



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 102 OF 2015

JANE JELIMO KOSGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original judgment and conviction in Eldoret Resident Magistrates

Court criminal case 3273 of 2010 Republic v Jane Jelimo Kosgei delivered by

I. Maisiba, Resident Magistrate, on 12th April 2011)

JUDGMENT

1. The appellant was convicted on *four* counts. Two related to *obtaining goods by false pretenses* contrary to section 313 of the Penal Code. The other two counts were for *making a document without authority* contrary to section 357 (a) of the code; and, *uttering a document with intent to defraud* contrary to section 357 (b) of the code. She was sentenced to *three years imprisonment* on each of the four counts; the sentences to run concurrently.
2. The particulars of the first count were as follows: that on 27th May 2010 at Kapkoi village, Uasin Gishu District, she, jointly with others not before the court, obtained 100 bags of wheat valued at Kshs 190,000 from Jacob Busienei by falsely pretending that a banking slip from Equity Bank was good and valid for Kshs 190,000. Counts two and three related to making and uttering the banking slip.
3. The last count was that on 24th May 2010 at Kaptuli village, Uasin Gishu District, she, jointly with others not before the court, obtained 30 bags of maize valued at Kshs 47,800 from John Silingi by falsely pretending that a cheque number 000008 issued by K-Rep Bank, and which she presented to the complainant, was good and valid for Kshs 47,800.
4. The appellant is aggrieved by the conviction and sentences. The original petition of appeal was filed out of time (but with leave of the court) on 5th August 2015. On 26th May 2016, the Court granted the appellant leave under section 350 of the Criminal Procedure Code to amend the grounds of appeal. The *amended grounds* were lodged on 15th June 2016.
5. There are *ten* grounds of appeal. However, learned counsel for the appellant, *Mr. Omboto*, argued *two* grounds: first, that after close of the prosecution's case, the appellant was not granted an opportunity to defend the case; and, secondly, that there was no compliance with section 211 of the Criminal Procedure Code. In a synopsis, learned counsel submitted there was a *mistrial*; and, that the consequential conviction was *unsafe*.

6. The learned Prosecution Counsel, *Mr. Mulati*, conceded the appeal.

7. This is a first appeal to the High Court. I am required to re-examine, re-evaluate, and analyze all the evidence on record. Thereafter, I must draw my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Arum vs. Republic* [2006] 2 E.A 10.

8. The prosecution called *seven* witnesses. According to PW1 the appellant claimed she had deposited Kshs 190,000 into his account at Equity Bank. The appellant gave him a banking slip to that effect. The complainant released to her 100 bags of wheat. It was subterfuge. No such deposit had been made. From the evidence of PW1, PW3 and PW4, I am satisfied that there was sufficient evidence to prove counts one, two and three.

9. PW2 was the other complainant. The appellant offered to buy 30 bags of maize valued at Kshs 47,800 from the complainant. The maize was loaded onto two trucks driven by PW5 and PW6. The appellant at first said she would pay by mobile money transfer. She sent the complainant two fictitious messages showing she had transferred Kshs 35,000; and, Kshs 12,000 into his *Mpesa* account. It was a simple trick; a scam. The appellant vanished. After a complaint was lodged with the police, the appellant now claimed she had deposited a cheque number 000008 drawn on K-Rep Bank into the complainant's account. It was equally deceitful. From my reappraisal of the evidence, this charge was also made out.

10. However, the learned trial magistrate made *three* fatal errors at the close of the prosecution's case that render the entire proceedings a *mistrial*. I have compared the original *hand-written transcript* of the trial court with the *typed record*. They both agree. The first error is at page 31 of the record. When the investigating officer (PW7) concluded his testimony, the appellant said "*I have questions to put to the witness*". She was not given such opportunity. The record shows that the case was *closed* at that point. It was premature and a complete violation of Article 50 (2) (k) of the Constitution; sections 150 and 151 of the Criminal Procedure Code; and, section 146 of the Evidence Act.

11. The second misstep was a mortal failure. Page 31 of the record shows that after the *close* of the prosecution's case on *28th March 2011*, the learned trial magistrate gave a date for *final judgment* to be delivered on *12th April 2011*. With the greatest respect, the learned trial magistrate was required to review the evidence; and, to make a finding whether the appellant had *a case to answer*. I thus find there was *non-compliance* with the *mandatory* provisions of section 211 of the Criminal Procedure Code.

12. The third mistake was a natural corollary of the second one. The learned trial magistrate went straight to final judgment without putting the appellant on her defence; or, considering whether she had a defence to any or all of the four counts.

13. It follows that the conviction was *highly irregular*; and, that the entire proceedings amounted to a *mistrial*. The learned Prosecution Counsel, *Mr. Mulati*, was thus right to concede the appeal.

14. Having reached that conclusion, I have to consider whether to order for *retrial*. Considering the gravity and nature of the charge; and, the evidence of the *seven* witnesses, this would have been a suitable case for a retrial. But it would result in an *injustice* and *serious prejudice* to the appellant. The appellant was convicted and sentenced on *12th April 2011*. That is nearly *five* years ago. She has been in custody partly because of serving other unrelated sentences. I am accordingly minded to set the appellant free. See *Patel Ali Manji v Republic* [1960] E.A 343, *Ratilal Shah v Republic* [1958] E.A 3, *Hassan Rehman v Republic* [1976-80] 1 KLR 1243, *Abraham Munai v Republic*, High Court, Eldoret, Criminal Appeal 131 of 2012 [2013] eKLR.

15. The upshot is that this appeal is *allowed*. I set aside the conviction and sentences on *all* the counts. The appellant shall be set at liberty *forthwith* unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 8th day of September 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Mr. R. Omboto for the appellant.

Ms. B. Oduor holding brief for Mr. J. W. Mulati for the Republic.

Mr. J. Kemboi, Court Clerk.