



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.74, 75 & 77 OF 2013

CHARLES NDUNGI MUNGAI.....1ST APPELLANT

STEPHEN ODUOR.....2ND APPELLANT

DANIEL WATHIKA ALIAS WAITHIKA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. R.A. Mutoka (Mrs.)

(PM) delivered on 19th February 2013 in Nairobi Criminal Case No.2729 of 2003)

JUDGMENT

The 1st Appellant, Charles Ndungi Mungai, the 2nd Appellant, Stephen Oduor and the 3rd Appellant, Daniel Wathika *alias* Waitthika were jointly charged with four counts of stealing by a person employed in the Public Service contrary to Section 280 of the Penal Code. The particulars of the offence were that on diverse dates as particularized in the charge sheet at Kenya Forestry Research Institute, in Muguga within Kiambu County, the Appellants being persons employed in the public service as Chief Accountants/Cashiers at Kenya Forestry Research Institute, jointly stole Ksh.2,003,007.50, Ksh.2,484,056.20, Ksh.2,945,971.85 and Ksh.523,938.85 respectively being the property of the Government of Kenya which came into their possession by virtue of their employment.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged on all four counts. The 1st Appellant was sentenced to serve fourteen (14) months imprisonment in each count. The 2nd and 3rd Appellants were each sentenced to serve 12 months imprisonment in each count. The sentences were to run concurrently. The Appellants were aggrieved by their conviction and sentence. They have each filed a separate appeal to this court.

In their respective petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their convictions and sentences. They were aggrieved that the prosecution failed to establish the case against them to the required standard of proof beyond any reasonable doubt. They were further aggrieved that their convictions were based on a defective charge sheet since the evidence on record was at variance with the particulars of the charge. They faulted the trial court for failing to consider the evidence adduced that an imprest register was issued to each officer of the organization. They pointed out that the trial magistrate was misdirected in relying on the evidence from a duty manual allegedly authored by the 1st Appellant which was not dated or signed by the said Appellant and neither was its origin known. They took issue with the trial court's finding that the Appellants received money in the absence of documentary evidence to that effect.

The Appellants faulted the trial court for relying on evidence of prosecution witnesses which was full of contradictions, and in particular, the evidence that the 2nd and 3rd Appellants were the only cashiers who had authority to receive revenue. They were aggrieved that the trial magistrate failed to appreciate the evidence of PW15 which indicated that according to the Auditor General's reports for the periods stated in the charge sheet, the institution did not make any financial losses. They took issue with the trial court's finding that the 2nd Appellant failed to file his written submission while the same was duly filed. They complained that the trial magistrate failed to consider exhibits tendered in evidence in arriving at her decision. They asserted that their right to a fair trial was violated. In the premises, the Appellants urged this court to allow their respective appeals, quash their conviction and set aside the sentences that were imposed on them.

During the hearing of the appeal, all parties filed their respective written submission. In addition, this court heard oral submissions from Mr.

Kariuki for the 1st Appellant, Mr. Murage for the 2nd Appellant, Mr. G. Kamau for the 3rd Appellant and Mr. Mureithi for the State. Mr. Kariuki submitted that the 1st Appellant was not a custodian of the accounting documents as alleged by PW13. He was only a custodian of the receipt books. He asserted that the 1st Appellant was the Chief Accountant. He averred that no evidence was led to prove that the 1st Appellant received any money. He stated that the money in question was received by PW1 and PW15. Counsel for the 1st Appellant pointed out that a complaint was raised regarding the trial magistrate at the Judges and Magistrates' Vetting Board. He submitted that the trial court was not impartial. He maintained that no evidence was tendered connecting the 1st Appellant to the present offences. The trial court in convicting the Appellant stated that he must have been complicit. He averred that the trial magistrate did not give any reasons why the 1st Appellant's sentence was enhanced.

Mr. Murage for the 2nd Appellant stated that the Appellants were convicted on the basis of a defective charge sheet. He averred that the amounts of stolen money as particularized in the charge sheet were inconsistent with evidence adduced by the prosecution witnesses. He asserted that the trial magistrate was misdirected in finding that the 2nd Appellant received money at the cash office in the absence of any evidence to that effect. He pointed out that the prosecution witnesses produced copies of documents in evidence instead of the original documents. He faulted the trial court for relying on the employer's manual to determine the duties of the Appellants. He stated that the said manual did not reflect the correct position with regard to what the Appellants' duties were. He was of the view that the Appellants were not accorded a fair hearing since the trial case dragged on from year 2003 to 2013. He asserted that the external audit exonerated all the Appellants from the present offences. He submitted that the trial court ought to have given each Appellant the option of a fine when sentencing them.

Mr. Kamau for the 3rd Appellant submitted that the 3rd Appellant was an assistant. He was appointed as a banking agent on 3rd January 2002. However, he was charged with offences that took place way before his employment commenced. Counsel was of the view that the 3rd Appellant could only answer to charges in Count 3 and 4. He asserted that PW1 stated that an external audit was conducted every quarter. However, no anomalies were noted during the said audits. He averred that all the accounting documents in the 3rd Appellant's possession were handed over to the 2nd Appellant who forwarded the same to the 1st Appellant, the Chief Accountant. He was of the view that investigations were not properly conducted. He pointed out that the 3rd Appellant was never interrogated on the loss of any funds. He maintained that the 3rd Appellant was one among many cashiers at the headquarters. Counsel for the 3rd Appellant submitted that no documentary evidence was adduced connecting the 3rd Appellant to the present charges. In the premises therefore, Counsels for the three Appellants urged the court to allow the Appellants' respective appeals.

Mr. Mureithi for the State opposed the Appellants' appeals. He submitted that the 3rd Appellant joined the institution in 1986. He was attached at the Cash Office as was evidenced by *Prosecution Exhibits 20, 21 and 24*. Learned State Counsel asserted that all revenue received by cashiers was forwarded to the 1st Appellant. He averred that the Appellants failed to account for the missing funds. He was of the view that the discrepancy in the amounts quoted in the charge sheet was not fatal. He stated that the variances were curable under *Section 382 of the Criminal Procedure Code*. He submitted that the complaint lodged against the trial magistrate had no bearing in the present case. Learned State Counsel stated that the prosecution laid proper basis for admissibility of the secondary evidence relied upon. He therefore urged this court to dismiss the Appellants' respective appeals.

The facts of the case according to the prosecution are as follows: PW1, Ibrahim Momanyi Okeri, was the Principal Internal Auditor at Kenya Forestry Research Institute (KEFRI). In the course of conducting a routine audit, he discovered a shortfall between the amounts of money that was banked as compared to the cash received by the institution as revenue. PW1 produced in evidence a cash banking analysis for years 1999-2000, 2000-2001, 2001-2002 and 2002-2003. The analysis indicated as follows:

YEAR	1999-2000	2000-2001	2001-2002	2002-2003
REVENUE COLLECTED (Ksh.)	4,832,494.25	4,284,140.55	4,046,920.95	5,271,594.55
AMOUNT BANKED(Ksh.)	2,828,586.75	1,800,084.35	1,100,949.10	4,747,655.70
SHORTFALL (Ksh.)	2,003,007.50	2,484,056.20	2,945,971.85	523,938.85

PW1 testified that the duties of banking and revenue collection fell under the Chief Accountant's department. He stated that the 1st Appellant was the Chief Accountant at the institution during the period in question *i.e.* 1999 to 2003. The 2nd and 3rd Appellants were cashiers who worked under the 1st Appellant. PW1 told the court that the 2nd Appellant was posted to the Cash Office as the head cashier in 1986 (*PEX16*). The 3rd Appellant was a banking agent tasked with banking the collected revenue (*PEX17*).

PW1 explained that revenue collection at KEFRI was done by cashiers who issued receipts for money received. The cashiers then posted the received amounts in a cash book at the end of every day. The money was afterwards deposited in the organization's bank account. On discovering the stated discrepancies during internal audit, PW1 interrogated the Appellants. The 2nd Appellant informed him that he forwarded all the cash he received to the 1st Appellant (*PEX9*). The 3rd Appellant informed him that he forwarded all the received monies to the 2nd Appellant (*PEX10*). PW1 wrote to the 1st Appellant inquiring about the missing money. The 1st Appellant promised to investigate the issue and revert back to him. He however failed to do so.

PW1 informed the Director of KEFRI about the missing money and sought his assistance in getting the receipt books that he needed for his investigations from the 1st Appellant. The Director instructed the 1st Appellant to avail the receipt books and banking documents. The 1st Appellant forwarded some of the receipt books to PW1. The total missing amount was Ksh.6,940,480.30. The Director then instructed the 1st Appellant to prepare revenue returns for year 2000 to 2003. The revenue returns forwarded by the 1st Appellant did not tally with PW1's

audit figures. The 1st Appellant indicated that he had a shortfall of Ksh.765,961.40 in total for period 1999 to 2003. However, according to PW1's investigation, the total missing money amounted to Ksh.7,914,660/-. The 1st Appellant blamed the 2nd and 3rd Appellants for the shortfall.

PW1 got a copy of the revenue collection procedures (*PEX21*) as well as the receipt acknowledgement file (*PEX22*) which in his view confirmed that the three Appellants were responsible for the missing funds. PW1 noted that the external auditors failed to detect the shortfalls. He gave a detailed account of all the receipt books issued to the 2nd and 3rd Appellants according to the revenue register. He outlined the funds collected as per each receipts books *vis a vis* the funds deposited in the organization's bank account for each of the four years. He outlined the shortfalls in each case. He produced the receipt books as well as the corresponding bank statements in evidence. He also produced audit report of his findings. He averred that the 2nd and 3rd Appellants collected revenue for the years in question *i.e.* 1999 to 2003. He added that the 1st Appellant acknowledged receipt of the revenue collected.

PW2 Janet Njagi Mbugua, worked as a clerk based at the Cash Office at KEFRI from April 2000 until June 2001. Her duties included, *inter alia*, revenue collection. She stated that she only collected revenue in the absence of the 3rd Appellant. After receiving payment from a client, she issued an original receipt. She testified that she kept the revenue collected and handed it over to the 3rd Appellant together with copies of receipts issued. She produced in evidence a summary of the revenue she collected and receipts she issued which she had forwarded to the 3rd Appellant. She asserted that the 3rd Appellant signed at the back of each receipt as acknowledgement of receipt of the revenue. On cross-examination however, PW2 asserted that there were several cashiers at the Cash Office who collected revenue including herself, the 3rd Appellant, one Sigei, one Waitherero and one Njoroge. She also stated that she handed over revenue collected to the 2nd Appellant if the 3rd Appellant was absent. She admitted that some of the receipts she had produced in evidence did not contain the 3rd Appellant's signature.

PW3 Samuel Sigei and PW4 John Njoroge Ngugi also worked as clerks at the Cash Office. One of their duties was revenue collection. They stated that all the revenue collected by the clerks as well as receipts issued were forwarded to the 3rd Appellant, who was a senior clerical officer at the Cash Office. The 3rd Appellant kept the receipt books. The 2nd Appellant who was in charge of the Cash Office maintained the cash books. PW3 and PW4 stated that the 3rd Appellant acknowledged receipt of all the revenue collected and forwarded to him by appending his signature on the receipts. They produced in evidence reports of revenue they collected as well as receipts they forwarded to the 3rd Appellant. On cross-examination, it was established that some of the receipts produced did not contain the 3rd Appellant's signature. PW3 also admitted that he had not availed all the receipts he had issued after collecting revenue.

PW5 Lucy Muthoni Kagunjo, was based at the Vegetation Propagation Unit at

KEFRI. She was tasked with selling seedlings and plants. She issued receipts for all the purchases made. She then forwarded the revenue collected as well as receipts issued to the Cash Office. She stated that she handed over the cash collected to several cashiers at the Cash Office. PW6, Sophia Wambui, was a Senior Clerical Officer at KEFRI. She was tasked with selling seeds and seedlings. She would then surrender the revenue collected to the 3rd Appellant who acknowledged receipt of the same. She maintained that she only forwarded the revenue to the 3rd Appellant at the Cash Office.

PW7 Nellis Omondi Okoth, PW8, Robert Kamata Ajwang, PW9 Titus Kibae Machora, PW10 Allan Kariuki Mbuthi, and PW11 David Ochieng were tasked with selling forest produce at KEFRI. They collected revenue at their designated collection points. They all testified that they forwarded all revenue collected to several clerks at the Cash Office depending on who they found at the office. They stated that cashiers at the Cash Office acknowledged receipt of revenue by appending their signatures on the receipts.

PW12 Julius Cheche, worked as an Accountant at KEFRI. He maintained the general ledger and did bank reconciliations. He stated that he noticed several discrepancies in the cash book between the years 2000 to 2003 and that he raised the issue during a general meeting in year 2000. He added that he did not notice any shortfalls in the amount banked during his routine bank reconciliations. On cross-examination, he told the court that there were several cashiers at the cash office apart from the 2nd and 3rd Appellants. He named Sigei, Njoroge and Njambi.

PW13 Shem Arthur Ogao, was a Senior Accountant at KEFRI. He stated that he worked in the same department as the 2nd and 3rd Appellants who were cashiers. PW13 was tasked with issuing accounting documents such as receipt books. He was also in charge of expenditure and final accounts preparation. He recorded the serial numbers of each receipt book issued, the issuing date as well as the person receiving the receipt book. He produced in evidence a register containing a list of receipt books issued to the 3rd Appellant. He testified that he was not involved in supervision of revenue collection and that the cashiers were directly supervised by the 1st Appellant. On cross-examination, PW13 testified that he issued receipt books to various people involved in revenue collection.

PW14 Patrick Chege, was a Senior Auditor at Kenya National Audit Office. On 26th January 2004, he was instructed by the CID to audit various documents which originated from KEFRI. The documents included cash books, receipt books, bank statements and company registers. The audit was limited to revenue collection as reflected in the receipt books, in relation to the entries made in the cash books and bank statements. He conducted the audit and discovered various discrepancies with regard to revenue that was collected and revenue remitted from year 1999 to 2003. He produced the audit report in evidence. He testified that the shortfall for the 4 financial years totalled to Ksh.7,954,4344.20. On cross-examination, PW14 stated that he relied on the documents forwarded to him by the CID in conducting the audit. He was therefore not sure whether all the receipts books from KEFRI were provided to him. He added that he was not provided with and did not rely on any payment vouchers when carrying out the audit. He also pointed out that he discovered several weaknesses in the accounting and internal control systems at KEFRI which hindered proper accounting of the revenue received.

PW15 Paul Kipkorir, was the Director at KEFRI. Sometimes in March 2003, the Internal Auditor (PW1) informed him that he had discovered discrepancies between the amount of revenue collected and revenue remitted. PW1 requested for the revenue returns for the financial years preceding year 2003. PW15 instructed the 1st Appellant to forward the returns for the stated periods to him. The 1st Appellant prepared two reports for the stated periods. PW15 noted that the figures in the accounting documents did not balance. He wrote a letter to the

1st Appellant instructing him to explain the disparity. However, the 1st Appellant failed to do the same. He afterwards requested for the receipt book, cash book, banking slips and bank statements from the 1st Appellant. He forwarded the same to PW1 for audit purposes. The audit report indicated shortages in amount of revenue remitted and banked as compared to the amount that was collected. The 1st Appellant was unable to account for the discrepancies. PW15 reported the matter to the police. On cross-examination, PW15 stated that he was not aware if any principal officers were given money collected as revenue to settle payment vouchers. He acknowledged that the 2nd Appellant was authorized to bank and withdraw money as well as make payments. He admitted that revenue was collected and banked by several cashiers at the Cash Office.

PW16 Cpl Dishon Okuthu, was one of the investigating officers. The investigation was however headed by IP Wanjala. On 22nd October 2003, he accompanied IP Wanjala to the KEFRI Headquarters. They were also accompanied by three other police officers. They were instructed to interview employees based at the Accounts Department as well as the collection centres in relation to theft of revenue that was reported. PW15 and PW1 also handed over documents related to the said theft to IP Wanjala. IP Wanjala was later transferred. He handed over the case to PW16. PW16 proceeded to charge the three Appellants with the present offences. PW16 testified that he made the decision to charge the 1st Appellant since he was in charge of revenue collection. He authorized all banking deposits and withdrawals. He also acknowledged receipt of all the returns before the money was surrendered to the cashiers. He was therefore aware of the amount of revenue that was collected and the amount that was deposited in the organization's bank account. PW16 stated that the 2nd and 3rd Appellants were cashiers who received money brought in by clerks from different collection centres. They acknowledged receipt of revenue by signing on the receipts. They were tasked with making entries in the cash book as well as depositing revenue collected in the organization's bank account. They however failed to account for the revenue that was collected but never deposited in the company's bank account.

The 1st Appellant was put on his defence. He stated that he was the Chief Accountant at KEFRI between years 1999 to 2003. He was in charge of the Accounts Department. He was also tasked with preparation of final accounting documents such as the balance sheet. He told the court that revenue collection and banking of the same was done by the revenue cashiers. PW13, who was a Senior Accountant supervised revenue collection. He stated that PW13 was the custodian of revenue books and he also countersigned reconciliations done by Accountant 1. It was therefore the responsibility of PW13 to flag any financial loss. The 1st Appellant denied stealing any money from KEFRI. He stated that the balance sheets he prepared for years 1999 to 2003 were all approved by the Deputy Director of Finance as well as the Director (PW15) and Board of Directors at KEFRI. The financial statements were also approved by the Auditor General. He produced in evidence audit reports for KEFRI from the Auditor General for the stated years. He testified that none of the audit reports indicated any financial loss at KEFRI for the financial years in question. He denied the charges against him.

The 2nd Appellant was put on his defence. He stated that he worked as a cashier at KEFRI. His duties included cashing in cheques and maintaining the cash book. He told the court that the Permanent Secretary in the Ministry of Agriculture authorized for payments to be made using the revenue collected at KEFRI. He testified that cashiers at the Cash Office paid imprest to various officers of the organization who applied for the same. The imprests were paid out from revenue collected. He said that it was the Senior Accountant's (PW13) responsibility to oversee revenue collection and ensure that all the funds were deposited in the organization's bank account. He pointed out that the organization's audit reports did not indicate any loss of funds. He denied the investigating officer's claims that he was the only one involved in balancing of cash books. He asserted that all the cashiers were involved in balancing the cash books. The cash books were also verified by Internal Auditors. He stated that none of the prosecution witnesses stated that they gave any money to him. He denied the charges against him.

In his sworn statement, the 3rd Appellant stated that he was a clerical officer at KEFRI at the material time. At the Cash Office, he was tasked with the duty of preparing salary payments, issuing cheques, payment of vouchers and revenue collection. He reported to the senior accountant. He stated that there were eight cashiers at the Cash Office including himself and the 2nd Appellant. They all did the same duties. He denied stealing any money collected as revenue. He stated that after receiving revenue, he either banked the same or gave the cash to the 2nd Appellant who was his superior. He also issued receipts to clerks who brought the revenue. If he was instructed to bank the money, he would prepare a bank-in slip and request for a vehicle from the Senior Accountant's office to escort him to the bank. On the other hand, if he was instructed to forward the money to the 2nd Appellant, he attached a deposit bank-in slip before giving him the cash.

The 3rd Appellant stated that the prosecution failed to produce documentary evidence to prove that he failed to remit any revenue collected. He maintained that audit reports did not show any theft of funds in the organization. He failed to understand why he was arrested yet the other cashiers at the Cash Office were not similarly charged. He denied stealing any funds from the organization. On cross-examination, he stated that PW13 was in charge of the Cash Office. He testified that all cashiers had authority to bank revenue collected. He added that monthly returns were never conducted at the Cash Office.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See [Okeno vs Republic \[1972\] EA 32](#)). In the present appeal, the issue for determination is whether the prosecution established the charges of stealing by a person employed in the Public Service contrary to Section 280 of the Penal Code to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal.

In the present appeal, it was the prosecution's case that the Appellants used their positions at Kenya Forestry Research Institute (KEFRI) to steal money collected as revenue from the said organization. The prosecution was required to demonstrate that the Appellants were employed in Public Service and that they fraudulently stole funds belonging to the Government without any claim of right. It is not disputed that the Appellants were all employees of KEFRI. The 1st Appellant was the Chief Accountant. The 2nd Appellant was employed as a Head Cashier at the Cash Office while the 3rd Appellant was a Cashier. The Appellants confirmed the same in their respective defence statements.

PW1 who was an Internal Auditor discovered a shortfall in revenue deposited in the organization's bank account as compared to the amount collected at the cash office. The amount of money banked did not tally with the amount of revenue collected by the cashiers. He produced in

evidence numerous receipt books and bank statements for financial years 1999 to 2003 which established the same. The total shortfall for the four financial years amounted to Ksh.7,914,660/-.

It was his evidence that the 2nd and 3rd Appellants were authorized cashiers who collected revenue at the Cash Office. Once a cashier received revenue, he/she was required to issue a receipt for the same. The amount collected was then posted in the cash book and then afterwards banked.

From the evidence on record, this court notes that there were several cashiers at the Cash Office who were involved in revenue collection. They included the 2nd and 3rd Appellants, PW2 (Janet), PW3 (Sigei), PW4 (Njoroge), Mary Waitherero, and Jane Wangari. Therefore PW1's averment that the 2nd and 3rd Appellants were the only cashiers tasked with revenue collection was incorrect. There were other cashiers who were tasked with revenue collection. PW13 testified that he issued receipt books to several cashiers who collected revenue. The same can also be seen from the register for issuance of receipt books (**PEX26 & PEX27**) produced into evidence.

PW2, PW3 and PW4 who were also cashiers at the Cash Office stated that they forwarded all the revenue they collected to the 3rd Appellant who acknowledged receipt of the same by signing at the back of each receipt. They produced into evidence receipt books for monies collected and given to 3rd Appellant. However, this court notes that not all the receipts produced in evidence were signed by the 3rd Appellant. The witnesses admitted as much during cross-examination. In addition, PW2 admitted during cross-examination that if the 3rd Appellant was out of the office, she forwarded the money collected to the 2nd Appellant. She was however not able to point out which receipts among those she produced in evidence reflected money forwarded to the 2nd Appellant. This Court is therefore not able to state with certainty that the revenue reflected in the receipts produced in evidence by PW2, PW3 and PW4 was all received by the 3rd Appellant since his signature was not appended on all the receipts.

It was the prosecution's evidence that revenue was also collected at various external KEFRI collection points. The revenue was then forwarded to Cash Office at KEFRI Headquarters. PW5, PW6, PW7, PW8, PW9, PW10 and PW11 were clerks who received revenue at the various KEFRI collection points. They stated in their testimony that they gave the money to several cashiers at the Cash Office, not just the 3rd Appellant. PW5 stated that she gave the money to whoever she found at the Cash Office including PW3, PW4 and the 3rd Appellant. PW7 testified that there were several cashiers at the Cash Office who received money. PW8 stated that he gave money to PW4 or 3rd Appellant. PW9 stated that he handed over money to 2nd or 3rd Appellant. PW10 on cross-examination stated that he surrendered money to the 3rd Appellant, PW2, PW3 or PW4 depending on who he found at the Cash Office. The same sentiments were echoed by PW11.

The investigating officer, PW16, stated that he made the decision to charge the 2nd and 3rd Appellants since they were the ones who received revenue at the Cash Office but never banked the same. As stated earlier, there were several cashiers at the Cash Office. In addition, the Appellants in their defence testified that some of the revenue collected was used to pay imprest which could have led to the shortfall in amount of money banked. The 2nd Appellant in his defence stated that the cashiers paid imprest to various officers of the organization who applied for the same. The Director at KEFRI (PW15) testified that the 2nd Appellant was tasked with banking, withdrawals and making payments. This corroborates the 2nd Appellant's assertion that payments were made at the Cash Office. **It's interesting to note that PW14 stated that he did not rely on any payment vouchers when carrying out the audit requested by the investigating officer. It appears that when the audit ordered by PW15 was undertaken, this aspect of revenue management was not looked into or considered.**

The 3rd Appellant in his defence stated that there were 8 cashiers at the cash office. They all collected revenue and banked the same. He told the court that at times he would hand over cash to 2nd Appellant accompanied by a bank deposit slip, for instance, if revenue was collected past the bank operating hours. He added that each cashier had authority to bank the cash.

From the foregoing, it is clear that reasonable doubt was raised as to whether the 2nd and 3rd Appellants received all the proceeds collected as revenue at the Cash Office. Some of the cashiers mentioned such as Mary Waitherero were not availed in court to adduce evidence. The 2nd and 3rd Appellants asserted that some of the revenue collected was used to settle payment vouchers and imprests. PW13 told the court that the 2nd Appellant was tasked with making payments among other duties. In addition, during cross-examination, PW1 admitted that one receipt book would sometimes be used by different cashiers/collectors. Therefore, the fact that a receipt book was issued to the 3rd Appellant was not conclusive proof that he received all revenue reflected on the receipt book. The prosecution failed to prove beyond any reasonable doubt that the 2nd and 3rd Appellants fraudulently stole money which led to a shortfall in revenue that was banked.

This court holds that the investigators zeroed in on the Appellants without considering the probability that other employees in the finance section of the complainant could have been involved in the loss of funds. There is no evidence to suggest that a process of elimination was applied by the investigators to ascertain that it was Appellants and only the Appellants who were involved in the loss of the cash and no one else. The fact that it was established that there were other members of staff who handled cash but were not interviewed raises reasonable doubt that exhaustive investigations were conducted to establish all those who were culpable for the loss.

Further, according to PW14, a Senior Auditor at Kenya National Audit Office, the accounting and internal control system at KEFRI at the time had several weaknesses which hindered proper accounting of revenue received. It cannot be ruled out that members of staff exploited these weaknesses in the system to pilfer funds from the complainant. These weaknesses enabled employees who were less than honest to take advantage of the same. The decision to isolate the Appellants from the entirety of the employee body in the finance section and charge them without adducing cogent and watertight evidence against them led to this court to conclude that there was an attempt to cover up the weaknesses in the accounting and internal control systems that were pointed out by PW14 by having a fall guy in the prosecution's case.

The accused person always benefit from any doubt raised. The Court in the case of **Philip Muiruri Ndaruga v. Republic [2016] eKLR** held as follows:

“The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt...To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him...”

With regard to the 1st Appellant, this Court notes that there is no direct evidence pointing to the fact that the 1st Appellant received any funds collected as revenue. The investigating officer (PW16) made the decision to charge the 1st Appellant since he was in charge of the Cash Office. The trial magistrate in convicting the 1st Appellant held that he was aware of the shortfall since he acknowledged all revenue collected and authorized banking of the same. The 1st Appellant was in essence convicted since he was unable to account for the shortfalls in the books of account.

Section 37 of the Evidence Act provides that:

“Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

In the case of **Charles Wanjau Karimi v R [1997] eKLR** the evidence available against the Appellant revealed a shortage of money which was not accounted for by him. The Court of Appeal held that without more evidence, besides the shortfall in the books of accounts, it was inadequate to prove the charges of stealing by a person employed in the Public Service. In the present case, the prosecution failed to conclusively establish that the 1st Appellant exclusively was authorized to receive any funds collected as revenue from the cashiers. He was not the custodian of the receipt books as PW13 stated that he was. The prosecution did not prove to the required standard of proof that the 1st Appellant exclusively was authorized to received any funds. The 1st Appellant in his defence denied receiving any revenue. He stated that cash was collected and banked by the cashiers. His conviction on the four counts must therefore fail.

In the premises therefore, this court finds merit in the appeal lodged by the Appellants. The Appellants’ respective appeals are hereby allowed. Their convictions are quashed. The Appellants are acquitted of all the charges. The Appellants are set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2019

L. KIMARU

JUDGE