



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Criminal Appeal 227 of 2003**

**NAHASHON WACHIRA MAINA.....APPELLANT**

*Versus*

**REPUBLIC.....RESPONDENT**

***(Being Appeal against the sentence and conviction by J. N. Nyaga, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 469 of 2001 at Karatina)***

**JUDGMENT**

The Appellant was charged in count one with obtaining goods by false pretences Contrary to *Section 313* of the Penal Code particulars alleging that on the 8<sup>th</sup> day of November 2001 at Karatina Municipality with intent to defraud he obtained specified shop goods by falsely pretending that he had paid Ksh.20775/= to Wamu General Merchants.

In count two the Appellant was charged with forgery Contrary to *Section 349* of the Penal Code particulars alleging that on 8<sup>th</sup> November 2001 at Karatina Municipality the Appellant forged a certain cash sale receipt No. 10831 dated 8<sup>th</sup> November 2001 purporting it to have been genuinely stamped by Wamu General Merchants.

The Appellant was convicted on both counts and fined. He was aggrieved. Hence this appeal.

From the evidence, Francis Muraguri who gave evidence as P.W.7 was the proprietor of Wamu General Merchants which was a wholesale shop. His wife Josphine Wanjiru Muriuki, who gave evidence as P.W. 1, was the cashier at the shop. The Appellant was their regular customer.

The procedure at the shop was that when a customer went to buy goods, he would obtain a receipt from one of the employees of the shop at the counter and that receipt would contain each good intended to be bought indicating the quantity and relevant price to be paid. The customer then took that receipt to the cashier for payment of the required purchase price. On payment, the cashier would endorse on the receipt in her handwriting the word "paid". She would then stamp the receipt with the words "PAID WAMU". The receipt would be returned by the cashier to the customer who would carry it to shop workers at the place where shop goods are stored and those workers would issue goods to the customer in accordance with the contents of the receipt presented to those workers by the customer.

That is the procedure which the Appellant went through at the shop of the Complainant in this Criminal Case that morning of 8<sup>th</sup> November 2001 and as a result, the goods mentioned in count one of the charge sheet were delivered to the Appellant's shop that same day. Unfortunately for the Appellant, one item mentioned in the receipt, Exhibit 2, namely rice, was not available in the Complainant's shop at the time the purchased goods were being delivered, and the Appellant agreed with the workers to collect the rice later in the day, apparently that rice being expected to be available in the shop by the time the Appellant was expected to go and collect it.

Subsequently rice was not available and the Complainant's employee at the store had to take the Appellant and the receipt, Exhibit 2, to P.W. 7 Francis Muraguri to authorize refund of the money the Appellant had paid as purchase price for the non available rice. Instead of P.W.7 authorising the refund,

he started claiming that the Appellant had not paid, not only the purchase price for the rice but also purchase price for the rest of the goods in Exhibit 2.

Apparently P.W.7 started making that claim before he consulted his wife P.W.1 and therefore when the two subsequently got together, they came out with a strong case against the Appellant to the extent that the Appellant was given no opportunity to go away. Instead, he was detained at the Complainant's shop until he was re-arrested by the police from there.

During the trial therefore, one of the main issues was whether the Appellant had paid the sum of Ksh.27,725/= for the goods that were written in Exhibit 2. While the prosecution's case was that the Appellant did not pay that money and that therefore obtained the goods that were delivered to him by false pretences, the Appellant's defence was that he paid that money in full.

To resolve that dispute, the prosecution never went beyond the receipt Exhibit 2. In other words, there was nothing like a cash book showing entries where money received by the Complainant and a receipt issued is entered to prove whether or not such money had been received by Wamu General Merchants – on 8<sup>th</sup> November 2001. There was no evidence of a reconciliation having been made between the amount of money as reflected on the receipts issued on that day and the actual total cash received that day from all sales.

Moreover, although only one rubber stamp owned by Wamu General Merchants may have been officially in use on that particular day 8<sup>th</sup> November 2001, there was no evidence that the various previous rubber stamps which were also available at the shop could not have been used by an unscrupulous employee or even owner of Wamu General Merchants. If therefore a different rubber stamp, other than the one in official use on that day, was the one which was impressed on Exhibit 2, why must that impression have been effected by the Appellant and could it not have been done without his knowledge? The Appellant produced receipts from the same shop having stamp impressions different from the stamp that was in use on 8<sup>th</sup> November 2007, yet payments in respect of those receipts had not been denied by Wamu General Merchants.

Since the specimen handwriting of the Appellant was not taken for comparison with the handwriting in the word "paid" in Exhibit 2, how could it be said the Appellant wrote that word in Exhibit 2?

To my mind, the prosecution did not prove this case against the Appellant beyond reasonable doubt. I do therefore allow this appeal. Quash the Appellant's conviction on each count and set aside the sentence on each count. The fine paid be refunded.

*Dated this 19<sup>th</sup> day of February 2007.*

**J. M. KHAMONI**

JUDGE