



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.32 OF 2014**

*(An Appeal arising out of the conviction and sentence of E.G. NDERITU (MRS.) - SPM delivered on 11<sup>th</sup> February 2014 in Nairobi CMC. CR. Case No.2034 of 2009)*

**MICHAEL ADEGO OCHIENG.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Michael AdegO Ochieng was charged with four (4) counts of **forgery** contrary to **Section 349** of the **Penal Code**. The particulars of the offences were that on or before the 5<sup>th</sup> and 10<sup>th</sup> November 2009, at an unknown place within the Republic of Kenya, the Appellant jointly with others not before court, with the intent to defraud, forged several Barclays Bank of Kenya cheques as particularized in the charge sheet, purporting them to be genuine and valid cheques issued to Barclays Bank of Kenya customers, to wit Mombasa Maize Millers Limited, Kenya Utalii College and Hillcrest Secondary School. The Appellant was further charged with four (4) other counts of **stealing by servant** contrary to **Section 281** of the **Penal Code**. The particulars of the offences were that between the 5<sup>th</sup> and the 10<sup>th</sup> November 2009 at Barclays Bank of Kenya Limited, Karen Branch in Nairobi, the Appellant, being a servant of the said bank, jointly with others not before court, respectively stole the sums of Kshs.5,843,900/-, Kshs.4,942,000/-, Kshs.11,426,000/- and Kshs.4,490,700/- the property of the said bank which came to the Appellant's possession by virtue of his employment.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on all counts. In respect of the forgery charges, he was sentenced to serve two (2) years imprisonment on each count. In respect of the theft charges, he was sentenced to serve four (4) years imprisonment on each count. All the sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence and dully filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of insufficient evidence that did not establish crucial ingredients of the offences. He faulted the trial court for convicting him against the weight of evidence and on the basis of insufficient essential and vital corroborating evidence. He took issue with the fact that the trial court had created theories which was not supported by the prosecution's

evidence and which did not establish the prosecution's case to the required standard of proof beyond any reasonable doubt. The Appellant was aggrieved that the trial court had failed to take into consideration the fact that the prosecution had failed to call crucial witnesses who would have exonerated him from the crimes. He took issue with the fact that the trial magistrate had relied on hearsay evidence to convict him. He was aggrieved that he had been sentenced to serve a manifestly excessive sentence that did not give the Appellant the option of paying a fine. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, Mr. Njagi for the Appellant made oral submission urging the court to allow the appeal. He submitted that the prosecution had failed to prove that the Appellant had the requisite *mens rea*. There was no evidence adduced to prove forgery. The prosecution had not established that he had forged the documents or that he had authored the forged documents. He explained that the prosecution did not establish that there existed a master-servant relationship between the bank and the Appellant. There was no evidence to support the prosecution's assertion that the Appellant actually took the money. He wondered why the bank only noticed the alleged theft after several days when in actual fact it conducts daily audits according to the usual banking practice. The Appellant asserted that he was newly employed at the time and was framed by other employees. He submitted that the prosecution failed to adduce evidence of CCTV to establish the persons who actually collected the money. He reiterated that there was no evidence to prove that the Appellant actually physically moved the money from the bank. He was of the view that the prosecution had failed to adduce sufficient evidence to support the charges brought against him. In particular, he submitted that no handwriting expert was called to establish that he had indeed forged the documents in question. He claimed that he was a victim of machinations by others who made him a scapegoat. He urged the court to reconsider the custodial sentence that was imposed on him. He was of the view that having served half of the sentence, the court should find that he had been sufficiently punished. He has been a person of good conduct while in prison and therefore should benefit from the exercise of discretion by this court in his favour.

Ms. Aluda for the State opposed the appeal. She submitted that the Appellant's criminal conduct led to the bank losing Kshs.26 million. She explained that the Appellant was at the time employed as a cashier. Within the material period, the Appellant dealt with various forged cheques which resulted in money being moved from the particular accounts of the bank's clients. The signatures in the said cheques were forged. The money was paid over the counter and online. The Appellant confirmed dealing with the cheques. As regard to whether CCTV evidence was necessary, Ms. Aluda submitted that the court properly held that the CCTV evidence was not required because the prosecution witnesses who testified had adduced sufficient evidence which connected the Appellant to the forgery and the theft. He explained that the Appellant did not exercise due diligence as required of him as a cashier which led to the payments being made from the complainants' accounts. As regard sentence, she was of the view that the sentence meted on the Appellant was insufficient and lenient taking into account the amount that the Appellant had stolen. She was not persuaded that the Appellant had reformed in prison to entitle this court to exercise discretion in his favour. She was of the view that the Appellant was not sincere since he had not made any effort to refund the money that he had stolen. She urged the court to dismiss the appeal, both on conviction and sentence.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court and thereafter reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required by law to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (**See Okeno –Vs- Republic [1972] E.A. 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charges brought against the Appellant on **forgery** and **theft** contrary to **Sections 349** and **281** of the **Penal Code**.

In the present appeal, it was the prosecution's case that the Appellant used his position as a cashier with the bank to cause certain cheques belonging to the bank's customers to be forged and thereby have monies withdrawn from the respective accounts of the said customers. The prosecution adduced evidence from 19 witnesses. All the prosecution witnesses gave evidence to support the prosecution's case which was to the effect that the Appellant had identified three of the bank's customers accounts namely

Mombasa Maize Millers Limited, Kenya Utalii College and Hillcrest Secondary School with a view to stealing from the said accounts. The Appellant used information that he had obtained from the said customer's record in relation to the signatories of the said respective accounts and the agents appointed by the said customers to deposit cash and cheques and also withdraw cash from the said accounts. According to the prosecution, the Appellant caused parallel cheques to be printed with particulars of the said customers' accounts after which he had the signatures of the signatories of the said accounts forged and sums of less than Kshs.500,000/- withdrawn through each cheque.

It was the prosecution's case that the figure of Kshs.500,000/- was significant since it was the limit upon which the Appellant as a cashier would pay customers over the counter without the necessity of authorization from a senior bank official. The Appellant used the names of the current and former agents of the said three customers to withdraw sums from the said accounts. The signatories of the said accounts were called as witnesses. They testified that the signatures on the said cheques were indeed forgeries. The document examiner confirmed that indeed the said signatories had not signed the said cheques. The agents who were purported to have withdrawn money from the said accounts also testified and confirmed that they had not withdrawn any cash from the bank on the particular dates. The prosecution also adduced evidence which established that all the said sums were paid by the Appellant. It adduced evidence to the effect that stamp No.15 which was issued to the Appellant appeared in all the forged cheques. The Appellant did not dispute this fact. He explained that he paid the said cheques in the course of his work as a cashier. He had no reason to doubt that the said cheques were genuine. He urged the court to take into account the fact that the prosecution had not adduced CCTV evidence to establish the actual persons who withdrew the money from the respective accounts of the three customers.

Having carefully re-evaluated the evidence adduced by the prosecution witnesses, the defence of the Appellant and considered the submission made on this appeal, it was clear to this court that the prosecution did indeed prove to the required standard of proof beyond any reasonable doubt that the Appellant was involved in the forgeries and the theft of the said sum of Kshs.26,702,600/-. *Why this conclusion?* Firstly, it was a strange coincidence that in a span of four (4) days forged cheques were presented to the Appellant for encashment. The forged cheques were more than ten (10) in numbers. *Why were the said cheques not presented to another cashier within the said branch where the Appellant worked or another branch of the bank?* Secondly, it was clear that the entire scheme to encash the forged cheques would not have been successful if the Appellant was not active participant. It was clear that the perpetrators of the forgery, who included the Appellant, used inside information, firstly, to create parallel cheques in imitation of cheques which were already in the possession of the particular customers, and secondly, to forge the signatories of the actual persons authorized to sign the said cheques.

The third inside information was in regard to the list of agents of the particular customers who were authorized to transact through the said accounts. This information was obtained from the database kept by the bank. The Appellant had access to all this information. *Is it conceivable that the Appellant innocently paid these sums in the normal course of business without noticing the forgery pattern?* The answer is a definite No. The prosecution witnesses who testified on behalf of the three customers told the court that at no time did any of the agents ever withdraw any sum from the particular branch where the Appellant worked. In fact, the said witnesses were emphatic that all their cash withdrawal transactions were undertaken in the particular branches where their respective accounts were held.

*Is it possible that the Appellant did not realize that the particular transactions were unusual and out of the ordinary? Wasn't any red flag raised in his mind when persons who did not ordinarily transact business in his branch, all of a sudden started transacting many transactions within a span of four days?* The answer is simple. The Appellant was deep into the conspiracy to defraud the bank of the said sum of money. The Appellant's questioning of the lack of use of the CCTV evidence by the prosecution is a red herring: Such evidence would not be of any use since the persons who were said to have withdrawn the money testified in court and confirmed that they had not undertaken such transactions. In any event, the testimony of the document examiner confirmed that the said agents did not sign the particular cheques withdrawing the sums in question.

In the premises therefore, this court holds that the prosecution did prove to the required standard of proof

the four counts of **forgery** contrary to **Section 349** of the **Penal Code** and **theft by servant** contrary to **Section 281** of the **Penal Code**. The appeal against conviction lacks merit and is hereby dismissed. As regard sentence, it was clear that the sentence imposed by the trial court fitted the crime. The complainant lost a colossal sum of Kshs. 26 million which has not been recovered. If the Appellant had offered to refund the said sum, this court would have considered his plea for reduction of sentence. As it were, the Appellant cannot have the money and the freedom as well. His appeal against sentence is similarly dismissed. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2015**

**L. KIMARU**

**JUDGE**