REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL NO. 1 OF 2008

CHARLES MAINA NGARE……APPELLANT

VERSUS

REPUBLIC…..……..…….RESPONDENT

(Being an appeal from the original conviction and sentence of the Court Martial Case No. 3 of 2007 held at Langata Barracks Armed Forces School of Higher Learning and delivered on 21st December 2007).

JUDGMENT

Background

The Appellant was charged with 8 counts of civil offences contrary to Section 69(1) of the Armed Forces Act Chapter 199 of the Laws of Kenya i.e. stealing by a person in the public service contrary to Section 280 of the Penal Code Chapter 280 of the Laws of Kenya. It was alleged that the Appellant committed the offence at the National Defence College while he was performing the duties of the college paymaster. The particulars of the charges were as follows:

Charge I: that between 1st November, 2005 and 30th Nov. 2005, the Appellant stole Ksh. forty three thousand, one hundred and twenty shillings (Ksh. 43,128.00), being the property of the Government of Kenya.

Charge II: that between 1st Dec. 2005 and 31st Dec. 2005, the Appellant stole Ksh. one hundred thousand (Ksh. 100,000.00), being the property of the Government of Kenya.

Charge III: between 1st December, 2005 and 31st December, 2005, the Appellant stole Ksh. one hundred thousand, one hundred (Ksh. 100,000.00), being the property of the Government of Kenya.

Charge IV: between 1st June 2006 and 30th June 2006, the Appellant stole Ksh. five hundred thousand, six hundred and sixty three and fifty cents (Ksh. 571,663.50), being the property of the Government of Kenya.

Charge V: between 1st August 2006 and 31st August 2006, the Appellant stole Ksh. four million, eight hundred and ninety one thousand one hundred and fifty eight (Ksh. 4,891,158.00), being the property of the Government of Kenya.

Charge VI: between 1st October 2006 and 31st October 2006, the Appellant stole Ksh. eight hundred and

forty six thousand eight hundred and fourteen and seventy five cents (Ksh. 846,814.75), being the property of the Government of Kenya.

Charge VII: between 1st November 2006 and 30th November 2006, the Appellant stole Ksh. two hundred and thirty six (Ksh. 236,000.00), being the property of the Government of Kenya

Charge VIII: between 1st December 2006 and 31st December 2006, the Appellant stole Ksh. five hundred and thirty one thousand, and seventy six and ten cents (Ksh. 531,076.10), being the property of the Government of Kenya.

The prosecution called 17 witnesses. The Appellant denied all the charges. He gave a sworn testimony in his defence and called three witnesses. At the conclusion of the trial, the Appellant was convicted of all offences as charges and sentenced as follows: on the 1st charge, he was reduced to the rank of senior private, on the second charge he was sentenced to two years' imprisonment, while on the 3rd to 8th charges, he was sentenced to three years' imprisonment in each of the charges. In addition, on the eighth charge, the court ordered his dismissal from the Armed Forces. The sentences of imprisonment were ordered to run concurrently.

Aggrieved by the conviction and sentence, the Appellant filed this appeal. He thereafter, by leave of the court, amended the Petition of Appeal which sets out the following grounds of appeal:

a. The prosecution failed to prove its case beyond reasonable doubt.
b. The evidence on record fell short of supporting the conviction and sentence.
c. The court erred in shifting the burden of proof on the Appellant.
d. The Appellant's defence and submissions were not considered.
e. The judge-advocate ignored legal and factual issues raised in the proceedings, evidence and submissions.
f. The court failed to consider the fact that the Appellant had been in custody during the trial, and further failed to consider the Appellant's submissions and mitigation.
g. The entire prosecution was oppressive and abuse of the criminal justice system.
h. The Appellant's conviction was based on presumptions and circumstantial evidence which was not sufficient to justify reasonable inference of guilt.
i. The judgment of the court did not contain points for determination contrary to section 169(1) Criminal Procedure Code
j. The judge-advocate ignored irregularities in the investigation and prosecution of the Appellant, in violation of section 77 of the Constitution.
k. The judge-advocate misdirected in law by relying on fabricated, contradictory, speculative case in his analysis that compelled of the Appellant.
l. The judge-advocate's analysis was subjective, skewed, slanted and unfair to the Appellant.
m. The conviction was unsafe since the evidence did not exclude the possibility of the offences having been committed by other persons.

Appellant's submissions.

The Appellant submitted that the proceedings were fundamentally flawed in that at the conclusion of the prosecution's case, he was never allowed to submit on the prosecution's case and the evidence adduced. Furthermore, the *mens rea* of the offence charged was not proved, since the prosecution in placing heavy reliance on the books of accounts failed to show the direct nexus between the Appellant and the charges. The Appellant was just part of a transaction, adding that the evidence was not corroborated as required by Section 37 of the Evidence Act. The case of ***Raphael Ngari Wamae v Republic*** **(2005) eKLR** was cited in support of this reasoning. Thus the prosecution case was not proved beyond reasonable doubt. Further, the Appellant was not given an ample opportunity to defend himself thus denied the right to a fair trial. Moreover, heavy reliance on the books of accounts prejudiced the defence, and the judge-advocate misdirected himself and the court martial in failing to find that the offence was committed by someone else. Further, the court martial should have examined whether shortfalls in the books of account were a result of the theft or normal shortage since no evidence was advanced to show that the Appellant received

the money alleged to have been stolen by him. The case of ***Mary Wesonga v Republic*** **(1992) eKLR** was cited.

Respondent's submissions.

In response, it was submitted for the Respondent by learned State Counsel, Mr. Warui that all the counts of offences had been established. Further, it was submitted that the sums of money not accounted for were not mere accounting shortfalls as there were entries which were false, while in other cases, the Appellant failed to account for the balances of imprest. On the allegation that the Appellant was denied a chance to submit on the prosecution case, the respondent submitted that the Appellant chose to submit at the end of the defence case. It was also submitted that the court martial properly considered the Appellant's defence and found it to be an admission of the charges. The respondent urged the court to dismiss the appeal for lack of merit.

Determination.

Having considered the above, I consider the issues for this court's determination to be the following:

a. **Whether the Appellant's right to a fair trial was violated.**
b. **Whether Section 169(1) of the Criminal Procedure Code was contravened.**
c. **Whether the court martial disregarded the Appellant's defence.**
d. **Whether the prosecution case was proved beyond a reasonable doubt.**
e. **Whether the sentence was appropriate in the circumstances**.

Right to a fair trial

The Appellant alleged that he was denied the right to submit on the prosecution case and further that he was denied sufficient time to defend himself. In countering this submission, the respondent submitted that the Appellant opted to submit at the close of the defence case.

The proceedings show that when the prosecution closed its case, the defence counsel sought to make submissions on no case to answer. He was referred to **Rule 57(1), (2)** and **(3)** of the Armed Forces Rules of Procedure. Thereafter, the presiding officer of the court martial proceeded to find that the Appellant had a case to answer and placed him on his defence.

The trial of the Appellant was governed by the **Armed Forces Act** and in particular the **Rules of Procedure** established pursuant to **Section 228** of the Act. **Rule 57** that was cited in this respect provides that:

> ***"(1) At the close of the case for the prosecution the accused may submit to the court in respect of any charge that the prosecution has failed to establish a prima facie case for him to answer and that he should not be called upon to make his defence to that charge; and if the accused makes such a submission the prosecutor may address the court in answer thereto and the accused may reply to the prosecutor's address.***
>
> ***(2) The court shall not allow the submission unless they are satisfied that-***
>
> ***(a) the prosecution has not established a prima facie case on the charge as laid; and***
>
> ***(b) it is not open to them on the evidence adduced to make a special finding under either section 96 of the Act or rule 64 (3).***
>
> ***(3) If the court allows the submission they shall find the accused not guilty of the charge to which it relates and announce this finding in open court forthwith; if the court disallow the submission they shall proceed with the trial of the offence as charged.***

(4) Irrespective of whether there has been a submission under this rule or not, the court may at any time after the close of the hearing of the case for the prosecution, and after hearing the prosecutor, find the accused not guilty of a charge, and if they do so they shall announce such finding in open court forthwith.

From the record of proceedings, the provisions of Rule 57 were brought to the attention of the defence counsel. Sub-rule (2) gives the court martial discretion to disallow submission on no case to answer. In this case, the court martial found that the Appellant had a case to answer. The proceedings were therefore, properly conducted in this regard, in line with **Rule 57** of the Rules.

The Appellant also pleaded that the court martial erred in shifting the burden of proof to the Appellant and further that the entire prosecution was oppressive and abuse of the criminal justice system. It was also alleged in the grounds that judge-advocate ignored irregularities in the investigation and prosecution of the Appellant, in violation of Section 77 of the Old Constitution. Since particulars of these grounds were not expounded upon, this will be considered in the analysis of the evidence as a whole, in line with the powers of the High Court on appeal under **Section 118** of the Armed Forces Act which provides that:

(1) Subject to Section 119, the High Court shall allow an appeal against conviction and quash the conviction if it considers that the conviction-

(a) is unreasonable; or

(b) cannot be supported, having regard to the evidence; or

(c) involves a wrong decision on a question of law, or that on any ground there was a miscarriage of justice, and otherwise it shall dismiss the appeal:

Provided that the High Court may, notwithstanding that it considers that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

Non compliance with Section 169(1) Criminal Procedure Code.

Rule 65 provides that a finding is to be made on each charge in the form prescribed under **Form VI** of the Fourth Schedule of the Rules. From the prescribed form, it is apparent that the finding of the court is not in the form usually applicable under the civil courts governed under the Criminal Procedure Code and this ground therefore fails.

Proof of charges beyond reasonable doubt.

The Appellant challenged that the evidence as a whole fell short of supporting the conviction and sentence. It was stated that the presumptuous and circumstantial evidence could not lead to an inference of guilt and that the evidence was contradictory and speculative and further that it did not exclude the possibility of the offences having been committed by other persons. The summing up by the judge-advocate was also challenged as being subjective, skewed, and unfair to the Appellant and was based on a misdirection on the legal and factual issues raised in the proceedings, evidence and submissions.

The charges against the Appellant are anchored on **Section 69(1)** of the Armed Forces Act which gives the court martial the power to try an offence prescribed under other written law. It provides that:

"(1) Any person subject to this Act who commits a civil offence, whether in Kenya or elsewhere, shall be guilty of an offence and, on conviction by court martial- (a) if the civil offence is treason or murder, shall be sentenced to death; and

(b) in any other case, shall be liable to any punishment which a civil court could award for the civil offence if committed in Kenya, being one or more of the punishments provided by this Act,

or such punishment, less than the maximum punishment which a civil court could so award, as is provided by this Act: Provided that, where a civil court could not so award imprisonment, a person so convicted shall be liable to suffer such punishment, less than dismissal from the armed forces, as is provided by this Act.'

An offence triable under the court martial includes, as provided under Section **2 '***an offence under some written law other than this Act, or an act or omission which if committed in Kenya would constitute such an offence.'*

The counts of offences all relate to the offence of stealing by a person in the public service contrary to Section 280 of the Penal Code. **Section 280** provides for this offence in the following terms:

"If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years."

It is therefore, in proving this offence that the prosecution establishes that the Appellant was employed in the public service and further that the property in question is the property of the Government Kenya or the Appellant came into possession of the property by virtue of his employment. That, said, it is important to read the elements of the offence together with **Section 268** of the Penal Code which provides for the definition of stealing as follows:

"(1) A person who <u>fraudulently and without claim of right</u> takes anything capable of being stolen, or <u>fraudulently converts</u> to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

In light of the above, it is also important to prove that the accused acted fraudulently in taking away the property in question without a claim of right or in converting the property to the use by person who is not its owner. Sub-section 2 demonstrates the element of fraudulent action in the following terms:

"(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;

in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner."

Under **subsection 5,** *' a person shall not be deemed to take a thing unless he moves the thing or causes it to move.'*

At all material times, the Appellant was a Warrant Officer class II at the Kenya Navy, then deployed at the National Defence College as a paymaster. A person employed in the public service, as defined by **Section 4** of the Penal Code means "***any person holding, or performing with authority the duties of, any of the following offices (whether as principal or as deputy, and whether such service is permanent or temporary, paid or unpaid)"*** Therefore, the Appellant qualified as a person employed in the public service.

One of the duties of the Appellant as a paymaster was to ensure that the books of accounts were properly maintained. It is not disputed that the Appellant was in this respect, charged with the custody of the books in question, in particular the imprest account book which related to public funds (exhibit 4) and a central account cash book in respect of non-public funds (exhibit 5). The non-public funds were banked separately in a bank account held in the Kenya Commercial Bank while an account for the public funds was held at the Standard Chartered Bank, Karen Branch. The Appellant, in his capacity as a paymaster was a signatory to both accounts.

In the **first charge, it was alleged that the Appellant stole Ksh. 43,128.00 between 1st Nov. 2005 and 30th Nov. 2005**. The basis of this charge was that the Appellant posted this amount as cash to bank yet this amount was not reflected in the bank statement.

PW1 testified that this amount had been reflected as cash to bank in the central cash account book (Exh. 5) for non-public funds in November 2005. This he understood meant that cash was taken from the cash box and deposited in the bank account but such credit was not indicated in the bank statement (Exh. 24). A similar figure was indicated in the bank deposit slip, which was a deposit of several cheques. According to PW1, the bank denied any such deposits during the material time and provided a breakdown of all the cheques deposited then, totaling Ksh. 17,684 thus the cheque deposit slip indicating Ksh.43,128/- did not give a true reflection. PW1 also demonstrated that the correct amount of Ksh. 17,684 was well reflected in Exh. 5. Thus, owing to that deficit, there was a cash difference, thus the Ksh. 43,128/- was not accounted for.

During cross-examination, PW1 stated that the counterfoil of the cheque indicating Ksh.43,128/- was stamped by the Standard Chartered Bank, Karen Branch which signified the receipt of that transaction by the bank. When he sought explanation for the anomaly, PW1 indicated that the bank indicated that the calculations on the deposit were erroneous and the bank reflected the true amount of what was taken to the bank. The explanation was that one of the cheques reflected as Ksh. 28,071 was actual for Ksh. 2,087 thus, the total sum of the bundle of cheques was Ksh. 17,864 and not Ksh. Ksh.43,128/- owing to that error. PW1, while referencing the particular cheque, Exh. 37A, testified that the said cheque reflected Ksh. Ksh. 28,071 instead of Ksh. 2,087. Thus, the actual money deposited was Ksh.17,864/- and not Ksh.43,128/-. PW1 maintained that the money was not yet accounted for. He also admitted that the error had not been corrected in the book of accounts. **PW15** in her testimony agreed that no such deposit of Ksh. 43,128/- was ever made. She confirmed that the correct figure deposited was Ksh. 17,864.

Two observations are made here. Firstly, assuming the correction had been made on the actual total of cheque deposits, it is admitted that there is an explanation for the amount of Ksh.17,864 which amount was admitted by the bank and reflected in the bank statement. This reduced the unaccounted monies by the admitted amount of Ksh. 17,864. The deficit in question should be Ksh. 15,264/- which was the variance between the amount reflected and the actual value of the cheque.

Secondly, coming to the question of error, the unaccounted for amount being Ksh. 15,264/- the next question would be, establishing the loss of the said amount and who bears responsibility for the said amount. One of the anomalies in this regard would be that the bank itself received the cheques without cross-checking whether the breakdown in the bank deposit slip was a reflection of the actual values of the check. The bank went ahead to receive the cheque without alerting the drawer of the cheque. Further, the bank did not offer an explanation until a query arose. This was against normal banking practice since the bank went ahead to receive what was not declared in the bank deposit slip. This amount remains an outstanding amount unless an explanation is offered. **PW15** testified that the anomaly in the deposit slip and actual value of the cheques received was realized on the same day they were deposited as they went through cheques after being received at the counter. She stated that the errors lay in the adding up of the amounts in the cheques on the cheque deposit slip.

Thirdly, is the question of whether failure to account for that amount amounted to stealing. The Appellant stated in his defence that it was an erroneous entry, which was made by a pay clerk, Corporal Kilibwa. He added that he did not know about the entry. In his view, the entry ought to have been reversed and if no error had been made, the correction should have been effected in the books. But although the Appellant

admitted in his defence that he did not account for the money in respect of this, the burden of proof still lay with the prosecution to prove the theft on the part of the Appellant. The prosecution did not show that the Appellant stole the alleged Ksh. 43,128/- since there was an admission that part of the money was actually deposited and proved through the copies of the cheques that were adduced. The resulting balance of Ksh. 15,264/- was not proved to have been stolen by the Appellant. It was not shown that as a result of this variance, the Appellant went ahead and stole the monies in question. It was not enough to prove that there was an anomaly in the books but thatthe anomalies resulted in the theft of the money by the Appellant.

I find that even though the alleged amount stolen was indicated as Ksh. 43,128/-, the actual amount that should be in question was the balance that resulted from the erroneous entry in the books and the cash deposit amount, i.e. Ksh. 15,264/-. Thus, the prosecution has not proved that the Appellant stole Ksh. 43,128/-.

In the **second charge, the Appellant was accused of stealing Ksh. One hundred Thousand (Ksh. 100,000.00), between 1st Dec. 2005 and 31st Dec. 2005**. From the entries made, it was revealed that a double entry of cash to bank each of Ksh. 100,000 was made. However, the bank statement only showed one deposit of Ksh. 100,000/- made on 7th Dec. 2005. PW1 testified that in the month of Dec. 2005, there were two contra cash-to-bank entries each of Ksh. 100,000/-. This meant that in two occasions, the Appellant took the money from the cash box and deposited it in the bank. PW1 sought to clarify these two deposits in the bank statements and found that there was only one deposit in the form of an upcountry cheque deposit of Ksh. 100,000/-. Thus, Ksh. 100,000/- was not accounted for. PW1 explained that if the other deposit had not been cleared at the end of Dec. 2005, the bank statement would have indicated that as a debit and further as an RD cheque to show that it had bounced. He added that no bank statement indicated a dishonoured cheque of Ksh. 100,000/-. As a result, the cash book reflected a deficit of Ksh. 100,000 at the end of the month of Dec. 2005. PW1 referred to the audit report which indicated that the Ksh. 100,000 was transacted twice. **PW15** testified that there were only two deposits in respect of Ksh. 100,000/- one on 7th December 2005 and another one on 4th January 2006. She added that deposits are reflected in the bank on the day they were actually received. Thus, the deposit of Ksh. 100,000/-, according to the prosecution, could not explain away the second deposit of Ksh. 100,000/- made in December 2005.

The Appellant in his defence, referred to exhibit 5 in respect of the subject entries. He stated that the first transaction of Ksh 100,000/- did not indicate the date, while the second entry of Ksh. 100,000/- was on 31st December 2005. He denied making the 2nd entry of Ksh. 100,000/-. The Appellant also referred the court to the two entries in the bank statements, for Ksh. 100,000 dated 7th December 2005 and 4th January 2006. During re-examination, it was revealed that the bank statement entry of Ksh. 100,000/- was also reflected in the central account book. Thus, from this alone, the second entry of Ksh. 100,000 in December 2005 remains outstanding and unaccounted for. He also admitted that he did not open a suspense account to take into account any excess cash. This amount was similarly not indicated as having brought forward in the month of January 2007.Similarly, the deficiency in respect of the 2nd charge on Ksh. 100,000/- needed to be supported by more evidence besides the deficits in the books of account. This was not done. I therefore find that the offence was not proved against the Appellant to the required standard.

On the **3rd charge, it was alleged that the Appellant stole Ksh. 44,920 between 1st and 30th April 2006.** The basis for this allegation was that the Appellant had paid the money from exhibit 5 to the cashier as a refund for unspent imprest, when in the first place he did not receive the said imprest into the account. The imprest in question was Ksh. 108,000/- raised when PW10 and other two junior officers made the request to be facilitated for dinners for their respective dinner groups. Two of the three groups took up and spent their imprest, a total of Ksh. 63,080/- leaving a balance of Ksh. 44,920/- as unspent, and the basis for this allegation.

It was alleged that the Appellant received the imprest of Ksh. 108,000 but did not receive it in the central cash account despite going ahead to make a refund of the unspent imprest from the central cash account.

The loss of the Ksh. 44,920/- was reported as a result to the central account which the Appellant explained as uncleared effects in the reconciliation.

It is true that it was improper for the Appellant to receive an imprest and fail to indicate that as a receipt in the central account. It appears that the imprest was 'borrowed' from the imprest account to the central account to facilitate the intended expenditure. It was also admitted that Ksh. 63,080/- was spent. An examination of the books would reveal a shortfall if the initial total imprest was not indicated as a receipt, yet the refund of Ksh. 44,920 was made from the central account. Upon establishing this anomaly, the next step was to determine whether the said unspent money was accounted for, whether the Appellant actually took this money as opposed to handing it over.

There was also evidence to show that a cheque of Ksh. 44,920/- was surrendered to the cashier, as shown in the encashment register. This in my view, does not show that the Appellant stole the said monies. PW11 testified that Ksh. 44,920 was returned to the armed forces cashier through a cheque, which from the cheque encashment register was made on 14th June 2006. During cross-examination, PW1 indicated that the anomaly was the Ksh. 44,920/= was not paid in the central cash book and the subsidiary books yet the money had not been initially received in the central account book. Further, PW1 referring to Exh. 24, the bank statement, showed that there was an inward clearance of cheque number 900177 for the amount of Ksh. 44,920/-. PW1 explained that the paymaster was refunding back the balance of the imprest. It was not shown that the anomaly resulted in actual loss. He also confirmed that a cheque was paid to the Armed Forces Cashier. The Appellant also made reference to the special audit report (Exh. 28) which showed that a cheques for Ksh. 44,920 was written for surrendering imprest. I find that the prosecution did not also prove that the Appellant stole the Ksh. 44,920.

On the **4th charge, the Appellant was accused of stealing Ksh. 571,663.50 between 1st June 2006 and 30th June 2006**. According to PW11, he wrote a cheque of Ksh. 697,133.40 in order to surrender all the monies to the cashier at the end of the financial year 2005/06. He stated that he wrote this cheque on assurance by the Appellant that there were sufficient funds in the bank account. This cheque however bounced later for lack of sufficient funds. The Appellant explained to him that the cheque had bounced because the other cheque had not gone through. This cheque was not replaced. PW11 explained that later on, when they requested for an allocation for a regional tour, the armed forces cashier took the equivalent of the cheque and gave them less that amount. Thus, the cheque amount was taken from the subsequent allocation. This in essence would mean that the amount of the cheque was replaced by the said allocation.

From this testimony, it is clear that the cheque initially written bounced because there were insufficient funds. It is not clear which cheque was being referred to by the Appellant which he communicated to PW11 needed to go through for the cheque to be honoured. However, subsequently, when another allocation was needed for a regional tour, instead of paying the full requested amount, the armed forces cashier just gave them an equivalent of the requested amount less than the value of the cheque that had yet to be submitted of the balances at the end of the financial year. This, to me, means that the cashier reallocated the balance at the end of the financial year for the intended regional tour. This in essence would mean that no money was actually lost. Had that been the case, the deduction for the subsequent tour would not have been approved.

The Appellant explained that the armed forces cashier recovered the subject monies under this charge, as it took care of an international trip since no fresh imprest was given. He explained therefore, that an adjustment for this amount was made in June 2007 between the central cash account and the imprest account, because of the different purposes. He further explained that the money was not withdrawn from the central account and deposited into the imprest account as it ought to have been done.

It is therefore, my finding that the prosecution did not prove this charge beyond reasonable doubt.

The **5th charge concerned a sum of Ksh. 4,891,158.00 alleged to have been stolen by the Appellant between 1st August 2006 and 31st August 2006.** The prosecution alleged that the Appellant had indicated this sum as cash to bank and yet the said sum was not reflected in the bank statement, thereby

reducing the cash balance with the same amount, which according to the prosecution, caused a loss of the said amount in the central cash account. According to the testimony of PW1, he did not find documentation – receipt voucher – to show how this money was received in the first place, neither was there evidence of bank deposit slip. Upon further enquiries, PW1 learnt that the money was a direct telegraphic transfer from the Ministry of Defence, Uganda. This transaction was affirmed by the bank when it issued another credit advice, indicating the source of the money. **PW15** confirmed that the money was received as a direct telegraphic transfer from Ministry of Defence 132 Bombo. When the money was sent, the bank sent a credit advice to the National Defence College (Exh. 11).

Therefore, at all material times, the money was received and remained in the bank account of the National Defence College and the Appellant never transacted with the money. The only failure on the part of the Appellant was the manner in which it was reflected in the book of accounts. This however, did not result in actual loss. Thus, a charge of stealing could not suffice. This was supported by the auditor's report which acknowledged that in as much as the book of accounts gave a false status, the money was never withdrawn. The 5th count equally fails.

The **6th charge alleged that the Appellant stole Ksh. 846,814.75 between 1st October 2006 and 31st October 2006.** According to PW1, this money was indicated as cash to bank. The money had been received as a cheque to pay school fees. This money, as PW1 testified, was part of the several cheques that had been deposited totaling Ksh. 978,14.75. The various cheques, according to PW1 were received by the bank. This money, was supposed to be for tuition of students. The Ksh. 846,814.75 was meant for one of the students. PW1 testified that he also found out there had been a similar transaction of the same amount in July 2006, i.e. Ksh. 846,814.75 which was received and the cash was credited and it affected the officer's mess but had not been received as tuition fees. The Ksh. 846,814.75 was not paid by the bank. The Appellant reflected the returned cheque by inserting it in the reconciliation, which was according to PW1, one of the acceptable ways of treating a returned cheque. When PW1 made further enquiries as to the sum of another cheque that had been received of the same amount, it was explained that the second cheque was a replacement cheque. PW1 faulted the Appellant for failing to receive the cheque and instead made a contra entry of taking cash to bank of the similar amount. According to PW1, the Appellant should not have transacted the replaced cheque again in the book but instead he should have just deposited it in the bank and thus no reconciliation would have been necessary. He should not have made a contra entry of cash to bank. PW1 faulted the Appellant for making another cash-to-bank entry in the books, thus, the books could not have balanced since the Ksh. 846,814.75 would remain as a deficit in the books.

PW15 confirmed the transactions in relation to the Ksh. 846,814.75. She testified that the cheque for this amount was not honoured and was returned unpaid on 28th July 2006. She clarified during cross-examination that the cheque of Ksh. 846,814.75 was among the cheques deposited on 29th Sep. 2006. Referring to Exh. 24, she stated further that the cheque that was re-banked must have cleared since it was not indicated otherwise.

Referring to the special audit report, the Appellant stated that the accounting anomaly arose when he made a cash-to-bank entry, in the cash book, as a result of which, the return to drawer cheques remained outstanding, even though it was not cashed in the first place. It is worrisome that even after the prosecution noted the error was in recording the entries, it went ahead to try the Appellant for the offence. It is a count that was unwarranted in the first instance. The bounced cheque was replaced with another one, a fact that was confirmed by PW1. I have no alternative but to find that the Appellant did not steal this money and must be set free in its respect.

In the **7th charge, it was alleged that the Appellant stole Ksh. 236,000.00 between 1st November 2006 and 30th November 2006**. The money in this charge related to an imprest raised to cater for a graduation ceremony, payable to the Utalii Hotel. PW1 stated in evidence that when he went to investigate the entry anomalies, he found that Utalii Hotel provided catering services in the month of November 2006 during the graduation ceremony.

The prosecution challenged the manner in which the Appellant made entries in respect of the money that was released to be paid to Utalii. Utalii was indicated as a debtor for the amount of Ksh. 236,000/-. The entry as a debtor would mean that the College was owed the money indicated. PW1 further testified that Ksh. 300,000/- imprest had been issued to Major Mugane. This payment was paid through Exh. 5 as opposed to Exh. 4. PW1 explained that it was not out of order to make such a payment, but the Appellant as the paymaster was supposed to ensure that the money was transferred back to replace the payment made out of that book. This was not done and Utalii Hotel continued to be reflected as a debtor, implying that no receipt of the amount had been done. PW1 further explained that since Utalii had been paid through MFI, once the imprest was issued out to cater for that expenditure, **(PW13)** Major Mugane would not be paid the money physically. Rather, he would be issued with receipts for expenditure. Alternatively, had Major Mugane been paid, he would have been expected to pay back what had already been spent on Utalii Hotel.

From the above, the Appellant clearly paid out Ksh. 236,000/- for payment to Utalii Hotel for the services provided. Later on, Ksh. 300,000/- was released as imprest that was intended to pay for the catering services. The Appellant ought to have cleared the amount indicated as a debtor from the imprest that was eventually released to Major Mugane of Ksh. 300,000/-. This was not done and the books continued to reflect that the amount of Ksh. 236,000/- was outstanding.

PW13 testified that he took an imprest of Ksh. 300,000/- and signed for it. The imprest once approved was given to the paymaster (the Appellant). The cheque was received by the Appellant. He stated that he did not receive the money which was supposed to go towards expenses for the graduation ceremony. PW13 testified that he was later cleared of the imprest. He cleared the imprest by presenting the receipts for the money that was spent and he was issued with a certificate of imprest clearance. A balance of Ksh. 1361.00 remained out of that expenditure and he was given by the Appellant. What is clear is that the Appellant was required to receive the Ksh. 300,000/- and clear the entry indicated as Utalii Hotel debt in Exhibit 5. This was however not done. Later on, PW1 stated that he did not follow up with the hotel because services were rendered and payments made, thus, the reflection of the hotel as a debtor was not an actual representation of the true status.

With the above in mind, I find that the entry of Ksh. 236,000/- as a debt was a misrepresentation in the book of accounts since even PW1 admitted that services were rendered and payments made. PW13 was cleared for the imprest on the basis of the receipts for which the payment was made. I find that accounting error did not go ahead to show that the money that was released was stolen by the Appellant. It was not enough to show an anomaly in the books, the prosecution needed to show that the Ksh. 300,000/- was fraudulently used for other purposes than it was intended for. This was not the case, and I proceed to find that the Appellant was not culpable in respect of this count.

With regard to the **8th charge, the particulars alleged that the Appellant stole Ksh. 531,076.10 between 1st December 2006 and 31st December 2006**. These monies were in respect of failure by the Appellant to post some receipt vouchers of Ksh. 716,268.15 and payment vouchers of Ksh. 185,192.05. The amount of Ksh. 531,076.10 was according to the prosecution, the resulting loss for this failure.

PW1 testified that when he took over as the paymaster, an examination of the books revealed that the 10% that the Commanding Officer was allowed to make as a profit from the bar sales was less in the books. This prompted him to look into the stock records. PW1 later received a bunch of payment and receipt vouchers from one of the pay clerks who indicated that they had come from the Appellant. When considered in the books, they reduced some of the monies that had not been accounted for to the amount of Ksh. 531,076.10. After ascertaining the vouchers, PW1 had the appropriate postings made by PW4 and the deficit was reduced to Ksh. 531,076.10 in the Exh. 5. Thereafter, the audit report showed that some receipt vouchers of Ksh. 716,268.15 and payment vouchers of Ksh. 185,192.10, thus the Appellant had not accounted for the difference of Ksh. 531,076.10. PW6 and PW7 who had been involved in the bar sales testified that they had accounted for the sales and had been cleared by the pay office clerks and handed over the bar sales to the paymaster – the Appellant. According to the prosecution, the Appellant acknowledged receipt of the sales monies by appending his signature. **PW13** compared the signatures in the sales sheet with specimen signatures of the Appellant and concluded they were by the same hand.

The Appellant challenged the specimen signatures that were used. He also distanced himself from the bundle of documents allegedly from him after he had stopped working as a paymaster, and PW1 had already taken over. In his defence, the Appellant stated that the referenced vouchers could not have been missing since there was evidence that they had been transacted in December 2006. He took the court through the various entries in the central account cash book. He also explained that some bar sales entries were made late due to late submission by the barmen. The Appellant also distanced himself from some of the exhibits relied on i.e. Ex. 16 a(1), 16 c(1)comprising of a bundle of receipt vouchers which he stated bore dates when he had ceased to be the paymaster while others were not dated i.e. Exh. 16 d(1), e(1), f(1). The Appellant further demonstrated other vouchers that were not dated after he had left the duty of paymaster while others were not bearing any date i.e. Exh. 26a, a(1), 26c, 26 d(1), 26e(1). The Appellant indicated that the entries were made by Senior Sergeant. Kioko. He denied liability for the amount of Ksh. 531,076.50.

The Appellant also testified that during the material time between 2006 and 2007, he was unwell and was under treatment, during which period he would also handover his duties to his fellow officers in the pay office. He also stated that the status portrayed in the books was not what was exactly in the safe. He also stated that he was never allowed to keep liquid cash of Ksh. 100,000 and above However, in cross-examination it became clear that in practice, the Appellant would be holding more than Khs. 100,000/- cash balance. That notwithstanding though, as the paymaster, he was ultimately responsible for maintaining the books of accounts and the supporting documentation. It is true that in the pay office there were other officers who could make entries in the books. The individuals were not called to confirm if ever they handed over all the monies in their hand s to the Appellant.

It was submitted on behalf of the Appellant that the mental element of the offence was not proved for the reason that the prosecution heavily relied on the book of accounts but did not go ahead to show that the Appellant had stolen the monies as alleged. He added that the evidence ought to have been corroborated as required by Section 37 of the Evidence Act.

In addition to proving the Appellant was an employee in the public service at the material time and that the property in question was from the public office, the prosecution was under a duty to prove the fraudulent action of the Appellant set out under section 280(2) of the Penal Code.

Section 37 of the Evidence Act provides that:

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

Upon ascertaining the shortfalls in the book of accounts, it is important to follow that with the actual status of accounts, determinable through the balances in the bank accounts and the cash box retained by the paymaster. This is to ensure that the shortfalls indicated as missing and not accounted for by the Appellant are equally reflected as missing. It is not enough to claim that there is an anomaly in the book of accounts. As was held in the case of ***Charles Wanjau Karimi v Republic*** **Nairobi CACRA No. 7 of 1987** where the evidence available against the Appellant revealed a shortage of money which was not accounted for by him. The court agreed with the prosecution who conceded, on the ground that without more evidence, besides the shortfall in the book of accounts, it was inadequate to prove the charges of stealing by a person employed in the public service.

The above is buttressed by the evidence of PW6,7 and 8 who confirmed that they transacted bar sales in the respective messes. They also attested to the stock books and sales sheets emanating foe these sales. They testified that these were checked and cleared by the checking clerk and thereafter by the paymaster. Some of these documents did not contain dates when they were signed. Again none of the witnesses handed over the actual proceeds to the Appellant. They were handed over to the duty officers who then presented to the Appellant. There were several duty officers during the material time. The said duty officers were never called to testify to corroborate the assertion by the prosecution that the Appellant received the said proceeds. Without that crucial link, I find it difficult to conclude without a doubt that the

Appellant received the proceeds. In the same spirit then Count VIII must also fail.

In the end, I find that the prosecution did not tender sufficient evidence to prove their case beyond a reasonable doubt. This appeal must therefore succeed. I quash the conviction and set aside all the sentences. The Appellant shall forthwith be set free unless otherwise lawfully held. I further order the Appellant be reinstated back to service on the previous rank of Warrant Officer II before the demotion. His terms of service including decorations, if any, are hereby restored. It is so ordered.

DATED and **DELIVERED at NAIROBI** this **23rd** day of **May**, **2016**.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;

Mwathe holding brief for Kibe for the Appellant.

Miss Atina for the Respondent.