



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL 110 OF 2018**

**BETWEEN**

**JOSEPH MAINA MBURU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from the original conviction and sentence in the Chief Magistrate's Court**

**at Milimani Cr. Case No. 361 of 2014 delivered by Hon. C.,M Njagi, RM on 3<sup>rd</sup> July, 2018).**

**JUDGMENT**

1. The Appellant was charged with twelve (12) counts. Count I was with respect to stealing contrary to **Section 268(1) as read with Section 275 of the Penal Code**. Counts II to XII were offences of forgery contrary to **Section 345 as read with Section 349 of the Penal Code**. The particulars of each of the counts are set out here below:

**2. Count I:** That on diverse dates between 2<sup>nd</sup> July, 2012 and 11<sup>th</sup> January, 2014 at Co-operative Bank Kawangware Branch Nairobi, within Nairobi County, jointly with others not before court stole Kshs 1,132,000/- the property of Jikaze Kwa Upendo Self-Help Group.

**3. Count II:** That on or before the 2<sup>nd</sup> day of July, 2012 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank of Kenya cheque number 000001 for Kshs. 232,000/- in the name of Joseph Maina Mburu purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo Self-Help Group.

**4. Count III:** That on 3<sup>rd</sup> day of September, 2012 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000002 for Kshs. 170,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

**5. Count IV:** That on 21<sup>st</sup> day of September, 2012 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000004 for Kshs. 70,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo Self-Help Group.

**6. Count V:** That on 9<sup>th</sup> day of October, 2012 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000006 for Kshs. 34,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

**7. Count VI:** That on 23<sup>rd</sup> day of November, 2012 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000007 for Kshs. 47,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

**8. Count VII:** That on 9<sup>th</sup> day of February, 2013 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000008 for Kshs. 55,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

**9. Count VIII:** That on 11<sup>th</sup> day of March, 2013 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000020 for Kshs. 55,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

**10. Count IX:** That on 12<sup>th</sup> day of April, 2013 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000022 for Kshs. 35,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

**11. Count X:** That on 11<sup>th</sup> day of April, 2013 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000023 for Kshs. 42,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

**12. Count XI:** That on 11<sup>th</sup> day of June, 2013 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000011 for Kshs. 70,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

**13. Count XII:** That on 8<sup>th</sup> day of June, 2013 at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain document namely Co-operative Bank Kenya Cheque number 000003 for Kshs. 60,000/- in the name of Joseph Maina Mburu, purporting it to be a good and valid cheque for payment issued by Jikaze kwa Upendo self-Help Group.

14. The Appellant was convicted of the all twelve counts and sentenced to serve two (2) years imprisonment in Count I and on Counts II-XII to serve one (1) year each. The sentences were to run consecutively. He was aggrieved with the decision and preferred the present appeal. He framed the grounds of appeal as follows:

**a. That the evidence was riddled with contradictions and inconsistencies;**

**b. That the evidence was not corroborated;**

**c. That the case was not proved beyond reasonable doubt; and**

**d. That the defence was not considered.**

### **Evidence**

15. The prosecution called seven witnesses to prove its case. The Appellant gave a sworn defence and not call any witness. He was represented by learned counsel, Mr. Kinyanjui. This being the first appellate court will reevaluate the evidence and come up with independent conclusion but bear in mind that it has neither seen nor heard the witnesses and give due regard for that. (**see: Okeno v Republic [1972] eKLR**).

**16. PW1, William Kiarie** had formed a self-help group, Jikaze kwa Upendo members Self-Help group which was registered in 2010. The Purpose for this group was to assist the members with financing in a merry-go round and other group member financing methods. The office bearers were: Joseph Maina the chairperson, William Kiarie, the Vice Chairperson, John Nguthuka Githima the Secretary and Lucy Wahu, the treasurer. They held a bank account at Cooperative Bank Kenya Kangemi Branch but operated it from Kawangware Branch. The signatories of the account were four (4); Joseph Maina, the Appellant herein and chairperson, Lucy Wahu, the treasurer, and John Nguthuka, the Secretary and Njogu Waweru. According to PW1 it was not possible to withdraw money without at least three (3) of the four (4) signatories appending their signatures to a cheque.

17. In December, 2013, the members requested Mr. Njogu Waweru, John Nguthuka and Lucy wahu to produce a statement of the accounts. The chairperson brought statements but members insisted on confirmation. The statement of accounts produced showed an anomaly in the amounts. The statements were in relation to a Haba na Haba Account instead of the Mshiriki account. The bank statements were for account number 01134316250700 in the name Jikaze Kwa Upendo Self-help group Haba na Haba access account Kangemi Branch and the balance was Kshs. 1,302,190.50cts. However, the Appellant tabled statements of an account other the one belonging to members.

18. On the procedure of withdrawal, at least three people of the four mandated to sign a cheque needed to sign. Further, members had to agree and have a written resolution to withdraw. There were however, no minutes, to support the withdrawal of between Kshs. 1 030 000- 1 134 315/- from the group's account.

**19. PW2, John Nguthuka** was the Secretary of the group. There was a cheque book that, to the best of his knowledge, had not been used. It was his testimony that the treasurer kept accounts and banked monies for the group. That after repeated requests she failed to produce statements of accounts. Sometime on 9/3/14 two statements emerged, one by the Appellant and the other by Njogu Waweru. Members then realized that Ksh. 1,340, 315/ had been withdrawn from their account.

**20. PW3, Njogu Waweru** was a member of Jikaze Self-Help group as well as a signatory to the account. He went to the bank to get a bank statement from which he anticipated to find about Kshs. 1.34 Million. He however found only Kshs. 600/-. It was not clear who withdrew

money frequently by cheques. He stated that there had never been a bank communication that his signature had been forged.

**21. PW4, Lucy Wahu Matubia** was the treasurer of Jikaze kwa Upendo. It was her testimony that the group was duly registered as attested by a certificate of registration produced as P. Exhibit-4. The Appellant had a cheque book for the bank account and further took out yet another amid the protest of the group. In December, 2013 they had an Annual General Meeting whose main agenda was to discuss an intention to buy plots of land. Pursuant thereto, members enquired about the group's financial position. The chairperson presented bank statements, but members sought to procure it from the bank themselves. That is when they realized that there was a deficit of Kshs. 1,340,315/- .

**22. PW5, C.I Daniel Gutu** a forensic document examiner attached to the CID Headquarters examined the signature samples collected from Lucy Wahu(PW4) nor John Nguthuka (PW2) in their capacities as signatories to the group account. He compared them with those on the cheques used to pay the Appellant. He formed an opinion that neither signed the cheques. **PW6 Corporal Nehemiah Ndirangu** from financial investigations unit at DCI headquarters, Nairobi and **PW7 Corporal Joseph Mwaura** investigated this matter.

**23. DW1**, the Appellant herein in his defence stated that was the chairperson of Jikaze Self-Help group. It was his testimony that the group contributed money ranging between Kshs. 500-1000/-. The bank account balance was Kshs. 500 000/-. The same would be deposited to the bank in cash and no one did cheque deposits. The group had a cheque book. When need arose for money to be given to a member, a cheque would be drawn in his name. He would accompany the member to the bank to withdraw the money and hand it to them. Further, the mode used was a counter cheque drawn to get the member the cash. The records of transactions were with the treasurer.

### **Analysis and determination**

24. I have accordingly considered the submissions and the respective rival submissions. The only issue arising for determination is whether the case was proved beyond all reasonable doubts.

### **Whether the offence of stealing was proved:**

25. **Section 268(1) of the Penal Code** gives the following definition of stealing:

**“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.”**

26. Therefore, to establish the offence of theft, there has to be evidence that the Appellant fraudulently and without claim of right converted to the use of any person these monies. He was charged of stealing Kshs 1,132,000/-. His counsel submitted that the court did not appreciate that the prosecution failed to prove that the said monies had been stolen. Also that the prosecution only proved theft of Kshs. 696 290/-. Ms Nyauncho for the Respondent referred to PW4's testimony in submitting that the treasurer of the group had established through bank statements that the amount in the account should have been Kshs. 1 340 315/-.

27. Of emphasis is that the burden of proof in a criminal case is beyond all reasonable doubt. In this case, it cannot be assumed that, because statements were shown in court in which withdrawals were made in favour of the Appellant, the Appellant stole the money. Of importance is that the prosecution needed to demonstrate that the statements came from the bank. The only pointer to this was that they were stamped by a bank. However, no official from the bank testified in confirmation that the statements originated from the bank. What this means is that it is practically impossible to rely on the content of the statements.

28. The said statements were contained in what was marked as MFI 2 and subsequently adduced in evidence. There is however no record showing that the statements were ever adduced by a competent person from the bank. The mere fact that the investigating officer produced them as exhibits is not sufficient proof that they emanated from the bank. Hence, although the withdrawals are reflected in the statements, there is nothing to demonstrate that the adduced statement was a genuine document.

29. It is not contested that the Appellant and witnesses **PW1-PW4** were members of Jikaze Self-Help group. Further, that the Appellant, **PW2-PW4** were signatories to an account opened at Co-operative Bank. As well, that at least three of them needed to co-sign a cheque to allow withdrawals. The point of divergence is whether the other members sanctioned the various withdrawals.

30. There is no doubt that the drawn cheques were payable in favor of Joseph Maina Mburu. Counsel for the Appellant submitted that the transactions were explained in his testimony; for purposes of facilitating withdrawals meant as loans for members. It was his testimony that the funds were directed towards loans to members. In my candid view, in the face of poor investigations to demonstrate the source of the statements, it is possible to buy the defence of the Appellant. Yes, it is said that other members did not sanction the withdrawals. But the proof of the authenticity of the statements was not discharged.

31. I consequently find that the conviction of the Appellant in the count of stealing was unsafe. The prosecution failed to prove that count beyond all reasonable doubts as per the law requires.

### **Whether the offences of forgery were proved**

32. The definition of forgery is given under Section 345 as read with Section 347 of the Penal Code. Section 345 reads;

**“Forgery is the making of a false document with intent to defraud or to deceive.”**

Section 347 (d) (iv) of the Penal Code reads;

“Any person makes a false document who -

(d) signs a document -

(iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.”

33. The question at this point is whether the Appellant signed the cheques or caused them to be signed. It was the submission of counsel for the Appellant that nobody whose signature was allegedly had been forged was called. Counsel for the Respondent sustained reiterated the testimony of the document examiner that the signatures were forged.

34. The allegation of forgery was laid out using signed cheques for withdrawals corresponding to the amounts withdrawn. The document examiner examined the said cheques. He procured signature samples from two of the account signatories, PW2 and PW4. On interrogating the same against the signatures on the cheques he found that the cheques had been forged. It was also the testimonies of PW2 and PW4 that they had no knowledge of these transactions. The Appellant in his defence submitted that there was no evidence that the signatories had been called to refute the signatures.

35. The critical question then is whether the Appellant was responsible for the forging of the cheques. It is the testimony of PW2 and PW4 that the Appellant was at all material times in possession of the cheque book that had been issued on the account. But this is not sufficient evidence to demonstrate that he was responsible. Just as he examined the cheques to confirm that PW2 and PW4 did not sign them, so he should have done of the Appellant, to confirm that in the converse, he signed the cheques. This line of investigations was not adopted. The net effect is that the prosecution could not demonstrate that he actually forged the cheques.

36. That aside, just as in count I, there was no evidence adduced to show that the cheques in issue came from the bank. What this implies is that it was not established that what PW5 examined were genuine cheques. The conviction therefore, in counts II to XII fell far from pointing to the guilt of the Appellant. In fact, given this gap, I would also equally be convinced that the Appellant’s defence was plausible. I equally find that his conviction in these counts was unsafe.

37. In the upshot, I find that the prosecution did not prove their case beyond all reasonable doubt. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

**Dated and delivered at Nairobi This 31<sup>st</sup> Day of October, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

1. Stanley Kinyanjui h/b for, Mbuthia Kinyanjui for the Appellant.

2. Mr. Momanyi for the Respondent.