REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 37 OF 2018

AMIS MAKOKHA WANEKHWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of Hon. C. Obulutsa, CM, delivered on the 25th day of May 2018 in Eldoret Chief Magistrate's Criminal Case No. 3235 of 2016)

JUDGMENT

[1] This appeal arises from the Judgment of the Chief Magistrate, **Hon. C. Obulutsa,** in **Eldoret Chief Magistrate's Criminal Case No. 3235 of 2016: Republic vs. Amis Makikha Wanekhwe**; a case in which the Appellant, **Amis Makokha Wanekhwe**, had been charged, in Count I with the offence of Obtaining Money by False Pretences contrary to **Section 313** of the **Penal Code.** The particulars thereof were that on the **11th day of December 2015** and **22nd day of December 2015** in Eldoret Township in Eldoret West District within Uasin Gishu County, with intent to defraud, he obtained **Kshs. 1,364,000/=** from **Jane Kabilu Muruingi** while pretending that he was in a position to supply her with 620 sacks of dry maize, a fact he knew to be false.

[2] In Counts II and III, the Appellant was charged with the offence of Issuing a Bad Cheque contrary to **Section 316(1)** of the Penal Code. The particulars thereof were that on the **15th day of February 2015** at Eldoret Township in Eldoret West District within Uasin Gishu County, with intent to deceive, he issued cheques numbers 000011 and 00012, respectively, amounting to **Kshs. 682,000/=** in favour of **Jane Kabilu Muruingi** while knowing that his account had insufficient funds.

[3] The Appellant denied the Charges and, upon full hearing and trial of the facts in dispute, the trial court found the Appellant guilty on all three Counts and convicted him thereof in a Judgment dated **25 May 2018**. Consequently, in respect of Count I, the Appellant was sentenced to 30 months' imprisonment; while in Counts II and III, the Appellant was sentenced to pay a fine of **Kshs. 50,000/=** on each Count, and in default of such payment, the Appellant was to serve 6 months' imprisonment. Being aggrieved by the sentence imposed on him, the Appellant preferred this appeal on the following grounds:

[a] That the trial court erred in law and in fact in failing to observe that the Prosecution had not proved their case beyond reasonable doubt, by failing to call a witness from the bank where the purportedly dishonoured cheques were banked into;

[b] That the learned trial magistrate erred in law and in fact in failing and/or ignoring the fact that the Prosecution had failed to prove their case beyond reasonable doubt, by failing to reveal the details of the bank where the cheques that were purportedly dishonoured were banked into;

[c] That the learned trial magistrate erred in law and in fact by failing to observe that the Prosecution did not prove the key elements of the offence of Obtaining by False Pretences;

[d] That the learned trial magistrate erred in law and in fact by completely disregarding the evidence of the Appellant whereas there was no evidence in law to warrant and/or sustain a conviction at all;

[e] That the learned trial magistrate erred in law and in fact by failing to observe that the Prosecution did not prove that the cheques that were issued by the Appellant were drawn by the Appellant;

[f] That the learned trial magistrate erred in law and in fact by failing to observe that the Prosecution did not prove that the Appellant intended to defraud the Complainant when the cheques were stopped by the Appellant;

[g] That the learned trial magistrate erred in law and in fact by failing to give sufficient regard to the Appellant's submissions;

[h] That the learned trial magistrate erred in law and in fact in failing to observe that the elements of the offence of Obtaining by False Pretences were not proved and specifically that the fact of misrepresentation was not demonstrated;

[i] That the learned trial magistrate erred in law and in fact in failing to observe that the Appellant was convicted against a backdrop of insufficient and contradictory evidence;

[j] That the trial court did not appreciate that the matter before it was civil and not criminal in nature, based on the contractual dealings between the Appellant and the Complainant;

[k] That the learned trial magistrate erred in law and in fact by failing to address himself on the exceptions to the offence of Obtaining by False Pretences;

[l] That the learned trial magistrate erred in law and in fact in failing to consider that cheques that were issued by the Appellant were subject to fulfilment of some other conditions by the Complainant before presentation to the bank;

[m] That the learned trial magistrate erred in law and in fact in ignoring the Appellant's defence that the agreement between the Appellant and the Complainant related to future events and therefore the offence of Obtaining Money by False Pretence could not arise;

[n] That the learned trial magistrate erred in law and in fact in failing to take into consideration the defence put forward by the Appellant and specifically the Appellant's past dealings with the Complainant;

[o] That the trial court did not comply with the provisions of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya;**

[p] That the sentence imposed was manifestly excessive on Count I without an option of fine;

[q] That the learned trial magistrate erred in law and in fact in failing to consider the issues raised in mitigation among other factors while sentencing the Appellant.

Consequently, the Appellant prayed that his appeal be allowed in its entirety; that the conviction be quashed and the sentence set aside.

[4] The appeal was urged on behalf of the Appellant by Learned Counsel, **Mr. Kagunza**. He relied the written submissions filed by him on **14 February 2019**. He thus urged the Court to find that the trial court failed to take into account the ingredients of the offence of Obtaining by False Pretences as defined in **Sections 313** as read with **Section 312** of the Penal Code. He relied on **High Court Criminal Appeal No. 159 of 2003: Republic vs. Charles Kithinji** for the proposition that, for purposes of the aforementioned provisions, the false pretence alleged must relate to an existing fact; and that a statement of intention to defraud about a future event does not amount to a false pretence in criminal law. It was therefore the submission of **Mr. Kagunza** that since the Appellant's agreement with the Complainant was for the supply of maize at a future date, the offence of Obtaining by False Pretences could not be said to have been committed before the future date as was purported before the lower court by the Prosecution.

[5] In the same vein, it was the submission of **Mr. Kagunza** that the cheques that form the subject of Counts II and III were not only post-dated, but were also conditional on the occurrence of future events; and that the Complainant was told not to bank them pending reconciliation. Counsel cited **Abdalla vs. Republic [1971] EA 657; Oware vs. Republic [1989] KLR 289** and **Joseph Wanyonyi Wafukho vs. Republic, Criminal Appeal No. 200 of 2012** to augment his arguments that the giving of a post-dated cheque is not a representation that there are sufficient funds to meet the cheque; and that the criminal process ought not to be a substitute for a grievance that is otherwise civil or commercial in character, and which ought, therefore, to be addressed through the civil jurisdiction of the court.

[6] Mr. Kagunza also made reference to what he perceived to be insufficient and contradictory aspects of the Prosecution Case, such as the failure by the Prosecution to adduce evidence from the bank in question as to the circumstances surrounding the dishonour of the two cheques; the question of who post-dated the two cheques; and the contradictions as to the date and time when the maize was to be supplied to the Complainant; the quantity to be supplied and the value thereof. On the sentence imposed by the trial court, **Mr. Kagunza** submitted that, in respect of Count I, the failure by the trial court to give an option of fine was a misdirection that resulted in the imposition of an excessive penalty on the Appellant; granted that the offences were misdemeanours. According to Counsel, these insufficiencies and contradictions were not addressed by the trial court. It was therefore on the basis of the foregoing submissions that the Appellant urged that the appeal be allowed and the conviction quashed and the sentence imposed on him in respect of the three Counts set aside.

[7] On behalf of the State, it was the submission of **Mr. Mulamula** that all the ingredients of the Charges were proved before the lower court; namely, that the Complainant gave the Appellant money to buy 620 sacks of maize; and that the Appellant did not deliver the maize as agreed. It was further submitted, on behalf of the State, that sufficient evidence was adduced to demonstrate that the Appellant issued two cheques to the Complainant in refund; and that the cheques were both dishonoured on presentation. He therefore prayed that the appeal be

dismissed.

[8] The Court has carefully considered the Appellant's Grounds of Appeal, the submissions made by either side, as well as the record of the lower court. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. This principle was aptly expressed in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[9] What, then, was the evidence upon which the Appellant was convicted? The record of the lower court shows that the Prosecution called three witnesses in proof of the Charges. The Complainant, **Jane Kabilu**, testified as **PW1** on **2 February 2017**. She told the lower court that the Appellant was a person well known to her prior to **11 December 2015**, and that she used to buy dry maize from him. That pursuant to their trade practice, she sought to buy maize from the Appellant and that, to that end, she paid him **Kshs. 682,000/=** on **11 December 2015** by way of deposits into his bank account in tranches of **Kshs. 550,000/=** and **Kshs. 132,000/=.** She added that she made an additional payment of **Kshs. 682,000/=** via inter-bank transfer on **27 December 2015;** but that the Appellant did not deliver the maize as agreed. Subsequent discussions led to the issuance by the Appellant of two cheques, **Nos. 000011** and **000012** for **Kshs. 683,000/=,** respectively; but that the cheques were dishonoured on presentation. He therefore reported the matter to the Police; whereupon the Appellant was arrested and charged.

[10] The Prosecution's second witness was **Lucy Kagwiria (PW2),** a business companion of the Complainant's. She told the lower court that she was with the Complainant on **11 November 2015** when they met the Appellant and agreed that he would supply them with maize on **27 December 2015;** and that, pursuant to that agreement, the Complainant deposited money into the Appellant's bank account. She added that the Appellant did not meet his part of the bargain and thereafter issued cheques to the Complainant which subsequently bounced on presentation.

[11] The last Prosecution Witness was **Cpl. Kaldale** of **Eldoret Police Station (PW3).** He told the court that he was on duty on **11 April 2016** when the Complainant reported a case of Obtaining by False Pretences, in which she paid the Appellant on the understanding that he would deliver some maize to her, but did not. He recorded her statement and received the documents in the Complainant's possession as exhibits. They included two dishonoured cheques and a Bank Statement which were produced before the lower court as exhibits. He then arrested the Appellant and charged him with the offences as set out in the Charge Sheet that was filed before the lower court.

[12] On his part, the Appellant told the lower court that the Complainant was his business colleague; and that their business relationship was partly formal and partly informal; and therefore not all the transactions between them were documented. He conceded that the Complainant paid him **Kshs. 682,000/=** on **11 December 2015** as consideration pursuant to an agreement for the sale of maize. According to him, however, he duly delivered the maize in question and the Complainant transported the same in **Motor Vehicle Registration No. KBT 224Z/B1524**. Thus, his contention before the lower court was that he did not owe the Complainant anything; and that to the contrary, it was the Complainant who owed him; and that when he sought to have reconciliation of account between them, the Complainant had him arrested. According to him, the cheques issued by him were issued on the understanding that they would not be deposited for payment before reconciliation was done; and that after his arrest, he opted to countermand the cheques.

[13] The Appellant called two witnesses before the lower court. **DW2** was **Amos Kipchumba**, a friend of the Appellant's. He told the court that he owned a lorry **Registration No. KAA 950F** which he used for transportation purposes. He therefore confirmed that on **11 November 2015**, he met the Complainant and the Appellant in **Kiminini** in the course of his business and that the Complainant paid the Appellant **Kshs. 500,000/=** for maize which the Complainant collected. **DW3, Chripinus Wekesa**, is the Appellant's son. He testified that, on **17 November 2015**, he was with his father, the Appellant at **Kapcherop Station** where they deal in maize. It was therefore his evidence that he received instructions from his father to supply the Complainant with maize; and that he complied.

[14] In the light of the foregoing, the trial court needed to ascertain whether the evidence adduced by the Prosecution proved the key ingredients of the offences charged beyond reasonable doubt. Accordingly, having given due consideration to the 17 Grounds of Appeal presented herein by the Appellant, I would reduce the issues for consideration to the following main ones:

[a] Whether the key elements of the offences of Obtaining Money by False Pretences under **Section 313** of the **Penal Code** were established by the Prosecution beyond reasonable doubt;

[b] Whether the key elements of the offence of Issuing a Bad Cheque under **Section 316A** of the **Penal Code** were proved beyond reasonable doubt; and if so,

[c] Whether the sentences imposed in respect of the three Counts preferred against the Appellant are excessive in the circumstances.

[a] <u>On the Charge of Obtaining Money by False Pretences</u>:

[15] From a careful consideration of the record of the lower court, it emerges that the Appellant and the Complainant were well known to

each other; and that prior to **December 2015**, they had engaged in business transactions to do with their mutual interest of dealing in maize. To that end, there is no dispute that the Complainant made payments for the purchase of dry maize from the Appellant to the tune of **Kshs. 1,300,000/=**. Likewise, although it was the contention of the Appellant that the maize was delivered, there appears to be no dispute that he issued the Complainant with two refund cheques for **Kshs. 682,000/=** each; which cheques were dishonoured on presentation. Copies of the two cheques were produced before the lower court and marked **the Prosecution's Exhibit No. 3(a) and 3(b).**

[16] The offence of Obtaining Money by False Pretences is provided for in **Section 313** of the **Penal Code**, which stipulates that:

> **"An person who by false pretence and with intent to defraud, obtains form 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 misdemeanour and is liable to imprisonment for three years."**

[17] Clearly therefore, the Prosecution was under duty to prove that the Appellant obtained from the Complainant something capable of being stolen; that he obtained the same by false pretences; and that his intention in so doing was to defraud the Complainant. As pointed out hereinabove, cogent evidence was adduced by the Prosecution before the lower court to demonstrate that a sum of **Kshs. 682,000/=** was paid to the Appellant by the Complainant on **11 December 2015** in two tranches of **Kshs. 550,000/=** in cash and **Kshs. 132,000/=** via transfer vide his Bank Account with Kenya Commercial Bank. In the same vein, there was sufficient proof placed before the lower court to demonstrate that on the **22 December 2015**, the Appellant received a further **Kshs. 682,000/=** from the Complainant vide a transfer to the same Bank Account. The Appellant's Bank Statement evidencing these payments was produced before the lower court and marked **the Plaintiff's Exhibit No. 2.**

[18] It is manifest therefore that, indeed, the Appellant obtained something capable of being stolen, in the form of **Kshs. 1,364,000/=.** The next question to pose is whether he Appellant received the aforestated amount by false pretences; and in this regard, "false pretences" is defined as follows in **Section 312** of the **Penal Code:**

> **"Any representation, made by words, writing or conduct 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."**

[19] Before the lower court, evidence was adduced by both **PW1** and **PW2** that the Appellant was well known to them; and that they had had dealings with him before without any difficulty; hence, the complaint before the lower court was not about any of the past transactions between the parties. A consideration of the evidence adduced by **PW1** before the lower court reveals that, although the payment was made on **11 December 2015** and **22 December 2015**, the delivery was to be made at a future date. Thus, it was the evidence of **PW1** that:

> **"On 11th I paid Kshs 550,000/- and Ksh 135,000/- into his Bank Account (deposit slip - Pexh 1) for Ksh 550,000/- (PMFI-2) for Ksh 132,000/-. On 2nd I did transfer for Ksh 682,000/- (PMFI 3). He was to deliver on 27th December but did not..."**

[20] It is plain therefore that, as of **11 December 2015**, the Appellant could not be accused of obtaining **Kshs. 1,364,000/=** by false pretences because, firstly, he had not yet received the full payment of **Kshs. 1,364,000/=** by that date; and secondly, because agreed date of delivery was yet in the future. Authorities abound to support the proposition that false pretence must relate to the past or present; but not what is yet to happen. For instance, in **R vs. Dent [1955] 2 AllER 806**, at page 807 Letter H, it was held that:

> **"The case for the prosecution is that when the appellant entered into each of the contracts in this case, he thereby impliedly represented that he intended to carry it out whereas in fact he had no such intention. It is of course undisputed that to constitute a false pretence the false statement must be of an existing fact...we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law."**

[21] Similarly, in **Republic vs. Charles Kithinji** (supra), it was held that:

> **"...to constitute a false pretence the false statement must be on an existing fact...a statement of intention about a future conduct whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law."**

[22] In the circumstances, it cannot be said that the Prosecution proved beyond reasonable doubt that Appellant obtained the **Kshs. 1,364,000/=** from the Complainant on **11 December 2015** by false pretences. Likewise, it cannot be said in the circumstances that the intention of the Appellant in accepting payment from the Complainant was to defraud her. Indeed the Complainant conceded that:

> **"...on 5th January 2016 I came to Eldoret. He had no maize. I called him, he gave me a cheque No. 000011 for Ksh 683,000/- 15th February 2016 (PMFI 4) and 000012...We were both dealing in maize. I dealt with him 3 times and he delivered. He however supplied me in credit. I believed he could supply..."**

[23] It would be pointless for the Appellant to issue the Complainant with cheques for the equivalent sum paid by her if his intention from the beginning was to defraud her. It is therefore my finding, and I so hold, that the Prosecution did not prove the essential ingredients of the offence of Obtaining Money by False Pretences against the Appellant; and therefore that his conviction in respect of Count 1 was made in error.

[b] On the Charges of Issuing Bad Cheques:

[24] Section 316A(1) of the **Penal Code,** pursuant to which Counts II and III were laid, provides that:

> **(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) knows that the account has been closed; or**
>
> **(c) has previously instructed the bank or other institution at which the account is held not to honour the cheque.**

[25] It was the evidence of **PW1** that after the Appellant failed to supply the maize for which she had paid him, the Appellant issued her with two cheques on the **5 January 2016** which were dishoured on presentation. The cheques were numbers 000011 for **Kshs. 682,000/=** and 000012 for **Kshs. 682,000/=.** The two cheques were postdated to **15 February 2016** and were produced before the lower court and marked **the Prosecution's Exhibit No. 3(a) and 3(b)**. There is sufficient and uncontroverted evidence that when the cheques were presented on the **16 February 2016,** they were dishonoured with the remarks **"Insufficient funds - Refer to Drawer."** Thus, assuming that Counts II and II were laid pursuant to **Section 316A(1)(a)** of the **Penal Code**, the pertinent question to pose is whether the two cheques are indeed bad cheques for purposes of **Section 316A(1)** of the **Penal Code**.

[26] First and foremost, it is manifest that, although the particulars of Counts II and III state that the cheques were issued on **15 February 2016,** the evidence of **PW1** was explicit that the cheques were given to her on **5 January 2016**. Here is what she had to say in this regard:

> **"...On 5th January 2016 I came to Eldoret. He had no maize. I called him, he gave me a cheque No. 000011 for Ksh 683,000/= ...and 000012. When I presented the cheques they were dishonoured. I reported to the police and he was arrested and charged..."**

[27] Likewise, **PW1** conceded in cross-examination that:

> **"...I was given postdated cheques, then we had recorded the accounts. There is no time we dealt in cash. I always paid through the bank. I was not told not to bank this cheque..."**

[28] Thus, where, as in this instance, the cheque in question is a postdated cheque, **Section 316A(2)** of the **Penal Code** is explicit. It states that:

> **"Subsection (1)(a) does not apply with respect to a postdated cheque."**

[29] Indeed, in **Abdalla vs. Republic [1971] EA 657 KLR 289**, it was held that:

> **"In our view the giving of a postdated cheque is not a representation that there are sufficient funds to meet the cheque. It is a representation that when the cheque is presented on the future date shown on the cheque there will be funds to meet it ... That the Appellant, in giving the postdated cheque, was not representing that he had sufficient funds to meet it is clear from the undisputed facts. That he asked the treasurer not to present it without prior reference to him, which was not done, so as to give him an opportunity of making arrangements with his bank to meet the cheque."**

[30] In the premises, granted that the two cheques were not issued on **15 February 2016** as was alleged before the trial court; and the clear provisions of **Section 316A(2)** of the**Penal Code**, there can be no doubt that the learned trial magistrate erred in his conclusion that the Prosecution had proved beyond reasonable doubt that the Appellant had issued bad cheques. And, granted the admission by the Complainant that she has already filed a civil case to recover the funds paid to the Appellant, I would agree with Counsel for the Appellant that this is one of those cases where an attempt was made to use the criminal process for ulterior purposes. In this respect, I would accordingly endorse the expressions of **Gikonyo, J.** in Joseph **Wanyonyi Wafukho vs. Republic [2014] eKLR** that:

> **"criminal process is never a substitute ... to be used to settle civil claim or to avail in a commercial transaction undue or collateral advantage over the other. That kind of practice is fraudulent demented abuse of the court process, should always be avoided by the parties, resisted and forcefully suppressed by the courts of law, when ever it manifests itself before court."**

[31] For the foregoing reasons, I would agree with Counsel for the Appellant that, had the learned trial magistrate paid sufficient attention to the provisions of the law under which the Charges were laid and the written submissions filed by Counsel for the Appellant dated **18 April 2018,** he would have come to conclusion the Prosecution had not made out a case against the Appellant. I therefore find the appeal meritorious, and would allow the same and quash the conviction recorded against the Appellant in respect of Counts I, II and III by the lower court. Consequently, the sentences imposed on him in respect thereof, namely: 30 months imprisonment for Count I, **Kshs. 50,000/=** fine in default 6 months imprisonment for Count II and **Kshs. 50,000/=** fine in default 6 months imprisonment for Count III, are hereby set aside. If any fine was paid by the Appellant, the same should accordingly be refunded. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF APRIL, 2019

OLGA SEWE

JUDGE