



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MWILU & KANTAI, JJ.A.)**

**CIVIL APPEAL NO. 57 OF 2012**

**BETWEEN**

**JULIUS KULUNDU ASIBA ..... APPELLANT**

**AND**

**CONSOLIDATED BANK OF KENYA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Njagi, J.) dated 31<sup>st</sup> January, 2012 in HCCC No. 535 of 2007)*

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**JUDGMENT OF THE COURT**

The matter before L. Njagi, J., appears to have been simple and straightforward but has provoked this appeal where the appellant, **Julius Kulundu Asiba**, has raised 31 grounds of appeal against the Judgment delivered on 31<sup>st</sup> January, 2012.

The respondent, **Consolidated Bank Limited**, in the suit filed at the High Court of Kenya, Nairobi, on 15<sup>th</sup> October, 2007 claimed that the appellant, who was its customer, deposited a foreign US Dollar cheque No. 018292 for \$67400 (equivalent Kshs.5,234,837/20) drawn on Worth National Bank, Texas; that it sent that cheque to its collecting bank, Citibank NA in New York; that the cheque was duly cleared; that it released a sum of Kshs.3,592,663/65 to the appellant but that immediately thereafter the said collecting bank informed the respondent that the said cheque was a forgery; that the collecting bank debited the respondent's account with the full value of the cheque and that the respondent was then entitled to a refund of the sum it had released to the appellant.

In the amended defence and counter-claim the appellant confirmed that he had deposited the said cheque at his account with the respondent; that he had withdrawn the sum claimed by the respondent from his account with them but denied that Citibank NA, New York, had debited the respondents account with the value of the dollar cheque. The appellant went on to state that allegations of forgery had not been proved as evidenced by criminal cases filed against him where he was not convicted and **".....through the acquittal the Defendant was exonerated from any criminal liability relating to the alleged forgery, handling stolen goods, uttering a false document and stealing ...."**. It was further stated in the defence that the suit before the High Court was an abuse of court process intended to deny the appellant his credit balance at the respondent bank and for all that the suit should be dismissed.

The counter claim related to a demand for Kshs.1,518,673/55 being credit balance held at the appellant's account which the respondent had refused to release to the appellant and which was the subject of a suit between the two parties at the subordinate court which was by order of the High Court consolidated with the suit giving rise to this appeal. There was also a claim for damages for defamation.

The evidence in support of the respondent's claim was by a sole witness, **Eric Kinoti Mugambi**, its Manager. He reiterated the facts pleaded in the plaint and produced various documents which included communications between the respondent and its collecting bank in New York.

The appellant testified that he was a businessman who dealt in computers and electronics and was good in e-commerce where he connected buyers and sellers via the internet. It was while he was so engaged in the year 2002 that he visited a website called Alibaba.com and found that a company called South Western Services in the United States of America were looking for computer cartridges. He therefore sent a quotation to a manufacturer in Hong Kong and managed to get a price of US\$20 per cartridge which he marked-up by US\$10 and sent it to the said United States company which readily accepted the price and so the appellant had clinched a lucrative deal because the consignment was for US\$67400 which included the mark-up. He further testified that he was sent a cheque up-front which he deposited at his account with the respondent. The cheque was eventually cleared after some delay associated with clearance of foreign cheques and he proceeded to withdraw the sum claimed by the respondent and travelled to Hong Kong where he bought cartridges which he shipped to the United States and returned home. He was in need of money for other purposes so he visited the respondent at its Harambee Avenue, Nairobi, branch but was surprised to be denied access to his money being told, instead, by the Manager .....

***“.....young man you should actually run away.....”***

He eventually complained to the Anti-Bank Fraud Department of Central Bank of Kenya whose officers arrested him where he was charged in court on various offences; the offences were withdrawn, he was re-arrested on more or less similar charges but was acquitted when the prosecution was unable to produce evidence before the trial magistrate.

The appellant told the learned trial judge:

***“As I stand here, none of the criminal charges has been proved against me. I see a copy of the cheque which I am supposed to have deposited but this cheque does not have my endorsement at the back. I say that this is not the one I deposited as it does not have my features, i.e. my i/d number, my signature and my name.”***

The learned judge analysed the evidence before him and found that the appellant had deposited a forged US dollar cheque and that the respondent was entitled to a return of the sum it had released to the appellant and in the event dismissed the counter-claim and also the claim for damages for defamation.

The thrust of the grounds in the Memorandum of Appeal is that the learned trial judge erred in finding for the respondent when there was no evidence to support the claim; that the learned judge erred in finding that the cheque produced as part of the evidence was the same one that the appellant had deposited; that the learned judge erred in not finding that withdrawal of criminal charges and an acquittal on the same vindicated the appellant and that the civil court could not later find otherwise; that the learned judge was biased and was not an impartial arbiter. The other grounds related to the claim for damages for defamation but these were not pursued when the appeal was argued before us.

**Mr. G.E. Wesonga**, learned counsel for the appellant, in arguments before us, took us through the long journey the dollar cheque had travelled which culminated in the arrest of the appellant and denial of access to the bank account and the balance thereof. Learned counsel submitted that there was no complaint by the drawer of the cheque and that Citibank NA of New York did not provide evidence that the cheque was forged. According to counsel the standard of proof in forgery cases was high and the learned judge, thought counsel, was wrong to find for the respondent on a balance of probabilities standard. Learned counsel concluded his submissions by faulting the learned judge for finding for the

respondent when it was the appellant who had made a report to the police.

**Mr. G.M. Otenyo**, learned counsel for the respondent, thought otherwise. He submitted that the appellant could not benefit from the proceeds of a forged cheque and the respondent was in the event entitled to recover what it had allowed the appellant to withdraw from the account.

Mr. Wesonga, in a brief reply, submitted that the claim before the learned judge was based on forgery thus a higher standard of proof was demanded.

Upon our consideration of the record of appeal, the grounds thereof, submissions of counsel and the law we take the following view of the matter.

The appellant faults the learned judge for not finding that after criminal charges were withdrawn under **Section 87A** of the **Criminal Procedure Code** and an acquittal ordered under **Section 210** of the said **Code** the appellant had been cleared of the forgery allegations. Also that the learned judge erred in lowering the standard of proof where the claim was, according to the appellant, based on forgery.

The facts on this issue which are clear from the record and are summarized in the judgment appealed from were that the appellant was charged on various counts in **Criminal Case No. 112 of 2003** before the Chief Magistrate, Nairobi. That court found that the prosecution had preferred charges before proper investigations were conducted and this led to the charges being withdrawn under **Section 87A** of the said **Code**. Thereafter the appellant was charged on almost the same offences in **Criminal Case No. 591 of 2004** before the Chief Magistrate, Kibera. The criminal case came for hearing various times but did not proceed and the court prosecutor applied to withdraw the charges as had happened in the other court but the appellant's counsel objected to the withdrawal and the court agreed that withdrawal could be an abuse of the court process. No evidence was therefore offered leading to the acquittal under the said Section of the said Code.

The learned judge analysed the standard of proof required in civil cases and found that:

***“..... On the facts of this case, the defendant was discharged in both trials on technicalities. In the first case, he was discharged because he had been taken to Court before the completion of investigations and in the second one he was acquitted for want of prosecution. In neither of those situations was an order made on the basis of the substantive evidence before the Court.”***

We fully agree. In neither of the two criminal cases was the appellant tried and acquitted. The trial court in the two criminal cases did not make any substantive findings on evidence and the appellant is not entitled to the shield of an acquittal which would be the case if substantive findings had been made. In any event the suit by the respondent was based on money paid to the appellant on a cheque which eventually turned out to be a forgery.

The appellant complains that the learned judge erred in finding that the cheque he had deposited was the same as the cheque produced in evidence. The deposit slip drawn by the appellant shows details of the cheque deposited as:

***Drawer or number – 18292***

***Bank and branch – WORTH NATIONAL BANK, 2901 SUFFOLK DRIVE SUITE 100 FORTHWORTH, TEXAS 76133 – 152***

***Amount – US\$67400***

This cheque was the same one produced in evidence as exhibit No. 5. It is duly endorsed “FORGERY”.

Also produced by the respondent were various telex – communications between the respondent and Citibank showing that communication was sent to the latter as collecting bank; clearance of the cheque

was confirmed but later reversed and a charge imposed against the respondent by the said Citibank being handling charges for the cheque that turned out to be a forgery. The respondent showed in evidence that it allowed the appellant to draw the sum claimed in the plaint which sum it was entitled to a return once the dollar cheque ended up being a forgery. The learned judge found that once the dollar cheque was found to have been a forgery it became a nullity and the appellant was not entitled to any proceeds because there were none. There is no merit in this appeal and we accordingly dismiss it with costs to the respondent.

***Dated and Delivered at Nairobi 9<sup>th</sup> day of October, 2015.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**P.M. MWILU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**