REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO 30 OF 1992

SAMAT BHIMA KESWALA.....APPELLANT

VERSU

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No 5339 of 1990 of the Principal Magistrate's Court at Eldoret - J Ondieki (Mrs), R M)

JUDGMENT

The appellant was charged in the Court of the Principal Magistrate at Eldoret with the offence of obtaining credit by false pretences contrary to section 316(a) of the Penal Code.

It was alleged that on 15th February 1990 in Eldoret Township he incurred a debt or liability to one Jackson Kithimba Mulinge by obtaining 9 motor vehicle tyres valued at Kshs 40,200/- by falsely pretending that he was buying them and that he would pay him cash on the following day, facts which he knew or believed to be false.

The evidence adduced in the lower court was that on the day in question, the appellant went to the shop premises of the complainant, namely Jackson Kithimba Mulinge, and ordered for 13 tyres and 13 tubes. The price quoted for the items was worked out to Kshs 60,400/-. The appellant wrote two post-dated cheques each for Kshs 30,200/- and when one of the cheques was presented for payment on 9th May 1990 it bounced, but it was replaced by another cheque of Kshs 10,000/- after the appellant made a cash payment of Kshs 20,000/-. The latter cheque for Kshs 10,000/- was also dishonoured.

After the payment of Kshs 20,000/- the total amount due from the appellant was Kshs 40,200/-. A cheque was issued for Kshs 40,000/- after the appellant promised to pay Kshs 200/- in cash, see exhibit 4, but when presented for payment at the bank, this cheque also bounced and the matter was reported to Eldoret Police Station.

Investigations were carried out and the appellant arrested on 28th August 1990. He was taken to the same police station and the next day was produced before the Senior Resident Magistrate's Court at Eldoret where he was charged with the offence subject to the present appeal.

In his defence the appellant denied obtaining anything by false pretence. He said that if any items were provided to anybody then it was to New Mumias Supermarket.

According to him since original cheques were returned, it must have meant that the complainant had already been paid the money in cash. He produced the originals which were marked as evidence in Court.

The Resident Magistrate who heard the case wrote a long judgment in which she set out the case for the prosecution and that for the defence. She dismissed the appellant's denial as false and accepted the prosecution evidence that infact he, the appellant, had obtained tyres and tubes knowing well that he had no money in the account and yet issued cheques which bounced. She found him guilty, convicted and sentenced him to 12 months imprisonment, hence the present appeal.

The offence under section 316(a) is in two limbs; firstly incurring a debt or obtaining credit by false pretences and secondly obtaining such credit by means of any other fraud.

It was suggested in the case of *Bennalt Ainamo v Republic* [1976] KLR at page 159 that in a case of this nature, it was desirable to charge an accused person with two counts, namely: (1) of obtaining credit by false pretences and (2) of obtaining credit by means of any other fraud; otherwise the accused person may be confused and not know exactly with what offence he is charged.

The offence of obtaining by false pretences has seven possible ingredients which have to be proved beyond doubt before an accused person is convicted. They are (a) a false representation (b) which is made (c) by words or writing or conduct (d) of a matter of fact (e) either past or present (f) with knowledge of the falsehood or without belief that the presentation is true, and (g) the representation causing the giver to part with the thing obtained. See *Amugo v Republic* High Court Criminal Appeal No 320 of 1980.

One problem the appellant raised in his defence in the lower court and in this appeal was whether he personally obtained any goods or incurred such a debt with the complainant. Here the complainant's case was simply that the appellant had gone to his place of business on 15th February 1990 and asked for 13 tyres and 13 tubes costing Kshs 60,400/-, not only 9 tyres as per the charge sheet.

Then he issued two cheques post-dated to 30th March 1990. They were each for Kshs 30,200/-. That when the first cheque was presented on its due date it bounced.

A question paused here is whether the complainant scored on the fifth ingredient which requires that the representation should be about the present or past matter of fact by virtue of the cheque having been post-dated.

My view here is the representation was the issuance of cheques on the face of which was written Kshs 30,200/-; to be paid thereby. It is just as in a situation where someone enters into an eating house and has food worth so much money, promising to pay but at the end of which he doesn't. In *R v Jones* [1898] 1 QB 119 where a situation of this nature arose, the Court held that the accused had incurred a debt or liability with an implied promise to pay.

He did not pay and the Court found him guilty of obtaining credit by means of other fraud because he was found to have had no intention of paying but rather that he intended to cheat.

Another problem, and of a more forceful nature, is as to who the drawer of the cheque was. The evidence shows that the first cheque for Kshs 30,200/- each were drawn by New Mumias Supermarket Limited.

If this be a registered company with a common seal then it is a legal personality which, in law, is capable of being charged under the Penal Code. But may be because the evidence adduced indicated that it was the appellant himself who went to the shop to obtain those tyres and tubes on credit and that he may be a director of this company, though no evidence was offered therefor, then the learned Resident Magistrate thought that it was him personally liable. Unfortunately this was a misdirection: See *Solomon v Solomon & Co Ltd* (1895) Ch 323 (House of Lords).

The principle of the company's separate legal personality from that of the shareholders has been applied by the Courts rigorously since the decision in *Solomon's* case. This has not only been done in cases where the principal question before the Court was one of company law, and in some situations where the corporate personality of the company involved was really of secondary importance, the application of the principle was worked hardship and injustice.

In some cases the Court would disregard the company's corporate personality and pay attention to where the real control and beneficial ownership of the company's undertaking lies.

When it does this, the Court relies either on the principle of public policy, or on the principle that devices used to perpetrate frauds or evade obligations will be treated as nullities, or on presumption of agency or trusteeship, which at first sight *Solomon's* case seems to prohibit.

Yet apart from the appellant who raised this point in his defence, no evidence was offered by the prosecution or through submissions that though the earlier cheques were drawn by New Mumias Supermarket Limited it was, the appellant in real control and/or beneficial owner of its undertakings.

If then it was the company liable for the drawing of the cheque then how could the appellant have made a false representation to the complainant?

On the other hand, when the company issued two cheques for Kshs 30,200/- each, one of which was to be presented on 30th March 1990 and when it was so presented it bounced, the appellant, through the same company, paid Kshs 20,000/- in cash which the complainant admitted in evidence. Then the same company issued another cheque of Kshs 10,000 to cover the balance of the first cheque on promise that KShs 200/- would be paid in cash, but when the same was presented on 9th May 1990 it unfortunately again bounced.

If the company or the appellant for that matter, had intended to defraud the complainant of the cash, which must be the reason for making a false representation, then it is unlikely that Kshs 20,000/- would have been paid in cash.

Nevertheless, the case before the lower court and this appeal relates to the cheque for Kshs 40,000/-. The evidence here shows that after the cheque for Kshs 10,000/- had bounced the appellant again handed to the complainant a cheque drawn to the account of Tolk Investment Kenya Limited to the appellant. It is not known for what services this cheque had been issued to the appellant but it seems it was blank and the complainant's name was inserted therein. Strictly speaking, this cheque was not issued by the appellant because it was not from his cheque book, nor was it signed by him.

If he was given this cheque for some services rendered to the drawer thereof, namely Tolk Investments Kenya Limited, and he handed it over to the complainant, he surely must have believed that those who drew the cheque had sufficient money in the account and this is why he handed it over to the complainant to satisfy his own debt. This belief should rule out the sixth ingredient that the appellant himself knew or had reason to believe that the cheque given to him had falsehoods that there was money in the account when there was none. How would he know this unless evidence was adduced to establish collusion between the two??

Infact I would not say that on the cheque of Kshs 40,000/- the appellant made any representation because he is not the one who drew and signed it and would not be aware of the falsehood represented therein to hand the same to the complainant.

Moreover, the word obtaining credit refers to the obtaining of credit in connection with a debt or liability which will be liquidated by a payment or repayment in money only and this must be by the accused person himself. Where therefore, as in this case, the repayment is indicated by a third party in the name of Tolk Investments Kenya Limited, then that ingredient does not lie for a decision.

Secondly if the credit is obtained by a false pretence then it must be a pretence about an existing fact which is false. The false pretence in this case as looked at by the lower court was simple; namely that the appellant issued a cheque for Kshs 40,000/- which when presented for payment was returned with remarks "refer to drawer."

What she failed to note was that the appellant might as well have been acting on the strength of the cheque issued to him by Tolk Investments Kenya Limited having confidence that that account had

money. In that event the question of the appellant personally incurring a debt by false pretences could not have arisen because his confidence rested in the third party.

And how could the complainant accept a cheque by a third party to liquidate a debt owed to him by the appellant or, anybody else, for that matter without being on the look out or making inquiries about the genuineness of this cheque? He was partly to blame for the ensuing consequence.

In this class of case, evidence need to be adduced to show that an inquiry was made to establish that the accused had known that he had no sufficient funds to meet the cheque or that he had no intention to pay. But how could this be confirmed when the cheque was issued on account of a third party? See *R v Jones ibid*.

I had already indicated the desirability of charging an accused person with the offence under section 316(a) with two counts. This view was expressed in the case of *R v Homes* (1958) Cr LR 394. There Salmon J opined that it was much better that separate alternative counts should be put on an indictment alleging in the first count obtaining credit by false pretences and in the second count obtaining credit by fraud other than a false pretence. This would make it easier to consider the case because in any event there are two separate offences committed and if they are separate it is certainly easier to consider the offence on separate heads.

If in this case it was the appellant himself who issued the cheque for Kshs 40,000/- and evidence was adduced to prove an intention on his part to cheat, then it would have been proper to impute fraud on his part particularly after two previous cheques had bounced, but when the cheque was issued by a third party this tends to imply that the appellant depended on the creditworthiness of the drawer to give the cheque to the complainant to pay off his own debt.

In the premises I would allow this appeal, quash conviction of the appellant and set the sentence aside. The appellant was released on cash bail pending appeal and had also been ordered to deposit his passport in Court. These two items should be returned to him. Order accordingly.

Dated and delivered at Eldoret this 12th day of November 1992.

D.K.S AGANYANYA

JUDGE