



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 70 of 2007

PETER NJUGUNA GIKERA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 688 of 2006 of the Chief Magistrate's Court at Nairobi by Mrs J Wanjala – P.M.)

J U D G M E N T

PETER NJUGUNA GIKERA alias **PASTOR GITAU** was jointly charged with Ezekiel Kungu Guchu for the offence of forgery contrary to section 349 penal code, that on or about the 25th day of January, 2006 in Nairobi, within Nairobi area, with intent to defraud, forged a certain Standard Chartered Bank of Kenya Limited bankers cheque No. 100162 for Kshs 174,000/- payable to Leonard Wainaina Njuguna, purporting it to be a good and valid bankers cheque drawn by Standard Chartered Bank of Kenya Limited Kimathi Street Branch.

Appellant faced a second count of uttering a false document contrary to section 353 penal code, that on 25th day of January 2006 at Uthiru shopping centre in Nairobi within Nairobi, with intent to defraud knowingly and fraudulently uttered a certain forged Standard Chartered Bank of Kenya bankers cheque No. 100162 for Kshs 174,000/- to Leonard Wainaina Njuguna, purporting it to be a good and valid banker's cheque drawn by Standard Chartered Bank of Kenya Limited, Kimathi Street.

A third count was that they jointly obtained goods by false pretences contrary to section 313 penal code, that on 25th day of January, 2006 at Uthiru in Nairobi within Nairobi area, jointly with others not before court, and with intent to defraud, obtained from Leonard Wainaina Nuuguna, 4 box speaker, 2 powered mixers, 4 microphone stands, 4 microphone and 1 roll speaker cable all valued at Kshs 164,000/- by falsely pretending that a certain Banker's cheque No. 100162 was a good and valid order for payment of Kshs 174,000/- to the said Leonard Wainaina Njuguna.

Upon hearing the case to its conclusion, the learned trial magistrate found appellant guilty on count 1, 2 and 3 and sentenced him to serve two years imprisonment on count 1 and three years imprisonment for count 2 and three years imprisonment for count 3 – the sentences were to run concurrently. The second accused was acquitted on all the counts. It is against this conviction and sentence that the appeal is lodged. The evidence presented to the trial court by PW1 Leonard Wainaina who runs a workshop at

Uthiru shopping centre known as Lenny's Electronics is that one day in mid January, a church choir member introduced to him one pastor Timothy Gitau (who is the appellant) and who needed preaching equipments namely 4 box speakers, 2 powered mixers, 4 microphones, 4 microphones stands and one roll of speakers cables – which would cost Kshs 164,000/-. Appellant said he was working for the Glory Restoration Church in Kikuyu and that the church would make payment for the equipments by cheque which would be issued to PW1 on the date of collecting the equipment. So on 25th January, 2006 appellant collected the goods and gave PW1 a cheque for Kshs 174,000/-. Appellant wore a PCEA Pastor's collar and had a Bible. Out of the sum in the cheque appellant said that Kshs 10,000/- was for the person who had introduced him to PW1 as a sign of appreciation. The bankers cheque No. 100162 for Kshs 174,000/- dated 24th January, 2006 was produced in court. The appellant presented a purchase order dated 25th January, 2006 (exhibit 2) which was addressed to PW1 and authorized by the appellant – the equipment and their prices were duly listed in the LPO . All the equipment bore the logo or serial number of Lenny's Electronics. PW1 banked the cheque at Equity Bank on Tom Mboya Street but was later informed that there were no funds in that account and eventually the bank manager called police and PW1 was arrested and remanded in police custody for 3 days. He was charged in court. Upon being released from police custody, using the cell phone number appellant was traced and turned out to be known by the names Peterson Njuguna Gikere in a church along Jogoo Road – appellant was preaching. The appellant was taken to Kabete Police station and they wrote an agreement in which he offered to return 75% of the equipment he had taken. Eventually two speakers were brought and PW1 was able to identify them because of a scratch mark he had made on them and they were unique in design and specification.

There was also the power mixer which PW1 recognized because he is the one who had made it. Eventually the case against PW1 was withdrawn and he was made a witness.

Peter Kinuthia Macharia (PW2) a music teacher at the Anglican Church in Uthiru stated that appellant introduced himself as Peter Timothy Gitau and that he wanted to buy music equipments and needed to know where he could make such purchase. Appellant promised to give PW2, Kshs 10,000/- as commission if he got him good instruments – that is how he eventually ended up introducing appellant to PW1. He heard PW1 asking appellant for a deposit but appellant said the elders would have to sit down and agree on when to write a cheque. PW1 was to give PW2 a commission of Kshs 5,000/- for getting him market. Appellant told PW2 that his commission of Kshs 10,000/- would be included in the cheque to be issued to PW1. Eventually when PW1 was arrested and PW2 was enlisted to try and help trace appellant, the phone calls all went on voice mail. PW2 also referred to appellant as Pastor.

Paul Ngure Kiragu(PW3) a Pastor at Revival Covenant Ministry in Ongata Rongai recalls in early March 2006, his church had a problem with the public address system and he was referred to the appellant who was introduced to him as Pastor Peter by one Pastor Thuita of C.F.F. Church. Appellant was said to be a supplier of instruments like the ones PW3 required and so after talking with appellant his needs, PW3 was duly informed by appellant that the equipment would cost him Kshs 250,000/- and the appellant was willing to sell to him the same. Eventually appellant informed PW3 that he did not have all the equipment PW3 required and they agreed on the following items and prices:-

Public system Kshs 45,000/-

Each speaker Kshs 25,000/- (Total 50,000)

2 microphones 2,400/-

Stands 2,400/-

The total cost was drawn up and they drew up an agreement exhibit 7 and signed by appellant, PW3 and their witness Pastor Thuita and PW3 received the instruments and were identified in court as exhibits. Eventually the instruments developed technical problems and then appellant wrote a message to PW3 requesting him to give the equipment to one Reuben saying he had been arrested as a result of someone writing him a fake cheque. Meanwhile PW3 gave back the equipment to Reuben (who turned out at an

agreed place) for onward transmission to the appellant.

Benson Kilonzo Makau (PW5) the validation manager at Standard Chartered Bank Head Office testified that on 27th January, 2006 cheque No. 100162 was presented to him and he passed it through the machine to detect its validity – the cheque which was payable to PW1 was rejected and he stated that it was an ordinary cheque which had been made to look like a Banker's cheque and had several defects among them being that –

- 1. There were erasures on the name of the drawer and on top of it was written “for and on behalf of Standard Chartered Bank.”**
- 2. The account number was for an ordinary account as bankers accounts have a long number beginning with 1C. and**
- 3. It bore the words “Not exceeding 3 million” which is not a feature for Standard Chartered Bankers Cheque.**

So when the cheque was rejected, PW5 forwarded it to the Investigations Department. PC Naftali Mwangi (PW6) who investigated this matter established that it was the appellant who had given the fake cheque to PW1, recovered the speakers and mixers which had been brought by second accused and even recovered the other instruments. He took specimen handwriting of the appellant, plus the agreements and LPO and sent all these documents to the Document Examiner for examination. Emmanuel Kenga (PW4) the document examiner confirmed receiving the documents and he was of the opinion that the questioned handwriting and the known handwriting were by the same hand. So appellant was charged.

Upon being placed on his defence appellant gave unsworn testimony and said he was a pastor with CFF church along Jogoo Road and also dealt in second hand clothes at Ngara Market. His evidence dwelt mainly on the day of his arrest and how he was accused of interfering with the relationship Stephen Dung (a brother to the complainant) had with a lady in the church. Appellant was asked to commit himself in writing, that he would pay compensation of Kshs 60,000/- for the losses incurred and when he declined, he was arrested and charged. Having listened to all the evidence presented to her, the learned trial magistrate in her judgment stated thus:-

“From the evidence on this case, this court is satisfied that accused 1 is the one who issued a fake cheque No. 100162 for Kshs 174,000/- to PW1 and obtained from PW1 goods as the purchase order he also issued to PW1.”

The learned trial magistrate also noted that even the evidence of PW3, Paul Ngure confirmed that appellant sold to him the equipments which later turned out to be stolen and appellant, himself, told PW3 to return the goods for collection. Further that PW3 confirmed returning the instruments which had been sold to him by the appellant. She then summed it up thus:-

“It is therefore proved that accused 1 Peterson Njuguna Gikere alias Pastor Timothy Gitau approached PW1 pretending to be Pastor Timothy Gitau and managed to obtain goods from PW1 using a fake document called a cheque. Accused 1 must be knowing where he obtained the cheque from.”

The learned trial magistrate held that both the cheque and LPO were not genuine and that appellant had not even stated that he was a Pastor at Glory Restoration Centre.

It is against this finding that the appellant appeals on grounds that:-

- 1. The learned trial magistrate erred by shifting the burden of proof from the prosecution to the accused person.**
- 2. The learned trial magistrate erred in failing to observe that the prosecution failed to call crucial**

witnesses mentioned by PW1, 2 and 4.

3. *The prosecution failed to call the arresting officer as a witness.*
4. *The learned trial magistrate erred in accepting conflicting evidence from PW1 and PW2 as regards his telephone number and that prosecution failed to call an expert from Celtel to testify on the print out mentioned in court by PW1 so that the court would know the truth about the telephone number used.*
5. *That the learned trial magistrate erred in accepting a defective sale agreement and that the same was a photocopy without his identification.*
6. *The learned trial magistrate erred by relying on the evidence of PW4(the document examiner, which was a mere operator and not binding on the trial court – he referred to the decision in High Court Criminal Appeal No. 9 of 2003 Christopher Waruki versus Republic.*
7. *It was never proved that appellant had given accused the goods.*
8. *Appellant's Constitutional rights were infringed as he was not provided with witness statements as had been ordered by the trial court.*

In his submissions to the court, the appellant stated that vital documents like a counter receipt, invoice, delivery note, were not produced as exhibit to confirm that there was any transaction. Appellant further expounds on the question of crucial witnesses not called saying PW1 mentioned Stephen Ndungu appellant's father (that these witnesses were mentioned in the agreement) yet not called. Also that PW3 mentioned Pastor Thuita yet he too did not testify and the same goes for the taxi man and Reuben. I think the insistence on calling Reuben is mischievous since there is evidence from PW3 that Reuben eventually never turned up and he could well be accused 2 who is known as Ezekiel Kungu Guchu or a character created by appellant to pose as Reuben. Appellant also complained that he was not brought to court within the 24 hours period – having been arrested on 9th April, 2006 and taken to court on 13th April, 2006. However this is an afterthought which was not included in his grounds of appeal and comes as an ambush to the respondent, so that they would not be able to adequately respond to this allegation – indeed this was the approach adopted by the court of appeal as the case of Eliud Njeru versus Republic CA 182 of 2006. Mr Makura the learned State Counsel terms it as belated – I agree.

The appeal is opposed and Mr Makura, the learned State Counsel submitted that appellant upon realizing that his misdeeds had caught up with him agreed to return the equipments. Further that PW3 confirmed that some of the public address systems were sold to him by the appellant and some were recovered from him (PW3). Mr Makura also points out that the authenticity of the cheque was tested and it proved to be fake. As regards recovery of the instruments, the learned State Counsel submits that PW6 carried out thorough investigations and his evidence corroborated that of PW3 especially as regards the recovery of the instruments. It is to be noted that PW1 observed the instruments and pointed out erasures of the logo or serial number on the same.

I have read through the trial court's record, and re-evaluated the evidence, I do not detect any shifting of the burden of proof from the prosecution to the appellant – indeed the learned trial magistrate considered every aspect of each charge from the evidence adduced and came to the conclusion that it pointed to the appellant. It is true that certain individuals were mentioned in the testimony of witnesses yet not called as witnesses especially Pastor Thuita and the Taxi driver. Was the failure to call them fatal? Pastor Thuita is referred to only in terms of having introduced the appellant to PW3 – his failing to come as a witness make no material impact on the prosecution case – he was a linkman but the person appellant dealt with subsequently was PW1 and PW3 and their evidence was direct evidence which was consistent. As for the taxi man what difference would his evidence make? That he was hired to carry the instruments? But this fact is confirmed by the evidence of the subsequent evidence of PW3 as regards supply of goods by the appellant and also recovery. PW6 the police officer – so I find no prejudice occasioned by not calling them. Actually I would not regard them as crucial witnesses.

As regards the non production of receipts or invoices or delivery notes, PW1 on cross examination confirmed that appellant took a receipt. If those instruments had only ended in the appellants hands then the absence of a receipt would have been fatal. However there are other circumstantial evidence which clearly point at the appellant as the culprit – starting with evidence of PW2 who took him to PW1 and he was present even as he made orders and undertook to make payments, the evidence of PW3 who got the goods from him and subsequently had to return them – that buttressed the prosecution case and sealed any loophole that the absence of a receipt may have created.

As regards the contradiction in the evidence of PW1 and PW2 involving the correct cell phone number attributed to the appellant – I consider that insignificant indeed that was not the basis of the learned trial magistrate’s finding against the appellant. The appellant had interacted frequently with PW1 and PW2 and confirmed that he was the person who had introduced himself as Pastor Gitau – they recognized and identified him by his person not the telephone number and so that issue is of no consequence. Whether the sale agreement was defective because it was not witnessed by a magistrate or a senior police officer is also an issue of concern to appellant. I except that the defective agreement the appellant is referring to is exhibit 8 where he had agreed to return 75% of the goods to the complainant. Technically that would amount to a confession which would be invalid under the Evidence Act since it was obtained from appellant when he was already under arrest. However that is not the only evidence the learned trial magistrate relied on, so that even if that portion of the evidence was to be disregarded, one would still be left with the totality of the prime witnesses evidence from the introduction by PW2, the request for supply of instruments by PW3, the bad cheque the subsequent return/recovery and the expert opinion evidence by PW4 which all pointed at the appellant’s involvement. It is also instructive to note that it is not only the evidence of the document examiner that the learned trial magistrate relied on in making her conclusion, she took the sum total of events, conduct and encounters in making her decision and it mattered not that the goods were not recovered from appellant – in the end he was the hand behind their movement. Was the appellant prejudiced under the provisions of section 77 because he was not given witness statements and so he was not able to adequately prepare? The record shows that when the matter came up for hearing at 12.00p.m., the appellant spoke thus:-

“I have just been given statements. I need time to study them. I am not ready now.

Whereupon the learned trial magistrate recorded:-

“Adjournment to 2.00p.m.”

When the hearing resumed at 3.00p.m. the record does not show appellant saying he was still not ready and infact the matter proceeded without as much as a whimper in that regard.

Consequently that limb of the appeal has no leg on which to stand. The upshot is that the appeal has no merit and is dismissed. The conviction is upheld and sentence confirmed.

Delivered and dated at Nairobi this 28th day of May, 2006 at Nairobi.

H.A OMONDI

JUDGE.