REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 85 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 299 of 2013 of the Chief Magistrate's Court at Naivasha –E. Kimilu, SRM)

FRANCIS KARIUKI NJUGUNA..…….....APPELLANT

VERSUS

REPUBLIC…….....……...RESPONDENT

J U D G M E N T

1. The Appellant was tried and convicted on four counts, namely Stealing contrary to Section 268 (1) as read with Section 275 of the Penal Code, Forgery contrary to Section 350 of the Penal Code, Uttering a false document contrary to Section 353 of the Penal Code and Attempted stealing contrary to Section 268 (1) as read with Section 389 of the Penal Code. He was sentenced to one year imprisonment on each count.

2. Aggrieved by the outcome, he lodged this appeal in person on 2/6/2015 raising five grounds of appeal as follows:

> **"1. My Lordship, the trial magistrate erred in law to uphold the evidence as adduced without paying legal regard that such conviction and sentence were irregularly and illegally entered mistrial of the appellant here in that was illegally premised on an incurably defective charge sheet for want of particularization of the alleged forged document.**
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> **2. My Lordship, the learaned magistrate erred in law and facts by purporting to shift the burden of proof on me, and excessively high sentence in a matter that the absence f the certificate from experts (finger prints) in court records had legally initiated the charge to the extent that resultant doubt ought to have been interpreted in favour of I the Appellant.**
>
> **3. My Lordship, the learned magistrate erred in law to uphold the evidence despite the evident misdirection of that court in shifting the standard of burden of proof from the prosecution to the Accused as opposed to the trite law that such burden of proof ought to be borne by prosecution throughout.**
>
> **4. My Lordship, the trial magistrate erred in law in the re-evaluation of evidence on record and erroneously failed to note that the prosecution did not prove its case beyond any reasonable doubt.**
>
> **5. THAT, the learned judge made a crucial error in both law and facts by failing to note and acknowledge that the circumstances surrounding my arrest was not satisfactory nor does**

prove to my participation in the commission of the offence as charged."

3. The Appellant argued his appeal through Mr. Njuguna who came on record prior to the hearing of the appeal. He argued on the first ground that by failing to state what exactly was forged – writings or signatures – the second count was defective.

4. Regarding the 2nd to 5th ground he contended that the prosecution evidence was insufficient for reasons that:

a) the beneficiary of forged cheque alleged to be the Appellant's wife Rachel Wanja Giita was not called as a witness.

b) the bank manager to whom the cheque was presented did not testify.

c) the forged signatures were not attributed to the Appellant and his purported official connection with Rachel Wanja Giita was insufficient.

d) The appellant did not have exclusive access to the cheque book out of which the forged cheque leaf was plucked.

e) The court erroneously required the Appellant to fill the gaps in the prosecution evidence regarding his relationship with the payee and access to the cheques.

5. On the sentence, the Appellant takes issue with the fact that the court did not indicate whether the sentences were to run concurrently or otherwise.

6. The Director of Public Prosecutions through Mr. Koima, opposed the appeal by reiterating the evidence adduced at the trial. He argued that there was strong circumstantial evidence linking the Appellant to the offences.

7. The duty of the first appellate court remains as stated in **Pandya -Vs- Republic [1957] EA 336** namely:-

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

8. The prosecution case herein was that the Appellant worked at Bigot Flowers as a grader in the material period. Employees benefited through funds remitted by flower customers under the Fair Trade. The workers operated a Self Help Group, Bigot Self Help Group which administered such remitted funds for the workers' benefit. In the period in question the Appellant was the secretary of the Self Help Group and responsible for writing cheques on behalf of the Group. Other employees of Bigot Flowers and officials of the Self Help Group were **Richard Osoro Ndege** (treasurer PW2), **Evanson Ntabo Jumba** (chairman, PW3).

9. The Human Resource Manager Bigot Flowers **George Ganda (PW1)** was a mandatory signatory and authority in respect of the bank account number **1132556899** held by the Self-help group at Kenya

Commercial Bank.

10. In the material period, bursary cheques were being made out in favour of members of Bigot Self Help Group from the Fair Trade proceeds. On 5/2/2013 **PW1** received a call from the Kenya Commercial Bank seeking confirmation of a cheque number 000479 issued to one **Rachel Wanja Giita** for the sum of **Shs 96,540/=** and banked into account number 02019998275 at Equity Bank Naivasha Branch. Upon consultations with the Self-help group officials, the cheque was declared stolen and a forgery as the officials denied issuing it. **PW1** denied approving it.

11. In a meeting called by **PW1, PW1** called for the Appellant's personal file which contained his details, including his next of kin indicated as **Rachel Wanja Giita**. Confronted with the information the Appellant admitted that he had issued the cheque to the payee who was his wife. He sought forgiveness. Police were notified. They arrested the Appellant and commenced investigations.

12. In his defence, the Appellant gave an unsworn statement. To the effect that he reported at work, Bigot Flowers on 5/2/2013. **PW1, PW2** and **PW3** questioned him about a cheque. When he pleaded ignorance he was told the cheque was in his wife's name. He was "surprised". With **PW1**, **PW2** and **PW3** he went to police station. He was placed in custody. He said he was neither responsible for keeping or signing cheques and was innocent.

13. There seemed no dispute that a cheque, (**Exhibit 1**) that was stolen from the Self Help Group was issued in the names of **Rachel Wanja Giita** for the sum of **Shs 96,540/=**. There is undisputed evidence that none of the official said signatories of the Self Help Group authorized the issuance of the cheque. The sticking point in the matter was whether the Appellant was responsible for the theft, forgery and uttering of the cheque at the bank in a bid to fraudulently obtain the proceeds thereof.

14. The trial court in its analysis of the evidence correctly framed the issues and concluded, upon analyzing evidence that:

> **"The last issue for determination is whether this cheque was stolen by Accused person in attempts to defraud the complainant. The prosecution evidence is very consistent that the cheque was stolen from cheque book. The author of the cheque is not known. The person deposited it is not known. However, the cheque having been drawn in favour of Rachel Wanja Giita the officials realized the payee was Accused person. Accused person had access of the cheque books since he was an official to Bigot Self Help Group. He was also working for Bigot Flower Limited. The circumstantial evidence is overwhelming against Accused person who apparently claimed he was used to give his wife details. The prosecution produced Accused file which shows he had indicated Rachel Wanja Giita was his wife. Accused had called her using another staff mobile number. Investigations showed clearly Accused stole said cheque forged and uttered the same to Equity Bank Naivasha with sole intention of defrauding complainant group Kshs 96,540/=.**
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> **The cheque having being intercepted before clearance is clear Accused person attempted to steal Kshs 96,540/= the property of Bigot Self Help Group by depositing the cheque in his wife's account held with Equity Bank." (sic)**

15. Before dealing with the merits of the case, I find it necessary to consider the complaint by the Appellant that the second count was defective. The statement of the offence in count two stated that:

> **"Forgery contrary to Section 350 of the Penal Code."**

The particulars thereto are to the effect that:

> **"Between 31st January 2013 and 5th February in Naivasha Sub-County within Nakuru County, jointly with others not before court forged a cheque leaf Serial number 00479 purporting it to be issued by Bigot Self Help Group Limited."**

16. Forgery is defined in Section 345 of the Penal Code as:

> **"the making of a false document with intent to defraud or deceive"**

Intent to defraud is defined in Section 348 of the Penal Code as follows:-

> **An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document."**

17. The two key elements of the offence of forgery under Section 350 therefore are the making of a false document accompanied with the intention to defraud. In the instant case, the relevant portion in the particulars of the second count are that the Appellant **"with others not before court forged a cheque leaf serial number 00479 purporting it to be issued by Bigot Self Help Group"**

18. I agree with Mr. Njuguna that the inclusion of words indicating the actual forged writing or signature may have given more details of the offence. In this case however I think the particulars given were adequate. The prosecution case was that the stolen cheque bore purported signatures of purported officials which turned out false. The intention was to give the impression that the cheque was properly **"issued by the Bigot Self Help Group."**

19. In my considered view, the particulars contained sufficient information to enable the defence understand the charge. Section 134 of the Criminal Procedure Code provides as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

20. The proceedings in the trial indicate that the Appellant clearly understood the charges he was facing at the trial. Nothing therefore turns on the question of the propriety of the charge particulars in the second count.

21. The evidence connecting the Appellant to the offences was primarily circumstantial, namely his position and roles in the Self Help Group which gave him access to the cheque of the Group, and the fact that the payee in the stolen cheque was alleged to be his wife. However there is also direct evidence by **PW2** and **PW3** that the Appellant, upon being confronted with the wife's details in his official file, did admit to issuing the cheque and pleaded for forgiveness. This is apart from the apology letter **Exhibit 4** which in my view ought not to have been produced by **PW4**. More so because it not identified by **PW2** and **PW3** during their evidence.

22. As regards the Appellant's personal file (**Exhibit 2**) the same was identified and produced through **PW1** the Human Resource Officer at the Bigot Flower farm which employed the Appellant. I do not agree with the defence submissions that the details found therein are unreliable as the particular details form is not signed by the Appellant.

23. Evidence by **PW1, PW2,** and **PW3** that the said file was produced in a meeting of the officials of the Group and **PW1** on 6/2/3013 was uncontested. The Appellant in cross-examination of the witnesses **PW1, PW2,** and **PW3** never suggested to them that the details form to which he now takes objection was manufactured to frame him. Indeed both **PW2** and **PW3** said that upon being shown the evidence in his file, the Appellant conceded his involvement and begged for forgiveness. And despite the prosecution evidence on the relationship between the Appellant and the cheque payee, the Appellant remained reticent on this score in the course of his defence. The Appellant's wife was not a compellable prosecution

witness under Section127 (3) of the Evidence Act for the purpose of the offences preferred against the Appellant.

24. Perusing the impugned Appellant's personal file, I note that it appears to be a regular and routine record in respect of the Appellant's employment with Bigot Flowers since 2006. Apart from the details of his wife, the staff personal details form therein contains other personal details that nobody would have easily made up. These include the names and dates of birth of his children, identity card number (copy of which is attached) and his next of kin. The instructions on the form state that the said from is **"To be completed by all the Employees."**

25. It is highly unlikely that somebody else invented these details. Nor did the Appellant in his defence dispute the contents of the said form. All he stated was:

> **"We were asked about our mobile phone (numbers) after some interrogations. I was told I was suspect since cheque was in my wife's name. I was surprised……."**

26. I accept the trial court's finding that the cheque (**Exhibit 1**) was proved to be a forgery having been issued in the Appellant's wife's name and further that the Appellant as an official of the Self Help Group, had access, though not exclusive, to cheque books of the Self Help Group. In this case, the fact that the actual forged signatures on the cheque were not linked to the Appellant by the document examiner does not detract from the otherwise strong direct and circumstantial case made against him.

27. Pursuant to the provision of Section 111 of the Evidence Act, it was reasonable for the trial court to expect, in light of the prosecution evidence, that the Appellant would explain his relationship to the payee of the stolen cheque. Although the choice of words of the trial court in stating such expectation may appear to shift the burden of proof to the Appellant, I think that taken in context, all the court was saying by noting the Appellant's failure to "**challenge evidence on record**" is that in light of evidence marshalled against the Appellant, it was reasonable to expect an answer from him, in particular regarding his relationship with the cheque payee.

28. I also think that the defence submission on this score ignores evidence by **PW2** and **PW3** that the Appellant upon being confronted with his personal details in the file **Exhibit 2** admitted that the payee of the cheque was indeed his wife and that he had written the cheque in question. He then pleaded for forgiveness.

29. Based on the direct and circumstantial evidence, I believe the trial court was justified in entering a conviction against the Appellant in respect of Counts 1 and 2. There was insufficient evidence however to connect the Appellant with the 3rd count. There is no evidence that he presented the forged cheque for payment at the Equity Bank, or that he was one of the holders of the account at Family Bank. I therefore will quash the conviction on Count 3 and set aside the sentence.

30. As regard count number 4, the intention to defraud is exhibited in the admitted act of forgery of the stolen cheque. The payee of the cheque was the Appellant's wife and clearly, he too, being the architect of the fraud stood to gain from the proceeds of the cheque. That was the ultimate intention: to steal the cash belonging to the members of the Self Help Group. The fraudulent intent can be presumed in this case as contemplated in Section 348 of the Penal Code.

31. The High Court decision in the case of **Joseph Mukuha Kimani -Vs- Republic [1983]** cited by the trial court, was overturned by the Court of Appeal in **Joseph Mukuha Kimani -Vs- Republic [1984] eKLR.** Although the said appeal dealt with the question of uttering of a forged document, there are some useful comments made by the Court of Appeal that I find applicable to this case. The court observed *interalia* that:

> **"In the case of Kilee -Vs- Republic [1967] EA 713 at page 217, it was said that the false document must tell a lie about itself not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud, is**

by deceit, to induce a course of action; Omar bin Salim -Vs- Republic [1950] 17EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit, of some economic advantage or inflicting upon him some economic disadvantage or inflicting upon him some economic loss, see Samuel -Vs- Republic [1968] EA 1."

32. There is no merit in the grounds of appeal in respect of the conviction in counts 1, 2 and 4 and the same is dismissed.

33. As regards the sentence, I do accept the complaint that the trial court should have indicated whether the sentences were to run concurrently or otherwise. Ordinarily, where several offences arise from the same transaction, the court will exercise its discretion where no fine is imposed on any of the counts, to order that the sentences in respect of several offences run concurrently.

34. Section 14 (1) of the Criminal Procedure Code states:

"Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently."

35. The court in this case did not direct that the sentences in respect of the offences should run concurrently, which means in terms of Section 14 (1) of the Criminal Procedure Code that they were to run consecutively.

36. In light of the fact that the Appellant was a first offender, and has already served about two years of the imprisonment term, I would review the sentences as follows

a) Sentence hitherto served be treated as concurrent punishment in respect of counts 1, 2 and 4.

b) Sentence in respect of counts 1, 2, 4 be reduced to the equivalent of the period already served.

In the circumstances, the Appellant is to be set at liberty forthwith unless otherwise lawfully held.

Delivered and signed at Naivasha, this **28th** day of **April, 2017.**

In the presence of:-

Mr. Mutind for the DPP

Mr. Gichuki holding brief for Mr. Njuguna for the Appellant

Appellant – present

C/C – Quinter Ogutu

C. MEOLI

JUDGE