



REPUBLIC OF KENYA



**KENYA LAW**  
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**Musera v Republic (Criminal Appeal 41 of 2019)  
[2022] KEHC 17213 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2022] KEHC 17213 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL 41 OF 2019**

**A. ONG'INJO, J  
MARCH 30, 2023**

**BETWEEN**

**MERCY VOSENA MUSERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision of Hon. E. K. Makori (CM), on 21st March 2019  
in Mombasa Criminal Case No. 3070 of 2010, Republic v Mercy Vosena Musera)*

**JUDGMENT**

**Background**

1. The Appellant herein, Mercy Vosena Musera, was charged in Mombasa CMC Cr No 3070 of 2010 with the offence of stealing by servant in Counts No 1 and 4 contrary to section 281 of the [Penal Code](#). The particulars are that on February 11, 2010, at Habo Plaza in Mombasa District within Coast Province being a servant to Habo group of companies stole Kshs 300,000 in each of the two counts, the property of HALB East Africa Trading which came into her possession by virtue of her employment.
2. In the 2<sup>nd</sup> and 5<sup>th</sup> count, she was charged with the offence of making a false document without authority contrary to section 347 of the [Penal Code](#). The particulars were that on February 11, 2010, with intent to deceive or defraud, she altered a documents namely cheques No 2284 and 002300 issued by Commercial Bank of Africa by inserting the letter F to read Four Hundred Thousand and figure 4 to read 400,000 instead of 100,000, the alteration that was not authorized and changed the effect of the said cheques.
3. In count No 3, the appellant was charged with the offence of fraudulent false accounting contrary to section 330 (b) of the [Penal Code](#). The particulars were that the Appellant on diverse dates between 1<sup>st</sup> February and February 28, 2010 in Mombasa District of the Coast Province being a servant to Habo Group of Companies and with intent to defraud, made an entry into the accounting system (Pastel)



belonging to the said Habo Group of Companies purporting to show that Kshs 800,000 had been used for demurrage recovery, a fact she knew to be false.

4. The evidence of Hezron Awiti Bolo was taken on March 8, 2011 by Hon T Gesora, the then SRM, who admitted having signed cheques that were issued in the name of Kennedy Otieno for Kshs. 100,000 each but the same were altered by adding the letter F to make it Four Hundred Thousand and converting the figure to 4 to form 400,000. He said that apart from himself, there are two other signatories to the said cheque, namely Violet and Jack Odongo. He said that the Appellant's signature was not in the cheques. He could not tell whether the signature on the counterfoil was for the Appellant or any other person.
5. When Hon Riechi took over the conduct of the matter on April 5, 2012, the order was that the matter starts de novo under section 200 of the [CPC](#). The prosecution called 5 witnesses but Hezron Awiti Bolo who had initially testified did not testify again and in consideration of the evidence of the 5 witnesses and the Appellant's testimony on oath, the trial magistrate who took over the conduct of the matter on February 27, 2017 and recorded the evidence of Corporal Joseph Kiprono and the testimony of the Appellant and found the Appellant guilty in all the 5 counts and convicted her and she was fined Kshs 25,000 in each count in default to serve 12 months imprisonment.
6. The appellant was aggrieved by the conviction and sentence and she preferred the appeal herein on the following grounds: -
  1. That the learned Magistrate erred in law and fact when he convicted the accused on 5 charges while the prosecution had not adduced enough evidence to support the conviction.
  2. That the learned Magistrate erred in law and fact when he based his conviction for the 1<sup>st</sup> and 4<sup>th</sup> Count on the grounds that the bank agent testified that indeed the money was brought back to the office and handed over to the accused person when in fact that was part of the accused person's job description and the same could not have been said to have been stolen.
  3. That the learned Magistrate erred in law and fact when he based his conviction for the 3<sup>rd</sup> charge on the grounds that the pastel entry was indeed made by the accused person while that fact was not in issue whether the entry was fraudulent or not.
  4. That the learned Magistrate erred in law and fact when he based his conviction of the 3<sup>rd</sup> charge on the fact that the prosecution had proved the same yet the file referenced as L/19154 and L/19203 were not produced in court.
  5. That the learned Magistrate erred in law and fact in basing the conviction on insufficient evidence and hence the said conviction is erroneous.
  6. That the learned Magistrate erred in law and fact in failing to appreciate that it was the duty of the prosecution to adduce sufficient evidence to support conviction beyond any reasonable doubt.
  7. That the learned Magistrate erred in law and fact in making assumptions to fill the gaps created in evidence when the prosecution did not call key witnesses who would have shed some light on the various issues in question.
  8. That the learned Magistrate erred in law and fact in completely disregarding the accused person's written submissions.
  9. That the learned Magistrate erred in law and fact by misinterpreting the evidence that was on record and by so doing entered an erroneous conviction and a flawed sentence.



7. The Appellant sought that her appeal should allowed, he sentence quashed and conviction set aside.

### **Prosecution's Case**

8. PW1, Jackson Omondi Odonyo, the managing director of HALB Trading (EA) Limited stated that in early 2010, he was informed by one Violet Kemunto that the accountant of the company had forwarded a cheque to the CEO for signature. That he asked her for details of the cheque and she gave him the cheque numbers. PW1 informed court that there were two cheques, 000197 and 000198, drawn in favour of HABO group of companies limited and that he then gave the information to the internal auditor. That PW1 expected that the auditor would confirm what the payments were for and the auditor informed him that the money was to be given to the CEO. That when PW1 approached the CEO by the name Hezron Awiti Bolo and asked him why he was taking money from the company without PW1's knowledge, the CEO denied having received any money.
9. PW1 further states that after a few days, external auditors went in to examine the books and that is when it was revealed that around February 2010, some two cheques were written, altered and drawn but the moneys were not accounted for. PW1 stated that he was shown photocopies of the cheques which were for Kshs 100,000. That for cheque No 002284 for Kshs 100,000, the payee is Kennedy Otieno and it is an open cheque. That the cheque voucher in question is No 2244 – MN-1, the money was for clearance of a cargo. PW1 states that later, he was shown a copy of the bank statement showing that Kshs 400,000 was withdrawn and was also shown a cheque of that amount. PW1 identified in court 002284 for Kshs 400,000 – MN-2 and a photocopy of cheque No 002300 of Kshs 100,000 drawn on voucher No 2081. That the amount requested was for Kshs 100,000 for file processing but on the bank statement, the amount of Kshs 400,000 was withdrawn. Voucher and photocopy cheque is MN-3. PW1 confirmed in court of the original cheque No 002300 dated 20.2.2010, drawn in the name of Kennedy Otieno and the amount is Kshs 400,000 cashed at Commercial Bank of Africa – MN-4. PW1 testified that he went and recorded his statement at Urban Police Station and at the time audit was still ongoing. That the processes that cheques go through are done in the accounts department and the accountant is the one in charge of that department and the accountant was Mercy Vosena. PW1 identified Mercy Vosena as the accused in court and that she worked for HALB from early 2009 to about August or September 2010.
10. PW2, Kennedy Otieno Okoth, a messenger at HABO group of companies stated that on 11.1.2010, he was given a cheque by Mercy Vosena, the accountant, to go and cash it at CBA. That he went and withdrew the cash which he brought back to her. PW2 testified that the cheque was No 002284, dated 2.1.2010 and issued in his name. That when he is given a cheque, the same is posted in the system. That another cheque No 002300 dated 20.2.2010 for Kshs 400,000 was also issued. PW2 stated that he went and cashed it the same day and took the money to Mercy Vosena who posted the transaction in the system and did payments. He identified Mercy Vosena as the accused in court.
11. PW3, Joseph Maithya Mulelu, the internal auditor at HABO group of companies stated that he knew Mercy Vosena, by pointing at her in court and that they had worked together from 2006 to 2010. That she worked as an accountant at HABO (EA) Ltd which is one of the companies the HABO group of companies and her duties included preparation of cheque payment vouchers, writing of cheques, posting of cash books and reconciliation. PW3 informed court that Jack Odongo, the Managing Director of HABO EA raised some questions about some suspicious transactions. That PW3 started to investigate and found that cheque No 002284 drawn from Commercial Bank of Africa (CBA) account No. 6575790018 dated 21.1.2010 for Kshs. 400,000 was altered. That the original amount was Kshs. 100,000 (MFI-2) and that PW3 realised that when he looked at payment voucher No 2044 which only had the amount of Kshs 100,000 (MFI-1) and that is the amount that had been requested for. That



the amount stamped paid by the accused was also Kshs 100,000 and the debit on the No. 7700 was for Kshs 50,000 and the next was Kshs 50,000 totaling to Kshs 100,000. PW3 stated that the cheque payment vouchers were prepared and signed by the accused and dated 10.2.2010. That he knew the accused person's signature because as the auditor, he was always going through the documents she made. That the voucher was approved by the group CEO whose signature he was also conversant with as he audited several documents signed by him.

12. PW3 identified the requisition in court - MFI-5. He stated that he has a photocopy of a cheque dated 21.2.2010 and the cheque is for Kshs 100,000 – MFI-6. That if MFI-6 bore similarities to MFI-2 except that one shows Kshs 400,000 while the other shows Kshs 100,000. He states that they got MFI-2 from the bank, thus MFI-6 could not have an original as its original had been altered before presentation to the bank. PW3 was shown the cheque counterfoil for cheque No 002284 – MFI-7, and he stated that it was one of the items that had been kept by the accountant. He stated that he could also see counterfoil No 002300 for reference No. 219221 and that each of the two counterfoils read Kshs 400,000 but the actual fact, they ought to have read Kshs 100,000. PW3 informed court that on 27.2.2010, cheque No 002300 was cashed at Kshs 400,000 and the payee was Kennedy Otieno who was the messenger and the bank agent. That when Kennedy went to the bank, he would take the money to the accused, from there, the accused would prepare a manual voucher which would be used to pay the money to the person who had requested for it. PW3 had in court the manual voucher MFI-10 showing that Kshs 100,000 was paid to Violet who had requested for the same. He stated that he could identify the signature and handwriting of violet but on MFI-10, he could only see her name. That he then prepared his report regarding the two cheques and produced the report as an exhibit.
13. PW4, Emmanuel Kenga, the forensic documents examiner stated that on 19.1.2011 while at the CID headquarters, he received exhibits from Cpl Koech attached to CID Urban. That the documents taken for analysis and which had accompanied the exhibit memo form included A & B – questioned cheques, C1 – C6 – specimen handwriting of accused, and D – known handwriting of accused. PW4 stated that he analysed the questioned handwriting which he formed an opinion that they were similar and indistinguishable, thus they were made by the same person. PW4 informed court that he made a report on 21.11.2011, signed it and produced it as Exhibit 12. That Exhibit A is cheque number 00228407000 for Kshs 400,000. Exhibit B is cheque No 0023000700 for Kshs 400,000. He stated that he picked the figures he examined from both exhibits and from the known handwriting marked D.
14. PW5, No 63647 CPL Joseph Kiprono stated that the complainant had discovered some alterations in cheques, in words and in numbers whereby he had signed cheques of one hundred thousand in words and in figures but what went to the bank was Kshs 400,000 in both cheques. He stated that the aim was to find out whether the alterations were done by the same hand of the accused. That they got a specimen of the accused from her personal file in a letter she had written to the company under a different issue. The outcome was that there were similarities in the handwriting in the cheques as compared to the writings sent to him. That there were changes to the cheques which were honoured by the bank and the cheques were encashed by one Kennedy Otieno who was a messenger and whose role was to go to the bank to withdraw cash and hand it over to the accountant for the intended purposes. That Kennedy had given the cash to Mercy, the accused herein.

## Defence Case

15. The Accused Mercy Vosena Musera gave sworn evidence and stated that she used to Work at HALB East Africa Trading which had other companies affiliated to it. She stated that she worked as a cashier where Lorraine and Sylvia were her colleagues but she handled cheques much later. That HABO group wrote cheques to pay HALB group and that for every cheque, there had to be an instructing cheque



from the small companies. The accused stated that she authorized Lorraine to write cheques because she was in charge but would not control the process. That the cheques would then be signed by CEO Hezron Awiti, Monica Awiti and Augustine Omondi Awiti. That when the cheques are ready, Lorraine had to keep a copy of the cheques. The accused points out that the messengers were given copies which were also written in the register book and Lorraine would be left with the cheques. That there was a register to sign money for petty cash that would be brought to the office and there was no time the accused received money and refused to receipt. She states that she was the credit controller and she could check immediately there was a posting as she had to do a daily report. That the system they were using was also right.

16. This appeal herein was canvassed by way of written submissions.

### **Appellant's Submissions**

17. The Appellant submitted on Count I and Count IV that the prosecution failed to prove the essential elements of the offence of stealing by servant. The Appellant the Appeal case of *Pascal Musyoka Mutua v Republic* (2020) eKLR where the learned judge held that it is trite law that in order to secure a conviction, the prosecution ought to prove stealing also known as *animus furandi* or fraudulent conversion, that it must be proven that the stolen items belonged to the employer and that the offender is a clerk or a servant. The Appellant contends that the charge sheet indicates that the funds belonged to Halb East Africa Trading but the Appellant was never a servant of the mentioned company but was an employee at Habo Group of companies. The Appellant states that the trial court based its conviction for the 1<sup>st</sup> and 4<sup>th</sup> Counts on the grounds that the bank agent testified that after withdrawing the money, he handed over to the Appellant when in fact it was not part of the Appellant's job description. That the prosecution failed to adduce any evidence to prove that the Appellant stole the Kshs 300,000 in each cheque.
18. The Appellant submits that merely relying on PW-2 testimony which in fact does not point out that the Appellant altered and stole monies does not suffice to convict one for theft by servant. That the prosecution witness did not prove beyond reasonable doubt that the Appellant altered, forged and stole monies by servant, and that the onus of proving does not shift. The Appellant points out that there was no evidence that led and/or linked and/or directly pointed that the Appellant is guilty and diverted the monies to her personal use or any other use. The Appellant cited the case of *James Beecher Kiura v Republic* (2020) eKLR where the learned judge equally held that entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability. That in the instant case, the trial court failed to appreciate the fact and the Appellant's defence that at all time before any withdrawal was done, the bank usually calls the signatory. That if at all the amount was withdrawn, it was done in full knowledge of the signatory, who are the directors of the complainant company.
19. In respect to Count 2 and 5, the Appellant submits that the court erred when it based its conviction for the two counts on making of false document without authority contrary to section 347 (b) of the *Penal Code* on the basis of the report by the document examiner who did not testify before the court. The Appellant cited the case of *Boaz Owiti Okoth & another v Republic* (2014) eKLR where the court held that the learned magistrate erred in admitting the document examiner's report without calling the maker thereof and that the report could not be relied upon to form the basis of the conviction for the offence of forgery on count 1 and 3. The Appellant submits further by citing section 35 (1) (b) of the *Evidence Act*, cap 80 of the Laws of Kenya which stipulates that documents must be produced by the maker except where the maker is dead, cannot be found, is incapable of giving evidence or his



attendance cannot be procured without an amount of delay or expense. The Appellant states that the prosecution has no exceptions neither did it give any reasons why the document examiner was not called during the trial. The Appellant also cited the cases of *James Beecher Kiura v Republic* (*supra*) and the case of *Lilian Wangui Mubuyu & another v Sisters of Mercy (sued as the registered trustees of the Mater Hospital)* (2017) eKLR.

20. The Appellant points out in respect to Count 3 that it is directly linked to Count 2 and 5 and that the trial court erred in the conviction. The Appellant submits that the prosecution failed to prove that the Appellant altered the cheques and how she fraudulently accounted for the amount in the altered cheques. The Appellant states that the Appellant worked in Habo Group of Companies as the Assistant Credit Controller and not the Company Accountant as alleged.
21. In submitting on double jeopardy, the Appellant states that the trial herein is an abuse of the court process and offends the legal principle prohibiting double jeopardy. That the Appellant has previously been charged in other five criminal cases and two civil cases on the basis of the same charges, the same facts, emanating from the same transaction and relying on the same evidence of the same witnesses as those presented in this case. The Appellant contends that the case violates provisions of article 50 (2) (a) of the *Constitution, 2010*. That the evidence as adduced is doubtful and cannot warrant a conviction, and that the Appellant ought to be unconditionally acquitted.

### **Respondent's Submissions**

22. The Respondent's submissions were in the order of the Appellant's nine grounds of appeal. The Respondent submitted on whether the prosecution had adduced enough evidence to support the conviction by citing section 268 and 275 of the Penal Code that define stealing and the penalty for the same. The Respondent states that the evidence adduced demonstrated a pure state of conversion of PW1's property by the Appellant, an act constituting the offence of theft/stealing. That they established existence of the property, ownership and the fraudulent conversion thereof and proved the false accounting and making of false document without authority.
23. The Respondent pointed out that the evidence of PW2 was cogent, consistent and unshaken during cross examination. The Appellant's ground of appeal that the bank agent testified that indeed the money was brought back to the office and handed over to the accused person when in fact that was part of the accused person's job description and the same could not have been said to be stolen, the Respondent submits on this that it is an admission by the Appellant that PW2 indeed gave her the money as it was within her job description to receive money and must therefore account for it. The ground of appeal of when the trial magistrate based the conviction for the 3<sup>rd</sup> charge on the ground that the pastel entry was made by the accused person while that was not a fact in issue and the fact in issue was whether the said entry was fraudulent or not, the Respondent submits that the Appellant made an entry of Kshs 100,000 split twice as expenditure for Kshs 50,000 each whereas she had received Kshs 400,000 on both occasions.
24. On the ground of appeal that the trial magistrate based the conviction on the 3<sup>rd</sup> Charge on the ground that the prosecution had proved the same and yet the files referenced as L/19154 and L/19203 were not physically presented before court, the Respondent stated that the file numbers were introduced by the defence on page 153 line 11 and 12 but the same were not raised during the prosecution's case. Neither did they request the court to compel the Complainant to avail the said files to support their case hence an afterthought and their existence cannot be proved.
25. The Respondent contends that the conviction was safe since the evidence met the required threshold which is beyond reasonable doubt. Additionally, the Respondent states that the court did not shift



the burden of proof to the accused person at any point but held that the prosecution had proved its case. On the ground that the trial magistrate made assumptions to fill the gaps created in the evidence when the prosecution did not call for key witnesses who would have shed light on the various issues in question, the Respondent submits that the prosecution is at liberty to call the number of witnesses sufficient to establish its case. The Respondent cited section 143 of the *Evidence Act* and the case of *Keter v Republic* (2007) EA 135 which affirmed the principle. That the director had been called as PW2 before the case was started de novo and it was explained that he had become unavailable since he became a member of parliament. That the second one was violet Kemunto who discovered the anomaly who was not called since she had stopped working for the complainant company and therefore could not be traced. The Respondent pointed out that the witnesses called sufficiently established the prosecution's case.

26. The Respondent submits that in completely disregarding the accused person's written submissions, the court evaluated the evidence by both parties. That the court reached its verdict after considering the prosecution's case and rejoinder by the defence. Additionally, the Respondent states that by misinterpreting the evidence that was on record and by so doing entered an erroneous conviction and a flawed sentence. The Respondent therefore prayed that the conviction and sentence are upheld thereby dismissing the appeal for lack of merit.

### **Analysis and Determination**

27. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

28. After considering the grounds of appeal, records of the trial court and submissions, the issue for determination is whether the case against the Appellant was proved beyond all reasonable doubt.
29. When the trial magistrate was analysing the evidence of the prosecution and weighing it against the accused person's evidence, he concluded that since PW2, Kennedy Otieno said that he handed over the money to the Appellant, it was proof that she committed the offences in the charge sheet.
30. Hezron Awiti Bolo and the other two signatories to the account in question did not attend to testify and prove the case against the appellant that she is the one who altered the figures and letters in the cheques that they had signed. The bank officials who cashed the cheque were also not called to explain how they processed the same when in the words of the prosecution witnesses the alterations were obvious. PW2 verbally said that he handed over Kshs 400,000 to the appellant but there is no other proof except for his word against the word of the appellant that she did not receive the money.
31. The two cheques that were in question were taken to document examiner for analysis to establish whether it was the appellant who altered the document as per counts No 2 and 5 but the document examiner Emmanuel Kenya in his report, Exhibit 12, simply said that the questions hand writings, the known handwriting of the Appellant and the specimen handwriting were similar and distinguishable



and such were made by the same person. He said he could not comment on alleged alteration of letter F and figure 4 because he did not get instruction to inquire whether any letter was altered. The basis of the charges against the Appellant was that she altered the cheques that had been issued to read Kshs 400,000 in words and in figures in the two cheques instead of Kshs 100,000 which had allegedly been issued.

32. Being that the document examiner did not establish this fact, it was erroneous for the trial magistrate to find that the appellant is the one usually drew the cheques and was therefore the one who altered the figures.
33. There are possibilities that PW2 altered the cheques, cashed them and kept the change of Kshs 300,000 from each cheque as there is no evidence of handing over the cash to the appellant. There is also a possibility that the signatories to the account in question issued cheques for Kshs 400,000 otherwise the bank should have noticed that there was an alteration and do due diligence by alerting the signatories.
34. As to whether the appellant is the one who made entries into the pastel system, there was evidence that she was not the only one who had access to the said system and at the same time no ICT expert came to testify on access of the complainant's system.
35. In conclusion, this court finds that there are very many doubts that were raised in the prosecution's case which should have been resolved in favour of the appellant. The appeal has merit and the same is allowed. The conviction is quashed and sentence set aside.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 30<sup>TH</sup> DAY OF MARCH, 2023.**

**HON LADY JUSTICE A ONG'INJO**

**JUDGE**

**In the presence of: -**

**Ogwel- Court Assistant**

Ms. Anyumba h/b for Mr. Ngiri for the Respondent

No appearance for Mr. Egunza for the Appellant

No appearance for the Appellant

Notice of judgment to be issued to the Appellant's counsel

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**Ms. Nyameda**

I pray for a copy of the judgment

**Order:** Copy to be supplied to Prosecution/Respondent

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**30.3.2023**

