



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO.15 OF 2011**

**KOSSAM OKIRU .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**[Appeal from Original Conviction and Sentence in CMCR.C. No.4 OF 2005: ONGINJO P.M. (MRS)]**

**\*\*\*\*\***

**J U D G E M E N T**

This is an appeal preferred from the Judgment of Principal Magistrate that was delivered on the 28<sup>th</sup> of January, 2011 in **CMCR.C.NO.4 of 2008** where the accused faced two charges. The first count was Cheating Contrary to Section 315 of the Penal Code. The second count was possession of forged bank notes contrary to Section 359 of the Penal Code. He was found guilty of the first count and sentenced to 3 years imprisonment. Being dissatisfied with the judgment he preferred this appeal on the following grounds:

- 1. That the learned trial magistrate erred in law and facts by failing to detect that the charge is defective under section 214 (i)(b) of C.P.C. it does not accord with the evidence given at the trial.**
- 2. That the learned trial magistrate misdirected himself by convicting the appellant without material evidence from the prosecution file which went missing with statements of the witnesses, evidence of the fake documents and the bank documents of PW2 contrary to section 50 (2)(j) of the new constitution.**
- 3. That the learned trial magistrate erred in law and facts by convicting the appellant in the absence of the key witnesses (investigating officer's) testimony.**
- 4. That the trial magistrate erred in law in not collecting independent and corroborative evidence to support the conviction.**
- 5. That the learned trial magistrate erred in law in convicting the appellant on reliance of the evidence of PW1, 2 & 3 who were relatives and not corroborating other independent witness to support the conviction.**
- 6. That the learned trial magistrate convicted without evidence of a documents expert. This was necessary since this case was based on cheating PW1 & 2 using alleged documents not ascertained**

and proved so to be.

7. That the circumstances that led to the appellant's arrest were inappropriate yet the learned trial magistrate failed to detect the same.

8. That the learned trial magistrate violated section 169 of C.P.C. in convicting me without considering the defence statement.

9. That the learned trial magistrate acquitted the appellant on account of possession of the fake documents whilst convicting me of cheating which lacked supporting evidence from the prosecuting officer.

10. That the learned trial magistrate was unfair in not granting the appellant a non-custodial sentence or any option of fine as earlier mitigated.

11. That the learned trial magistrate misdirected himself in law by failing to satisfy himself that the alleged offence was proved beyond any reasonable doubt.

The appellant also filed his written submissions which he relied upon at the time of the appeal

Which may be summarized thus; that the prosecution did not prove its case beyond reasonable doubt, the investigating officer a vital witness was left out, there were no documentary evidence or exhibits produced, there was no independent witness to corroborate the evidence on record, the case was fabricated and the evidence on record was not credible.

The learned State Counsel **Mr. P. Kiprop** conceded to the appeal on the grounds that the prosecution did not call the investigating officer neither were exhibits produced in court.

This court has the duty to examine and consider the evidence on record and arrive at its own independent conclusion. The court is not bound by the arguments of the prosecution.

I have considered the evidence on record as required See **Okeno versus Republic (1972)** at 32.

The summary of the prosecution case is that on diverse dates between the 12<sup>th</sup> and 21<sup>st</sup> December, 2007 at Nubian Estate in Kisumu jointly with others the accused obtained Kshs.200,000/= from the complainant. They promised to multiply the money which they did not do. The prosecution called 3 witnesses. The salient features of their evidence was as follows.

**PW1 Stephen Wabwana Akuda (complainant)**

- **He operates a hotel and shop in Nubian estate Kisumu;**
- **He was known to the appellant;**
- **The appellant together with one other person approached him on 12/12/2007 and told him they could triple money;**
- **Later his wife got Kshs.300,000/= loan;**
- **She withdrew kshs.204,000/=;**
- **He rung the appellant who came to his house;**
  
- **The appellant was with one Kibisu. He gave them the money which they tied with papers in a black polythene, they applied some chemical a heavy object was put on the money and he was to turn the same after every 30 minutes by 4 p.m., the chemical had exploded and Kibisu was to return later with more chemical which he did not.**
  
- **Later he realised he had been conned and reported the matter to Kondele Police and the appellant was arrested.**

**PW2 PASCALIA NABWIRE ABARA** wife to PW1:

- **She applied for a loan of Kshs.300,000/= on 3/12/07;**

- **Obtained the cheque on 10/12/07;**
- **On 11/12/07 she withdrew Kshs.200,000/= while in the company of PW1;**
- **The appellant came to their house on 12/12/07 and sent for her husband;**
- **Her husband asked for kshs.200,000/= from her;**
- **She has not recovered her money.**

**PW3 BRIAN ABARA TAABU** a student at Butula High.

- **He is known to the complainant PW1 who is a husband to his aunt PW2;**
- **On 12/12/07 he found his uncle with 2 people one is the appellant;**
- **He was asked to take two basins. One with water. One empty;**
- **He found his uncle and the strangers counting money;**
- **Later one of the 2 returned with bottles. One broke and he threw in the toilet;**
- **He later learnt that his uncle’s money got lost;**

The accused was put on his defence and he stated in very few words that he knows the complainant, they used to stay at the same estate. He did not receive Kshs.200,000/= from him.

In convicting the appellant the trial court appreciated that despite several adjournments the investigating and arresting officers did not turn up in court. The court relied on the evidence of **PW1** and **PW3** and circumstantial evidence in that the appellant who was known to **PW1** and **PW2** went to the house left behind papers he purported to turn into money while in the company of others. The trial magistrate had this to say;

**“money papers” were left behind and presented to the police as exhibits. Though they were not produced I have no reasons to doubt the evidence of both PW1 – Akuda and PW2 – Abara. There was no reasons for the couple to plant the charge against the accused.....PW3 Taabu saw money being counted.”**

I share the sentiments of the lower court. I am further of the view that the absence of the arresting and investigating officer did not weaken the case of the prosecution. The same was proved beyond any reasonable doubt. The two witnesses i.e. **PW1 & 2** were consistent and appeared truth-full. I believe their testimony.

I therefore see no reason to interfere with the conviction and sentence of the trial and I dismiss the appeal.

**Dated and delivered this 23<sup>rd</sup> day of September 2011**

**ALI-ARONI**  
**J U D G E**

**In the presence of:**

.....state counsel

.....Accused in person.