



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 50 OF 2016

MUNGAI WACHAGA HINGA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence the Chief Magistrate's Court at Nairobi Cr. Case No. 59 of 2011 delivered by Hon. Gandani, SPM delivered on 18th March, 2016).

JUDGMENT.

Background.

1. Mungai Wachaga Hinga, hereafter the Appellant was charged in three counts. In Counts I and III he was charged with the offence of stealing contrary to Section 275 of the Penal Code. The particulars of Count I were that on unknown dates between the months of May and June 2008 at unknown place within the Republic of Kenya, jointly with others not before the court stole one Development Bank of Kenya cheque leaf number 011710 valued at Kshs. 100 the property of Muigai Commercial Agencies.
2. The particulars of Count III were on 20th June, 2008 at Commercial Bank of Africa, International Life House branch in Nairobi within Nairobi area jointly with others not before court stole Kshs. 385,000/- the property of Muigai Commercial Agencies.
3. In Count II he was charged with the offence of forgery contrary to Section 349 of the Penal Code. The particulars were that on or before the 20th day of June, 2008 at unknown place within the Republic of Kenya with the intent to defraud, forged a certain Development Bank of Kenya cheque No. 011710 for Kshs. 385,000/- purporting it to be a good and valid order of payment issued to Mungai Wachaga Hinga.
4. The Appellant was found guilty on all the three counts. He was sentenced to serve one year imprisonment in count I and two years imprisonment each in counts II and III. He was dissatisfied with both the conviction and sentence as a result of which he lodged the present appeal. His grounds of appeal were set out in his petition of appeal filed on 23rd March, 2016. They were; (i)that the learned magistrate erred in failing to exhaustively analyze all the evidence on record, (ii)that the trial magistrate erred in relying on circumstantial evidence to found a conviction, (iii)that the learned magistrate erred in convicting him despite her finding that there was no direct evidence linking him to the offences, (iv)that the learned trial magistrate erred when she found that the prosecution had discharged its burden of proof whereas a material witness was not called to give evidence, (v)that the trial magistrate erred in shifting the burden of proof to him, (vi)that the trial magistrate erred in entirely disregarding his defence, and (vii)that the learned trial magistrate erred in sentencing him to five years imprisonment which was manifestly excessive in the circumstances.

Submissions.

5. The Appellant was represented by Mr. Wachira whilst Ms. Aluda acted for the Respondent. Both parties filed written submissions which they canvassed on 10th April, 2018.
6. The Appellant's written submissions were filed on 15th March 2018. It was opined that given the concession to the appeal by the Respondent, the burden of proof upon the Appellant was lessened as the grounds of appeal were all presumed admitted. Counsel submitted that the Appellant was convicted on the basis of circumstantial evidence which was erroneous as the co-existing circumstances weakening the inference that the Appellant was guilty. He cited the Court of Appeal decision in **Jan Chebichii Sawe v. Republic [2003] eKLR** to buttress this submission. He pointed to the trial court having failed to consider that the officer at Development bank who verified the cheque as properly drawn was not called to testify. Further, the failure to call the accountant at the complainant firm who was responsible for keeping the cheque in question whose evidence the Appellant deemed material was called into question. He submitted that PW6 admitted that the cheque was properly drawn and the signatures were proper. He questioned why the document examiner's report was done in 2012

after the Appellant had already been charged. He submitted that the Appellant's defence was that the cheque was given to him by an employee of the complainant whose name he gave to the police. That this was not disproved by the prosecution. He submitted that the failure by the prosecution to call him pointed at his evidence being adverse to their case. He concluded that all these circumstances sufficiently created doubt about the prosecution's case which meant that the prosecution did not discharge its burden to the required standard. He therefore urged the court to allow the appeal.

7. Ms. Aluda in conceding to the appeal submitted that there was no proof that a cheque was stolen, how it was stolen and how it got into the Appellant's hands. She submitted that the person entrusted with the cheque book could not explain how the cheque went missing whilst the complainant's bank representative testified that it was cleared as it bore the correct signatures. She submitted that the money was not stolen as it was found in the account of Meridian Traders. She questioned how the Appellant was charged in court even before his specimen signature had been taken for examination by the document examiner. Further, that it was not clear why the Appellant was the only one of four directors who was charged. Furthermore, it had been confirmed that the person who cashed the cheque was not the Appellant. She submitted that the circumstantial evidence on record could not be relied upon to found a conviction. Amongst the case she relied on to buttress the submission were **Abanga alias Onyango v. Republic, Sawe v. Republic[2003] KLR 364, GMI v. Republic(Criminal Appeal No. 308 of 2011(Nyeri)) and Teper v. R[1952] All ER 480,**

8. She submitted that the trial magistrate shifted the burden of proof to the Appellant based on the document examiner's report and that she ought to have taken the defence into consideration when analyzing the circumstantial evidence. She questioned the truthfulness of the document examiner's report which by virtue of its late preparation pointed to poor investigations. She therefore urged the court to allow the appeal and set aside the sentence.

Evidence.

9. The prosecution's case was that the Appellant stole a cheque leaf from the complainant which he proceeded to forge and deposit into his account.

10. **Stephen Nganga Muigai**, PW1 testified that he worked as a property manager at Muigai Commercial Agencies and was in charge of making payments. On 21st July, 2008 he noticed a strange entry in the bank statement which was a debit of Kshs. 385,000/- dated 23rd June, 2008. He went to the bank and confirmed that cheque number 011710 dated 20th June, 2008 payable to Meridian Traders for Kshs. 385,000/- had been made. The Appellant was a Director in the latter company. Investigations revealed that the Appellant had written the cheque as well as the deposit slip and this led to his arrest. PW1 testified that cheque books were kept with the cashier. He reported the matter to the anti-fraud police unit. He later learnt that the Appellant had been arrested although he did not know him.

11. **Peter Paul Maira**, PW2 was an operations manager in the complainant's company. He corroborated the evidence of PW1. He added that he noted irregularities in the cheque in that it did not originate from them. The company name was misspelt on the cheque to read Miugai and the serial number was way ahead of the current cheque book as it was an 1171 series while they were using the 1151 series. He wrote a letter on 22nd July, 2008 asking for a refund. The cheque leaf number 011710 from their cheque book was missing as was its counterfoil. He testified that the company had three signatories at any time and two could sign. He pointed out that the cheque had a signature that was alleged to be his but that he had not signed the cheque. The handwriting of the cheque writer was not familiar.

12. **Elizabeth Wanjiku Gichanga**, PW3 also worked for the complainant. She recalled that in 2008 she was at the office when she was approached by the Appellant who asked if she knew Mr. Otieno. He alleged to have purchased property from the company but she informed him that the person he was seeking did not work at the company. In cross examination she denied loaning Charles Onyango money to buy a car or that the Appellant visited the offices looking for Charles Onyango.

13. **Stanley Muganda**, PW4 also worked for the complainant where he performed petty errands. He recalled that on 17th June, 2008 he was sent to collect cheque books from the bank which he handed to the accountant.

14. **No. 231671 CI Alex Mwongera**, PW5 who was a document examiner confirmed that the subject cheque leaf was written by the Appellant. He did the examination on 25th April, 2012. He also confirmed that the cheque deposit slip was written by the Appellant. He did this by comparing the writing in the documents with the specimen hand writings of the Appellant as well as of PW2.

15. **Daniel Edward Sagia**, PW6 was a clearing clerk at Development Bank at the Loita House branch. He used to collect cheques and present them to the clearing house, the Central Bank. He recalled receiving cheque number 011710 which was an inward cheque. It was a payment to Meriden Traders. He effected the payment. He then moved it to the auditor for verification and authorization.

16. **Joseph Kiarie Kamau**, PW7, of Commercial Bank of Africa was charged with receiving cheques and deposits. He recalled that on 20th June, 2008 he received the subject cheque and after confirming that it was properly drawn forwarded it to Central Bank. It was accompanied by a cheque deposit slip. In cross examination he stated that he did not know the Charles Onyango who did the deposit.

17. **Margaret Wangu**, PW8 an assistant registrar of companies confirmed who the shareholders of Meriden Traders were, amongst them the Appellant.

18. **CI Fatuma Ali, PW9** of Banking Fraud Unit investigated the case. She summed up the evidence of all the prosecution witnesses. She added that the cheque was deposited by one Charles Omondi. He provided her with Identity Card No. 14226727 and she wrote to the National Registration Bureau for the particulars of the card and received a reply on 28th May, 2009 informing her that the card did not exist in their database. She got the specimen signatures of the signatories of the complainant bank account. She forwarded them to the document examiner who returned a report on 30th April, 2012 implicating the Appellant. She then charged him.

19. In his sworn defence, the **Appellant** confirmed that he was a director of Meriden Traders. He recalled that in 2008 he met one Charles Omondi who informed him that his office was interested in buying him a car. He asked him to sign an agreement which he wanted to take to the company to process the loan. He took their bank details. About a month later, he realized that there was a deposit of Kshs. 385,000/- in the account by one Charles Omondi. Due to the lapse in time the company sold the vehicle and asked him to choose another one. He became uncomfortable and asked for a refund of the money. He traced the company offices and met PW3 who informed him she would consult the accountant and confirm the way forward. However, police came to his office and informed him that they were investigating the theft of the money. He submitted that none of the witnesses said he had signed the cheque and that the bank actually confirmed that the cheque was properly written and signed. He testified that he could not refund the money unless it was officially claimed from him. Further, that in 2008 Charles was an employee of the complainant but had since been fired.

Determination.

20. In am minded that the Respondent conceded to the appeal. However, the court is still under a duty to re-evaluate the evidence and come up with its independent findings. After considering the evidence at hand and the submissions by the parties, I have deduced that the issue arising for determination is whether the case was proved beyond a reasonable doubt.

21. The first issue for determination relates to the burden of proof which the Respondent submitted was shifted upon the Appellant. Miss Aluda submitted that this was exhibited when the trial court relied on the report of the document examiner as a basis for the conviction. This is an untenable assertion because the report was an expert evidence which was used to demonstrate the Appellant's culpability in writing the subject cheque. No other form of evidence would have established who the author of the cheque was other than to examine its writer. That exercise could only be executed by an expert, a document examiner. As such, the reliance on the report could not be deemed to amount to a shift of the burden of proof as the prosecution was under a duty to prove its case beyond reasonable doubt. Furthermore, it cannot be construed from the judgment of the learned trial magistrate that she required the Appellant to disprove the fact that the prosecution solely shouldered the burden to proof. All that was set out in the judgment was a failure to weaken the findings in the report.

22. The Respondent and the Appellant also submitted that the report was made after the case had commenced and used this lapse in time as an indication of shoddy investigations. The Respondent submitted that the fact that the evidence was "not gathered in good time" raised doubts about its truthfulness. The Appellant submitted that the report in question was made with the intention of convicting him. From the evidence, it appears that the document examiner, PW5, received the exhibits in question on 25th April, 2012. They included a cheque deposit slip, the Appellant's handwriting specimen, PW1's handwriting specimen and PW2's handwriting specimen. The report he prepared was signed on 30th April, 2012. There is no doubt that the evidence and the report prepared pursuant to that evidence was procured after the Appellant had taken plea and the matter had commenced. What this court must determine is whether this is an indication of incompetence on the part of the investigators or whether the evidence was an afterthought. It is also clear that the evidence that was adduced from the Registrar of Companies was also collected after plea was taken but curiously the litigants did not seek to impeach it.

23. The court is of the view that this did not prejudice the Appellant as it is clear that he was privy of the evidence and sufficient cross examination was done when the evidence was adduced in court by the document examiner. Further, it is not a cardinal principle of law that the prosecutor should be in possession of all evidence she/he shall rely upon before arraigning the accused in court. All that is required is to have a sufficiency of evidence to ensure that they can competently charge an accused without the prosecution being tainted with hints of malice or amounting to an abuse of the process of the court. Be that as it may, an accused is obligated to object to the admission of any piece of evidence he feels would prejudice him. More so, if it is demonstrated that that it was procured unprocedurally or with the intention to secure a conviction or for purposes of self-incrimination. None of these facts were shown to exist. The document examiner did his work meticulously having compared specimen signatures and hand writings of the known bank signatories and those of the Appellant. He also underlined the methods he used to arrive at the conclusion that the Appellant had written the cheque. The fact that the evidence was collected while the prosecution's case was ongoing is not an indication that it was "manufactured" to obtain a conviction. I do accordingly dismiss this piece of submission.

24. On proof of the offences, Count I related to stealing contrary to Section 275 of the Penal Code. This relates to a Development Bank of Kenya cheque leaf number 011710, the property of Muigai Commercial Agencies. It is unclear how the Appellant was convicted of this count given the dearth of evidence pertaining to how the cheque leaf left the offices of Muigai Commercial Properties. The evidence of PW4 was that he picked the cheque books from the bank on 17th June, 2008 and took them back to the office where he delivered the same to the accountant. PW2 testified that the cheque books were kept in a safe and that they only noticed that the cheque leaf and its counterfoil were missing after they noticed the suspicious transaction from the bank statements. The only evidence that points to the Appellant being present at the offices of the complainant was that of PW3 which does not point to him having access to the location of the cheque. In the circumstances, the court finds that the Appellant was not pinpointed as the person who stole the cheque leaf.

25. The second count relates to forgery contrary to Section 349 of the Penal Code. The particulars of the case were simply that the Appellant forged the Development Bank Cheque with the intention to defraud. It is clear that the bank paid out the monies after considering that the cheque was properly authorized. The prosecution did not call the party who authorized the transaction to show in what circumstances this was done. However, they called a cashier with the bank who acknowledged receipt of the cheque from the clearing house and paid it by reflecting the same in the complainant's account before forwarding it to the auditor for verification and authorization. The document examiner's report concluded that the handwriting on the cheque leaf and the cheque deposit slip was that of the Appellant and found that the signatures on it were not those of the complainant's signatories. It is therefore questionable how the bank authorized the payments. The Appellant's defence was that the cheque was given to him by one Charles Onyango who was an employee of the complainant pursuant to a car sale agreement. He did not adduce evidence of the transaction and submitted that he did not either refund the money once the transaction was terminated due to a failure by the complainant to lodge a formal document seeking a refund of the money. I find that the document examiner's evidence was truthful and sufficient conclusion that the Appellant drew the cheque. The evidence of intention to defraud was demonstrated by the fact that the prosecution demonstrated that the person the Appellant claimed deposited the cheque did not work for the complainant. He thus wrote the cheque with the sole intention of defrauding the complainant. This fact was never rebutted by the Appellant's defence. Count II was accordingly proved beyond a reasonable doubt.

26. The third count related to the offence of stealing contrary to Section 275 and its particulars were that on 20th June, 2008 at Commercial

Bank of Africa the Appellant stole Kshs. 385,000/- the property of Muigai Commercial Agencies. To convict the Appellant on the basis of such a charge would first of all run counter to the conviction in count II. This is because the forgery charge in count II was based on the fact that the Appellant intended to defraud the bank into making a payment pursuant to the cheque. That payment was made by the bank having been procured as a result of fraud in the sense that the bank was negligent in paying a cheque that was not signed by the account holder's signatories. As such, the loss was suffered by the bank. Simply stated, given the evidence of a forgery, the proper authority for payment was lacking. Therefore, the money was clearly the property of the bank and the complainant could not lay any property claims on it. The bank ought not to have paid. The charge would then fail as the complainant was not Muigai Commercial Agencies but the bank itself.

27. In view of the foregoing, I hereby uphold the conviction in respect of count II. With respect to the sentence, Section 349 of the Penal Code provides for a penalty of up to three years imprisonment if a person is convicted for forgery. Therefore, the penalty of two years imprisonment without the option of a fine was harsh and excessive. I substitute it with an order that the Appellant shall pay a fine of Ksh. 100,000/in default serve one year imprisonment. I however find that no sufficient evidence was adduced in respect of Counts I and III for which I quash the conviction and set aside the respective sentences. It is so ordered.

DATED and DELIVERED this 23rd day of **May, 2018.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Wachira for the Appellant.
2. Mr. Momanyi for the Respondent