



**Gana v Republic (Criminal Appeal 62 of 2018)
[2023] KEHC 23524 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 62 OF 2018
RM MWONGO, J
OCTOBER 12, 2023**

BETWEEN

JOSEPH NJOROGE GANA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. Y.M. Barasa (RM) in Chief Magistrate's Court at Kerugoya Criminal Case No. No. 723 of 2016 delivered on 15th March, 2018)

JUDGMENT

1. The Appellant was convicted for giving false information to CID Joseph Ayoma Mutesa employed in the Public Service contrary to Section 129(a) of the Penal Code. He served the sentence meted and is not challenging the sentence.
2. He also faced another count of obtaining money by false pretenses for which he was acquitted. He is not challenging this acquittal.
3. The appellant's appeal is against the conviction in count 1. The particulars of that count as stated in the charge were that:

' On October 28, 2015 at Kirinyaga CID office within Kirinyaga County, the accused person informed Joseph Ayoma Mutesa a person employed in the public service as a police officer that his signatures had been forged in an agreement that was intended to defraud him of his land parcel No Ngariama/Rung'eto/2697 information he knew to be false intending thereby to cause the said Joseph Ayoma Mutesa to investigate, which he ought not to have done if the true state of facts respecting which such information was given had been known to him.'



4. The Judgment of the Lower Court found that Joseph Ayoma Mutesa was a police corporal attached to DCIO, thus a public officer. Further the learned magistrate found that the accused made a report that some people forged his signature in an agreement and wanted to defraud him his land. The officer recorded the statement, took specimen signatures to the document examiner, who noted that the signature was authored by the accused person.
5. The evidence of PW6 Joseph Mutesa was that on October 28, 2016 at 5.00 pm he was in the office. He was then introduced to the accused accompanied by his mother. He took the accused's statement and took the number of the person he alleged to have been involved with.
6. In cross-examination PW6 reiterated that he took the accused's statements on 30th October. He also testified that on that date it was the first time he met the accused.
7. The complaint of the appellant is that the trial magistrate in his judgment was making reference to evidence relative to October 28, 2016, when in fact the appellant expressly submitted that he never made any complaint on October 28, 2015.
8. In his statement the accused denied the charges and said that:

' For count one 1 reported the case in 2015, I don't know about the charge.'
9. The appellant argues that the trial magistrate in his judgment at Page 11 noted that PW6 testified and confirmed that:

' On October 28, 2016 he was in the office at around 5.00 pm at Kerugoya CID office. His evidence that he was a CID Officer at Kerugoya CID office on October 28, 2016 when the offence is said to have occurred wasn't challenged in cross examination. This court also takes judicial notice of the fact that the state will normally verify the witnesses who come to court to testify and it is therefore unlikely that an imposter would be allowed to take the stand.

My finding is that the prosecution has been able to prove that Joseph Ayoma Mutiso was employed in the public service at the time the offence was said to have been committed.'
10. Now it is clear that there is a year's variance between the date in the charge sheet which is October 28, 2015, and the date on which the officer testified that he was in the office when he received the accused's information, namely October 28, 2016.
11. On that basis the appellant argues that the trial magistrate erred in making a finding of conviction against the weight of the evidence.
12. The prosecution, in their submissions on appeal have not addressed anomaly in the date in the charge sheet relative to the evidence. Clearly, all the other witnesses spoke of the offence in terms of October 2016. The charge sheet reads October 28, 2015.
13. The prosecution has not even bothered to point out whether there was a clerical error or a slip in the charge sheet in respect of the charge on false information. They have not suggested that the charge sheet was defective or that the defect was curable or that the defect was not fatally defective.



14. The prosecution has not argued that Section 382 of the [CPC](#) gives guidance on whether, even with such defect, justice could still be done. Section 382 CPC provides:
- ' Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint or summons.'
15. Indeed, that prosecution re-emphasized the evidence given in support of the charge. At page 3 of their submissions, the prosecution stated:
- ' PW6 No 713xx (CP Joseph Mutesa) testified that he was at the police when he was introduced to the appellant....
- That the Appellant told him that some people had forged an agreement and wanted to defraud his land and he recorded his statement.'
16. This earlier pointed out, the trial magistrate accepted the evidence of PW6 to the effect (at Page 6 Judgment):
- ' That on October 28, 2016 he was in office at CID office in Kerugoya when he was introduced to the Accused person. That the accused person told him that some people had forged an agreement and they wanted to defraud him his land.'
17. The trial magistrate noted that Accused's submission that he:
- ' ...denied making any complaint to the police on October 28, 2015. That no evidence was adduced to support that count...'
18. In his analysis of the evidence the trial magistrate again noted that the particulars of the count indicated the offence was committed on October 28, 2015. At Page 11 of the Judgment the learned magistrate stated:
- ' When he testified in court, he introduced himself as No 713xx Corp Joseph Mutesa attached at JKIA DCIO. He stated that on October 28, 2016 he was in the office at around 5.00 pm.
- His evidence that he was a CID officer at Kerugoya CID office on October 28, 2016 when the offence is said to have occurred wasn't challenged in cross-examination...
- My finding is that the prosecution has been able to prove that Joseph Ayoma Mutesa was employed in the public service at the time the offence was said to have been committed.'
19. Clearly, the evidence did not lead to the conclusion reached by the trial court. In response to the appeal the prosecution reasserts the evidence as having proved the offence as set out in the charge.
20. I am aware of the holding in [Benard Ombuna v R \[2019\] eKLR](#) where the Court of appeal stated:
- 'In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put an appropriate defence.'



21. It is trite law that parties are bound by their pleadings and submissions. In this case, there is no claim that the charge sheet was defective. The charge sheet particularises a date October 28, 2015. The Accused put up a defence that on October 28, 2015 he did not give any false information to the police officer.
22. On his part the police officer's evidence was that the false information was given to him on October 28, 2016. In cross-examination he reiterated that date. At no point was any correction made or alleged with regard to the charge sheet.
23. Where, on in this case, appellant alleges that the evidence does not or prove the offence as stated in the charge, and there is not assertion by the prosecution or any party that the charge sheet is defective, then, in my view, the rules for construing defective charge sheets cannot be invoked.
24. Accordingly, on this technicality, I am unable to invoke the principles on construing defective charge sheets. I consider the evidence given in court as intended to prove the charge, which in this case, it could not.
25. I am prepared to accept the technicality on the further basis that Section 382 CPC was not invoked, even on appeal. Strictly speaking the evidence of PW6 did not and could not, prove that the accused gave false information on October 28, 2015. The accused is entitled to the benefit of the doubt on this appeal.
26. Accordingly on this technicality, I uphold the appeal and set aside the conviction. The appellant was not challenging the sentence which he has already served in any event.
27. Orders accordingly.

DATED AT KERUGOYA THIS 12TH DAY OF OCTOBER, 2023

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Appellant not Present.
2. Muchira for Appellant
3. Mamba for State
4. Murage - Court Assistant

