



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 50 OF 2015

JAMES THURANIRA MBURUGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and Sentence in the Chief Magistrate's Court at Kiambu Cr. Case No. 891 of 2015 delivered by Hon. J.N. Onyiego,CM on 13th April, 2015).

J U D G M E N T

JAMES THURANIRA MBURUGU, the Appellant, was charged with Stealing contrary to **Section 268** as read with **Section 275** of the Penal Code.

The particulars of the charge were that on diverse dates between 14th February, 2013 and 28th March, 2013 at UNAITAS SACCO, Temple Road Branch in Nairobi within Nairobi County, jointly with others not before court stole Kshs. 1.46 million the property of the said UNAITAS SACCO.

After the trial in which the prosecution called twelve witnesses and the defense one, the Appellant was convicted of the offence and sentenced to two years imprisonment. The Appellant was aggrieved by the conviction and sentence and has therefore lodged this appeal.

The Appellant filed a Petition of Appeal dated 22nd April, 2015 through his advocate K'Bahati. He raised 16 grounds of appeal which I have reproduced verbatim as follows:- That:

- i. **The Learned Magistrate erred in law and in fact in convicting the appellants against the weight of evidence.**
- ii. **The learned Magistrate erred in principle and went against the weight of evidence in finding the appellant guilty of stealing.**
- iii. **The learned Magistrate erred in fact when he gave no weight and disregarded the evidence of the Appellant.**
- iv. **The learned Magistrate erred in principle by failing to address his mind to the failure by the Prosecution to call crucial documentary evidence.**
- v. **The learned Magistrate erred in law by failing to address the issues raised in the defence' submission and thus totally ignoring the same.**
- vi. **The learned Magistrate erred in law and in fact in sentencing the Appellant to two years which was excessive and unwarranted, in view of the evidence tendered by the Prosecution.**
- vii. **The learned Magistrate erred in law and in fact in failing to find that the Prosecution did**

- not prove their case beyond reasonable doubt.**
- viii. The learned Magistrate erred in law and in fact in failing to find that there were reasonable doubts in the evidence tendered by the Prosecution which doubts ought to have been resolved in favor of the Appellant.**
 - ix. The learned Magistrate erred in law and in fact in giving superficial or no consideration to the evidence tendered by the Appellant, while giving undue and disproportionate weight and significance to the evidence tendered by the Prosecution contrary to law.**
 - x. The learned Magistrate erred in law and principle and misdirected himself when he excluded the Appellant submissions and refused to allow the Appellant's advocate to make submissions on the question of whether the accused could be placed on his defence which decision prejudiced the Appellant's case.**
 - xi. The learned Magistrate erred in law and misdirected himself when he refused to allow the accused to give mitigation personally and insisted on the Advocate to do so despite protestations.**
 - xii. The learned Magistrate erred in law and in principle in replacing Judicial mind with emotions and personal idiosyncrasies thereby failing to exercise his judicial duty with impartiality, disinterest, dispassion and objectivity.**
 - xiii. The learned Magistrate erred in law and fact in drawing erroneous and inaccurate reference of guilt on the Appellant leading to the conviction.**
 - xiv. The learned Magistrate erred in law, principle and fact in misinterpreting, misapprehending and drawing inaccurate, wrong and misleading conclusion from the evidence tendered by the Appellant.**
 - xv. The learned Magistrate erred in law and principle in holding that there was a conspiracy between the Appellant and Linus Chege and proceeding to convict the accused on a charge of stealing whereas there was no charge of conspiracy.**
 - xvi. The charges as drawn and prosecuted were incurable and defective in law and a conviction on the same could not be sustained since it did not meet the threshold set in law for a safe conviction.**

SUBMISSIONS.

Appellant's submissions

In his brief oral submissions Counsel for the appellant, Mr. Kimathi told the court that the evidence adduced at the lower court did not support the charge of stealing. He urged that the definition of stealing envisaged that the accused must take the stolen thing with the intention of keeping it. Counsel said that the evidence of all Prosecution witnesses pointed to the fact that all the money was stolen by Linus Chege. Counsel submitted that the appellant was being held vicariously liable yet liability in criminal cases should be on an individual basis.

Regarding the issue of premature clearance of the cheque for Kshs. 500,000 to Linus, Counsel urged that PW2 had admitted that a cheque can be cleared prematurely if the account is well run and therefore the appellant did not make a mistake in clearing the cheque prematurely. He said that he forgot to post-date the cheque. Counsel urged that the appellant in his defense had stated that Linus had been introduced to him by PW2 which implied he knew him more than the appellant did.

Regarding the second cheque of Kshs. 960,000/= drawn in favor of Linus that was transferred from the general ledger account of the Sacco to Linu' account, counsel urged that this was an honest mistake that would occur electronically and which could have been stopped. Counsel submitted that when the Linus withdrew the money, he was identified by both the cashier and the manager through the system in place and therefore, the manager allowed the payment of Kshs.960,000/= knowingly. Counsel finally submitted that no efforts to arrest Linus were made. He concurred with the evidence of PW9 that the withdrawal of such large amounts required authorization by PW1.

Respondent's submissions

The learned State Counsel, Miss Akuja opposed the appeal and briefly submitted that the Sacco had lost a total of Kshs. 1.4 million. She urged that the Appellant had informed PW11 of his intention to open an MPESA Service and therefore wanted a loan which he asked PW11 gives him through a cheque drawn in the name of Linus Chege. She urged that PW11 told the appellant that Linus account did not have money and therefore they agreed that Linus would deposit the cheque after two weeks which cheque he later learnt bounced after it was deposited. Counsel urged that PW11 called the appellant to inform him of what had happened but the appellant simply told him that it was a mistake even though the records showed that he approved the cheque that was paid well in advance before it matured.

Counsel questioned how the appellant who was only limited to approve cheques whose value did not exceed Kshs.50,000/= cleared a cheque of Kshs.500,000. With regard to the other withdrawal of Kshs.960,000/= by Linus, Counsel for the Respondent questioned why the appellant who sought to paint the transaction as an honest mistake on his part also called their Kasarani Branch at the same time and asked PW6 to confirm if they had enough money in the branch to allow the withdrawal by Linus Chege who was on his way there. Counsel urged that if indeed an honest mistake occurred then the enquiry by the appellant and his keen interest raised suspicions on his involvement.

Evidence.

The brief facts of the prosecution case is that, the accused James Thurania Mburugu who was the Credit Administrator at UNAITAS SACCO authorized the clearance and payment of a cheque No. 000085 worth Kshs. 500,000/= prematurely, before it could be procedurally cleared by the clearing house to one of their clients Linus Chege of account No. 012013183. The cheque eventually bounced. The cheque had been drawn by Paulse Environment Kenya in favor of Linus Chege who deposited it and was paid in full. PW1 who was the branch operations officer of UNAITAS SACCO was alerted by his Finance Section of the bounced cheque on 21st February, 2013 by which time the client Linus Chege had already withdrawn the money. PW1 said he called the client and informed him of his bounced cheque and asked him to pay back the amount. PW1 urged that although the client promised to make good the payment, he did not keep his promise. The client on his part said that he had taken the money to the accused as the beneficiary. When the accused was called to explain this transaction, he undertook to ensure that the Client refunded the money as he knew him personally. In the end, this money was never refunded as the client disappeared leading to the arrest of the accused herein. **PW1, Kirkson Murage Muraguri** was the UNAITAS Sacco Branch Operation's officer. His evidence comprises the summary of the prosecution's case.

PW2, Stanley Gitari Kanyweru was the branch manager at UNAITAS SACCO Temple Branch Nairobi. He had worked with the accused for three years and used to evaluate him and therefore knew him well. He corroborated the testimony of PW1 that the accused who was one of the bank employees had irregularly made payment to his drivers account before his cheque could be cleared. PW2 inquired from the accused person why he authorized the said payment yet he had no authority to authorize any payment that was over Kshs.50,000/=. That such an amount exceeding Ksh.50,000/= could only be authorized by the branch manager. PW2 in his evidence said he knew Linus very well as their customer. He blamed the accused for having conspired with Linus to steal from the bank.

PW2 explained that the accused promised to get the customer to return the money but after two weeks when PW2 checked to see whether the money had been reimbursed, he did not find anything. PW2 said that they explored various means of regularizing the account. The customer promised to take a loan and repay the money but failed to do so. It is then that PW2 said he reprimanded the appellant person to make good the amount but he pleaded for more time and promised to refund the money himself. The appellant made a written undertaking to ensure the money was refunded within 5 days, however this did not happen.

PW2, observed that there was no document to support the transfer of money to Linus Chege though they confirmed that the transfer had actually taken place through his bank statement. Further, he explained that though the appellant purported to have transferred money from Co-operative bank to Linus' account, there was no evidence that there was any deposit at Co-operative Bank in favour of Linus' account at

Unaitas Sacco. He faulted the appellant person for failing to conduct what he referred to as “*know your customer*” investigation which was usually done before authorizing payment.

PW3, Margaret Akinyi was a teller clerk at Unaitas Sacco Temple Branch. She urged that on the material day she served one Linus who was their customer who had come to withdraw money. She paid him Kshs. 68,500/= leaving a balance of Kshs.19,634/=. PW3 said that she could not pay a customer before confirming the availability of funds. She told the court that she knew Linus very well as he had an account with them.

PW4, Martin Muhoho was the internal audit manager. He carried out an audit on this transaction and confirmed that a sum of Kshs. 960,000/= had irregularly been removed from their control ledger account no.705033. PW4 confirmed that this was as a result of a transfer done on 28th March, 2013 by the accused person.

PW4 explained that the narration given for the said transfer was cash deposit through Co-operative bank. He sought for receipts in support since he knew the normal practice was that if a member deposited cash in their account through co-operative bank, it had to be supported by a deposit slip for transfer and in this case there was none. When PW4 contacted their head office to confirm if there was any credit in their Co-operative Bank account and there was none. Further, he told the court that the transfer of the money to account number 012102011403 belonging to Linus Chege of KShs.960,000/= took place on 28th March, 2013 at 7:11 am which was two minutes after James viewed the account.

PW4 said that he looked at all the transactions that took place from 1st January, 2013 to 28th February, 2013 and observed that the normal transactions mode in the account for Linus Chege was through m-banking and normal ATM transactions. He observed that with the exception of three transactions, the rest were transactions worth Kshs. 10,000/= and below.

PW4 established that although a cheque deposit of Kshs. 500,000/= was made in Linus’ account on 14th February, 2013 and expected to clear on 21st February, 2013 which was 7 days later, the account holder was given uncleared effects of Kshs.420,000/= against the same cheque which was cleared by the accused on 15th February, 2013 which was a day after the deposit was made. PW4 noted that this was done notwithstanding the fact the normal process required the Managers approval and not James who was the credit administrator and who was not authorized to approve payment of any effects exceeding Kshs.10,000/=. Furthermore, any approvals before the lapse of the normal period would only be done by the branch manager.

PW4 also noted another irregular transfer of Kshs. 960,000/= on 28th March, 2013 which was a day before the expiry date in which the accused had promised to pay back the Kshs. 500,000/=. This meant that the total amount lost was Kshs. 1,460,000/=.

PW4 flagged another cheque in that account of Kshs.450,000/= that was deposited on 19th February, 2013 which bounced on 21st February, 2013. The appellant who had committed to clear the money however regularized on 22nd March, 2013 after PW4 liaised with the legal officer who advised that they take legal action. PW4 explained that he did not know why PW2 did not contact him immediately when he discovered the irregular transactions as the branch manager.

PW5, Faith Nyambura Kago was a cashier at Unaitas Sacco Kasarani Branch. She was at work on 28th March, 2013 when the Linus came to make a withdrawal of some cash. PW5 looked at his ID card for identification purposes. The customer had come to withdraw Kshs. 950,000/= and after she checked their system and confirmed he was the account holder, she sought for her supervisor's authority to pay that amount as her authorized maximum amount without approval was Kshs.100,000/=. PW5 said that her supervisor who was the branch operations officer approved the payment after which she paid. She explained that the request is normally done verbally after which authorization is done in written form on the system. She said that the customer acknowledged receipt after payment and signed on the withdrawal

voucher.

PW6, Rariasho Maina Gacheru was the branch operations officer at UNAITAS SACCO Kasarani Branch. He testified that the appellant called him on 8th March, 2013 to find out if he had enough cash in his account to pay a customer who was coming to withdraw Kshs.950,000/-. PW6 said he confirmed availability of the sum required and shortly after when the customer arrived. He authorized the transaction and advised the teller to pay the customer Kshs. 950,000/= from his account. PW6 said that he later heard that the money was fraudulently obtained. During cross examination, PW6 said that it was not abnormal for him as the branch manager to authorize payments beyond the value of Kshs.100,000/= or authorize any other senior officer like a credit officer to approve.

PW7 Judy Mwangi merely produced employment records to confirm that appellant was working as an employee UNAITAS Sacco.

PW8, Samuel Felix Kamau was the data base administrator at UNAITAS SACCO. He told the court that sometime in August 2010 he assigned the appellant person his systems user name as James M which he was expected to use in all his transactions. His account number was 705033. PW8 explained that the appellant debited his account using his user name on 28th March, 2013 by Kshs. 960,000/= and transferred the said amount to a customer's account number 012102011403 by the name Linus Kiguoya Chege. He produced a daily transaction report (P.Ex 12) showing transactions that were carried out by the appellant.

PW8 further added that in practice they do not debit bank account to customers account when the transaction on the end is not complete. He said the money was alleged to have been deposited in Co-operative Bank in favour of the customer which deposit had not been cleared by the Co-operative bank.

PW9, Jane Warueno Irungu was a cashier at Unaitas Sacco Temple Branch in Nairobi. She testified that on 15th February, 2013 at about 8:51 hours a client by the name Linus Kiguoya Chege came to withdraw cash amounting to Ksh. 420,000/-. She paid the amount after an approval by her supervisor. She produced a payment slip for the said amount as Pexhibit 8.

PW 10, Chief Inspector Dan Ogutu was a forensic document examiner. He examined the document in question which was the letter the accused had written to Unaitas Sacco committing himself to ensure that the said customer Linus would refund the Kshs. 500,000/=. He formed the opinion that the handwriting was made by the same hand. He prepared and produced a report dated 19th February, 2015 in court as Pexhibit 13

PW11, Josephat Grata Mwangi Karimu was a business man dealing in petroleum products. He said that he met with appellant who was also his friend on 14th February, 2013 when he requested him to lend him Kshs.500, 000 to start an MPESA business in Nairobi. Since PW11 did not have cash, he gave him a post dated cheque which would be deposited in two weeks. After two weeks he checked his bank statement and noted that the appellant had deposited the cheque pre maturely and the same had bounced. PW11's account number was 0299100131, Equity Bank. When he contacted the Appellant on why he had accepted the cheque yet the account had no money, he told him that it was an error. He also raised his concern with the Manager.

PW12, Police Corporal Naomi Subah of Serious Crime Unit was the investigating officer in this case. She summed up the prosecution's case after which she found the Appellant culpable and charged him accordingly.

The Prosecution established a prima facie case against the accused person who was found to have a case to answer and was placed on his defense.

The accused made a sworn statement and did not call any witness. He stated that he began as a branch operation's officer and later as a credit operator. He denied having authorized any payment or clearance of Kshs. 960,000/= on 28th March, 2013 when it was allegedly paid as there were people who were

supposed to authorize such payments. He said that it was cleared by a different person. He however shortly stated that he authorized the transaction by mistake and discovered the following day when Linus had already withdrawn the money at their Kasarani branch. The accused urged that he found the transaction suspect as the money was withdrawn immediately. He told the court that any withdrawal that was beyond the value of Kshs.100,000/= had to be authorized and ascertained by the branch operations officer. He said that the cheque of Kshs. 500,000/= was approved by the branch operations manager Kirkstone Murage. He alleged that Linus was related with officers working in the bank. He particularly pointed out to one Mr. Waitha who he alleged used to do business with Linus. Mr. Waitha was a cousin to the branch manager.

During cross examination, the appellant stated that Linus was his taxi driver and that he did a letter to the bank confirming that he would follow up on Linus to regularize the bounced cheque by paying back the money he received irregularly. He also confirmed having authorized the payment of Kshs. 960,000 to Linus who he said had good a history with the Sacco as he used to make regular deposits and withdrawals. He admitted that the mistake he made was to authorize the payment without supporting documents.

Determination.

It is now the task of this court to reevaluate the evidence on record and come up with its independent conclusion. The court must however bear in mind that it has neither heard nor seen the witnesses and give due allowance for this. See **OKENO vs. REPUBLIC 1972 EA 32.**

Having considered the evidence and submissions of the appellant and Respondent, I find that the issue for determination is whether the prosecution proved its case beyond a reasonable doubt.

Was the Appellants conviction against the weight of evidence?

I shall begin by looking at Section 275 of the Penal Code which creates both the offence of stealing, as well as the punishment therefor and the definition of stealing as set out in Section 268 of the Penal Code. The definition of stealing provides that a person who fraudulently and without a claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof any property, is said to steal that thing or property. Section 268 of the Penal Code quoted verbatim defines the offence in the following terms:-

1. ***A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.***
2. ***A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –***
 - a. ***an intent permanently to deprive the general or special owner of the thing of it;***
 - b. ***an intent to use the thing as a pledge or security;***
 - c. ***an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;***
 - d. ***an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;***

It is therefore imperative to establish whether the weight of evidence adduced by the Prosecution at the trial court could sustain this offence as defined.

From the record, the learned trial magistrate did consider the evidence advanced by the Prosecution before arriving at a conviction. It is clear from his Judgment that he took this evidence into account. The following excerpt from his Judgment illustrates this position;

“It is clear also from the evidence of PW11 Josephat Gwata that accused had on 14.2.13 persuaded

him to lend him 500,000/- to start an Mpesa business and when PW10 told him he was expecting money in his account within two weeks as he had no money in his account, accused insisted on being given cheque which he promised to keep until two weeks were over. However he went ahead and had it written in the names of Linus Chege his driver, had it deposited and cleared before maturity. He admitted Linus was his driver. From this chain of events, it could not have been a coincidence that accused was behind the acquisition of a cheque from PW10 very much aware that that account had no money but proceeded to have Linus deposit it and then had it cleared. From this chain of events it is clear that accused had a hand in the clearance of the cheque. In his commitment letter he was so remorseful in his last sentence in which he promised to rectify the situation implying that he was to blame for that situation. Circumstantially and from the evidence of PW1, PW2, PW4 and PW8, a blameworthy finger points towards the accused. Accused knew very well that he was the beneficiary of the 500,000/- out of the cleared cheque and It was deliberately cleared while aware the account of the driver had no money.”

From the evidence on record, PW2 who is the branch manager of Unaitas Sacco Nairobi corroborated the testimony of PW1 who was the branch operations officer of the same branch that they both discovered on 21st February that a cheque Number 000085 dated 20th February, 2013 for Kshs.500,000/= deposited by Linus who was one of their clients had bounced. Further, they also discovered that the accused had irregularly authorized premature payment of the same cheque that bounced of Kshs.500,000/= to the said client.

I note that there are two conflicting statements from the officers at Unaitas Sacco regarding the bank balance of Linus. On one hand PW2 said that when they checked his account on 21st February 2013 they found that it did not have any money. He said;

“I do recall 21st February 2013.....We checked Linus’s account. The account had no money”

On the other hand, PW3 who also worked in the same branch as a teller said she attended to the said Linus on the said date and verified that he had money in his account when he came and withdrew Kshs. 68,500/= leaving a balance of Kshs. 19,634. She said;

“I can see a withdrawal slip for 21st February 2013 in respect of Linus account no.012013183 (MFI7). I confirmed if he had cash and signature as in the system. I gave out the money. I paid him. He signed on the cash withdrawal slip (MFI-8)”

From the above, it is clear that PW2 and PW3 statements contradicted each other in that, whereas PW3 said there was money in Linus account PW2 alleged there was none as at 21st February, 2013. The question that arises from this is why Linus was allowed to withdraw money from his account by PW3 if at all there was none as alleged by PW2 on the same day they discovered his bounced cheque of Kshs.500,000/=. Either one or both of them must have been peddling a lie. For Linus to have withdrawn the Kshs.68,500/= from his account on this day so effortlessly when they discovered the bounced cheque of Kshs.500,000/- means his account had money in it or someone created that impression. Further, he must have had the support of an invisible hand that allowed him to maneuver his account and cash the uncleared cheque.

This then leads to the question as to who this influential insider was who authorized the payment of this particular cheque that bounced?

PW1 said that the appellant who was the credit administrator had cleared the cheque before it was cleared by the clearing house. PW2 was very categorical during cross examination that only the branch manager or assistant manager had the authority to authorize any payment that was above Kshs. 50,000/=. PW2 said when he checked their system on 21st February 2013, he found out that it is the accused who authorized the payment against the cheque that bounced of Kshs.500,000/= and when he called him to inquire, he simply promised to ensure the amount was paid in two weeks by the beneficiary who he knew very well. PW2 said that when he asked the appellant why he authorized the payment yet he was not allowed to authorize any payment of over Kshs. 50,000/=, he simply promised to get the customer to return the

money. PW6 who was the branch operations officer testified in cross examination that a branch manager could also authorize any other senior officer like a credit officer to approve payments beyond Kshs. 100,000/=. There was no evidence of such authority having been given to the appellant. He therefore acted unprocedurally..

PW5 explained that the request for authorization was normally done verbally while the authorization was done in writing through the system. That being the case, could PW2 have requested the appellant to pay and subsequently authorized him? This may be a hard nut to crack, however of curious note, it is instructive to note that PW2 testified how they explored ways of regularizing the account two weeks after the discovery of this irregular transaction when the same was not reimbursed as promised. This in my view is clear evidence of conduct that gives an impression of perceived cover up by PW2 in the face of blatant breach of clearly laid down procedure or practice in their operations cash manual that gave guidance on how they were to transact money business. As the branch manager, the mere fact that an employee who was not authorized to sanction the payment of such a large sum of money ended up doing so should have led to a serious reprimand from him or stern and immediate action against the said employee. Sadly however, PW2 simply chose to act on a promise by the accused person that he would pay the amount or ensure payment is effected by the said Linus which promise was not honored. PW2's conduct even left PW4 wondering why he was not called earlier when the fraudulent transactions were red flagged.

PW4 conducted an investigative audit and found that a deposit of Kshs.500,000/= was made into account number 012102011403 belonging to Linus on 14th February 2013 and was expected to clear on 21st February 2013. PW4 established that the same cheque was unprocedurally cleared by the appellant on 15th February, 2013 which was a day after the deposit had been made. PW4 explained that the appellant was not authorized to approve payment of any effects exceeding Kshs.100,000/- but the branch manager. It is clear from this evidence that the appellant authorized the clearance of the bounced cheque.

The other questionable transaction in issue involves Kshs.960,000/- which was also irregularly deposited by the accused to Linus account on 28th March 2013. This amount was curiously withdrawn on the same day by Linus at their Kasarani branch after which he disappeared. I note that although PW1 said during his evidence in chief that out of this money, Kshs.950,000/= was withdrawn by Linus Kiguoya Chege over the counter at their Kasarani Branch, while Kshs. 10,000/= was withdrawn from the ATM. During cross examination however he said that he did not know the actual person who withdrew the money clearly contradicting his earlier statement. PW2 corroborated PW1 that this amount was debited from their general ledger account and credited into the account of Linus and that there was no document to support this transfer. This obviously was an irregular transaction by the appellant outside his normal course of duty.

PW4 however testified that if a member deposited cash with their account (Unaitas Sacco) through Co-operative bank, it had to be supported by a deposit slip for transfer and in this case there was no support. PW4 even went ahead and contacted their head office to confirm if there was any credit at their Co-operative bank account and confirmed there was none. He also found that the conduct of the accused person in regards to this transaction was suspect firstly because the system indicated that the amount was transferred to Linus account within 2 minutes, immediately after the appellant had personally viewed the account on 28th March, 2013 at 7.11 am. Secondly, this transfer and withdrawal took place exactly one day before the expiry date which the accused had promised to pay back the other bounced cheque of Kshs.500,000/=. Thirdly, PW6 told the court how the accused called him on the same day to confirm whether there was enough money in the branch at Kasarani to pay a customer who was coming to withdraw Kshs. 950,000. PW6 confirmed there was and at 10:05 am the customer went and withdrew the cash. PW6 authorized the transaction and advised the teller to pay. However the teller PW5 on the other hand testified that Linus went and withdrew the money at 11.00 am and not 10:05 am as earlier stated by PW6. The inconsistency on the time, I find, is immaterial as it is clear that the withdrawal was done in the morning hours. Further, there was the evidence of PW8 who testified that as a matter of practice they did not debit bank account to customers account when the transaction on the end is not complete. That being the case, PW8 explained that this money that was alleged to have been deposited in Co-operative bank in favor of the customer had not been cleared by the bank. PW2 observed that there was no document to

support the transfer of money to Linus Chege though they confirmed that the transfer had actually taken place through his bank statement.

The appellant argued that the learned Magistrate erred in principle by failing to address his mind to the failure by the Prosecution to call crucial documentary evidence. However, PW10 the document examiner, examined the letter that the appellant wrote committing himself to ensure that Linus had refunded the Kshs.500,000/= and compared it with specimen signatures P.exhibits (14,a,b,c,d,e) and concluded the handwriting was that of the appellant. The appellant did not rebut this during cross examination.

Having set out in the evidence in elaborate detail, I believe the Prosecution was able to prove the offence of stealing that there was intent to deprive the complainant permanently of the monies that belonged to it. The prosecution evidence, I believe, has demonstrated that this money was never returned and we could argue that it could possibly not be returned as the main culprit is still at large.

Was there a conspiracy to steal?

The appellant urged that the learned Magistrate erred in law and principle in holding that there was a conspiracy between the Appellant and Linus Chege and proceeding to convict the accused on a charge of stealing whereas there was no charge of conspiracy. As to whether there was a conspiracy, there has been no reasonable explanation or proof beyond reasonable doubt that the Manager was involved, though his conduct was questionable. The Prosecution did not prove this fact to the required standard.

Section 393 of the Penal Code provides the offence of Conspiracy. That Section provides:-

“393. Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”

In **Archibold: Writing on Criminal Pleadings, Evidence and Practice (Supra)**, the writers observe at pages 2589 and 2590 that:-

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

From the foregoing, it is clear that the prosecution must prove the existence of an agreement between the appellant and Linus to do the act complained of. The trial Magistrate in her Judgment urged that the appellant must have alerted Linus that he had already credited his account for him to withdraw. PW2 in his evidence said he knew Linus very well as their customer. He blamed the appellant for having conspired with Linus to steal from the bank. I do not think the element of agreement involving the appellant and Linus as alleged or Linus and PW2 was ever proved.

The appellant pleaded mistake with regard to the transaction he had authorized of Kshs. 960,000/=. However, it is clear he knew what he was doing and even used his secret code to transfer money, a fact he conceded to. Regarding the bounced cheque of Kshs.500,000/= there was corroborating evidence by the Prosecution witnesses that he indeed authorized it and even volunteered to ensure that Linus returned the money. He must therefore bear the full responsibility of his actions.

The learned trial magistrate may have been brief in his analysis of the defence case but he did not ‘ignore’ the same but evaluated it before convicting the Appellants.

In the result, I find that the appeal has no merit and the same, on conviction, is dismissed. On sentence, the appellant was a first offender. In mitigation, he pleaded that he was remorseful and had urged for a non-custodial sentence. Given these circumstances, I think that the sentence imposed was harsh and excessive. Under Section 354(3)(iii) of the Criminal Procedure Code, in an appeal from conviction this court is conferred with powers to, “..... ***with or without altering the finding, alter the nature of the sentence***”. I accordingly substitute the two year jail term with an order that the appellant shall pay a fine of Ksh. 300,00/- in default serve one year imprisonment, less the period served before his release on bail pending appeal.

DATED AND DELIVERED THIS 25TH DAY OF MAY, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. kimathi for the Appellant.
2. Miss Akuja for the Respondent.