



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO 904 OF 2001

(From Original Conviction and Sentence in Criminal Case no 1014 of 1999
of the C. Magistrates Court at Nairobi)

STANLEY NJOROGE NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with several offences seven counts in all ranging from stealing forgery, uttering a false document, attempting to obtain and obtaining money by false pretences. He denied all those offences.

After a full trial, the appellant was convicted on counts 3,4 and seven. Upon conviction, in count three he was fined Kshs. 20,000 in default to serve one year imprisonment, in count four he was fined Kshs. 100,000/- in default to serve one year imprisonment and in count seven he was fined kshs 10,000 in default six months imprisonment. This is an appeal against both he said conviction and sentence.

Count three related to the offence of uttering a false document c/s 353 of the penal Code. The appellant was said to have knowingly and fraudulently uttered a certain forged cheque no. 001556 for Kshs 568,000 to one Violet Njoki Ndegwa a cashier at Barclays Bank Accra Road Branch purporting it to be genuine and good order for payment to Theley Agencies.

Count four related to obtaining money by false pretences. It was alleged that the appellant, with intent to defraud obtained from the same violet Njoki Ndegwa a cashier at the same bank Kshs. 568,000 by pretending that the cheque which was the subject matter in count three was valid and good order for payment to theley agencies.

Count seven related to attempting to obtain money by false pretences. The appellant was said to have attempted to obtain Kshs. 15,000 from the same cashier with intent to defraud by falsely pretending that a certain cheque NO. 001572 was good and valid for payment.

Violet Njoki Ndegwa before whom the appellant was alleged to have committed all the offences upon which he was convicted was not called to give evidence. There is no one else in the entire prosecution case who could be substituted for her position. She was the most crucial witness and no reason has been advanced for this grave omission. This was fatal to the prosecution. On that alone the prosecution case must crumble for the pillars do not exist to hold the same.

Further to the foregoing it is very clear that he learned trial magistrate shifted burden of proof to the appellant. This is clear in the language used by the learned trial magistrate at pages J3 and J4. This amounted to a miscarriage of justice.

Finally, this case was heard by two magistrates. The provisions of section 200 of the Criminal procedure Code cap 75 Laws of Kenya are clear and unambiguous. In this particular case Section 200(3) was applicable. The learned trial magistrate who finalized the trial found some evidence recorded by her predecessor. It is mandatory that he succeeding magistrate shall inform the accused of he right to demand that nay witness be re summoned and re heard. This was not done in the instant case. The omission once again is fatal.

From the foregoing reasons, this appeal must succeed. Accordingly the convictions quashed and sentences set aside. In the event the appellant paid the fines imposed, the same should be refunded to him. If he is serving prison sentences in default, I order that he be released forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of November, 2001.

A. MBOGHOLI MSAGHA

JUDGE

Mr Njoka for appellant

Mr Obuor for the state