



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 120 OF 2017**

**CLIFFORD MUTEMBEI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the judgment of the Senior Resident Magistrate's Court at Githongo by the Honourable Magistrate C. Kemei (SRM) delivered on 12<sup>th</sup> October 2017 in Githongo Cr Case No. 739 of 2017)**

**JUDGMENT**

1. The Appellant herein was charged with two Counts. The first Count: Cheating contrary to section 315 of the Penal Code. The second Count: Conspiracy to commit a felony contrary to section 393 of the Penal Code.

2. The particulars of the offence in count I are that; on diverse dates between 26<sup>th</sup> June 2017 at Nkuene village Imenti Central District Meru County, the accused person jointly with others not before court, by means of fraudulent tricks obtained Kshs. 700,000/= from Catherine Kiambi. Of the second Count he is alleged to have conspired to conduct a misdemeanor namely cheating.

3. The trial Court delivered its judgment on 12<sup>th</sup> October 2017 convicting the accused person for the first count. The trial court then fined the appellant Kshs 150,000/= in default to serve 18 months.

4. The appellant was aggrieved by the aforesaid decision and lodged a petition of appeal on 24<sup>th</sup> October 2017. He subsequently filed a supplementary petition of appeal on 23<sup>rd</sup> February 2019 setting out the grounds which in essence convey;

a. That the prosecution did not established its case beyond reasonable doubt; and

b. The sentence was excessive.

5. During the trial Courts hearing four (4) witnesses testified. Pw1, the complainant, averred that he met the accused person herein on 11<sup>th</sup> May 2017. The accused introduced himself as **David Gitonga Ikiuru**. She therefore knew him by that name. They exchanged contacts and kept on communicating. On 24/5/2017 the accused picked her from work and took her to Meru town where he introduced her to one **Godfrey Mugambi Kaiba**. They rode in Geoffrey's vehicle to a field where they applied some chemicals in some blank papers and converted it into Kshs. 1000. Geoffrey told the accused that he needed Kshs, 600,000 to buy the black chemical to make more money. The accused said that he had Kshs. 195,000. The accused asked the complainant how much she could raise. She replied that she could raise Kshs. 100,000. The complainant stated that all this time she was in a confused state. The accused asked her to give him money for the transaction and that he would refund it. She ended up giving a sum of Kshs. 700,000/= to the accused person and Geoffrey on diverse dates between 24/5/2017 and 7/7/2017.

6. She then avers that upon coming back to her senses she called Pw2 who assisted her hatch a plan to have the accused arrested. She called the accused to come and pick the Kshs. 70,000 he said he needed. He came to her house. He came on a motorbike and left his vehicle parked at the road. She locked him inside her house and she called the police who came and arrested him. Pw2 and Pw3, mother and friend of Pw1 respectively confirmed that on 8/7/2017 they went to Pw1's House and assisted her in arresting the accused person. At the time the accused person had come to receive Kshs. 70,000/= which he had requested from the complainant.

7. Pw4 the investigating officer gave an account of the investigation carried out. He averred that it is the complainant who reported that she was duped by the accused person herein into giving out money. Later they arrested the accused person at the residence of the complainant. He also confirmed that the accused person was found with the identity card of David Gitonga Ikiuru (deceased) but on further investigation he realized that his real identity was **Clifford Mutembe**.

8. When put on his defence the accused person averred that he was in a relationship with the complainant and upon realization that things would not work out between them the complainant sought to kill him and/or extort damages for the time wasted during their elusive relationship. He however confirmed that indeed he had the Identity card of David Gitonga Ikiuru but insisted it belonged to his brother who had passed on. He also acknowledged that he was sent KShs. 1,000/= by the complainant through Mpesa which he stated was to assist his dental problem.

9. The trial Court after analyzing the facts of the case convicted the accused person based on the following reasons;

- a. **There is sufficient evidence to confirm that the accused and Pw1 knew each other well.**
- b. **There is sufficient evidence that the two communicated and accused visited Pw1 both at his place of work and at her home.**
- c. **There is sufficient evidence of bank and Mpesa transactions which further confirm the evidence of Pw1.**
- d. **There is evidence confirming that accused presented himself as David Gitonga and that he also transacted using the said names.**
- e. **Accused confirmed to court that his real names were Clifford Mutemebei and not David Gitonga.**
- f. **The fact that the accused transacted using names different from his real names confirmed that he was not an honest person.**
- g. **It is clear that the accused was the chief mastermind of this fraud but only made sure that he carried out a clean job to avoid leaving evidence of any money transactions.**

#### **Duty of court**

10. I know my duty as first appellate court; to evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses when they testified. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. I am, however, aware that, in this exercise, the court is not beholden or compelled to adopt any particular style. Except, it must avoid merely rehashing of evidence as was recorded or trying to look for a point or two which support or negate the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed

11. The offence of cheating is established in **Section 315 of the Penal Code** stated below;

**315. 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 deliver to any person any money or goods or any 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 and is liable to imprisonment for three years.**

12. The Appellant argued that the prosecution did prove its case beyond reasonable doubt. The reason given by him is that none of the monetary transactions was sent to him, hence, there is no evidence that links him to the offence or supports the charge. He argued that Pw2 and Pw3 could not confirm the purpose of the money borrowed and that the Trial Magistrate only relied on circumstantial evidence.

13. From the record, the prosecution laid a lot of emphasis on circumstantial evidence in establishing that the appellant had a motive in cheating the complainant. Four things were emphasized: (1) the nature of the relationship with the complainant; (2) the use by the appellant of his brother's identity; (3) the payment of KShs. 1,000/= through Mpesa to the appellant; and (4) the circumstances in which the appellant was caught played a role in establishing the circumstantial evidence.

#### **Of circumstantial evidence**

14. On circumstantial evidence see **Sawe V Republic [2003] KLR** where the Court held that;

**“In Order to justify on circumstantial evidence, the inference of guilt, the inculpatory factors must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden that never shifts to the party accused.”**

15. The chain link of circumstantial evidence in this case began with the lift the appellant gave to the complainant. He introduced himself as David Gitonga Ikiungu. This was not his real name. Investigations confirmed that this was not his name. He also admitted that this was not his name. His name is Clifford Mutemebei. In addition, he held an identity card bearing the names of David Gitonga Ikiugu. He stated that the ID card belonged to his deceased brother. Surprisingly he used this ID card and passed off as his. This chain of evidence portends intent to cheat.

16. That is not the end. The evidence show that he introduced the complainant to Godfrey Kaiba. They took her to a field and Geoffrey demonstrated how he could make money. The accused pretended to be ready to give Kshs. 195,000 towards purchase of the black chemical used to make money. From evidence adduced, Geoffrey was a friend of the accused and the accused is the one who lured the complainant into his scheme of making money through the black chemical. These were fraudulent tactics by the accused who knew the complainant and induced her to give money to a fraud star.

17. The accused claimed in his defence that he was in a relationship with the complainant which went sour and as a result she threatened him with death and extortion. There may have been a relationship between the two but there was no evidence whatsoever on threat to his life or extortion. The evidence show that the accused used the relationship or acquaintances with the complainant to lure her into his devious business; this adds to his fraudulent tricks.

18. The evidence of Pw2 and Pw3 corroborated the fact that he was to receive Kshs. 70,000/=, monies that were part of the larger transaction that deceived the complainant.

19. The prosecution provided credible evidence that the accused knew the complainant; he introduced him to Geoffrey who was "increasing or making" money by applying black chemical to some paper; that he pretended to give money to the illegal cause, thus, causing the complainant to give money towards the transaction; and also received some money from the complainant. He also was arrested when he had gone to the complainant's home to receive Kshs. 70,000 which was part of the larger fraudulent scheme. The accused was one of the chief architect of the fraudulent scheme to defraud the complainant of her money through fraudulent tricks. All these vents lead to one and irresistible conclusion that the accused is guilty of the offence as charged. to pay money to Geoffrey on fraudulent tricks. They also showed that the accused had gone there to receive the money he had sought from the complainant as part of his scheme to defraud. .

20. The circumstantial evidence adduced justifies the inference of guilt as the inculpatory factors are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There are no other existing circumstances weakening the chain of circumstances established by the prosecution. I therefore find that the prosecution proved its case beyond any reasonable doubt.

21. On sentence, section 315 of the Penal Code prescribes penalty of imprisonment of three years. Therefore, a fine of Kshs. 150,000 in default to serve 18 months in prison is appropriate sentence. I therefore find that the trial Court made a proper analysis of the charges and laid a proper ground for convicting the appellant herein. The sentence was also appropriate.

22. The upshot is that the appeal herein lacks merit and is dismissed. It is so ordered.

**Dated, signed and delivered in open court this 15<sup>th</sup> day of May 2019**

**F. GIKONYO**

**JUDGE**

In presence of:-

Abubakar for appellant

Namiti for respondent

**F. GIKONYO**

**JUDGE**