



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 13 OF 2019

RICHARD KIPYEGON CHEBOI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence delivered on 17th December 2018 by Hon. J. Nthuku, SRM,

in Eldama Ravine Principal Magistrate's Court in Criminal Case No. 88 of 2017,

Republic versus Richard Kipyegon Cheboi)

JUDGMENT

1. The appellant has appealed against his conviction and sentence of a fine of shs 100,000/= in default to serve 12 months imprisonment in respect of the offence of conspiracy to defraud contrary to section 317 of the Penal Code in count 1.
2. He has similarly appealed against his conviction and sentence of a fine of shs 100,000/ in default to serve 12 months imprisonment in respect of the offence of stealing by a person employed in the public service contrary to section 280 of the Penal Code (Cap 63) Laws of Kenya in count 2.
3. The sentences were ordered to run consecutively.
4. In this court the appellant has raised nine (9) grounds of appeal in his petition. Additionally, has raised six (6) grounds of appeal in his supplementary grounds of appeal which he called "*SUPPLEMENTARY RECORDS OF APPEAL.*"
5. In grounds 1 and 7 the appellant has faulted the trial court for convicting him for the two offences of conspiracy to defraud and stealing by a person employed in the public service in the absence of supporting evidence. In this regard, the prosecution called Majani Mingi (Pw 1), the chairman of the board of management of the Kaptera primary school. Pw 1 testified that he was a signatory to the school bank account with National bank, Nakuru branch. It was also his evidence that the school cheque book and stamp were missing.
6. Pw 1 testified that on 13/1/2017, he received a phone call from Willy Chebusi (Pw 2) that he was required at Eldama Ravine police station. Upon arrival there, he was informed of a suspect who had a cheque leaf for Kaptera primary school drawn in favour of Remo bookshop in respect of account number 2488***** with National bank. The suspect had an order for the supply of 47 cartons of exercise books worth shs 261,000/-. Pw 1 identified the cheque serial number 000047, which was eventually produced as prosecution exhibit Pexh 1. Attached to the order was a piece of paper upon which was written "Kaptera Primary Order"; which piece of paper Pw 1 identified and was later produced as prosecution exhibit Pexh 2. The cheque leaf was from a missing cheque book of the school.
7. Furthermore, Pw 1 testified that a cheque is only drawn after the delivery of the exercise books. In this case the cheque was issued before delivery. It was also the evidence of Pw 1 that it was the duty of the appellant to draw the cheque and for the chairman (Pw 1) to verify the delivery of the books and after doing so; Pw 1 was to sign the cheque. Pw 1 denied placing an order for the said books.
8. Pw 1 also testified that the signatories to the school's cheque were the appellant as secretary to the school board, the chairman and treasurer; the latter two all did not sign the said cheque.
9. In cross examination, Pw 1 testified that he had no personal differences with the appellant and that they only disagreed with the appellant when the CDF money went missing.
10. The prosecution called Willy Chebusi (Pw 2), the head teacher who took over from the appellant. Pw 2 testified that the appellant did not hand over to him the financial books and did not hand over anything to him. Pw 2 learned that the appellant had been interdicted over fraud

of Rongai Constituency Development Fund (CDF).

11. Pw 2 also testified that on 13/1/2017, he received a call from the director of Remo bookshop that a person had gone to that bookshop with a cheque from his school and had presented it to him. The director wanted to know whether Pw 2 had issued the said cheque. Pw 2 informed the chairman and together they proceeded to the said bookshop. Upon arrival he learned that a person had gone there alleging that he had been sent by Pw 2. Pw 2 identified the said cheque (exhibit Pexh 1); which was in the sum of shs 261,900/-. Pw 2 denied drawing the said cheque.

12. Pw 2 then proceeded to Eldama Ravine police station, where they met the suspect, who denied knowing Pw 2.

13. The prosecution also called Everline Cherono (Pw 3), the school treasurer. Pw 3 denied signing the said cheque. Pw 3 also testified that the appellant did not hand over to Pw 2. Pw 3 also testified in relation to the appellant that: *"I can say that you took the cheque because for all the period you were carrying the cheque book in your pocket and there's no day you left it in the office."*

14. In cross examination, Pw 3 testified that the appellant as head teacher was the custodian of the school books. And in re-examination Pw 3 testified that as at 13/1/2017 she was the treasurer and no books had been ordered by the school. She denied signing the cheque exhibit Pexh 1. Pw 3 further testified that Pw 1 did not sign the said cheque and that the appellant never handed over the cheque books before he left.

15. Jennifa Cherotich (Pw 4), who was a supervisor for Remo stationers and printers, testified that she was called over the phone by a person who said that he was the head teacher of Kaptera primary school. He said he wanted 30 cartons of books. In response Pw 4 told him to go to the bookshop with the LPO. The said person told Pw 4 that he was going to send the bursar because he was busy. That person arrived in the bookshop at 4.00 pm.

16. Pw 4 asked that person for the LPO. Instead that person showed him a small rough piece of paper exhibit 2. That person introduced himself as Henry Cheboi, a teacher at Kaptera. When Pw 4 insisted, that person now said he was a subordinate. The person then gave him the cheque exhibit 1. Pw 4 then called her boss, Stancy Baskwony (Pw 5). Pw 5 called CID police officers, who came and arrested the suspect. The police took the cheque and the paper he used as an LPO. He was asked his name and he said that he was Henry Chemoiwo.

17. The prosecution called Stacy Kiplagat (Pw 5), the owner of Remo bookshop. Pw 5 testified that a person called him on telephone xxxx. He told Pw 5 that he is the chair of Kaptera primary school and that he wanted 30 cartons of 200 pages A4 and 120 pages A4 books. Pw 5 became suspicious as he had been conned in a similar manner and that he knew the said school does not use A4.

18. Pw 5 alerted his manager Jennifer (Pw 4) and a police officer. At 5.00 pm the person arrived in the bookshop and was arrested. The person was called Chemoiwo. Pw 5 rang the school chairman (Pw 1). Pw 1 told Pw 5 that they had not ordered for those books.

19. Pw 5 continued to testify he identified the cheque that had been presented, which was later produced as exhibit 1. When he looked at the order (LPO), Pw 5 realized that it was not the standard government form. Pw 5 knew the appellant as the former head of Kaptera primary school.

20. The prosecution also called C.I. Iranda Masiko (Pw 6), who is the document examiner. He examined both the known writing of the appellant and the questioned writing on the cheque and the order together with the specimen writings of Pw 1 and Pw 3. He found that the appellant was the author of the cheque and order (LPO). Pw 6 then produced his report as exhibit Pexh 4.

21. Pw 6 further testified that he amended his report as follows. The original report in part in paragraph 5 stated that: *"I have examined and compared the questioned handwriting marked in red ink on the exhibits marked "A1-A2" with specimen hand writing on exhibits marked "C2(I)-C2(iii)..."*. The amended report in respect of that same paragraph stated that: *"I have examined and compared the questioned handwriting marked in red ink on the exhibits marked "A1-A2" with specimen hand writing on exhibits marked "B2(I)-B2(iii)..."*.

22. The above amendment is also reflected in paragraph 6 of the amended report; in which the letters "B2(i)-B2(ii) are substituted with letters "C2(i)-C2(iii)

23. It is clear that the amendment is only in relation to letter "B" which is substituted with letter "C." Pw 6 has initialed the amendments.

24. I have also perused the exhibit memo form, which the document examiner relied in part in preparing his report; which shows the amendments were in line with the exhibit memo.

25. Finally, the prosecution called PC James Magondu (Pw 5), who was the investigating officer. Pw 7 testified that he was called by Stancy Baskwony (Pw 5), who told him there was a suspicious looking person who was pretending that he had been sent from Kaptera primary school. Pw 7 proceeded there and found Henry Chemoiwo, who said that he was an employee of Kaptera Primary school. They arrested him and proceeded to interrogate him. Upon interrogation, Henry Chemoiwo, told them he had been sent by the appellant with the cheque (Pexh 1) and order (Pexh 2); but Pw 7 received these exhibits from bookshop. Henry Chemoiwo, told Pw 7 that he was from the same area as the appellant.

26. Pw 7 established that Pw 1 and Pw 2 had not made any order for books from that bookshop. Pw 2 further told Pw 7 that the appellant had not handed to him the school cheque book and school stamps.

27. Furthermore, Pw 7 established that the cheque leaf recovered from Henry Chemoiwo was from the cheque book from the school; which the appellant failed to hand over.

28. Pw 7 also took specimen handwriting from Henry Chemoiwo and from the school secretary, the treasurer (Pw 3) and the school chair Pw 1; which he took to the document examiner (Pw 6).
29. Pw 7 also realized that there was an error in the document examiner's report; which he raised with Pw 6. Pw 6 told Pw 7 that he would raise it in court. Pw 6 noted the error corrected it and countersigned it. In cross examination, Pw 7 testified that after interdiction the appellant was hostile in relation to handing over.
30. Furthermore, Pw 7 testified that the handwriting of the appellant was marked C2i and C2ii and his specimen signature was marked C1; which he produced as exh 6a, b and c. He also testified that the hand writing in the cheque was that of the appellant. He further testified that the handwriting of the appellant did not match with the order (exhibit 2). He produced the cheque leaf and order as exhibits 1 and 2, respectively.
31. The appellant gave sworn evidence denying the charges. He testified that he was a person of integrity. And at that time he was the secretary to KEPSA Kampi ya Moto and head of ball games and sports Kampi ya Moto and also Rongai district. He was also the secretary to the Bondeni Mosque madrassa. He also testified that he could not engage in such activities since he is a Muslim.
32. He further testified that on 17/3/2016 he was summoned to the office of the sub-county director where he found the human resources officer (Biwott). While there he was served with a letter of interdiction. Chebotim closed the office of the school. This disabled him from having access to the office.
33. He further testified that it was up to the head teacher who took over from him (Pw 2) to arrange for the handing over and that he was not called to hand over.
34. In respect of the document examiner's report, the appellant testified that the document examiner's report, which he produced as defence exhibit Dexh 1, was altered by the document examiner. The report was manipulated to fix him. He also testified that he did not know Henry Chemoiwo.
35. The appellant further testified that he was in custody for one year. He also testified that as the head of Kaptera primary school, he was the custodian of cheque books. He also testified that the cheque does not have his signature and that he was not aware of any missing cheque books.
36. This is a first appeal. As a first appeal court, I am required to re-evaluate the entire evidence on record and making my own findings while deferring to findings of fact of the trial court based on credibility. I have done so.
37. I find that the evidence against the appellant is circumstantial. In order for the court to convict on such evidence, the chain of the said evidence must exclusively point to the appellant as the author of the offences committed either alone or jointly with another person or other persons.
38. I find as credible the evidence of Majani Mingi (Pw 1), the chairman of the board of management of the Kaptera primary school that that he himself did not sign the stolen cheque, which was produced as exhibit 1. It was also his evidence that the signatories to that cheque were himself as chairman, the appellant as the secretary to the school and Everline Cheroni (Pw 3) as the treasurer. I also find as credible his evidence that he himself and the treasurer did not sign that stolen cheque.
39. Furthermore, I find as credible the evidence of the treasurer, which supports that of Pw 1 that she did not sign that disputed cheque. I also find as credible her further evidence that the appellant stole the cheque because *"I can say that you took the cheque because for all the period you were carrying the cheque book in your pocket and there is no day you left it in the office. I know that the cheque book was for National Bank."*
40. Additionally, I find as credible the evidence of Pw 3 that she did not sign the disputed cheque and that the appellant was the sole custodian of the school cheque books. Her other credible evidence was that the school did not place any order for books from Remo stationers and printers. She also did not sign the disputed cheque. I further find that the appellant did not hand over to the head teacher who took over from him. This also confirmed by the evidence of head teacher who took over from him namely Chebusi (Pw 2).
41. I further find that the appellant never handed to Pw 2 two cheque books namely cheque book No 1 to 100 from which the disputed cheque was pulled out and cheque book No. 101- 200.
42. In regard to the foregoing evidence, the appellant who testified on oath testified that the school chairman (Pw 1) closed the school office and he did not have access to that office. Additionally, the head teacher who took over from him did call him to hand over.
43. Even in the absence of the document examiner's report through Pw 6, the circumstantial evidence on record exclusively points to the appellant as the author of the disputed stolen cheque. Furthermore, there is ample evidence that he had conspired with Henry Chemoiwo to defraud the school; since there is again ample evidence from the owner of the bookshop (Stacy Kiplagat -Pw 5) and his supervisor (Jennifa Cherotich (Pw 4), that the said Henry Chemoiwo presented to them the stolen cheque leaf and the piece of paper that was presented as an LPO (prosecution exhibit Pexh. 2).
44. The said Henry Chemoiwo was arrested in the premises of the bookshop by PC James Magondu (Pw 5), who was the investigating officer and Pc Douglas Musyoki; after he was identified by Pw 4 and Pw 5. Both the stolen cheque and the piece of paper that was presented as an LPO were recovered from the said Henry Chemoiwo. Henry Chemoiwo alleged that he had been sent by the appellant. The recovery of the stolen cheque leaf and the order from the said Henry Chemoiwo, lends credence to the said allegation.

45. The appellant has disputed the genuineness of the document examiner's report on the basis that it was altered by the document examiner, C.I. Iranda Masiko (Pw 6). Pw 6 testified on the issue and was cross examined on the issue by the appellant. I have examined the report in the light of the evidence of Pw 6, the exhibit memo and I find as credible that he merely corrected errors in his report. The report clearly shows that the appellant was the author of the disputed cheque and the piece of paper which purported to be the LPO from Kaptera primary school.
46. The report is additional evidence that proves beyond doubt that the appellant was the author of both the disputed cheque and the note that purported to be the LPO.
47. I find the sworn evidence of the appellant to be incredible in view of the abundant evidence of the prosecution. I further find that the sworn evidence of the appellant that he a person of high integrity and that being a Muslim he could not commit these offences was rightly disbelieved by the trial court. I further find as incredible his assertion that the police investigating officer manipulated the document examiner is not supported by evidence on record.
48. The existence of a conspiracy may be inferred from the circumstances of the case. Furthermore, proof of the identity of the co-conspirator is not important. All that is required is proof by way of evidence the existence of the co-conspirator with whom the appellant was in league in executing the conspiracy. It is also not important to prove that the conspirators met at a particular place. In this regard this court expressed itself in the following terms in Andrew Omondi Owuor alias Antony Njenga v Republic, Kabarnet High Court Criminal Appeal NO 4 of 2019, *"It is equally important to point out that in order to prove conspiracy, it is enough for the prosecution to prove an agreement between either a known or an unknown person. The existence of the agreement may be inferred from the circumstances of the case; for conspirators do execute their conspiracies in secrecy."*
49. The trial court had the advantage of seeing and hearing the appellant testify before it; which advantage is not enjoyed by this court. The factual findings of the trial court are supported by the evidence on record. I find no basis to interfere with those findings of fact.
50. The upshot of the foregoing is that I find that the offence of conspiracy to defraud in count 1 was proved beyond reasonable doubt.
51. However, I find that the offence of stealing the subject cheque leaf which is charged in count 2 raises an issue that requires to be addressed. The issue is that the monetary value of the said cheque leaf is not particularized in the particulars of the offence, which is a requirement of the law in terms of section 237 (c) (i) of the Criminal Procedure Code (Cap 75) Criminal Procedure Code; which provisions read as follows:
- "the description of property in a charge or information shall be in ordinary language, and shall indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;"*
52. The value of the cheque was not stated in the particulars of the charge sheet; which is the standard practice in offences involving stolen property. There is no doubt that the cheque is valuable property; a matter in respect of which stamp duty is always payable. I therefore take judicial notice that the value of the said cheque is one shilling in the circumstances of this appeal.
53. I therefore dismiss the appeal against the convictions recorded in the above two counts.
54. The appeal against sentence requires attention in view of the fact that the trial court summarily sentenced the appellant without taking into account his mitigation. This was an error of law committed by the trial court.
55. Furthermore, the trial court did not take into account that the appellant had been in pre-trial custody for one year as mandatorily required by section 333 (2) of the Criminal Procedure Code. The appellant was released on bail pending his trial, after being in custody for one year. This was also an error of law committed by the trial court in exercise of its sentencing discretion.
56. The trial court also failed to take into account that the appellant was a first offender.
57. The trial court also failed to take into account that there was no economic loss suffered by the victim.
58. Apart from the foregoing, the trial court also failed to take into account the aggravating circumstances of the offence, which were as follows. First, the appellant breached the trust imposed upon him as the head teacher of Kaptera primary school, which is a public school.
59. I have taken into account both the mitigating and aggravating factors. I have also taken into account that the appellant released on bail pending appeal on 12/06/2019 by this court (Muriithi, J) and has enjoyed liberty since then.
60. The upshot of the foregoing is that I am entitled to interfere with the sentencing discretion of the trial court due to the errors committed by that court.
61. In the premises, I hereby sentence the appellant to a sentence of a fine of shs 5,000/- in default to serve 3 months imprisonment in count 1.
62. Additionally, I hereby sentence the appellant to a sentence of a fine of shs 5,000/- in default to serve 3 months imprisonment in count 2.

63. The sentences are hereby ordered to run consecutively.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS
29TH DAY OF JUNE 2021.**

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Kemboi Court Assistant.

Appellant present in person.

Mr. Mong'are for the Respondent.