



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 221 of 2011

(An appeal against both conviction and sentence of the Chief Magistrate's Court at Kakamega in Criminal Case No. 2103 of 2009

[PETER ARERI, SRM] delivered on 15th June, 2011)

MOSES OMUTELEMA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with the offence of obtaining goods by false pretences contrary to Section 313 of the Penal Code. The particulars of the charge were that on 16th August, 2009 at Tamutamu investment shop in Kakamega town Municipality in Kakamega Central District with the Western province obtained assorted goods valued at Kshs.133,750/= from Patel Prabhakar Ishverbha by falsely pretending that he was in a position to pay for the goods obtained on a later date. In count II he was charged with issuing a bad cheque contrary to Section 316A (1) as read with Section 4A of the Penal Code. The particulars of the charge were that on the same day and place, he issued a bad cheque No.00002of Family Bank Kakamega for a sum of Kshs.150,000/= which was not valid for payment. He denied the charges. After a full trial, he was convicted on both counts. He was sentenced to pay a fine of Kshs.20,000/= on count I and in default to serve one year imprisonment. With regard to count II, he was also sentenced to pay a fine of Kshs.20,000/= and in default to serve one year imprisonment.

Being dissatisfied with the decision of the trial court, the appellant has appealed to this court on several grounds. The appellant also made submissions at the hearing of the appeal. He submitted that the learned magistrate did not consider his plea of not guilty. Further that the prosecution and the court erred in accepting a case without exhibits as the book of record allegedly kept by the complainant was not produced in court to ascertain the truth. The appellant also argued that the learned magistrate wrongly relied on hearsay evidence as specimen signatures were not produced in court to ascertain if he was the culprit. No handwriting examiners report was produced and the figure on the invoice was different from that in the cheque. The appellant submitted further that this was a civil matter and that the learned magistrate should not have entertained the criminal proceedings. In the appellant's view also, PW2 was not qualified to testify in the case as he was not involved in the actual transaction. He stated that the magistrate erred in not accepting his apology and that it was an injustice for the learned magistrate to have pushed him to defend himself.

The learned Prosecuting Counsel, Ms Opiyo opposed the appeal. Counsel submitted that all the exhibits were taken into account before entering a conviction. There was a certified copy of the cheque

for part payment and the letter of the appellant apologizing. In addition, an investigation was conducted on the appellant's account at Family Bank which showed that the appellant had written to the bank to stop the payment of the amount due. Counsel argued that from the facts of the case this was a purely criminal case. In counsel's view, the appellant was granted a fair hearing by the learned magistrate. He was allowed to defend himself. Counsel urged that the appeal be dismissed.

In brief, the prosecution case is that PW1, Patel Prabhakal operated a shop in Kakamega Town known as Tamutamu Investments. The appellant was his customer. He used to collect goods from his shop to do his business at Discount Traders shop. On 16th of August, 2009, the appellant collected goods from the complainant worth Kshs. 133,570/=. He was issued with an invoice and he issued a cheque for Kshs.150,000/=. The cheque was however dated 29/8/2009. The appellant came back later to the shop and agreed to pay the complainant bank charges because the initial cheque was not honoured. The complainant and the appellant entered into a written undertaking. The appellant however did not come back and the complainant therefore reported the matter to the police. When the appellant took the goods from the complainant, one Sylvanus Yeswa Andala PW2 was in the shop of the complainant. He worked for the complainant and was the one who assisted in loading the goods into the vehicle of the appellant.

When put on his defence, the appellant gave a sworn statement. He denied making any order for the goods since there was no order form signed. Secondly, there was no acknowledgement for the delivery of the goods from Tamutamu Investment. Thirdly, there was no delivery form signed by him for the delivery of goods.

According to the appellant, the cheque for kshs.150,000/= did not agree with the date of the invoice. The amount on the cheque was also different from that in the invoice. He admitted issuing the cheque for Kshs.150,000/= but maintained that the cheque was meant to cover amounts contained in the statements which had been supplied by the complainant. When he discovered that the amount in the statement was disputed, he wrote to the bank stopping payments. This was after his advocate had addressed the complainant over the issue. He stated that it was not true that the bank account had insufficient amounts to honour the cheque.

Faced with this evidence, the learned magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court convicted and sentenced the appellant. Therefrom arose the present appeal.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences, taking into account that I did not have the opportunity to see the witnesses testify and determine their demeanour. The burden is always on the prosecution in criminal cases to prove an accused guilty beyond any reasonable doubt. That burden does not shift to the accused – see the case of **Leonard Aniseth vs Republic [1963] EA 206**.

The appellant herein gave sworn evidence on the transaction involved. He admitted having business dealings with the complainant. According to him the amount alleged to be owing was not in respect of the goods allegedly taken by him from Tamutamu Investments, but an amount owing due previous business dealings with the complainant. He stated that he stopped payment of the cheque because of disputes as to the actual amount owing to the complainant. He stated that this was not a criminal case but rather a civil case.

The complainant PW1 admitted, in evidence that the appellant was his long time customer on credit. The evidence of the complainant as tendered in court was not watertight as to what the appellant was owing. The date of the alleged invoice for goods and the date of the cheque are different. That fact was admitted. The cheque was issued for a later date. The difference in dates, in my view, seems to support the appellant's story that they had various business transactions with the complainant. Though the complainant stated that there was a book in which he recorded the transaction, that book was not produced in court. Since the burden is on the prosecution to prove the case against the accused beyond any reasonable doubt, when a reasonable doubt is created or exists in the prosecution case, the benefit of the same has to be given to the accused. I do so in the present case

In my view, with the evidence on record, the prosecution did not prove beyond reasonable doubt any of the charges against the appellant. The money owing, in my view, was a civil debt that should have been pursued in the Civil Court. It was wrong to prefer criminal charges. I give the benefit of the doubt to the appellant and have to quash the conviction.

Consequently, and for the above reasons, I find that the appeal has merits. I allow the appeal, quash the convictions on both counts and set aside the sentences imposed. If the appellant has paid the fine, same should be refunded.

Dated, signed and delivered at Kakamega this 28th day of November, 2013

George Dulu

JUDGE