



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.92 OF 2019**

*(An Appeal arising out of the conviction and sentence of Hon. Stephen Jalang'o (PM) delivered on 5<sup>th</sup> April 2019 in Makadara Criminal Case No.3952 of 2012)*

**NICHOLAS NTHULI KIMWELI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Nicholas Nthuli Kimweli was charged with five counts under the **Penal Code**. In the first count, he was charged with **forgery** contrary to **Section 345** as read with **Section 349** of the **Penal Code**. The particulars of the offence were that on diverse dates between 27<sup>th</sup> May 2011 and 16<sup>th</sup> June 2012 at unknown place within Kenya, the Appellant, jointly with others not before court, forged 52 cheques leaves of Bank of Baroda as particularized in the charge sheet for a total sum of Kshs.11,792,700.40 the property of ChemAfrica Limited purporting them to be genuine cheques signed by Suryadevara Venkateswar Rao. He was further charged with the offence of **stealing by servant** contrary to **Section 281** of the **Penal Code**. The particulars of the offence were that between the above dates at Bank of Baroda Kenya Limited, Industrial Area Branch in Nairobi County, being an accountant of ChemAfrica Limited stole Kshs.11, 792,700.40, the property of ChemAfrica Limited which came in his possession by virtue of his employment.

In the third, fourth and fifth counts, he was charged with the offence of **attempted stealing** contrary to **Section 281** as read with **Section 389** of the **Penal Code**. The particulars of the offence were that on 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> June 2012 respectively at Bank of Baroda Kenya Limited, Industrial Area Branch in Nairobi County, being an accountant at ChemAfrica Limited, the Appellant attempted to steal the sums of Kshs.188,642/-, Kshs.350,844/- and Kshs.325,177/- respectively, the property of ChemAfrica Limited which came into his possession by virtue of his employment.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of all counts. In respect of the first count, he was fined Kshs.200,000/- or in default serve two years imprisonment. In respect of the second count, he was sentenced to pay a fine of Kshs.500,000/- or in default serve three years imprisonment. In respect of the third, fourth and fifth counts, he was sentenced to pay of a fine of Kshs.100,000/- each or in default serve two years imprisonment on each count. The default sentences were ordered to run consecutively. The Appellant did not pay the fines. He is serving the default sentences. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court had erred when it held that Suryadevara Venkateswar Rao and ChemAfrica Limited were one and the same. The Appellant faulted the trial magistrate for failing to differentiate between the said Suryadevara Venkateswar Rao and the company, which, according to the Appellant, in law is an independent and distinct legal person. The Appellant took issue with the fact that the trial court failed to properly evaluate the evidence and thereby arrived at the erroneous conclusion that the prosecution had established that monies belonging to the company had gotten lost. The Appellant accused the trial court of relying on impugned, hearsay and inadmissible evidence of the document examiner to convict him. The Appellant took issue with the finding by the trial court that he was connected with Fakiva Enterprises Limited yet the company was a different entity from the Appellant. In essence, the Appellant was saying that if anyone was to be found culpable, it was the said company and not himself. The Appellant was aggrieved that he was convicted of the charges despite the fact that crucial witnesses, including directors of the complainant's company and officials from the bank were not called to testify in the case. He faulted the trial magistrate for reaching conclusions based on questionable documents which did not establish his guilt to the required standard of proof beyond any reasonable doubt.

The Appellant was aggrieved that the trial court reached the conclusion that he had withdrawn certain monies from the particular bank yet no official or CCTV footage from the bank were produced into evidence. He accused the trial court of shifting the burden of proof to him by requiring him to establish that the payment made to Fakiva Enterprises Limited were regular and valid payments in respect of proper

transactions with ChemAfrica Limited. The Appellant was aggrieved that he was convicted on the charges despite the fact that the evidence adduced by the prosecution witnesses did not accord with the charges and particulars set out in the charge sheet. He took issue with the fact that, in arriving at its decision, the trial court selectively and in a biased manner analyzed the evidence and thereby reached the erroneous conclusion that he was guilty as charged. He faulted the trial magistrate for failing to consider his defence and the submission that he made before arriving at the erroneous decision that he was guilty as charged. In the premises therefore, the Appellant prayed that the court allows the appeal, quashes the conviction and set aside the sentences that were imposed on him.

Prior to the hearing of the appeal, learned counsel for the Appellant and for the Respondent filed written submission in support of their respective opposing positions. They further made oral submission urging their respectively opposing positions. Mr. Masila for the Appellant submitted that the prosecution failed to prove to the required standard of proof that the cheques which the Appellant was accused of having forged belonged to the company. He pointed out that there was bad blood between PW1, (whom he referred to as the actual complainant) and the Appellant. He emphasized that the prosecution failed to establish that actual monies were lost. Not all the cheques counterfoils that were the subject of the charge were produced into evidence. He submitted that it was wrong for the trial court to convict the Appellant on the charge of **theft** only by virtue of the fact that some of the cheques were issued to him. He reiterated that the company that had employed the Appellant was not the complainant; rather it was PW1 who was the complainant. He pointed out that the company never lodged a complaint with the police against him. Neither did the company adduce evidence against him. He wondered how the trial court could have allowed a stranger to adduce evidence on behalf of a company without the company's authority. Learned counsel submitted that the prosecution failed to establish that the particular witness had the authority of the company to give his testimony before the court. He wondered why the other signatories were not called to testify in court.

Mr. Masila accused the trial court of relying on inadmissible evidence of the document examiner to convict the Appellant. The actual document examiner who perused the documents and wrote his opinion did not come to court to testify. He complained that the trial court allowed the substitute document examiner to testify in court despite objection by the defence. There was no reason why the document examiner who examined the documents and prepared his opinion was not called to testify before court. Even if the court were to admit that evidence, learned counsel pointed out that the document examiner was not categorical that the Appellant was the author of the signatures in question. That evidence should have been evaluated in favour of the Appellant. The Appellant should therefore have been acquitted. Learned counsel disputed the finding by the trial court that falsehoods had been established on the part of the Appellant's conduct. He was of the view that there was no basis upon which the trial court would reach such finding. He questioned why the trial court never made a finding regarding how it was possible for the Appellant to withdraw monies from the bank without the two mandatory signatories having signed the cheque. He submitted that the narrative that the Appellant plucked the cheque, wrote the same in his favour, and withdrew funds from the account was not supported by evidence because it would not be possible for the cheques to be paid or cleared without the mandatory signatories.

Learned counsel submitted that critical witnesses were not called to testify in the case. He wondered why the trial court did not draw adverse inference in the case. In particular, he was of the view that the company directors and one Nzita Wanja, who had acted as an accountant, should have been called as prosecution witnesses. This is more so because of the prosecution's case that it was Nzita Wanja who had "discovered" the forgeries when the Appellant was on leave. He questioned why CCTV footage from the bank was not produced into evidence to show that indeed it was the Appellant who had gone to encash the cheques in issue. If the court had properly evaluated this evidence, it would have found that reasonable doubt was raised in regard to who wrote the cheques in question, and further, who withdrew funds from the bank using the said cheques. Learned counsel submitted that the trial court failed to find that at the time the charges were instituted, PW1 was not a director of a company and therefore lacked authority to adduce evidence on behalf of the company. Learned counsel explained that it was not possible for the trial court to reach the finding that the charge of **stealing** had been established when it was not established to the required standard of proof that the cheques had actually been encashed. He submitted that the ownership or shareholding of Fakiva Enterprises Limited was not established. He faulted the trial court for proceeding as if the shareholders of Fakiva Enterprises Limited were known. No documents were produced to establish that Fakiva Enterprises Limited had an account in which the cheques in question were deposited.

Learned counsel for the Appellant pointed out that the trial court did not interrogate the fact that PW1 owned a company by the name Baba Enterprises which used to trade with the company. He submitted that PW1 used this company to steal from ChemAfrica Limited. He achieved this theft by invoicing the company yet no goods had been delivered by the firm. He reiterated that the prosecution failed to establish to the required standard of proof that he had signed any of the cheques. He wondered why the trial court did not properly evaluate the evidence regarding the role that PW1 played in the entire transaction, which in his view, pointed to where culpability lay. He accused the trial court of relying on extraneous issues to convict the Appellant. He was of the view that PW1 lodged a complaint because he wanted to cleanse himself from blame resulting from the loss of funds by the company. He questioned why the trial court upheld the prosecution's evidence that he had stolen funds from the company when the prosecution did not produce bank statements to establish that indeed the said cheques had been encashed. He disputed the photocopies of the bank statements that were produced in court. He explained that such evidence was inadmissible. He submitted that the prosecution failed to prove that the Appellant either forged the cheques, attempted to steal or stole from the company. He was of the view that the evidence that was adduced by the prosecution witnesses did not meet the legal threshold to find the Appellant guilty as charged.

On sentence, learned counsel for the Appellant submitted that the same was harsh and excessive. There was no justification in sentencing the Appellant to serve the default custodial sentences consecutively instead of concurrently. He urged the court to accordingly review the sentence.

Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution adduced overwhelming evidence which established to the required standard of proof that the Appellant took advantage of his position as an accountant of the company to make payments to himself and Fakiva Enterprises Limited, a company he was associated with. The prosecution established that the Appellant forged the signature of PW1, a director of the company, and managed to withdraw funds from the company's account. The prosecution established that the Appellant was the custodian of the cheque books. It was only when the Appellant went on leave that it was discovered that some cheques including their counterfoils were missing. Upon investigations, it was discovered that the Appellant had transferred funds from the company's account to himself and to Fakiva Enterprises Ltd. As regard the ownership of Fakiva Enterprises Limited, learned prosecutor submitted that the investigating officer produced account opening documents of the company which proved that it was the Appellant who had opened the said account in the name of Fakiva Enterprises Limited. As regard the question whether the Appellant had forged the signature of PW1 in the cheques, learned prosecutor submitted that the document examiner confirmed that indeed it was the Appellant who

had signed the said cheques after comparing his known handwriting with the handwritings on the cheques.

As regard the charges of theft, Ms. Nyauncho submitted that the prosecution was able to establish to the required standard of proof that the Appellant abused his position as an accountant to forge the cheques and thereby transferred funds from the company account to his account and that of Fakiva Enterprises Limited, a company he is associated with. On the question of the prosecution's alleged failure to call necessary witnesses, learned prosecutor submitted that the witnesses who were called were able to establish to the required standard of proof that indeed the Appellant had committed the offences that he had been charged and subsequently convicted. It was not necessary to call any other witness.

On sentence, learned prosecutor urged the court to take into account that a substantial sum of money was lost by the complainant to an extent that the business collapsed and had to be closed down. The Appellant's criminal conduct caused misery to the complainant. She therefore urged the court not to interfere with the sentence. The appeal should be dismissed in its entirety.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1987] eKLR** stated this on the duty of the first Appellate court:

***“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”***

**In the present appeal, the issue for determination is whether the prosecution established the charges that were brought against the Appellant to the required standard of proof beyond any reasonable doubt.**

**This court has carefully re-evaluated the evidence adduced before the trial magistrate's court in light of the grounds of appeal and the submission, both written and oral, made before this court. There are certain facts that are not in dispute in this appeal. It is not disputed that at the material time the Appellant was employed as an accountant by the company, ChemAfrica Limited. His duties included the keeping of cheque books, preparation of the cheques for payments and encashment of some of the cheques for the company's day to day operations. It was apparent from the testimony of PW1, Suryadevara Venkateswar Rao, a director of the company, that in the course of his employment, the Appellant became a trusted employee. It was also apparent that the directors of the company did not audit the Appellant's work to ascertain that he was doing what he was employed to do.**

According to the prosecution's evidence, it was when the Appellant went on leave, that another employee, Nzita Wanja, who had temporarily held his position, discovered anomalies in the manner in which the cheques were written and withdrawals made. Further investigations revealed that the cheques with questionable withdrawals had been made had their counterfoils removed from the cheque books. Further inquiry established that those cheques had indeed been withdrawn by the Appellant or deposited in the bank account of a company by the name Fakiva Enterprises Limited. The trial court found that the prosecution had established to the required standard of proof that the Appellant had indeed forged the said cheques and withdrawn the cash either in his name or in the name of Fakiva Enterprises Limited.

In this appeal, the Appellant raised several grounds challenging his conviction. The first ground is that the company which had employed him did not lodge a complaint with the police. It was the Appellant's appeal that PW1, Suryadevara Venkateswar Rao lodged the complaint with the police in his personal capacity and not as a legal representative of the company. On re-evaluation of the evidence adduced, this court does not find favour with this argument. PW1 was a director of the company where the Appellant used to work. He gave his testimony in such capacity. He was director who was involved in the day to day management of the company. Therefore, he was the one who was qualified and competent to give evidence on behalf of the company. The assertion by the Appellant to the effect that PW1 framed him on the charges that were brought against him in order to cover up the fraud that he had committed in the company using a company by the name Baba Enterprises is not supported by evidence. Indeed, this court formed the view that the Appellant made the assertion as a red herring with a view to diverting the court's attention from the actual culprit who committed the offence. Further, it is inconceivable that PW1 could have testified in his personal capacity yet the money that was stolen belonged to the company where he was a director. PW1 did not personally lose any money; the money was lost by the company.

Another ground of appeal that the Appellant put forward to challenge the decision of the trial court is in regard to the manner in which the cheques were drawn. There was incontrovertible evidence that it required at least two signatories to sign a cheque in order for a withdrawal to be made. The signatories were the directors of the company. In this case, the prosecution was able to establish that one of the directors used to pre-sign the cheques so that in the event any payment was required to be made, PW1 would be the second signatory. The document examiner adduced evidence which established to the required standard of proof that the Appellant took advantage of this lapse in security to forge PW1's signature on the cheques in issue. It is the Appellant's appeal that the two signatories signed the cheques contemporaneously. Therefore, he could not be accused of forging the signature of PW1 alone. Upon re-evaluation of the evidence, this court agrees with the prosecution that indeed the cheques were pre-signed by one of the directors before the said cheques were written and PW1 signed the same as a second signatory. The prosecution further established to the required standard of proof that it was the Appellant who had custody of the cheque books, and had the mandate to write the cheques when payment was required to be made. Indeed, it was established that he was also entrusted with the duty of withdrawing any cash from the bank when the company required the same for its operation.

On the ground of appeal by the Appellant to the effect that the prosecution had failed to establish that indeed the said forged cheques had been encashed, the investigating officer produced bank statements which established that indeed the particular cheques had been paid. The Appellant challenged the production of the bank statements on the grounds that they were photocopies, and not originals, and therefore inadmissible in evidence. On re-evaluation of this ground, this court holds under **Section 66(c)** of the **Evidence Act**, the said bank statements were admissible in evidence as secondary evidence especially where the prosecution established under **Section 68(1)** of the **Evidence Act** that the original could not be procured at the time the case was being prosecuted. The Appellant faulted the trial court for admitting the photocopies of the bank statement into evidence. This court cannot find any fault with the decision of the trial court in admitting the said documentary evidence. That ground of appeal lacks merit and is disallowed.

It was the Appellant's appeal that the prosecution failed to establish a connection between himself and the company known as Fakiva Enterprises Limited. The Appellant took issue with the finding by the trial court that he was the owner or shareholder of Fakiva Enterprises Limited. On the other hand, it was the prosecution's response that it was able to prove that indeed the Appellant had opened a bank account at Kenya Commercial Bank under the name Fakiva Enterprises Limited. He was a signatory of the said account. On re-evaluation of the evidence, this court finds that indeed the prosecution produced documents, which established to the required standard of proof beyond any reasonable doubt, that the Appellant operated the account under the name Fakiva Enterprises Limited. He was therefore connected with the said company. He was a beneficiary of funds deposited in the said company. The Appellant cannot therefore deny association with the said company.

The Appellant complained that the prosecution failed to call the other directors of the company to support the prosecution's case. He further argued that failure to call Nzita Wanja, the accountant who is alleged to have discovered the anomaly in the accounts, weakened the prosecution's case. On the other hand, the prosecution submitted that it had adduced sufficient evidence to support the charges brought against the Appellant. It is apparent that the Appellant is relying on the case of **Bukenya & Others –vs- Uganda [1972] EA 549** where the court held that:

***“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***

***(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.***

***(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”***

In the present appeal, was the failure to call the other directors of the company and Nzita Wanja fatal to the prosecution's case? It was clear from the evidence adduced that the testimony of PW1, PW3 and PW4 was able to establish to the required standard of proof beyond any reasonable doubt the charges that were brought against the Appellant. It was not necessary to call another director of the company when PW1, as a director, was the one who dealt with the Appellant on a day to day basis as the person in charge of the daily operations of the company. His testimony was sufficient to establish the circumstances by which the cheques were forged and funds withdrawn from the company's account at Bank of Baroda (K) Limited, Industrial Area Branch Nairobi.

This court agrees with the Appellant that it would have been necessary for Nzita Wanja to be called as a witness to testify with regard to the circumstances she discovered the forgery. However, failure by the prosecution to call the said Nzita Wanja as a prosecution witness did not weaken the prosecution's case against the Appellant. All the ingredients supporting the charges brought against the Appellant were established to the required standard of proof beyond any reasonable doubt. This court agrees with the court in **Keter –vs- Republic [2007] 1 EA 135** where it held thus:

***“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses (as) are sufficient to establish the charge beyond any reasonable doubt.”***

This court therefore finds no merit with this ground of appeal. It is disallowed. The upshot of the above reasons is that the Appellant's appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer ground. This court agrees with the Appellant that the default custodial sentence that the Appellant is serving after failing to pay the fines is harsh and excessive. If the trial court had ordered the Appellant to serve a custodial sentence without directing him to pay a fine, he would have served the cumulative custodial sentences concurrently instead of consecutively. In the premises therefore, this court sets aside the default custodial sentence of eleven (11) years imprisonment and substitutes it with one custodial sentence of five (5) years imprisonment. The sentence shall take effect from 5<sup>th</sup> April 2019 when the Appellant was sentenced by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH 2020**

**L. KIMARU**

**JUDGE**