



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL APPEAL NO. 30 OF 2017**

*(From the Original Conviction and Sentence in Criminal Case No. 260 of 2015*

*of Senior Resident's Magistrate's Court at Baricho – E. H. KEAGO)*

**FLORAL GAKENIA KABUGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant **Flora Gakenia Kabugi** was convicted for the offence of cheating **Contrary to Section 315 of the Penal Code** and was ordered to pay a fine of Kshs; 100,000/= or serve one year imprisonment in default, by the Principal Magistrate at Baricho Criminal Case No. 260 of 2015.

2. The Appellant was dissatisfied with both the conviction and sentence and filed this appeal raising the following grounds;

(i) ***That there was no exhibit recovered in possession of the appellant at the time of arrest.***

(ii) ***That there was no documentary evidence produced in court to prove that there was money transaction between the appellant and the complainant to link the appellant in the alleged offence.***

(iii) ***That there was no inventory form drawn by the arresting officer to support that the alleged exhibits were legally recovered from the appellant as it was alleged.***

(iv) ***That the complainant did not prove by producing any documentary evidence that she was the commercial producer of alleged mushroom and no any other evidence ( permit) was produced in court to prove that the complainant had ever been a farmer producing the alleged product.***

(v) ***That there was no agreement or receipt produced as evidence/exhibit that there was business transaction between the complainant and the appellant.***

(vi) ***That the exhibits produced in court were empty and broken containers hence the same cannot prove that there was fertilizer recovered or supplied to the complainant as alleged.***

(vii) ***That there was no prove produced in court that the appellant and the complainant had ever communicated on phone/letter during the alleged offence.***

(viii) ***That the complaint did not prove documentarily that she had over paid any money to the appellant as alleged.***

(ix) ***That the evidence produced in court by the prosecution witness was not corroborative and it had contradictions.***

(x) ***That some of the witnesses who testified in court were coached by the investigating officer to testify in court.***

(xi) ***That trial Magistrate failed to consider that the alleged fertilizer was proved by government chemist as fertilizer***

*in court.*

3. The appellant prays that the appeal be allowed, conviction be quashed and the fine paid be refunded.
4. The respondent opposed the appeal and prayed that it be dismissed.
5. The Court gave directions that the appeal proceeds by way of written submissions. The appellant filed submissions and a reply to the submission by the state. The state filed submissions through Mr. Geoffrey Obiri Assistant Director of Public Prosecutions.
6. The appellant submits that she was the 1<sup>st</sup> accused in the proceedings before the trial magistrate. She chose to argue all the eleven grounds together. She disputes her involvement in the Commission of the offence. That the prosecution did not prove the charge against her beyond any reasonable doubts. That there were numerous contradictions which the trial Magistrate should have resolved in her favour.
7. The appellant further submits that she was subjected to double jeopardy as she was fined and also ordered to refund to the complainant that which was swindled. The appellant further submits that no inventory of the recovered items was made by the officers who recovered the foliar fertilizer. That the recovered items were not photographed at the scene.
8. It is further submitted that no documentary evidence was produced to prove that the complainant had withdrawn money from the bank. It is further submitted that the evidence was contradictory and lacked corroboration.
9. For the state it was submitted that the prosecution tendered overwhelming evidence which proved the charge beyond any reasonable doubts. He urged the court to dismiss the appeal.

**The brief facts of the case are that:**

On 17<sup>th</sup> February, 2015 the complainant **Mary Wambui Ndegwa (PW1)** who was a scrap metal dealer in Kagio Town was called by one Cyrus Murage Gakugi who told her that he was selling fertilizer which is used for mushrooms. He told her that, there was someone who would bring three bottles of the fertilizer, which was being sold at Kshs; 10,000/= on wholesale price, and KShs; 14,000/= on retail price.

10. After some time three people went in a motor-cycle and they were to collect the fertilizer. The three asked her why they were only three bottles, yet they expected there to be six bottles, she called Cyrus and said that they would pay Kshs; 39,000/=, which they paid via Mpesa.
11. PW-1- realized that it was good business, and she called Kariuki and asked him to bring 20 pieces which he did. She paid Kshs; 200,000/= while in her office, with one Peter Chomba, she then called the customer, and the customer said, there should have been 36 pieces. She called Kariuki again, and told him to bring some more fertilizer.
12. The appellant who is Flora took seven pieces to her the complainant, and she paid Kshs; 45,000/= in cash and Kshs:45,000/= via Mpesa. By then she had reported the matter to the Police, and the appellant was arrested. She led the police to where other suspects were, Police recovered seven bottles of fertilizer which the appellant had delivered, and the other suspects, had brought nine bottles of fertilizer, which were taken by the police. The bottles contained some black substance, the three were then charged. The Kshs; 45,000/= which she paid to the appellant was not recovered.

The appellant had denied the charge in an unsworn defence.

13. When the matter came up for directions, the parties opted to proceed by way of written submissions, in her submissions, the appellant, chose to argue all the grounds of appeal together. She submits that, it is not disputed that the complainant was cheated as alleged and recorded in the charge sheet, however central dispute involvement in committing the alleged cheating, that led the complainant to lose money.

He submits that the prosecution did not prove the case against her beyond reasonable doubt.

14. The appellant submits that, she was sentenced to pay a fine of Kshs; 100,000/= and in default serve one year imprisonment, and In addition the trial magistrate ordered that the amounts which the complainant was swindled be refunded, and in default the complainant to pursue jail remedy.
15. She further submits there were discrepancies and contradictions in the prosecution case, which raised substantial doubt, which the trial magistrate should have given to her credit, and should have considered in her favor.
16. She submits that the complainant, did not produce any permit to prove that she was operating the alleged scrap metal business, or the fake fertilizer. That to the best of her knowledge, the fertilizer is sold at the agro vet shop and not scrap metal site, as the PW1 alleged.
17. The evidence of PW-1- could not be relied on, for failure to produce supporting documents, that she was operating a scrap metal business.

18. The appellant submits that; the trial magistrate imposed double punishment for the same offence, by imposing a fine of Kshs; 100,000 and in default one year imprisonment, and ordering the appellant to refund the amount swindled.

19. She submits that, the Trial Magistrate 'Judgment' is double jeopardy. That the appellant is punished twice for the same offence. The appellant paid a fine of Kshs; 100,000/=, and then lodged this appeal to the High Court.

20. That the prosecution failed to follow the right procedure, during the recovery of the alleged fertilizer from the appellant, as they did not record an inventory. That it was the duty of the arresting officer, and recording officer to record all the items recovered in the inventory form and the said form signed by Appellant, the arresting officer, and independent witness, who could have witnessed the alleged recovery, in addition the prosecution could have taken photographs of the items that were alleged to have been recovered as supporting documents.

21. That the prosecution just testified verbally in court, without any documentary evidence, cannot support the charge.

22. The appellant further submits that, the recovery of the exhibit, was unprocedural. The appellant takes issue of the fact that, the scene of crime was not photographed. That the Investigating Officer failed to take photographs of the bottles of fertilizer, while in the car booth 'sic' for there were no crime scene nearby. That the trial Magistrate also noted in his judgment, that there was failure, by the investigating officer to record inventory form, to support recovery, of the alleged bottle of Foliar fertilizer and no photograph was taken at crime scene and produced before court, to support and proof that the alleged bottles of fertilizer were recovered from the booth "sic" of the motor-vehicle.

23. The appellant submits that, there was no supporting document, to proof that the appellant had received any payment from the complainant as alleged. She submits that, it was important for the prosecution to produce payment receipts issued by the appellant to acknowledge the transaction of selling and buying of alleged foliar fertilizer, or invoice record to acknowledge delivery of the alleged foliar fertilizer. She has urged the court, to dismiss the evidence of PW1, on the ground that, it lacks formal transaction documentary evidence to support the charge.

24. The appellant submits that the evidence was contradictory, and was not corroborated. That she submits that; there is contradiction about the business, that was conducted between third accused and the complainant. That the appellant admitted that she received Kshs; 25,000/= from Peter Chomba in form of a loan, and she was to refund back.

25. She further submits that there was contradiction, on the source of the Kshs; 25,000/=, that was sent to the appellant, whereby the complainant testified that, she sent the money to her. On the other hand, she submits that PW-2- Peter Chomba testified that, she is the one who sent the Kshs; 25,000/= to the appellant. He submits that no money was transacted between her and the complainant.

26. The appellant further submits that there was contradiction on the amount in cash, that the complainant alleged to have paid. She submits that, the evidence does not support the charge, the complainant failed to adduce any supporting document, to proof that she was transacting business with the appellant. There was contradiction, in the evidence of the witnesses who testified and that the investigating officer failed to record an inventory to support a recovery of the alleged items.

She prays that the appeal be allowed and the conviction be quashed.

27. For the Respondents submissions were filed by: G. Obiri Assistant Director of Public Prosecution. He submits that the prosecution opposes the appeal, as they proofed their case beyond any reasonable doubt. **That Section 315 of The Penal Code** provides as follows;

*"Any person who by means of any fraudulent trick or device 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, or to pay or to deliver to any person, any money or goods or greater sum of money, or greater quantity of goods, than he would have paid or delivered but for such trick or device is guilty of a misdemeanour or liable to imprisonment to three years"*

**From the above information the prosecution is required to proof that;**

a. *That a person uses a fraudulent means to obtain something capable of being stolen.*

b. *The person cheating induces the other person*

c. *The person cheated pays some money for the goods.*

28. That from the testimony of PW1 the Appellant is the one who delivered, seven pieces of bottles of fertilizer to her, and that she was paid Kshs; 70,000/=. That PW1 paid Kshs; 45,000/= in cash to the appellant, whereas Kshs; 25,000/= was sent via Mpesa by one Chomba PW2, from instructions of the complainant. The complainant paid a total amount of Kshs; 200,000/=

29. That on the Analysis of the purported fertilizer, PW5 testified that the fertilizer supplied by the appellant, was taken to the Government chemist for analysis and a report prepared. That in the opinion of the analyst, the fertilizer was not of merchantable quality because in essence the appellant delivered, and/or sold a substance purported to be fertilizer for mushroom when she knew the same was not the right quality.

30. That the appellant in her defence, denied committing any offence, wondered why she was arrested. She did not however, challenge the testimony of PW1, that she made a delivery of a substance, purported to be fertilizer for mushroom. She also denied, receiving any money from the complainant. That in essence her defence was nothing but a mere denial.

The prosecution submits that they have tendered overwhelming evidence on the record for cheating and urges the court to dismiss the appeal for lack of merit.

### **ANALYSIS AND DETERMINATION.**

I have considered the proceedings before the trial magistrate, and the submissions by the appellant as well as the ground of appeal and the submissions by the respondents.

31. This being a first appeal, this court has a duty to evaluate the evidence tendered before the trial Magistrate, and come up with its own finding.

32. This was held in the case of: **Okeno -versus- Republic (1972) E.A 32.**

Further in the case of; **Mwana Sokoni –versus - Kenya Bus Services Limited ( 1982- 88) 1 K.A.R 278,** and **Kiruga -versus – Kiruga ( 1988) KLR 716.** Where it was stated:

*“ On a first appeal, it is now well settled, the role of the Court, is to revisit the evidence on record, evaluate it, and reach its own conclusion. However, the court will not interfere with findings of facts of the trial court, unless they were based on no evidence at all. Or a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching its finding.”*

33. The appellant, chose to argue all the grounds of appeal together, and forms her submissions, four issues arise for determination, and this are;

*(i) Double punishment for the same offence.*

*(ii) Contradictions.*

*(iii) That the charge was not proofed beyond any reasonable doubt.*

*(iv) Unprocedural recovery of exhibits.*

#### **(i) Double Punishment.**

From the record, the appellant was fined Kshs; 100,000/= in default one year imprisonment. The trial magistrate further ordered that, the appellant will also refund the complainant, the amount swindled, and in default the complainant to pursue jail remedy.

34. The appellant was charged under **Section 315** of The Penal code. Which I have quoted above. And the particulars stated that, by means of fraud, they cheat Mary Wambui Ndegwa to pay a sum of Kshs; 270,000/= so that, they could deliver to her foliar fertilizer. The appellant was found guilty of the charge and was convicted.

**Section 31 of The Penal Code Cap 63 of The laws of Kenya,** provides:

*“any person who is convicted of an offence, may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to, or in substitution for any other punishment.”*

35. The trial court has discretion under this section to order compensation which may be in addition, or in substitution for any other punishment. And such compensation may be ordered, upon the person being convicted, in which case it is in addition to the punishment, or in substitution of the punishment thereof.

**Under Section 178 of the Criminal Procedure code, Cap 75 of the laws of Kenya.**

*“ It is provided, if a person guilty of an offence, mentioned in chapters XXIV, XXX1 both inclusive, of the Penal code, in stealing, taking, obtaining, extorting, converting, or disposing off, or in knowingly receiving, any property, is prosecuted to conviction by on or behalf of the owner of the property, the property shall be restored to the owner or his respective representative.”*

36. In every case referred to in this Section, the court before whom the offender is convicted, may award from time to time award writs of restitution for the property or order the restitution thereof in a summary manner.

37. Under this Section, where a person is convicted for offences related to appropriating property, the court must order the offender to pay restitution, to owner of the property.

38. In this case; the appellant was charged with cheating, and obtaining, or receiving a sum of Kshs; 270,000/= through fraud or trick. She was convicted of the offence, and in addition to the fine, the trial magistrate ordered her to refund the amount which they swindled the complainant.

39. In the circumstances, the order by the trial magistrate for the appellant to refund the money, which she had obtained, or which she had received from the complainant through fraud, and cheating, was within the law and does not amount to double punishment or double jeopardy.

40. It is not clear whether the complainant moved to enforce the order by the trial magistrate. **Section 178 of Criminal Procedure Code** provides that;

***“where the order made for the appellant to pay compensation, is appealable to the High Court,”***

The trial Magistrate had jurisdiction to order a refund upon conviction of the appellant. This ground of appeal is therefore without merit.

**(ii) CONTRADICTIONS:**

The appellant has submitted that there was contradiction about the business that was conducted between 3<sup>rd</sup> accused and the complainant.

After considering the evidence tendered by the Prosecution, I find that there were no contradictions on material particulars, nor are there contradictions which cast doubt on the prosecutions' evidence.

41. The court ignores minor contradictions, which do not show that the witnesses deliberately told lies to court.

42. The Court of Appeal in the case of; **Eric Onyango Ondeng -versus - Republic, (2014) eKLR C. A** the court held that; when dealing with the issue of contradictions stated as follows;

***“ nor do think much stands on the alleged contradictions, on the time of commission of the offence, the trial court after hearing all the evidence, accepts that the offence was committed about 7p.m, in accordance with the evidence of PW2. As noted by the Ugandan Court of Appeal in; Twehangane Alfred -versus - Uganda Criminal Appeal No. 139 of 2001 (2003) UGCA 6. It is not every contradiction that warrants rejection of evidence. As the Court put it, “with regard to contradictions in the Prosecution case,” the Law has set out in numerous authorities,***

***“ is that grave contradictions, unless satisfactorily explained, will usually but not necessarily, lead to the evidence of a witness being rejected.***

***The court will ignore minor contradictions unless the court thinks that, they point to deliberate, untruthfulness, or if, they do not affect, the main substance of the prosecutions' case.”***

43. The trial Magistrate after analyzing the evidence found that; nor doubt had been created. I find that the minor contradictions pointed out by the appellant, are not on material particulars, nor do they raise any doubt, in the prosecution's evidence. Such contradictions must be ignored.

I therefore find that this ground is without merits.

**(iii) UNPROCEDURAL RECOVERY OF EXHIBITS.**

I have considered the ground, and I find that there was cogent evidence which was well corroborated on how the exhibits were recovered. I find that failure to take the photograph of the exhibits, at the place where they were recovered, does not shake the strong evidence tendered by the prosecution, that the exhibits were recovered in the manner the witness testified, they were produced in court, and no prejudice was occasioned by the failure to produce an inventory, or photographic exhibit.

The ground is therefore without merits. In any case, the evidence of PW4, and PW5 on how they recovered the exhibits, was not challenged.

**(iv) PROOF BEYOND ANY REASONABLE DOUBT.**

The appellant, was charged with cheating under **Section 315 of Penal Code**. The prosecution had the burden to proof that, the appellant used fraudulent means to obtain something capable of being stolen from the complainant. That the appellant induced the complainant, and that the complainant paid some money for the goods. In this case, the complainant gave evidence how he was called by Cyrus Murage Gakugi on 17<sup>th</sup> February, 2015 and he finally told her that he was going to send somebody to deliver, what was purported to be mushroom fertilizer.

44. It is the appellant, went and delivered 7 pieces of bottles of fertilizer to PW-1- and was paid KShs; 70,000/=. The prosecution proofed that the appellant was paid Kshs; 45,000/= in cash, and Kshs; 25,000/= was sent to her through Mpesa money transfer by one Peter Chomba (PW-2-), and the complainant had paid Kshs: 200,000/= and together with what she paid the appellant, the total amount which the complainant paid, was Kshs; 270,000/= Thousand.

45. In her submissions, the appellant submitted that it is not disputed “ *that the complainant was cheated, as alleged and recorded in the charge sheet*” the charge sheet states that; it is the appellant and others were convicted, cheated the complainant, and as such the evidence by the complainant was not challenged by the appellant, in view of the above admission. The defence of the appellant, was a general mere denial.

46. From the evidence tendered by the complainant, it is clear that the appellant was involved with her co-accused’s’ in cheating the complainant. The trial magistrate found that the 3<sup>rd</sup> accused was the man playing the cards, while using appellant 1 and 2 as conduits to conceal his identification. And finally held that the appellant acted independently towards one objective, that of cheating the complainant, in a deal they were all sure they were out to swindle the complainant money.

47. There is no doubt that, the appellant was involved in the fraud, and cheating the complainant. And did indeed swindle her cash Kshs; 270,000/= Thousand shillings. The prosecution proved that the fertilizer which the appellant and her co-accused supplied the complainant, was fake as per the Government analyst report.

48. The prosecution discharged the burden to proof the charge, against the appellant beyond any reasonable doubt.

49. The appeal is therefore without merit and is dismissed

**Dated at Kerugoya this 18<sup>th</sup> day of May 2020.**

**L.W. GITARI**

**JUDGE**