



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC.CRIMINAL APPEAL NO. 63, 65, 66 OF 2015

JOSEPH JUMA NYAPETE.....1ST APPELLANT
JOSEPH MAKONGU GETATE.....2ND APPELLANT
SAMUEL MIRUGI MIHINDO.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in the judgment of Hon. Hannah N. Ndung'u (Chief Magistrate) in the Chief Magistrate's Court at Nairobi Criminal Case No. 1894 of 2008 delivered on 27th April, 2015.)

JUDGMENT

The Appellants were charged jointly with others with various offences in the Chief Magistrate's Court at Nairobi in Criminal Case No. 1894 of 2008.

In Count I the 1st Appellant was the 2nd accused and was charged jointly with another with the offence of making a document without authority contrary to Section 357(a) of the Penal Code. It was alleged that on or before 13th February, 2008 at Gusii County Council Offices in Kisii District within Nyanza Province jointly with others before court with intent to defraud made a certain false document namely; a full council minutes for a meeting held on 19th December, 2007 at 9.00 a.m in the council chamber purporting it to be a genuine and valid document approved by the Gusii full council meeting to open a bank account with National Bank of Kenya Kisii Branch.

In count II, the 1st Appellant was charged alongside another with altering a false document contrary to Section 353 of the Penal Code in that on the 21st February, 2008, at National Bank of Kenya Kisii Branch in Kisii District within Nyanza Province, jointly knowingly and fraudulently uttered a certain false document namely; a County Council of Gusii full council minutes for a meeting held on 19th September, 2007 at 10.00 a.m in the Council chambers to Michael Chembosi Busuale an account opening officer at the said Bank.

In count III, the 1st Appellant was charged jointly with another with making a document without authority contrary to Section 357(a) of the Penal Code. The particulars of the offence were that on or before 25th February, 2008, at unknown place within the Republic of Kenya, jointly with others not before court with

intent to defraud, made a certain false document namely; National Bank of Kenya cheque No. 000298 for account No. 0132166500 purporting it to be a genuine and valid cheque for Kshs. 28,885,756.00 drawn by Kenya Roads Board.

In count number IV, the Appellants were the 2nd, 3rd and 6th accused persons respectively and were charged jointly with three others with conspiracy to defraud contrary to Section 317 of the Penal Code. It was alleged that on 25th February, 2008, at National Bank of Kenya Hill Plaza Branch at Nairobi within Nairobi area, jointly with others not before court, conspired together to defraud Kenya Roads Board of Kshs. 28,885,756.00.

In Count Number V, the three Appellants were the 2nd, 3rd and 6th accused persons respectively and were charged with stealing contrary to Section 275 of the Penal Code. It was alleged that on diverse dates, between 25th February, 2008 and 22nd April, 2008 at National Bank of Kenya, Kisii Branch in Kisii District within Nyanza Province, jointly with others not before court stole Kshs. 28,885,756.00 the property of National Roads Board.

In Count VI the 1st Appellant was jointly charged with another with the offence of making a document without authority contrary to Section 357 (a) of the Penal Code. It was alleged that on or before the 26th February, 2008 at the Provincial Local Government office Kisumu, in Kisumu District within Nyanza Province jointly with others not before court with intent to defraud made a certain false document namely; an introduction letter referenced 3212/RWS/4 dated 26th February, 2008 addressed to the Manager National Bank of Kenya Kisii Branch to authorize Wilson K. Chebii and Joseph Juma as signatories in Account No. 0100234824300 held at the said Bank purporting it to be a valid and genuine document issued by Reuben S. W. Provincial Local Government officer Nyanza.

In count VII, the 1st Appellant was charged jointly with another with the offence of uttering a false document contrary to Section 353 of the Penal Code. It was alleged that on 26th February, 2008, at National Bank of Kenya Kisii Branch in Kisii District within Nyanza Province, jointly, knowingly and fraudulently uttered a certain false document namely; an introduction letter referenced 3212/RWS/4 dated 26th February, 2008 to Michael Chebosi Busaule, an account opening officer at the said Bank.

The Appellants were sentenced as follows:

Count I: The 1st appellant was sentenced to 36 months imprisonment

Count II: The 1st Appellant was sentence to 18 months imprisonment.

Count III: The 1st appellant was sentence to 36 months imprisonment.

Count IV: Each of the Appellants was sentenced to 18 months imprisonment.

Count V: Each of the appellant was sentenced to 24 months imprisonment.

Count VI: The 1st Appellant was sentenced to 36 months imprisonment.

Count VII: The 1st Appellant was sentenced to 18 months imprisonment.

All the three Appellants were dissatisfied with both the conviction and the sentence and they preferred this appeal. Each of them filed respective appeals separately. The 1st Appellant filed Criminal Appeal No. 66 of 2015, the 2nd Appellant Criminal Appeal No. 65 of 2015 and the 3rd Appellant Criminal Appeal No. 63 of 2015. They raised more or less similar grounds of appeal which are that, the prosecution did not prove the ingredients of the offences with which each of them was charged, that the prosecution's evidence was not corroborated, that the trial court misapplied the law in arriving at a conviction and that

the sentences were harsh and excessive in the circumstances. All the Appellants were represented by learned Counsel. Mr. Moindi represented the 1st Appellant, Mr. B'womote represented the 2nd Appellant whilst Ms. Msungu represented the 3rd Appellant. They all filed written submissions which I will highlight as under:-

On behalf of the 1st Appellant, the submissions were filed on 24th November, 2015. In brief, counsel submitted that PW1 disowned the council minutes alleged to be the subject of the offence in Count I. Further, that the chairperson who was alleged to have chaired the council meeting of 13th February, 2011 was not called as a witness to confirm the said minutes. In addition, the learned trial magistrate failed to take into account that PW1 had testified that the minutes were recorded in a minute book whose custody was in the hands of the council clerk. In that regard, the clerk ought to have testified and produced the minute book which would have contained the minutes of 13th February, 2008. Had the said minute book been produced, the learned trial magistrate would have found that the meeting of 13th February, 2008 was conducted by a full council meeting as a result of which she would not have arrived at a conviction against the 1st Appellant. In any case, no other minutes were produced in court to counter those of 13th February, 2008.

With regard to the theft of Kshs.28,885,756.00, counsel submitted that the 1st Appellant did not benefit from the money and it was an error on the part of the prosecution not to have either called as witnesses or prosecuted the beneficiaries of the money. These are the people who were paid by the council with the said money included but not limited to Mangarocks Enterprises, a sum of Kshs. 9,150,250.00 and Kshs. 1.5 million to Equity Bank for salaries of staff.

Learned counsel further submitted that the learned trial magistrate failed to consider the evidence of PW10 who testified that there was apparent complicity within the council board and the Bank who may have conspired to steal. In that regard, the council had suspended four officers because of the theft. He submitted that the 1st Appellant did not in any way benefit from the payments.

On behalf of the 2nd Appellant, submissions were filed on 1st December, 2015. Apparently counsel for the 2nd Appellant indicated that he was representing the 3rd Appellant which was a typographical error. He submitted that all that the 2nd Appellant did was to obey lawful orders of his employer as an agent of the various bank accounts the Gusii County Council held. That was in respect of the accounts held with Barclays, Cooperative, Family and National Banks. There was nothing unusual that he did in the course of his duties as an agent in respect of the account with National Bank that he did not do with the rest of the Banks. Furthermore, as an agent, he cashed the money and gave it to his bosses. The onus lay on the prosecution to prove that the 2nd Appellant may have conspired with the rest of the accused persons to steal the subject money, which onus was not discharged. All that he did was to perform his lawful duties under the instructions of his seniors.

He further submitted that there was no evidence adduced by the prosecution to demonstrate that the 2nd Appellant benefited from the money that the complainant lost. In this respect, the trial magistrate ought to have found the 2nd Appellant's evidence plausible that he did not steal or commit any other offence. The counsel urged that the 2nd Appellant be set free.

Submissions for the 3rd Appellant were filed on 30th November, 2015 by learned counsel Ms. Mbigi Njuguna and Company Advocates. In brief, counsel submitted that the prosecution failed to prove the ingredients of the offence of conspiracy and stealing. That is to say that the prosecution did not establish that the 3rd Appellant had a common intention with other accused persons to defraud Kenya Roads Board a total sum of Kshs.28,885,756.00. He cited the case of **R vs Underwood [1996] AC 27 HL Lord Bridge stated;**

“But beyond the mere fact of agreement the necessary mens rea of the crime is in my opinion established if and only if it is shown that the accused when he entered into the

agreement intended to play some part in the agreed course of conduct in furtherance of a criminal purpose which the agreed course of conduct was intended to achieve nothing less will suffice; Nothing more is required”.

With regard to stealing, counsel submitted that the prosecution failed to prove the following three elements namely; that the 3rd Appellant acted dishonestly, appropriated property belonging to another person and intentionally deprived the owner of the property.

It was submitted that the 3rd Appellant who was an employee of National Bank of Kenya did nothing wrong in the course of his duties. Although he did not call the client prior to the payment as at that time, there was no requirement by the bank that the client needed to be called before the payment was made. All that was required was for the bank manager to authorize the payment. The latter had testified as PW7 and had confirmed having authorized the payment after confirming that the customer details matched with those in the bank record. She was therefore the person who ought to have shouldered the blame for allowing the money to leave the bank. Accordingly, the 3rd Appellant was convicted based purely on circumstantial evidence. It was urged that he should be set free.

On behalf of the Respondent, submissions were filed by learned Senior Prosecutions Counsel, Ms. Jemima Alunda. She submitted that the prosecution's case was weak and did not warrant a conviction. Firstly, the prosecution did not prove that there were no minutes of 13th February, 2008 that did not approve the opening of an account with National Bank of Kenya Kisii Branch. Secondly, the prosecution failed to demonstrate that the 3rd Appellant was not acting in the course of his duty when he paid out the cheques to the employees of Gusii County Council. Thirdly, the prosecution failed to demonstrate common intention amongst the Appellants to defraud Kenya Roads Board of Kshs.28,885,756.00. Fourthly, there was evidence that it was PW7 who failed to exercise diligence as the Bank manager when she authorized the payment of the said sum Kshs.28,885,756.00. Fifthly, the document examiner's evidence failed to prove that the 1st and 2nd Appellants signed the cheques that paid the stolen money. Sixthly and Finally, the investigating officer did not prove that any of the Appellants was a beneficiary of the stolen monies.

This being the first appellate court its duty is to evaluate the evidence and come up with its own independent findings. See **Njoroge -v- Republic (1987) KLR, 19**. After summarizing the submissions, I conclude that the issue for determination is whether the prosecution proved its case beyond all reasonable doubt. It is then important that the court gives a brief background as a summary to the prosecution's. The 1st and 2nd Appellants were at all material time the treasurer and cashiers at the then Gusii County Council. They were charged as the 2nd and 3rd accused persons. The 1st accused person was one, Wilson Kwambai Chebii who was the County Council's clerk. The 1st accused and the 1st Appellant presented to the National Bank of Kenya Kisii Branch minutes of a meeting of the full Gusii Council held on 19th September, 2007 authorizing them to open an account with the bank. Respectively, a bank account into which funds from Kenya Roads Board were deposited was opened as account number 0100234828300. The two persons were the sole signatories of the account. The 2nd Appellant as a cashier was introduced to the bank as an agent of the account holder. The 3rd Appellant worked for the National Bank Hills Branch, Nairobi in the cash department. After the account was opened, all the monies paid by the Kenya Roads Board to the Gusii County Council was deposited into the said account. The account signatories applied for a cheque book which was collected by the 1st Appellant Joseph Juma Nyapete on the 3rd March, 2008. A cheque for Kshs. 28,885,786.00 was thereafter deposited which money was paid by the Kenya Roads Board on 18th January, 2008. On 31st October, 2008, Kenya Roads Board applied for refund of the said amount of money. That is when the bank informed the Kenya Roads Board that the money had already been paid out to the accounts signatories. Effectively, investigations commenced into how the money was paid. Incidentally, PW7 one Delilah Kadzo Ngala had authorized the payment of the entire sum to the accounts signatories through their agent. Investigations revealed that the 1st accused and the 1st Appellant had falsified the minutes of the Gusii Council authorizing the opening of the bank account into which the money was paid. They had also not been authorized to present the cheque that paid out the cash. They had not been authorized as the account holders and signatories of the bank account

into which the money was paid. They had therefore falsely uttered to the bank the said minutes of the meeting of the council authorizing them to open the account and be the signatories to the account and to present the cheque that paid out the money. Together with the 2nd and 3rd Appellants and two others namely; Edward Njuki Gitau and Patrick Saidi Musyoka, it was alleged, they had conspired to defraud Kenya Roads Board of Kshs.28,885,756.00.

At the same time, PW9 Rashid Mohammed who was a manager with Kenya Roads Board had blown the whistle on the scandal. About the time of the incident, he was out of the country having secured a scholarship for a Master Degree at Oxford University in the United Kingdom. Before leaving the country, he was one of the signatories to the accounts held by the Kenya Roads Board. He had informed the respective banks of his absence. Surprisingly, on his return, he visited the National Bank of Kenya, Hills Branch Nairobi on 16th October, 2008 where he was informed by a bank staff member one Pamela Kibiru about the fraudulent transaction. According to the information, the entire amount had been paid to a National Bank of Kenya account owned by Gusii County Council at Kisii. He raised the alarm by informing the Chief Executive Officer and the board members of Kenya Roads Board. He was then informed by one of their bank reconciliation officers one, Edward Gitau (4th accused) that the payment in their books reflected to Nairobi City Council. It had been paid by a cheque No. 298 from Kenya Roads Board. His signature as one of the bank's signatories had been forged and he was candid that some persons from their office knew about the illegitimate payment. This was so because the payment was not supported by a voucher. Moreover, from the analysis of PW11, one, Emanuel Kenga, a document examiner, PW9 had not signed the said cheque.

PW11 further testified that the authorized bank signatories of the bank accounts owned by the Gusii County Council had not opened the bank account at the Kisii Branch. In addition, both the 1st accused and the 1st Appellant had forged the minutes of the council of Gusii County Council purportedly authorizing the opening of the Bank Accounts at Kisii. A letter to the manager National Bank, Kisii Branch from the Gusii County Council authorizing the 1st Accused and the 1st Appellant as the sole signatories to the suspect account had also been forged.

PW12, Corporal Felix Karisa then working at CID Headquarters investigated the case. He summed up the evidence of all the prosecution witnesses. In addition, he testified that the cheque leaf No. 298 which was presented to National Bank at Kisii was not a genuine cheque because the genuine cheque leaf with Kenya Roads Boards cheque book was still intact and the same was produced as an exhibit in court. Further, his investigations revealed that the principal Local Government Officer, Nyanza had not in any way introduced the 1st accused and the 1st Appellant to be account holders of the suspect account. The letter therefore dated 26th February, 2008, in that regard had not been authored by him and that was confirmed by PW11 who stated that the signature did not belong to him. It was his further testimony that money spent by Kenya Roads Board was used for the sole purpose of construction of roads. Incidentally, the money as paid to their account was paid for different purposes. Some of the beneficiaries included Joseph M. Getata who was a cashier with the Gusii County Council, Integrated Health Institute whose director was Otwori Muyaki and Tot Therchediser whose company was not registered with the Registrar of Companies. PW12 further testified that the 3rd Appellant was charged in his capacity as the National Bank official who failed to make a call back to confirm whether Kenya Roads Board had authorized the payment for such a large amount of money to the Gusii County Council. The 4th accused, Edward Njuki Gitau and the 5th accused, Patrick Saidi Musyoka who worked for Kenya Roads Board were charged in the capacities of bank statement reconciliation officers who failed to raise queries on noticing the payments in question.

All the six persons named in the scandal were charged accordingly. The three Appellants denied committing the offence stating that the charges were fabricated against them and that the prosecution had not proved its case to the required standard.

It was apparent from the evidence of PW1 that both the 1st accused and the 1st Appellant were members of the Council of the Gusii County Council. They therefore sat in all the meetings held by the council.

From the evidence of PW1, the council held two meetings, one of 19th September, 2007 and another of 13th February, 2008. It is in the latter meeting that it was decided that an account be held with the National Bank of Kenya Kisii Branch. PW1 was not the only member of the council who sat in such meetings. Both the 1st accused and 1st Appellant were authorized to sign the minutes in their respective capacities as clerk and treasurer. It was confirmed that they signed both minutes. In the mind of the court it is difficult to fathom or differentiate the assertion by PW1 that some minutes were genuine while others are not whilst they were signed by persons authorized to sign the same. Besides, his evidence did not support the particulars of the charges relating to the minutes presented to the bank. He testified that the minutes that authorized the opening of the subject account were those of 13th February, 2008, yet the minutes which the police used to draft the charges were those of 19th September, 2007. The latter minutes, according to PW1, authorized the opening of other bank accounts. That variance of evidence renders a fatal blow to the prosecution's case. It is trite that the evidence adduced must always support the charges as the burden of proof in a criminal case is beyond all reasonable doubts. It raises eye brows why after the testimony of PW1 the prosecutor did not find it necessary to amend the charges so as to reflect the proper state of facts. In that regard, although the suspect bank account was opened on the recommendation of the meeting of 13th February, 2008, the only plausible conclusion i make is that that the account was opened in cohort with all the council members who sat in the meeting. No wonder the bank accepted the minutes because they were not in any suspect and were signed by persons authorized to do so.

With respect to the cheque leaf No. 298 deposited in the National Bank of Kenya Kisii Branch, it is clear from the evidence of PW12 that the same was not physically presented to the bank but through a drop off box. No evidence was presented to the court to show that the persons who posted it were any of the accused persons and for that matter, the Appellants herein. Moreover, none of the Appellants was a signatory to the said cheque as the same purportedly emanated from Kenya Roads Board and none of the accounts signatories with the Kenya Roads Board was charged in court.

Moving on to the offences of conspiracy to defraud it was important that the prosecution demonstrated the fact that all the accused persons acted with common intent to defraud Kenya Roads Board of Kshs. 28,885,756.00. To start with I have already pointed out that the account that received the suspect amount of money could not have been opened solely with the effort of the 1st accused and 1st Appellant. With respect to the 3rd Appellant, the prosecution failed to dislodge his defence to the effect that as at the time the cheque was paid there was no requirement by the parent bank in Nairobi for a call back to be made to confirm from the client that the amount needed to be transmitted to a 3rd party bank, in this respect the Kisii Branch. The defence of the 3rd Appellant is vindicated by the evidence in chief and in close examination of PW7, Delilah Kadzo Ngara the then manager, National Bank of Kenya Hills Branch who admitted that she authorized the payment to the Kisii Branch after which she passed on the cheque to the 3rd Appellant to merely pay it out. Respectively, the 3rd Appellant was only executing his duties in the normal course of his work and under the instructions of his superior. He needed not do more than had already been done by his superior who had confirmed that the cheque was ready for payment. For the purpose herein, the person then who ought to have been charged was PW7 herself. Unfortunately, she passed the blame to the 3rd Appellant who bore the blame yet he was a small fish in the entire scenario. That may be concluded of the 4th and 5th accused persons who in my view, may not have been in the picture of what was going on. They were mere bank reconciliation officers at Kenya Roads Board. They were not charged with the duty of signing any cheques of the board. It was also never demonstrated that they did not know that that amount had not been sanctioned by the Board. In my candid view, the biggest proportion of the blame for the illegitimate payment should have been apportioned to employees of the board, but definitely not the 4th and 5th accused persons.

I also hold the view that the investigations were not properly done to establish any nexus between the Appellants and the beneficiary companies. It was not established that any of the Appellants owned the companies or was a director to them and that therefore, the monies received by the beneficiary companies benefited them. As for the 2nd Appellant, he was a cashier with the Gusii County Council. He only acted in the course of his duties of cashing the cheques as instructed by his superiors after which he handed

over the monies to them. This was a fact that was never dislodged by the prosecution in any way and for that reason, he could not be said to either have stolen any money or conspired with any other person to defraud the Kenya Roads Board. The mere fact that the 2nd Appellant performed his duties in the course of his employment would not, of itself, amount to a conspiracy. What the prosecution needed to demonstrate was that he did not hand over the cashed amount to his superiors. The reverse was the case.

The Concise Oxford English Dictionary, 10th Edition, at Page 304 defines conspiracy as:-

“A secret plan by a group to do something unlawful or harmful.”

While defraud is defined at page 376 as;

“Illegally obtain money from (someone) by deception”.

Put together the two words imply that where a person is charged with conspiracy to defraud, it must be demonstrated that he, together with others, had a common intention by deceit to obtain something from another with the purpose of defrauding the owner. That is to say that it must be demonstrated that the accused together with others agreed by common mind to defraud the complainant. That inference must be made both from the actions of the accused and the evidence tendered in court. See the case of **Gichanga vs Republic [1993] KLR, 143 (Court of Appeal at Nairobi Criminal Appeal No. 115 of 1991)** in which the Court of Appeal held that:

“With respect to the offences of conspiracy the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money.”

In that case, the court observed that it must be demonstrated that there was an agreement amongst the conspirators which needed to be fulfilled as part of the deception in execution of the mission to defraud the complainant. In the instant case, this inference may not as a matter from the facts of the case, be deduced. Precisely so because, the court would have to deduce that the mission to defraud the Kenya Roads Board was executed at the time the meeting that agreed to open an account with National Bank was held. On this aspect, first, the appropriate minutes have no nexus with the charges. Second, the minutes produced do however show that the meeting authoring the opening of the account was attended by a full council and the 1st accused and 1st appellant were always signatories to the council meeting. Then, if any one concocted that the bank account be opened for purposes of defrauding Kenya Roads Board, then, it needed to be shown that all the attendants had made such common agreement. Although some of the attendants were never charged, no iota of evidence was adduced to demonstrate that the 1st Appellant in any way benefited from the money that was deposited in that account. In the same spirit, the staff of Kenya Roads Board at the time responsible for signing cheques ought to have come on board to clarify on how such a large sum of money left the entity.

In the present case, for the different roles that each of the Appellants played in their respective capacities in the course of their employment, there was no clear evidence that any of them conspired with their co-accused to defraud Kenya Roads Board the amount in question. That is to say that, it was not shown that they had a common mind and by deceit agreed to defraud the Board the money. For the charge to stand, the investigation ought to have brought on board other persons who played key roles in manufacturing the cheque in question as well as authorizing the opening of the bank account into which the money was paid. In the circumstances, the learned State Counsel for the Respondent was right in conceding to the appeal. For the above reasons, the prosecution failed to prove their case beyond all reasonable doubt as a result of which this appeal must succeed.

In the result, I quash the conviction and set aside the sentences. I order that the Appellants be and are hereby set free unless otherwise lawfully held. It is so ordered.

DATED and **DELIVERED** in Nairobi this 24th day of February, **2016**.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Moindi for the 1st Appellant*
2. *Mr. B'womote for the 2nd Appellant*
3. *Ms. Musungu for the 3rd Appellant*
4. *Ms. Akunja holding brief for Ms. Nyaundo for the Respondent.*