



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 267 OF 2010**

[From Original Conviction and Sentence in Criminal Case No. 358 of 2009 of the Principal Magistrate's Court at Kilifi: **J.M. Gandani – P.M.**)]

**SAFARI KATANA** .....

**APPELLANT**  
**VERSUS**

**REPUBLIC** .....

**RESPONDENT**

**JUDGEMENT**

The Appellant **SAFARI KATANA**, has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Kilifi Law Courts. The Appellant had been arraigned before the lower court on 6<sup>th</sup> May 2009 charged with the offence of **CHEATING CONTRARY TO SECTION 315 OF THE PENAL CODE**. The particulars of the offence were that

***“On the 5<sup>th</sup> day of May 2009 at Kwa Mwangi Shopping Centre in Kilifi District within Coast Province, jointly with another not before court by means of fraudulent trick obtained cash Kshs.1,050/- from Lillian Katana purporting to be the price of 20 litres of paraffin knowing or having reason to believe that it was not paraffin but water.”***

The Appellant pleaded **‘not guilty’** to the charge and his trial commenced on 6<sup>th</sup> November 2009. The prosecution led by **CHIEF INSPECTOR OCHIENG** called a total of three (3) witnesses in support of their case.

**PW1 LILLIAN MAPENZI KATANA** a shop-keeper in Kwa Mwangi area of Kilifi District told the court that on 5<sup>th</sup> May 2009 the Appellant and another came to her shop and offered to sell her some paraffin. **PW1** ordered for 20 litres which was to cost Kshs.1,050/-. The men left and returned at 3.00 p.m. in a Tuk Tuk taxi. They delivered a 20 litre jerrican containing some liquid. When **PW1** requested them to transfer the liquid into her jerrican the two men declined claiming that they were in a hurry. **PW1** paid the Appellant the agreed price of Kshs.1,050/-. It was only after the men had left that she checked the jerrican and realized that it contained water and not paraffin. She followed the two men to Kibaoni. One man ran away but the Appellant was apprehended with the assistance of members of public. He was taken to the police station and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. On 29<sup>th</sup> April 2010 the

learned trial magistrate delivered her judgement in which she convicted the Appellant of the charge of cheating and sentenced him to serve three (3) years imprisonment. Being dissatisfied with both his conviction and sentence the Appellant filed this present appeal.

The Appellant who was unrepresented relied entirely upon his written submissions whilst **MR. ONSERIO**, learned State Counsel made oral submissions opposing the appeal. I have carefully perused the submissions of the Appellant and I note that the main ground upon which he bases his appeal is that of a defective charge sheet. I have carefully and anxiously examined the charge sheet and I am unable to find any material defect therein. This ground is as Mr. Onserio submits merely frivolous and I do dismiss the same.

**PW1** told the court that she agreed with the Appellant that he would supply her with 20 litres of paraffin at a cost of Kshs.1,050/-. The Appellant later delivered to her shop some fluid in a 20 litre jerrican. He was paid the agreed sum of Kshs.1,050/- and left. It was only then that **PW1** checked the jerrican and found it to contain only water. **PW3 CORPORAL COSMAS KANYI** told the court that he took a sample of the fluid in the jerrican delivered to **PW1** to the Government Chemist for analysis. The report from the government chemist indicated that it was water. **Pexb2**. The fact that the Appellant was fully aware that he had delivered water and **not** paraffin as agreed to **PW1** is evidenced by the fact that he beat a very hasty retreat immediately after being paid for delivery. He declined to assist in transferring the liquid into the complainant's own jerrican. This is evidence of the '**mens rea**' or the mental element of the offence which was the intention to '**cheat**' or defraud **PW1**. When **PW1** trailed the Appellant and his companion to Kibaoni the second man took to his heels. This is further evidence of the intent to cheat. The delivery by the Appellant to **PW1** occurred in broad daylight and **PW1** was able to positively identify the Appellant as the man who delivered the water to **PW1**. **PW2 DENNIS KATANA** a nephew of **PW1** corroborates her testimony as he was present in her shop when the Appellant made the delivery. He too positively identifies the Appellant. I find that the possibility of a mistaken identity does not exist. The Appellant's defence can properly be termed as a mere denial as he makes no attempt to address the allegations made by **PW1**. He claims that he was arrested for no reason yet **PW1** did not know the Appellant before this incident and therefore had no valid reason to fabricate evidence against him.

I am satisfied that the prosecution did prove the charge to the required standard. The conviction of the Appellant by the trial court was sound and I do confirm the same.

The Appellant was allowed an opportunity to mitigate. The prosecution availed evidence of two (2) previous convictions. No doubt the fact that the Appellant was a repeat offender who as the trial court indicated had failed to learn from past mistakes, persuaded the court to impose a three (3) year term of imprisonment. Given the circumstances that sentence was appropriate. It was neither harsh nor excessive and I do hereby uphold the same. Finally this appeal fails in its entirety.

**Dated and Delivered in Mombasa this 14<sup>th</sup> day of December 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-  
Appellant in person  
Mr. Onserio for State

**M. ODERO**  
**JUDGE**  
**14/12/2010**