and promised to ensure her submissions would be on record. No submissions were however filed.
 8. This being the 1st appellate court my duty is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. (*See Okeno versus Republic (1972) E.A. 32*).
 9. With regard to the charge being defective, there was an amended charge sheet which the appellant's counsel does not seem to have seen. The charge sheet was not defective.
 10. The prosecution had a duty of proving that the appellant had an intention to defraud. This was a person who prior to obtaining the maize led the complainant and her husband PW2, **Albert Phillip Katiti** to his factory; he made part payment of the sum owing and issued a cheque. If he had an intention to deceive or cheat, in order to cause them to incur a financial loss for his own gain, it would be unlikely for him to take them to his factory and issue a cheque where he was the account holder.
 11. In his judgment the learned trial magistrate stated thus:-

“The accused admitted material issues in the case. He admits receiving the maize. He

admits the value of the stated maize and issuing a bad cheque. I examined his demeanour, considered the demeanour of the prosecution witnesses. Their explanation by the prosecution witnesses of the parties' transaction differs with the accused in regard to what transpired. The accused was supposed to pay for the maize... he has not paid to-date.. I dismiss the defence as lacking merit."

12. It was imperative for the learned trial magistrate to interrogate if indeed he had the intent to defraud. He did not make such an attempt. It was also important for him to interrogate if the representation was false.

13. **Section 312** of the **Penal Code** defines false pretence as:-

"Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence".

14. Looking at the evidence adduced by PW1, the complainant stated thus:-

"He then requested for one of us to accompany him to Nairobi to the factory for purposes of identifying the locality of the factory and that he will pay the money on the 5/1/2011."

15. It is obvious that whatever they agreed on did not relate to the 'present' intention. The representation made by the appellant of fact related to a 'future' intention. In the case of **Republic versus Dent[1955]2QB 594/5 Devlin, J** stated thus:-

"..... along course of authorities in criminal cases has laid down that statement of intention about future conduct whether or not it be a statement of existing fact, is not such a statement as will almost to a false pretence in criminal law."

16. The representation having been of a future conduct would not make the person liable in criminal law. The matter in issue was civil in nature. Convicting on that count was erroneous on the part of the court.

17. With regard to count 2, **Section 316A(1)** of the **Penal Code** states:-

"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. *knows that the account has been closed; or*
- c. *has previously instructed the bank or other institution at which the account is held not to honour the cheque".*

18. **Section 316A(2)** states:-

"Subsection (1)(a) does not apply with respect to a post-dated cheque.

19. It is alleged that the appellant issued the cheque knowing that the account had insufficient funds. This would suggest that the appellant ought to have contravened **Section 316A (1) (a)** of the **Penal Code**. There was an omission in the charge sheet as the particular paragraph of **subsection (1)** of the Section was not specified. It was the evidence of PW1 that after the cheque was issued it was returned because the funds were insufficient. She collected the cheque herself from the bank. On the cheque it is indicated '*refer to drawer – unpaid insufficient funds*'. This would make it a bad cheque.

20. This was a bad cheque as there were no sufficient funds on the account held by the appellant according to records at the Kenya Commercial Bank adduced by PW7, **Rose Kawera Mbaya**. However, the statement of the offence did not specify which law exactly the appellant contravened. It is solely on that ground that the appellant has to get a benefit of doubt.

21. In the premises the appeal succeeds. I quash the conviction on both counts and set aside the sentences imposed. The appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of DECEMBER, 2014.

L.N. MUTENDE

JUDGE