



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.58 OF 2015**

**PATRICK SAIDI MUSYOKA..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction in the judgment of Hon. Hannah Ndungu, CM, in the Chief Magistrate's Court at Nairobi in Criminal Case No.1894 of 2008 delivered on 27/04/ 2015).*

**JUDGMENT**

**INTRODUCTION**

The Appellant was charged alongside 5 others with various offences. In his respect, he was charged in Counts IV, V and VIII. In Count IV, he was charged with conspiracy to defraud contrary to **Section 317 of the Penal Code**. It was alleged that on 25<sup>th</sup> day of February, 2008 at National Bank of Kenya Hill Plaza Branch in Nairobi within Nairobi area, jointly with others not before court conspired together to defraud Kenya Roads Board of Kshs. 28,885,756/=.

In Count V, he was charged with stealing contrary to **Section 275 of the Penal Code** in which it was alleged that on diverse dates between 25<sup>th</sup> day of February, 2008 and 22<sup>nd</sup> day of April, 2008 at the National Bank of Kenya Kisii Branch in Kisii District within Nyanza province, jointly with others not before court stole Kshs. 28,885,756/= the property of Kenya Roads Board.

In Count VIII he was charged alongside another with fraudulent false accounting contrary to **Section 330 (c) of the Penal Code**. It was alleged that on diverse dates between the month of February 2008 and June 2008 at Kenya roads Board, Kenya Re Tower in Nairobi area, jointly with others not before court being an accountant and a clerk respectively to the Kenya Roads Board with intent to defraud the said Kenya Roads Board of Kshs. 28,885,756/= through her National Bank of Kenya Hill Plaza branch account Number [...], manipulated the cash book to reflect that the said amount was posted and reversed through cheque numbers 000197 and 000298 to the account of Nairobi City Council while knowing very well that Kshs. 28,885,756 had been debited from the account of Kenya Roads Board National Bank Account of Gusii County Council held at National Bank of Kenya Kisii Branch.

The Appellant was convicted in respect of the three counts. In count IV, he was sentenced to 18 months imprisonment, in Count V to 24 months imprisonment and in Count VIII, to 36 months imprisonment. He was dissatisfied with both the conviction and sentence as a result of which he preferred the present appeal.

It is worthwhile to note that the Appellant was a co-accused to the Appellants in Criminal Appeal numbers 63, 65 and 66 of 2015. It was not brought to the attention of the court of the existence of the current appeal. As a consequence this appeal was not consolidated with the other three appeals. Appeal Nos. 63, 65 and 66 were consolidated and a judgment delivered on 24<sup>th</sup> February, 2016. In that respect, I am quick to note that this judgment will bear in most instances a resemblance of the judgment in the consolidated appeal. More specifically, I will entirely adopt the evidence as summarized in that judgment.

In a Petition of Appeal dated 6<sup>th</sup> May, 2015, the Appellant raised 13 Grounds of Appeal which can be consolidated into the following Grounds of Appeal. Firstly, that the prosecution did not prove the ingredients of the offences the Appellant was charged with. Further, that the learned trial magistrate erred in holding that the Appellant conspired to defraud, steal or engage in fraudulent accounting with the sole intention to defraud the complainant. He was further dissatisfied that the prosecution evidence was not corroborated and that it was an error in arriving at the conviction without sufficient evidence. He faulted the learned magistrate in failing to appreciate basic accounting practice and custom in correcting postings and interpreting it to be guilty intent on the part of the Appellant. He also faulted the learned trial magistrate in failing to appreciate that there existed Nairobi High Court Civil Case No. 579 of 2009 filed by the complainant, Kenya Roads Board against National Bank of Kenya alleging contractual negligence on the part of the Bank by cashing a fraudulent cheque.

## **SUBMISSIONS**

The Appellant was represented by Wafula Simiyu Advocates who filed written submissions dated 8<sup>th</sup> September, 2016 and filed on the same date. The learned counsel argued all the grounds of appeal simultaneously. He submitted that the prosecution failed to prove its case beyond a reasonable doubt and proceeded to convict the Appellant on insufficient evidence. His view was that although the Appellant was convicted for stealing, it was clear that he never was the custodian of the National Bank cheque book which was placed in the custody of PW6, Sammy Koech. PW6 did in fact confirm this position. He was an assistant accounts clerk for Kenya Roads Board and was charged with preparing payment vouchers, cheques and doing bank reconciliations. He admitted to have prepared payment to Kenya Revenue Authority and generated a voucher of about Kshs. 58 Million on the National Bank cheque leaf. He therefore was the right person to answer in respect of the suspect payments.

Counsel submitted that the learned trial magistrate failed to appreciate basic accounting practice and custom in correcting erroneous posting in the cash book by reversals and misinterpreted it to be an evidence of guilt against the appellant. According to counsel, the prosecution failed to demonstrate how the Appellant knew that the subject money was debited from the complainant's account and credited to Gusii County Council Account. Effectively, both *mens rea* and *actus reus* were not demonstrated. In this regard, he submitted that the learned trial magistrate failed to credit the defence case with the contradictions marked in the evidence of PW6, 10, and 12 with regard to who had the custody of the subject cheque book. He stated that it was demonstrated that the Appellant was never in custody of the cheque and indeed not at the scene of the crime when the offence was committed. Furthermore, PW12 who was the investigating Officer was categorical that the Appellant was not one of the beneficiaries of the monies in question. Counsel went on to submit that although the Appellant posted cash book entries of 18<sup>th</sup> May, 2008, that did not imply that he ought to have detected and stopped the theft that occurred 25<sup>th</sup> February, 2008.

On the charge of stealing counsel further submitted that the ingredients of the offence were not proved. He submitted that at no point was the Appellant placed at the scene where the theft took place. It was also not demonstrated that he had knowledge of, and participated in, the events leading to the theft of 25<sup>th</sup> February, 2008.

On the offence of conspiracy, counsel submitted that the prosecution failed to link the Appellant to a common intention with his co-accused to fraudulently account for the monies in question. It was not established that he had any association with his co-accused with a specific purpose to collude or conspire to commit the offence. Furthermore, the prosecution also failed to show his involvement in authorization

of the cheque payments, custody of the cheque book or signed for the payments. In that respect, the offence of fraudulent accounting could not hold. In addition, the cash book against which the payment was allegedly made and posted was never adduced in evidence.

Counsel for the Appellant further submitted that it was erroneous that the Appellant was charged whereas vide High Court Civil Case No. 579 of 2009 – Kenya Roads Board vs National Bank of Kenya the plaintiff was refunded the money it lost plus accrued interest. This implied that Kenya National Bank was negligent in the manner it handled the cheque in question and not the Appellant or any of the co-accused persons.

Finally, counsel submitted that since the appeal in the consolidated appeals No. 63, 65 and 66 of 2015- Joseph Juma Nyapete, Joseph Makongu Getate and Samuel Mirugi Mihindo succeeded, it follows that the current appeal must also succeed.

On behalf of the Respondent, leaned State Counsel Ms. Akuja conceded to the appeal. Her view was that she entirely agreed with this court's decision in the consolidated appeal No. 63, 65 and 66 of 2015. The Appellant herein faced similar charges with the Appellants in those appeals and the circumstances under which the offences were committed were also similar. In that regard, she urged the court that the findings in the judgment of the consolidated appeals do apply to the instant appeal. She further was of the view that both *mens rea* and *actus reus* were not sufficiently proved. This was in view of the fact that PW6, 10 and 12 all gave contradictory evidence on who had the custody of the cheque book in question. The prosecution in addition failed to demonstrate how the Appellant participated in the theft. Furthermore, the action that the Appellant participated in, that is making an entry in the cash book was done in the course of his duties. Finally, Ms. Akuja submitted that the prosecution did not establish that the Appellant was a beneficiary, in person or by proxy of the money in question. She urged that the appeal be allowed.

## **EVIDENCE**

As I said earlier, I will adopt the evidence as summarized in my judgment in the consolidated appeals. For record purposes, the same was summarized as follows:

The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were at all material time the treasurer and cashiers at the then Gusii County Council. The 1<sup>st</sup> accused person was one, Wilson Kwambai Chebii who was the County Council's clerk. The 1<sup>st</sup> accused and the 2<sup>nd</sup> accused presented to the National Bank of Kenya Kisii Branch minutes of a meeting of the full Gusii Council held on 19<sup>th</sup> 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 3<sup>rd</sup> accused as a cashier was introduced to the bank as an agent of the account holder. The 6<sup>th</sup> accused 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 2<sup>nd</sup> accused Joseph Juma Nyapete on the 3<sup>rd</sup> March, 2008. A cheque for Kshs. 28,885,786.00 was thereafter deposited which money was paid by the Kenya Roads Board on 18<sup>th</sup> January, 2008. On 31<sup>st</sup> 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 1<sup>st</sup> accused and the 2<sup>nd</sup> accused 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 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> accused and the Appellant, it was alleged, they had

conspired to defraud Kenya Roads Board of Kshs.28,885,756.00. The Appellant herein was the 5<sup>th</sup> accused and had been employed by the Kenya Roads Board as cashier accounts clerk between 2<sup>nd</sup> May, 2002 and October, 2007. Thereafter, he was moved to the cooperative data.

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 16<sup>th</sup> 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 (4<sup>th</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> accused 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 1<sup>st</sup> Accused and the 1<sup>st</sup> 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 1<sup>st</sup> accused and the 1<sup>st</sup> Appellant to be account holders of the suspect account. The letter therefore dated 26<sup>th</sup> 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 3<sup>rd</sup> 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 4<sup>th</sup> accused, Edward Njuki Gitau and the Appellant, 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.

The Appellant denied committing the offence. He stated that he worked with Kenya Roads Board as a cashier accounts clerk from 2<sup>nd</sup> May, 2002 until October 2007 when he was replaced with one Samuel Koech PW6. His duties then were posting transactions in financial management which included cheque books and vouchers. He stated that reconciliations would be done at the end of every month. For instance, if it was February postings they would be reconciled in early March. PW6 was the sole custodian of all cheque payment vouchers. He admitted participating in the reconciliation of both February and March 2008 at the instance of the management to help out PW6 as the auditors were visiting the office for inspection. This applied also to reconciliation of September, 2008. In the course of his reconciliation, he

only came across the payment voucher as PW6 indicated to him that he had misplaced the cheque book. The cheque book was later traced in the month of April, 2008. In the cheque book, cheque leaf no. 298 had been cancelled. Accordingly, he vetted the entry of the cancelled cheque by a journal. He stated that he never at any one time visited the Kisii National Bank branch so that it could be said that he conspired with other persons to defraud Kenya Roads Board. Besides, he never received any money that was allegedly lost. He also neither manipulated the cheque book in question.

### **DETERMINATION**

Without belabouring to repeat myself, it suffices that the observations I made in the consolidated judgment should apply in the instant judgment. I will only highlight a few pertinent observations

The Appellant herein who was the 5<sup>th</sup> Accused was charged in his capacity for his role in reconciling the cashbook. In count IV, he was charged with conspiracy to defraud. It was necessary 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/=. In the respect of the Appellant, his role was only to post figures in the cashbook. The prosecution failed to demonstrate that he was aware that there was a suspect cheque that had been encashed by any of the other accused persons. Besides, even as he posted the payments, the prosecution failed to show that he acted in concert or had any nexus with other accused persons or any of the beneficiaries to the monies in question. It was also not demonstrated that he received any of the monies that Kenya Roads Board lost with the help of other accused persons. In my view then, the prosecution failed to demonstrate that the Appellant together with others had a common intention by deceit to obtain the money for purposes of defrauding Kenya Roads Board. His action of making entries in the cashbook did not constitute an element of the offence of conspiracy to defraud. For that reason, I hold that it was misdirection on the part of the learned trial magistrate to uphold the charge against him.

In the respect of count V, the monies were allegedly stolen through cheque number 298. The said cheque leaf number 298 was not physically presented to the bank but through a drop off box. From the evidence of PW12, the investigating Officer, none of the accused persons including the Appellant posted the cheque. The Appellant in addition, was not a signatory to the said cheque. He neither was the custodian of the cheque book. It begged then how he was linked to the theft through the said cheque leaf. Besides, although the money was lost, no iota of evidence was adduced linking the Appellant to the actual theft of the money. He neither was a beneficiary of the amounts stolen. It was a blunder in the circumstances that the learned trial magistrate held that he stole the monies in question.

With regard to the 8<sup>th</sup> count of fraudulent false accounting, the only thing that the Appellant did was to key in entries in the cash book based on the documents availed to him. It was evident that as at the time he did the reconciliation, the cheque book bearing cheque leaf number 298 was not availed to him and his employer knew that it was in the custody of PW6, one Samuel Koech. He did note the absence of the cheque book in the journal book. In my view then, the person who was answerable to the reconciliation was PW6. Furthermore, the mere participation in cashbook entries did not automatically constitute fraudulent false accounting as the Appellant relied on the documents availed to him. In any event, it was clear that he participated in the reconciliation many days after the suspect cheque had been cashed. He could not therefore be faulted for the encashment of the stolen cash. The prosecution asserted that he failed to raise a query on the suspicious payment. But again, the burden lay with the prosecution to demonstrate that he had the knowledge of the suspect payment. Unfortunately, this burden was not discharged. Thus, the conviction of the Appellant was based on no evidence at all. The charge could not stand against him.

Finally, I would wish to note that although Kenya Roads Board sued National Bank of Kenya in a civil suit did not of itself bar the police from conducting investigations if a complaint of a criminal nature was made to them. And once the case was filed in court, the obligation of the court is to analyse the evidence and strictly adhere to the law in arriving at a decision. That is the noble duty before this court.

In the end, it follows that the prosecution did not prove its case against the Appellant beyond a reasonable doubt. I quash the conviction against him and set aside the respective sentences. I order that he be and is

hereby forthwith set aside unless otherwise lawfully held. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DECEMBER, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Chirachi h/b for Simiyu for the Appellant.*
2. *Ms. Kimiri h/b for Ms. Akuja for the Respondent.*