



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 159 of 2003

REPUBLIC APPELLANT

VERSUS

CHARLES KITHINJI RESPONDENT

(An Appeal from a judgment of J.H. Njiru DM I, Maua delivered on 23rd December 2002)

JUDGMENT

The respondent was acquitted under section 210 of the C.P.C. by the court below of two counts of obtaining goods by false pretences under section 313 of the Penal Code.

According to the charge sheet the respondent is alleged to have obtained, in the first count, Kshs. 142,000/= from Julius Mungathia (Mungathia) by falsely pretending that cheque No. 00000807201 was good and valid order for payment of cash of Kshs. 142,000/=. It was Mungathia's evidence before the court below that when he presented the cheque it was dishonoured. Mungathia further testified that he had supplied 150 bags of maize to the respondent and the payment was for this purpose.

In the 2nd count, the complainant, Akisilino Guantai (Guantai) is alleged to have similarly supplied the respondent with 178 bags of maize. In consideration, the respondent issued a cheque for Kshs. 158,000/= and cash of Kshs. 20,000/=. On presenting the cheque to his bank the same was dishonoured.

The trial court considered the evidence tendered by the prosecution and found it did not disclose a *prima facie* case. The court proceeded to acquit the respondent. The state was not satisfied with that finding and preferred this appeal.

In the petition of appeal, the appellant avers, basically that the trial court erred by acquitting the respondent against the weight of evidence. Learned counsel for the appellant submitted that there was sufficient evidence to support the two counts charged; that by issuing cheques to the complainants when there were no funds in the account, the respondent committed the offence charged.

Learned counsel for the respondent did not agree with those submissions arguing that the respondent issued the cheques against an active account; that the dispute was a commercial transaction which ought to have been resolved in a civil suit.

I have considered these arguments very carefully and hold the following view on the matter before me. Section 348A of the Criminal Procedure Code provides:-

“348A. When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge has been made by a subordinate court, the Attorney General may appeal to the High Court from the acquittal or order on a matter of law.”

An appeal of this nature, therefore, must be on a point of law only. All the three grounds raised in the petition are, in my view, points of fact. All the three grounds taken together raise the issue that the respondent was acquitted against the weight of evidence adduced. Even if I was to stretch those ground to mean that the offence of obtaining by false pretences was proved to warrant the respondent to be required to make his defence, I still come to the conclusion that the evidence adduced did not disclose an offence under section 313 of the Penal Code.

It was the evidence of Mungathia that on 25th October 2001, the respondent issued to him a cheque of Kshs. 142,000 as payment of 150 bags of maize supplied to the latter. Both agreed that Mungathia presents the cheque on 8th November 2001. Seven days after presentation the cheque was returned.

A similar scenario was the case with Guantai who on 11th October 2001 after supplying the respondent with 178 bags of maize was paid Kshs. 20,000/= cash on the spot and given a cheque for the balance. The cheque was, according to Guantai payable on 5th November 2001. On 3rd November, 2001 he received a letter from the respondent asking him to bank it on 12th November 2001.

He complied but on 28th November 2001 the cheque was returned with the remarks “Refer to Drawer.” The term “false pretence” is defined in section 312 to mean:-

“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.”

This provision must be read with section 313 of the Penal Code which creates the offence. It provides:-

“313. 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 questions to be determined in a case brought under section 313 of the Penal Code are:-

- (i) Whether there was any representation made either by words, in writing or conduct.
- (ii) Whether the representation was false in fact
- (iii) Whether it was made with the intention to defraud
- (iv) Whether the representation related to a past or present event.
- (v) Whether due to the representation something capable of being stolen was stolen

In the present appeal there was representation both by word of mouth and in writing. There is also no doubt that Mugathia and Guantai only parted with their bags of maize after being assured of payment by way of cheques in the case of Guantai partly cash.

The cheque that was given to Mugathia was to be presented on 8th November, 2001 two weeks from the date of issue. To Guantai the cheque was post-dated, issued on 11th October 2001 and to be banked on 5th November, 2001 – approximately one month later. The fact that the respondent requested the two complainants to bank the cheques at a future date goes to demonstrate that he was acting in good faith.

Indeed in the case of Guantai he even wrote to him asking him to deposit the cheque on 12th November, 2001 instead of 5th November 2001. The conduct of the respondent is not consistent with that of a dishonest person who intended to defraud the two complainants.

The two cheques were returned, according to the complainants, with the remarks “Refer to Drawer”. I did not have the benefit of looking at the two cheques as it would appear they were not produced. The remarks “Refer to Drawer” was not explained to mean the account had no funds.

Finally, I have noted that the cheques were to be presented to the bank later. That constitutes a representation as to the future event. Derlin, J in the case of **R. V. Dent** (1975) 2 ALL ER 806 at 807 – H, said:-

“.....to constitute a false pretence the false statement must be of an existing facta statement of intention about a future conduct whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.”

See **Abdallah V. R. (1970)** EA 657 at Pg 658 per Law, JA and **Oware V. R.,** (1989) KLR 287. In the result, I find no merit in this appeal. The same is dismissed. Orders accordingly.

Dated and delivered at Meru this 11thday of April.... 2008.

W. OUKO

JUDGE