



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.193 OF 2018**

*(An Appeal arising out of the conviction and sentence of Hon. A.R. Kithinji (SPM) delivered on 14<sup>th</sup> October 2017 in Makadara Criminal Case No.4063 of 2009)*

**BONIFACE NDIRANGU NJUGUNA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Boniface Ndirangu Njuguna was charged on the 1<sup>st</sup> count with the offence of **obtaining by false pretence** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 22<sup>nd</sup> August 2009 at Cateres Milling Company Limited, Industrial Area in Nairobi County, with the intent to defraud, he obtained 90 bags of Mpishi Maize Meal valued at Kshs.265,500/- by falsely pretending that he was in a position to pay, a fact he knew to be false. He was further charged in the 2<sup>nd</sup> count with the offence of **issuing a bad cheque** contrary to **Section 316(1)(a)** of the **Penal Code**. The particulars of the offence were that on 7<sup>th</sup> September 2009 at Cateres Milling Company Limited, Industrial Area in Nairobi County, the Appellant issued a cheque of the sum of Kshs.265,500/- to Cateres Milling Company Limited knowing that his bank account had insufficient funds for the said cheque to be honoured. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged on the 1<sup>st</sup> count. He was sentenced to pay a fine of Kshs.50,000/- or in default serve six (6) months imprisonment. In respect of the 2<sup>nd</sup> count, he was acquitted. The Appellant paid the fine. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for convicting him on the basis of a charge which had been withdrawn. He took issue with the fact that the trial magistrate failed to evaluate the entirety of the evidence that was adduced during trial and therefore arrived at the erroneous decision that the prosecution had established its case against him. He was of the view that the evidence tendered did not establish the charge that was brought against him. The Appellant was aggrieved that he had been convicted on an issue that was essentially civil in nature. He was of the view that the criminal process had been unprocedurally used by the prosecution as a means to settle a civil case. He was aggrieved that the closing submission that he filed in court after the close of the case was not considered by the trial court before it reached the impugned decision. He faulted the trial magistrate for misapplying the law and shifting the burden of proof to the defence. He was finally aggrieved that his defence was not considered before the trial court reached the impugned verdict. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him. He particularly prayed that the fine that he had paid be refunded.

During the hearing of the appeal, this court heard oral rival submission made by the Appellant, who was acting in person and by Ms. Chege for the State. The Appellant submitted that he was initially charged with the current offence and the offence of issuing a bad cheque. The current offence was withdrawn. The case that proceeded was the one of issuing a bad cheque. He was surprised when at the conclusion of the case, he was convicted in respect of a charge that had been withdrawn. He insisted that he was irregularly convicted on a non-existent charge and therefore prayed the appeal be allowed. He prayed that the court orders the fine that he paid be refunded.

Ms. Chege for the State opposed the appeal. While conceding that there was initially an intention to have the charge in respect of obtaining by false pretences withdrawn, the intention was not actualized in the court record. She was of the view that the prosecution and the court erred in proceeding with the case on the basis of a withdrawn charge if the spirit of what the parties intended to do was to be taken into account. Since the Applicant was acquitted of the charge of **issuing a bad cheque**, then he ought not to have been convicted in respect of a count which had been withdrawn. She insisted that the trial court was *functus officio* when it convicted the Appellant. She urged the court to exercise its appellate discretion and accordingly pronounce itself.

As the first appellate court, this court is required to look at the evidence adduced before the trial court afresh, re-evaluate and re-analyze it with a view to reaching its own independent conclusion always bearing in mind that it never had the opportunity to see or hear the witnesses as they testified. (See **Okeno vs Republic [1972] EA 32**). The issue for determination by this court, is whether the Appellant established a

case for this court to allow his appeal on the basis of the grounds of appeal that he has placed before this court.

There is only one issue that came to the fore for determination by this court which will determine this appeal. The issue is whether the prosecution had withdrawn the charge against the Appellant earlier before the Appellant was convicted of the same charge that was withdrawn. The court record of 15<sup>th</sup> April 2015, reflects as follows:

***“Before Hon. E. K. Nyutu, Ag. PM***

***Prosecutor CI Bahati***

***Court clerk Bishar***

***Accused on bond present***

***Interpretation English/Kiswahili***

***Waiganjo for accused***

***Waiganjo – The appeal has not yet been determined but directions have already been given.***

***Hon. E.K. NYUTU, Ag. PM***

***Prosecutor – We wanted to proceed with this case in respect of count II.***

***Prosecutor – In the circumstances I wish to withdraw count 1 under section 87(a) CPC***

***Waiganjo – No objection.***

***Hon. E.K. NYUTU, Ag. PM***

***Court – Count 1 is withdrawn under section 87(a) CPC. Matter to proceed on count II.***

***Hon. E.K. NYUTU, Ag. PM”***

It is clear from the foregoing that the charge in respect of the 1<sup>st</sup> count was withdrawn and therefore the trial magistrate erred when he proceeded to try the Appellant in respect of the same. The trial court had no jurisdiction to try the Appellant on the basis of a charge that had been withdrawn. Once the prosecution withdrew the charge under **Section 87(a)** of the **Criminal Procedure Code**, and once the withdrawal was indorsed by the court, the said charge ceased to exist. The effect of the withdrawal is that the Appellant could not be tried of the said charge. It is evident that the trial court fell in error when it proceeded with the case as if the withdrawn charge was still alive. The Appellant has a case when he complains that he was convicted on the basis of a non-existence charge. Ms. Chege for the State essentially conceded to the appeal on the basis of this error apparent on the face of the record of the trial court.

In the premises therefore, the Appellant’s appeal is hereby allowed. His conviction is quashed. He is acquitted of the charge. The sentence that was imposed on him is set aside. The fine that the Appellant paid of Kshs.50,000/- is ordered refunded to him. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MAY 2020**

**L. KIMARU**

**JUDGE**