



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Republic (Criminal Appeal 74 of 2019)
[2021] KEHC 307 (KLR) (11 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 74 OF 2019
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

MERCY WANJIRU KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence of Hon.T.W Murigi, CM dated 5th December 2018 at the Magistrate's Court at Thika, Criminal Case No. 853 of 2012)

JUDGMENT

1. On 27th February 2012, the Appellant was arraigned in court and charged as follows:

Count 1

Obtaining money by false pretences contrary to Section 313 of the *Penal Code* (Chapter 63 of the Laws of Kenya)

It was alleged that the Appellant, on the 26th day of February 2011, in Mombasa town, within Mombasa County, intended to defraud and obtained KES 500,000.00 from Cecilia Wamaitha Mwangi by falsely pretending that she was in a position to refund the same after selling some goods, a fact the Appellant knew was false

Count 2

Issuing a bad cheque contrary to section 316 A(1)(a)(4) of the Penal Code

It was alleged that the Appellant, on the 30th day of November 2011 in Thika town within Kiambu County issued a Barclays Bank cheque No, 100313 for KES 250,000.00 to Cecilia Wamaitha Mwangi knowing that the account had insufficient funds

Count 3



Issuing a bad cheque contrary to section 316A(1)(c)(4) of the Penal Code

It was alleged that on the 30th day of November 2011, in Thika town within Kiambu County, the Appellant issued a Barclays Bank cheque No. 100314 for KES 125,000.00 to Cecilia Wamaitha Mwangi having previously instructed the bank not to honour it.

2. After hearing the case, the learned trial magistrate found that the Respondent had proved its case against the Appellant on all the counts and thus convicted and sentenced the Appellant to a fine of KES 100,000.00 and in default eight months' imprisonment in respect of Count I and; a fine of KES 20,000.00 in each of the other Counts and in default 4 months' imprisonment and that the custodial sentences were run consecutively if they were to be served.
3. The Appellant is dissatisfied with this decision and has appealed against both the conviction and sentence and seeks that the same be set aside. Her appeal is set out in the Petition of Appeal dated 30th September 2019 and is supported by the written and oral submissions of her counsel. The Respondent opposed the appeal through the oral submissions of its counsel.
4. In determining this appeal, I am mindful that this is the first appellate court where the Court of Appeal of *East Africa in Okeno v Republic* [1972] EA. 32, laid down what its duty is; It is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court and bearing in mind that it neither saw nor heard the witnesses testify.
5. In light of the above, I will rehash the evidence on record. Cecilia Wamaitha Mwangi (PW 1) testified that she lent the Appellant KES 500,000.00 to enable her buy a motor vehicle on the promise that the Appellant will refund the money later. However, the Appellant never repaid the money. She however issued PW 1 with cheques of KES 250,000.00 and KES 125,000.00 that were dishonoured. The Investigating Officer, PC Odolo Cheboi (PW 2), testified that he received the two cheques from PW 1 that had been dishonoured due to insufficient funds and withdrawal by the Appellant.
6. In her unsworn testimony, the Appellant (DW 1) stated that the cheques she issued to PW 1 were for the purchase of plots and not a car and that when she realized the plots were not genuine she stopped the payment of the cheques.
7. The main issue for determination in this appeal is whether the trial court was right to find that the Appellant had falsely obtained money from PW 1 and issued her with bad cheques. The offence of obtaining by false pretence under section 313 of the Penal Code is defined as follows;

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 misdemeanor and is liable to imprisonment for three years.

8. It follows that some of the salient ingredients constituting the charge are; Obtaining something capable of being stolen; Obtaining it through a false pretence and; Obtaining it with intention to defraud (see *Stephen Ndungwa v Republic* MKN HCCRA No. 21B of 2018 [2020] eKLR and *Boniface Kimani Karanja v Republic* NRB HCCRA No. 52 of 2018 [2019] eKLR). Section 312 of the Penal Code defines false pretence as, "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." It has also been held that the representation must be either of a past or present fact and not a future fact (see *R v Dent* [1955] 2 ALL ER 806 and *Joseph Wafukho v Republic* BGM HCCRA No. 200 of 2012 [2014] eKLR).



9. The particulars of the charge against the Appellant in respect of the charge of obtaining by false pretences was that she obtained KES 500,000.00 from PW 1, “by falsely pretending that she was in a position to refund the same after selling some goods, fact she knew to be false.”
10. The testimony by PW 1 is that she gave the Appellant KES 500,000.00 to purchase a car in Mombasa which she promised to refund this amount the moment they got back to Thika. Contrary to the charge, there is no evidence to show that the Appellant would refund the money after selling some goods as alleged in the charge. The nature of representation, as set out in the charge, is a material fact to be proved. In my view, therefore, the trial magistrate did not pay attention to the material facts set out in the charge which were not proved. Neither of the parties testified that the Appellant stated that she would repay KES 500,000.00 after selling some goods. Simply stated, the charge was not proved. It is apparent the transaction was simply a loan that was not paid and which was also devoid of an intent to defraud.
11. The Appellant does not deny that she issued bad cheques. Section 316(A)(1)(a) and (c) of the Penal Code states:
 316. Bad Cheques
 - (1) Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person –
 - a. knows that the account has insufficient funds;
 - b.
 - c. has previously instructed the bank or other institution at which the account is held not to honour the cheque.
 - (2)
 - (3)
 - (4) A person who is guilty of a misdemeanor under this section is liable to a fine not exceeding fifty thousand shilling, or to imprisonment for a term not exceeding one year, or to both.
12. The evidence is clear that Cheque No. 100313 for KES 250,000.00 dated 30.11.2021 was dishonoured due to insufficient funds while Cheque No. 100314 for KES. 125,000.00 dated 30th December 2011 was dishonoured as payment was stopped by the Appellant. The prosecution proved that the Appellant was guilty of issuing bad cheques under section 316(A)(1)(a) and (c) of the Penal Code hence I affirm that conviction on Counts 2 and 3.
13. Turning to the sentence on Count 2 and 3, the Appellant was sentenced to a fine of KES. 20,000.00 on both counts and in default, 4 month’s imprisonment. The Appellant has not shown that the sentence imposed is harsh or excessive or that the trial magistrate failed to take into account material facts. I affirm the sentence.
14. For the reasons stated above, I affirm the conviction and sentence on Count 2 and 3. I allow the appeal only to the extent that I quash the conviction and sentence on Count 1.

SIGNED AT NAIROBI

D.S. MAJANJA



JUDGE

DATED AND DELIVERED AT KIAMBU THIS 11TH DAY OF NOVEMBER 2021.

M. KASANGO

JUDGE

Ms Mwangi instructed by Waithira Mwangi and Company Advocates for the Appellant.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.

