



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 43 of 2009

EUNICE CHEBUKWA WANJALAAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

JUDGMENT

1. The appellant, **Eunice Chebukwa Wanjala** who was charged jointly with others not before the court today, was convicted on two counts of obtaining by false pretences in **counts no. IV and VIII**.
2. In **count no. IV** it had been alleged that on or about the 9th day of April, 2002, at Kenya Commercial Bank Ltd, River road branch in Nairobi within Nairobi area, jointly with others not before court with intent to defraud, obtained Kshs.1,632,000/= from Caroline Cheptoo Ywaya, an operations manager at the said bank by falsely pretending that a certain cheque No. 000056 was genuine and valid order for payment of Kshs.1,632,000/= to M/s. Riss Electrical Services.
3. In **count no. VIII** it was alleged that with intent to defraud, she obtained Kshs.1,581,000/= from Caroline Cheptoo Ywaya, an Operations Manager at the said bank by falsely pretending that a certain cheque No. 000045 was genuine and valid order for payment of Kshs.1,581,000/= to M/s Josones Electroworks.
4. Upon conviction, she was fined Kshs.100,000/= on each count and in default to serve twenty-four (24) months in imprisonment. The sentences were ordered to run consecutively.
5. On appeal the appellant set out fourteen grounds which have been summarised as hereunder:
 - (i) **That her conviction was based on a charge which was not properly read to her;**
 - (ii) **That the appellant's conviction was against the weight of the evidence;**
 - (iii) **That the investigations against the appellant were poor and continued alongside the trial resulting in the charge being amended three times in the course of the trial.**
 - (iv) **That the charge sheet was defective.**
6. In his written submissions Mr. Indidis, the learned counsel for the appellant urged that the charge sheet was defective in that it stated that the appellant was charged with obtaining by false pretence contrary to **Section 313** of the **Penal Code** without stating that she benefited from the proceeds of the payment made by cheque nos. 000045 and 000056.

7. I have anxiously re-evaluated the evidence on record bearing in mind that my duty as the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion, but to re-evaluate the evidence and draw my own conclusions and make my own findings, bearing in mind that I did not have the opportunity to observe the witnesses as they testified.

8. **Section 313** of the **Penal Code** defines false pretences as:

“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.”

The Black's Law Dictionary defines false pretences as:

“The crime of knowingly obtaining title to another's personal property by misrepresenting a fact with the intent to defraud”.

9. The evidence on record shows that the appellant passed the cheques as did both **PW2**, Mr. Wilson Kipyegon the Passing Clerk and **PW16** Miss Joyce Wambani the Operations Manager. These three employees of the bank scrutinized the cheques and found no reason to believe that they were not genuine. They passed them for payment.

10. The evidence further shows that the cheques were banked normally in the KCB River road branch, and were remitted to KCB Mumias branch where they went through clearance in the normal manner, after being subjected to scrutiny against the parameters set out by the bank.

11. I am inclined to agree with the appellant in her averment that this was a case of selective prosecution where, three people scrutinised and passed the cheques in the same circumstances, in the course of their duty and only one person was singled out for prosecution. All three employees acted within the scope their responsibility in confirming the two cheques, which had been scrutinized and found to have no unusual circumstances about them.

12. The learned trial magistrate concluded in her judgment that the appellant was :

“One of the others who assisted in the execution of the crime and there must have been a price for it”

These were serious conclusions drawn by the learned trial magistrate yet they were not supported by the evidence on record. The learned trial magistrate drew the inference of guilt from what she perceived to be the appellant's actions of going to:

“The trouble of passing cheques which did not have the proper signatories and she had everything within her section of current account”

13. The evidence of **PW16** the Operations Manager who was the immediate boss to the appellant, was that the appellant was a diligent officer, who had acted in good faith in passing the cheques. **PW16** did, in fact, write to the Council in response to the letter of the Council dated 22nd April 2002 which requested that a stop order be entered against the two offending cheques. In her letter **PW16** stated that the Council's request was time barred but that the bank was not in error in acting as it had.

14. From the evidence on record the signatures in the cheques and the specimen signatures held by the bank were similar. At the same time **PW19** the Investigations Officer from Banking Fraud Unit testified that there was no evidence that the appellant herein, benefited in any way from the monies paid out following these fraudulent transactions.

15. I have perused the evidence on record and in view of the facts that I have set out above, I am of the

humble view that the prosecution had no basis for charging the appellant in the first place, and that the learned trial magistrate erred both in fact and in law in making assumptions and drawing conclusions which were not supported by the facts on record, nor by the law applicable.

16. The prosecution having proved that the appellant was one of the persons, who passed the cheque, was required by law to go further and prove *mens rea* on her part. In Silumu & another v Republic[1986] KLR pg 259, the learned Judges of the High Court, Sachdeva and Patel JJ, held that:

“On a charge of obtaining by false pretences, the prosecution must prove the making of the pretence as stated in the indictment and where there is a substantial variation between the false pretence as alleged in that indictment and the pretence proved in the case, this will be fatal to a conviction.”

In the case before me there was no proof of false pretences at all.

17. The respondent was therefore right in conceding the appeal on the ground that the appellant’s state of mind as to knowledge of the planned fraud was not demonstrated by the evidence adduced, and that therefore a doubt had been created.

18. The trial magistrate failed to give proper consideration to the evidence which if she had, she would have doubted that the actions of the appellant were intended to defraud the complainant and she would have found that the appellant’s conviction was therefore unsafe.

19. I therefore quash the conviction of the appellant on each count and set aside the sentences flowing therefrom. The appellant is set at liberty forthwith unless otherwise lawfully held.

On behalf of the state I sincerely apologise to the appellant for the fact that it has taken her 11 anxious years to clear her name of charges that should have never been preferred against her in the first place, and of which she should never have been convicted.

SIGNED DATED and DELIVERED in open court this 21st day of **February 2013**.

L. A. ACHODE
JUDGE