REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 110 B OF 2019

Consolidated WITH

CRIMINAL APPEAL NO.110 A OF 2019

EARNEST TSUMA..........................1ST APPELLANT

GODFREY ODUOR ASUSO........2ND APPELLANT

DENNIS ODUOR OBONDI..........3RD APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Being an appeal from the conviction and sentence of **Hon. C.C. Oluoch (**Chief Magistrate) of the subordinate sitting at Mavoko in **Criminal Case No. 905 OF 2016 vide judgement delivered on 13.9.2019)**

BETWEEN

REPUBLIC.......................................PROSECUTOR

-VERSUS-

EARNEST TSUMA..........................1ST APPELLANT

GODFREY ODUOR ASUSO.......2ND APPELLANT

DENNIS ODUOR OBONDI.........3RD APPELLANT

JUDGEMENT

1. Earnest Tsuma, Godfrey Oduor Asuso and **Dennis Oduor Obondi** were jointly charged before the Mavoko Senior Principal Magistrate's court with different counts. The appellants faced the first count of the **offence of conspiracy to defraud contrary to section 317 of the Penal Code;** the 1st and 3rd appellant faced the second count of the **offence of stealing by servant contrary to section 281 of the Penal Code;** while the 2nd appellant faced count three of the **offence of stealing contrary to section 268(1) as read with section 275 of the Penal Code.** They were jointly sentenced to a fine of Kshs 500,000/- in default to serve two years' imprisonment**.**

2. The initial counts were substituted and amended to which the appellants pleaded thereto on 13.7.2017 before the trial court. The particulars of the counts were:

In respect of count one, "the appellants on diverse dates between 14th August 2015 and 29th June 2016 at Savannah Cement Limited Factory in Athi River off Namanga Road within Machakos County, jointly with others not before court, fraudulently conspired to defraud Savannah Cement Limited cement worth 129,841,909 (one hundred and twenty-nine million eight hundred and forty-one thousand nine hundred and nine shillings) by false pretences.

In respect of count two, the 1st and 3rd appellants on diverse dates between 14th August 2015 and 29th June 2015(sic) being servants of Savannah Cement Limited stole cement worth 129,841,909 (one hundred and twenty-nine million eight hundred and forty-one thousand nine hundred and nine shillings) which came into your possession by virtue of your employment

In respect of count three, the 2nd appellant on diverse dates between 14th August 2015 and 29th June 2015(sic) at Savannah Cement Limited Factory in Athi River off Namanga Road within Machakos County, jointly with others not before court stole cement worth 129,841,909 (one hundred and twenty-nine million eight hundred and forty-one thousand nine hundred and nine shillings) the property of Savannah Cement Limited.

3. The prosecution called ten (10) witnesses. **PW1** was **Edward Migunyu Kio,** the head of Human Resource at Savannah Cement. He testified that the 1st appellant had left the organization when he joined but however he had the 1st appellant's appointment letter, resignation letter, acceptance of resignation letter, show cause letter, the committee report which were marked for identification. He also tendered in court the 3rd appellant's appointment letter, summary dismissal letter, show cause letter, response to show cause letter and a copy of the disciplinary committee minutes which were marked for identification.

4. PW2 was **Brian Ongeri Wamwenje**, an IT practitioner with Savannah Cement, in charge of system administration and assignment of access and rights to users. He testified that he did inventory management. It was his testimony that in 2016, the services of PWC were retained to conduct an audit and to facilitate the same, they were issued with a list of system users, list of computers and the persons they were assigned to. It was his testimony that there were transactions in the system vide the user ID SEL 1226 and from the computer SEL 132M that were issued to the 1st appellant.

5. PW3 was **Beatrice Nashipai**, an accountant at Savannah Cement who testified that she came across a suspicious transaction where it was noted that money had been put in a customer's account (Safa Properties) so that they could collect cement and yet the norm was that money had to come from the bank to the customer's account. She testified that she noted that there was an unusual transaction that debited Western Greens account. She explained further that different expense accounts were being debited and that Western Greens was credited Kshs 59,348,627/- vide transaction on 24.12.2015. It was her testimony that during the period 9.1.2016 to 29.6.2016 it was noted that funds totaling Kshs 70,493,284 were credited to Western Greens Ltd and the expenses account was debited yet the norm was that the expense account would be debited when services were offered. It was her testimony that the transactions were attributed to the user staff ID 1226 that belonged to the 1st appellant. On cross examination she testified that she did not keep hard copies of general ledgers; that the same were kept in the system. She told the court in reexamination that the total amount of fraudulent transactions was Kshs 129,841,909/-

6. After the charges were amended, the court took the evidence of the seven other witnesses.

7. PW4 was **Ronald Ndirangu Ndegwa**, the managing director of Savannah Cement. He testified that it was reported that an approximate amount of Kshs 173m/- had been lost via fraud and that the same were traced to the 1st appellant. He testified that a forensic audit was conducted and an audit report was prepared by PWC; the same was tendered and marked for identification. He also tended in court a summary of fraudulent transactions which was marked for identification. On cross- examination he testified that Safa account had been credited with a fraudulent amount so as to reflect that they had money in the account and as a result they would be enabled to enter into an agreement to purchase cement on credit.

8. Pw5 was **Jonathan Katua Mwanya** a sales marketer with Savannah Cement. He testified that he received account opening forms from the 2nd appellant for Western Green Hardware Limited on 12.8.2015 and he approved the activation of the account. He testified that he received an identity card in the names of the 2nd appellant who was presented as the director of Western Green Hardware Ltd.

9. Pw6 was **Richard Oliech**, a Senior Financial Accountant with Savannah Cement who testified that on 3.8.2016 he noticed an unusual entry in the general ledger account of the company. He specified that there was a credit from the accrued expenses account to the Safa Properties Account indicating a supply had been made to Savannah and yet he did not have a request to credit their account. It was also strange that the credit came not from a vendor but from the accrued expenses account. He testified that the accounting transactions were traced to the 1st appellant by dint of the password that was used to enter the transactions. He testified that another fraudulent transaction affected a customer Western Greens where credits were passed from a general ledger account and not a cash book account to the Western Greens account; that the norm was that in respect of customers, the credit was from the cash book account to the customer's account. He testified that investigations revealed that there were 72 transactions involving Western Greens that were passed by the 1st appellant. He also testified that the impugned entries were no approvals for the same and yet the due process required approval by the head of finance. He testified that the 1st appellant had rights to approve in the absence of the head of finance and that his password was used in the questioned transactions. It was testified that the 2nd appellant is the director of Western Greens. He tendered in court a certificate under section 65(8) of the Evidence Act which was marked for identification-(P18). On cross examination he testified that the system generated statement of transactions indicated that there were fraudulent transactions totaling Kshs 129,841,909/-. He told the court that the impugned system entries were corrected in respect of the account of Western Greens and the statement to that effect was tendered and marked for identification. He was able to identify the audit report that was prepared by PWC that identified entries made by SEL 1226 as the 1st appellant. On reexamination he told the court that the accounts that were used to pass the fraudulent transactions belonged to the 1st appellant.

10. Pw7 was **Samson Shinna** the head of Finance at Savannah Cement. He testified that it was noted that there were unusual transactions noted in the system where credits were created in the system that enabled two customers to collect cement in the absence of cash paid or a credit arrangement. He identified the two customers as Safa Properties and Western Greens and that the total was Kshs 128,991,909/-. He

testified that the user of the system that occasioned the transactions was the 1st appellant. He testified that there were debits from the accrued expenses account to the account of a customer called Western Greens; that mining levy is paid to the government and not to a customer hence this was an irregular debit. He told the court that he signed a certificated under section 65(8) of the Evidence Act. He told the court that the 3rd appellant had been receiving amounts of money from Western Cement through M-pesa and his account and that the company lost because customer rebates were given to the customer based on the fraudulent transactions. On cross examination he testified that the user ID of the transactions were traced to the 1st appellant.

11. Pw8 was **Anthony Muniu Mboithi** an accountant at PWC who testified that he was contacted by Savannah Cement to conduct a forensic audit after it was reported that a customer had reported that he was given a credit not due to them. He testified that if a customer pays cash then his account is credited with the amount and the cash book is debited. He testified that he prepared a report that included data and digital information that was obtained from the 1st appellant's computer. He testified that the company suffered financial loss; that there was a direct loss of Kshs 129,841,909/-; that Western Greens benefited from a rebate of Kshs 23,648,656 that they were not entitled to. He testified that the 1st appellant was responsible for the irregularities and that the beneficiary of the irregularities was Western Greens. The audit report was tendered in court as Pexh16. On cross examination he testified that he had no certification in SAP and in reexamination he told the court that he was an expert witness.

12. Pw9 was **Felix Naftali Nithethia**, a clerk with the Registrar of Companies who testified that according to the records, the company Western Greens had the 1st and 2nd appellant as their shareholders and directors. He also testified that Safa Properties had Abdirashid Farah Omar and Umis Abdalla as the directors and shareholders.

13. Pw10 was **Pc John Mwiti** attached to the Flying Squad who was assigned to investigate the instant case. He testified that he involved Western Greens and Safa Properties and after recording statements he wrote a letter to the registrar of companies. He testified that according to the audit report, it was established that the company was defrauded money by Western Greens and Safa properties and he arrested the appellants then charged them. On cross-examination he testified that he had no documents to prove that cement was stolen.

14. After the court found a prima facie case against the appellants, they were put on their defence in respect of count one, the 1st and 3rd appellants were put on their defence in respect of count two while the 2nd appellant was put on his defence in respect of count three. The **1st appellant** testified that he was arrested on 28.6.2016 on allegations of posting fraudulent entries to benefit Western Greens Hardware Limited. He admitted that the said company was his. He denied being in charge of general ledgers in the complainant company but that Beatrice Noah who had taken over from Lydia Ngethe were in charge. He testified that he had no rights to post transactions but Beatrice did. He told the court that his role was verification. He lamented that an excel sheet could be manipulated and that no system generated ledger was brought before the court. He told the court that he would receive WhatsApp messages from the head office to grant credit and more specifically from Ronald Ndegwa to by-pass internal procedures and he did not do the same; that this led to him being reprimanded. He admitted being summoned for a disciplinary meeting and added that the delay in the stock of cement was occasioned at the point of delay in booking the vessel. He testified that the auditor misinterpreted the transactions and that there was no correct audit trail in the system. He told the court that the laptop that was tendered in evidence was not the one that was issued to him; and that the investigating officer used the terminal to identify the laptop but he however maintained that any laptop could be configured to any terminal. He testified that there was data inserted in the server to make changes. He took issue with the audit report for failing to question the invoices by seeking for supporting documents. He added that some transactions for instance those posted on 9.2.2016, 10.2.2016, 21.2.2016, 23.2.2016, 24.2.2016, 11.3.2016 and 14.3.2016 were posted when the 1st appellant was on leave; that was between 20.2.2016 and 25.2.2016; 11.3.2016 to 14.3.2016 and 9.2.2016 to 11.2.2016. He testified that he did not have remote access to the system. He took issue with the failure to produce a security log whose role was to establish who was in the system at a specific date and time or used a certain terminal; he applauded the auditor for noting that the security log remained with his client Savannah Cement. On cross examination he testified that Western Greens joined the company as a distributor. The court had the benefit of seeing the leave application forms. On reexamination he told the court that Western Greens was not a competitor with Savannah Cement and that the delay in supply of stock to Savannah Cement was due to the rains in Mombasa.

15. The **2nd appellant** testified that Western Greens Hardware was his company that collected cement from Savannah Cement for cement delivery and that at the exit a signed delivery note had to be shown. He admitted that the 3rd appellant helped him with payments on account of Western Greens Hardware. He tendered in court delivery notes that had delivery numbers and a stamp from savannah cement; payment slips as well as summary of rebates calculations. He testified that he did reconciliations of the account using delivery notes and invoices as well as LPO's but however, he was arrested. He complained that he was never interviewed by the PWC Auditor. On cross examination he admitted sourcing cement from Savannah Cement and that he made payments to them through the 3rd appellant who was his contact.

16. The **3rd appellant** testified that he was summoned to make a statement in October 2016. It was his testimony that he received huge amounts of money in his account as he was the agent of the 2nd appellant's company where his role was to cash cheques and deposit money. He testified that there was no evidence that he benefitted from Kshs 8.9m/-.

17. Dw4 was **Kevin Githinji Githogora** with SAP Certification. He testified that the 1st appellant engaged his services regarding allegations against him. He told the court that he considered the audit report and testified that Appendix 19 was not a system generated audit log; that the SAP system had ability to log such that when there was a dispute, one could look at the logs. He testified that appendix 20 was not a SAP generated report, it was an excel sheet; he testified that a screenshot is generated from the internet and not from the system and that the same could be manipulated to fit the intended purpose. He challenged the report for not being verifiable. He pointed out that there was no system generated report in the audit and he concluded that the items provided in the report were not system generated and could not be authenticated. On cross examination he testified that his training was in SAP Administration. On reexamination he testified that the 1st appellant did not have administrative rights and could not backdate in the system and post journal entries.

18. The appellants were acquitted by the trial Magistrate in respect of count one while the 1st and 3rd appellants were convicted in respect of count two for stealing by servant and that the 2nd appellant was convicted of stealing.

19. On conviction the court sentenced the 1st and 3rd appellants to a fine of Kshs 1,500,000/- and in default one year in prison in respect of count two while the 2nd appellant was sentenced to a fine of Kshs 1,500,000/- and in default one year in prison in respect of count three. Being dissatisfied with the conviction and sentence the appellants filed the instant appeal whereas the state also filed a cross appeal as it was dissatisfied with the sentence.

20. The five grounds of appeal presented by the appellant's counsel can be summarized as follows:

> **a. THAT** the Learned Magistrate erred in law and in fact by failing to hold that the prosecution had not proved its case beyond reasonable doubt and therefore the conviction was unsafe as against the weight of evidence.
>
> **b. THAT** the one-year imprisonment sentence passed on the appellants was excessive and the court ought to have meted a non-custodial sentence

21. The state had filed the appeal no. 110A of 2019 which was deemed as a cross appeal to the appellants appeal and on their part maintained that the trial court went into error in passing a lenient sentence and urged the court to enhance the same. The appeal by the state was deemed as a cross appeal against the appellants herein.

22. The appeal was canvassed vide written submissions. Counsel for the appellant submitted that the prosecution has failed to prove its case beyond reasonable doubt. Counsel submitted that the excel sheet, screen shots displays of the general ledger and the forensic audit report was the evidence that the trial court relied upon to support the conviction but however the absence of a mandatory certificate under section 65(8) and 106B of the evidence Act meant that the evidence was not reliable. It was posited that there was no evidence of the chain of custody of the HP Pro Book 430 Laptop Serial Number CND4479CGR that was said to have been issued to the 1st appellant. Counsel added that the ownership of the laptop could only be proved vide a special mark and it was pointed out that the 1st appellant testified that he did not sign an inventory when the laptop was taken by the investigating officer. It was pointed out that the 1st appellant in his evidence denied that the ExhP3 was the one that had been issued to him as there was no asset coding or a mark indicative of the removal of the asset coding strip. Counsel took issue with the failure to present an inventory of exhibits hence there could be likelihood of interference. Reliance was placed on section 65, 78A and 106B of the Evidence Act that provide for admissibility of electronic and digital evidence as well as admissibility of electronic records.

23. Reliance was placed on the case of **Idris Abdi Abdullahi v Ahmed Bashane & 2 Others (2018) eKLR** on the lack of a certificate of electronic evidence and **Annie Butoyi Ciza v R (2017) eKLR** on the chain of custody of exhibits recovered. It was submitted that neither the 1st or 3rd appellants were in possession of any cement. Counsel prayed that the appeal be allowed, the conviction and sentence set aside and the fine be refunded to the appellants.

24. The state vide submissions in support of the cross appeal urged the court to enhance the sentence. It was pointed out that count one attracted a sentence of seven years' imprisonment and count two attracted a three-year sentence. Reliance was placed on section 354(1) of the Criminal Procedure Code that granted this court power to enhance the sentence. The court was urged to consider the level of profit that the appellants earned from their illegal activities.

25. This is the first appellate court and as such I am guided by the principles set out in the case **David Njuguna Wairimu v Republic [2010] e KLR** where the Court of Appeal stated:

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself and come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant 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."

26. The issues that arise from the appeal and submissions filed herein are as follows:

> **a. Whether the prosecution proved its case to the required standard and in particular whether the prosecution proved the essential ingredients of the charge of stealing and that of stealing by servant.**
>
> **b. Whether the trial court made a finding that was contrary to the evidence?**

27. The element of employment of the 1st and 3rd appellants by the complainant is not in dispute.

28. With above in mind, I will consider the prosecution's evidence. In a nutshell the prosecution's case is that an audit was carried out and it was discovered that the appellants allocated cement worth Kshs 129,841,909/-. None of the bags of cement were recovered. The prosecution witnesses presented printouts that to them spoke to the fact that the appellants benefitted from the cement. The fact that the login details of the 1st appellant were used to create supply of cement worth Kshs129,841,909/- in the system; the fact that the 2nd appellant is a director of the company that benefitted from the cement and that the 3rd appellant received monies from the said company is what the prosecution used to infer that the appellants were guilty.

29. The Appellants in their defence denied the offence. The 1st appellant's explanation was that the allocation of monies using his login details was done at times when he was on leave; that the audit report was biased; that the statements of ledger entries were manipulated and doctored and were not generated from the system; that the correct status of the accounts are as per a system generated report that was not produced in evidence. It was also pointed out that the computer that was tendered in evidence was not the one that was allocated to the 1st

appellant. The appellants produced delivery notes and invoices to account for each and every bag of cement that they had allegedly taken.

30. It is well settled that in a criminal trial, the prosecution has to prove its case beyond reasonable doubt. **Denning J** in the case of **Millier v Minister of Pensions [1947]** stated:

> "It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the lease probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."

31. Section 281 of the Penal Code under which the 1st and 2nd appellants were charged states:

> **"If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years."**

32. 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. It must also be proven that the stolen items belonged to the employer and that the offender is a clerk or servant.

33. Stealing is defined in the Black's Law dictionary 8th Edition as:

> **"To take (personal property) illegally with the intent to keep it unlawfully".**

34. The definition of stealing as found in section 268 of the Penal Code is*:*

> **"A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person, other than the general or special owner thereof any property, is said to steal that thing or property."**

35. There is doubt whether the said cement or even whether the appellant stole them as I have seen no evidence of stock taking report to indicate loss of cement or that cement worth *129,841,909/-* was found in the possession of the appellants.

36. Bearing the above in mind I do find that the prosecution failed to prove its case beyond reasonable doubt. The evidence it presented has not produced convincing and credible evidence of theft perpetrated by appellants or that the cement even existed. I find that the prosecution evidence is scanty as it has not established the nexus between the appellants, the stolen cement and their existence thereof. There appears to be some doubts created as to the appellants involvement in the alleged offences which should be resolved in favour of the appellants. I am satisfied that the prosecution did not prove their case beyond reasonable doubt and thus the conviction arrived at by the trial court was not safe and which should be quashed in any event.

37. On the issue whether the trial court made a finding which was contrary to the evidence, I have considered the evidence adduced and I note that the appellant's counsel had taken issue with the failure of the prosecution to present a certificate of electronic evidence.

38. Electronic Evidence is any evidence stored in a digital form. It is a settled position that for electronic evidence to be admitted in evidence it ought to determine whether the same is relevant, whether it is authentic, or hearsay or whether a copy is acceptable or the original is required. There must be a degree of certainty that the evidence being presented was handled in such a way that it has not compromised the integrity of its content. This means that where the source of digital evidence has been established and no tampering has been shown by the opposite party it would be admissible like any other documentary evidence.

39. The points to be considered while laying foundation so as to rely on electronic evidence are set out in section 78A of the Evidence Act and 106B of the same Act.

40. In determining the authenticity of the electronic or automated documentary evidence and resulting document, the following six considerations are key:

a. whether the computer was working properly;

b. whether the programme in use with regard to the evidence was faulty;

c. whether the secondary media (disks, usb keys) upon which the information was stored have been damaged or interfered with in any way;

d. whether proper record management procedures were in operation;

e. whether error checking mechanisms existed with respect to the original creation of the programme, and;

f. whether proper security procedures were in place to prevent the alteration of the information contained in the drive file or secondary storage device prior to the information being reproduced in permanent legible form through a printout. **See R v Shephard**

(1991) 93 Cr App Rep 139, R v Governor of Brixton Prison and Another, ex parte Levin [1997] 3 WLR 117 and Article 8 of the United Nations Model Law on Electronic Commerce.

41. **Prof Edward John Imwinkelried, Professor of Law Emeritus** in the Book **"Evidentiary Foundations 5th ed. 2002, § 4.03[2]** gave an 11 step foundation process for authenticating computer records, namely:

a. The business uses a computer.

b. 2. The computer is reliable.

3. 3. The business has developed a procedure for inserting data into the computer.

d. 4. The procedure has built-in safeguards to ensure accuracy and identify errors.

e. 5. The business keeps the computer in a good state of repair.

f. 6. The witness had the computer readout certain data.

g. 7. The witness used the proper procedures to obtain the readout.

h. 8. The computer was in working order at the time the witness obtained the readout.

i. 9. The witness recognizes the exhibit as the readout.

j. 10. The witness explains how he or she recognizes the readout.

k. 11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

42. The court record does not indicate any attempt to establish the authenticity or to explain why the court chose to believe the evidence that was tendered in view of the 11 steps highlighted above.

43. In addition, section 65, 78 as read with 106B of the Evidence Act provides for the non-technical conditions being the requirement of a certificate of electronic evidence. The purpose of the certificate is to satisfy the conditions laid out by sub-section (3) of section 78A as well as section 106B (4) of the Evidence Act. The certificate is to be executed/signed by a person occupying a responsible position in relation to the device through which the data has been produced. The certificate must identify the electronic record containing the statement, describe the manner in which it was produced and also give such particulars of any device involved in the production of the electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer. The certificate by dint of section 78A must also deal with any of the matters to which the conditions for admissibility relate. The entire idea behind the certificate is also to ensure the integrity of the source and authenticity of the data, so that the Court may be able to place reliance on it. This is important because electronic data is more prone to tampering and alteration and also to give technical assistance to the court.

44. Courts in Kenya have indicated willingness to accept such evidence to be admissible in evidence upon filing of the record along with the certificate under section 78A and 106B of the Evidence Act. See **Idris Abdi Abdullahi v Ahmed Bashane & 2 Others (2018) eKLR.** This would mean that in the absence of the same, then the court ought not to give much relevance to the evidence. I find that the trial court went into error in accepting the evidence of Richard Oliech. I have looked at his certificate that is Pexh 18 and am not satisfied that the same meets the test of section 65(8), 78A and 106B of the Evidence Act. It simply states that there was a printout from the system and derived from information that was in the system but it does not show that Richard Oliech was a person occupying a responsible position in relation to the device through which the printouts had been produced *qua*, he did not explain how he interacts with and operates the system that produced the data; the certificate did not identify the electronic record containing the statement or describe the manner in which the record that was said to be in the printouts was produced; I do not see such particulars of any device involved in the production of the electronic record so as to show that the electronic record was produced by a computer since I only see the word "system" in the said certificate.

45. In addition, the audit report, screenshots and displays of the general ledger all were intended to point towards suspicious activities in operations of the ledgers of the complainant company and the activities were said to be attributed to the appellants. Under the Evidence Act,

> "banker's book" includes **a ledger**, day book, cash book, account book, and any other book used in the ordinary business of the bank, whether in written form or micro-film, magnetic tape or any other form of mechanical or electronic data retrieval mechanism whether kept in written form or printouts or electronic form;

46. If I were to accept the evidence, then it appears that the evidence that was led by the prosecution seemed to speak to offences other than those that the appellants were charged with.

47. Pw8 who proclaimed himself as an expert seemed to have overstepped his boundaries and made a conclusion. It is trite law that expert evidence is opinion evidence and it cannot take the place of substantive evidence. Moreover an expert is not a witness of fact and his or her evidence is only of advisory character. An expert therefore deposes and does not decide. It is incumbent upon an expert witness to furnish the court with the necessary scientific criteria for testing the accuracy of his or her conclusion so as to enable the court to form its independent judgment by application of the criteria to the facts proved by the evidence. In the case of **Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR** it was held that,

> “Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.
>
> While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.
>
> Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.
>
> Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
>
> Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
>
> Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.”

48. In **Mutonyi v Republic (1982) KLR 203 at 210** Potter JA said:

> Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.
>
> Section 48 of the Evidence Act (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point “of science, art, or as to identity or genuineness of handwriting or finger or other impressions”, opinions on that point are admissible if made by persons “specialist skilled” in such matters.
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> In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:
>
> “Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence.”
>
> *So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:*
>
> > 1. Establish by evidence that he is specially skilled in his science or art.
> >
> > 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> >
> > 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.”

49. The mentioned report was erroneously relied upon by the trial court so as to found culpability of the appellants. If the report was anything to go by, the same would not even be relevant to the charges that the appellants were facing. The conclusion of the trial court reached in that judgment in my view was not in conformity with the charge and the evidence which evidence has not proved the guilt of appellants.

50. Having evaluated the evidence adduced, I find that the trial court made an error in convicting the appellants. The defence evidence offered by the appellants somehow cast doubt upon that of the prosecution. The conviction arrived was therefore unsafe and it must be interfered with.

51. In the result it is my finding that the Appellants appeal vide **HCRA No. 110 B of 2019** has merit and is allowed. The State’s cross appeal vide **HCRA N0. 110 A of 2019** lacks merit and is dismissed. The conviction against the Appellants is hereby quashed and the sentences set aside. The fines that had been paid are ordered to be refunded to the rightful depositors.

It is so ordered.

Dated and delivered at **Machakos** this **11th** day of **November, 2020.**

D. K. Kemei

Judge