



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.43 OF 2013

ALEX NDIRANGU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the original conviction and sentence of the Chief Magistrate's Court at Nairobi
Criminal Case No.1209 of 2010 delivered on 25/2/2013 by F. Munyi Ag. PM)*

JUDGMENT

The Appellant was charged with stealing by servant contrary to Section 281 of the Penal Code. The particulars were that on diverse dates between the 29th day of May, 2010 and 14th June, 2010 at Family Bank Limited, Four Ways Tower in Nairobi within Nairobi area, being a cashier at the said bank, stole Kshs. 5,700,000/= the property of the said Family Bank Limited, which came into his possession by virtue of his employment.

For counts II, III, IV, V and VI, he was charged with forgery contrary to Section 349 of the Penal Code.

Particulars were as follows:

Count II: On 29th day of May 2010, at Family Bank Limited, Four Ways Tower in Nairobi within Nairobi area, with intent to defraud, jointly with others not before court, forged a family bank cash withdrawal slip dated 29/5/2010 for Ksh. 300,000/= purporting it to be a good and valid slip issued at the said bank, purportedly signed by Benard Mwangi Kiguru.

Count III: On 4th day of June 2010, at Family Bank Limited, Four Ways Tower in Nairobi within Nairobi area, with intent to defraud, jointly with others not before court, forged a family bank cash withdrawal slip dated 4/6/2010 for Ksh. 2,500,000/= purporting it to be a good and valid slip issued at the said bank, purportedly signed by Simon Nyoro Ngugi.

Count IV: On the 9th day of June, 2010 at Family Bank Limited, Four Ways Tower in Nairobi within Nairobi area, with intent to defraud, jointly with others not before court, forged a family bank cash withdrawal slip dated 9/6/2010 for Ksh. 200,000/= purporting it to be a good and valid slip issued at the said bank, purportedly signed by Simon Nyoro Ngugi.

Count V: On the 11th day of June 2010, at Family Bank Limited, Four Ways Tower in Nairobi within Nairobi area, with intent to defraud, jointly with others not before court, forged a Family Bank cash withdrawal slip dated 11/6/2010 for Ksh. 200,000/= purporting it to be a good and valid slip issued at the said bank, purportedly signed by Simon Nyoro Ngugi.

Count VI: On the 14th day of June, 2010 at family bank limited, Four Ways Tower in Nairobi within Nairobi area, with intent to defraud, jointly with others not before court, forged a family bank cash withdrawal slip dated 14/6/2010 for Ksh. 2,500,000/= purporting it to be a good and valid slip issued at the said bank, purportedly signed by Simon Nyoro Ngugi.

He was acquitted in the second count but convicted in counts I, III, IV, V and VI. He was sentenced to serve six months imprisonment in counts I and two years imprisonment in counts III, IV, V and VI respectively.

Being dissatisfied with the conviction and sentence, he decided to appeal. His Petition of Appeal is dated 6th March, 2013. He gave ten grounds of appeal which are condensed into the following six grounds:

1. That the learned trial magistrate erred in law and in fact in convicting the Appellant in the absence of any cogent evidence to support the alleged offence.
2. That the learned trial magistrate did not consider his evidence that all payments made by him were duly authorized by his superiors.
3. That the learned trial magistrate ignored his defence.
4. That the charge sheet was defective and that the learned trial magistrate disregarded the error in the amount alleged to have been stolen.
5. That the expert evidence was not conclusive and that the learned trial magistrate disregarded the fact that the signatures on the withdrawal slips were similar to those held by the bank.
6. That crucial and important witnesses were not called.

SUBMISSIONS BY APPELLANT

Counsel for the Appellant submitted that all payments were approved by the Appellant's supervisor (PW2) and branch manager (PW1). He submitted that the bank manager-in-charge confirmed receiving the identification documents of the customer from the Appellant. He submitted that PW1 authorized the payment of Ksh.2.5 million. PW1 also confirmed meeting the customer on a different date and explaining to him that she could not make the payment of the amount requested for the withdrawal since there was not enough cash in the branch. He submitted that nowhere in her evidence did PW1 question the identity of the customer. Counsel further submitted that PW2, the supervisor had interrogated the customer and confirmed the signature on the cash withdrawal voucher to be the same as that in the bank's system.

Counsel for the Appellant submitted that there were very serious contradictions in the evidence of the prosecution witnesses. He submitted that PW3, Samuel Nyoro Ngugi's letter of complaint to the bank dated 15th June, 2010 indicated a total amount of Ksh.5,880,000/= to be the actual cash withdrawn from different Family Bank branches namely; Four Ways, Kariobangi and Kisumu between the period of 4th June 2010 and 14th June 2010; whereas the prosecution alleged that Ksh.5,400,000/= is what was withdrawn from the Four Ways branch. He also submitted that the evidence of the document examiner was not conclusive. He submitted that the prosecution's evidence rested wholly on presumptions and suspicions and was not proved to the required standard. He referred to the case of **CHESIRE PAUL KAINO VS REPUBLIC, CR. APPEAL NO. 705 OF 2001** which touched on a similar situation. He urged the court to find the Appellant not guilty and acquit him.

RESPONDENT'S SUBMISSIONS

Those of the respondent were filed by learned counsel George H. Murithi. He submitted that PW1, Virginia Thuo, the branch manager confirmed that the Appellant was their employee and that he had presented some withdrawal slips for her approval. He submitted that PW2, Purity Ndungu testified that she was the supervisor at Family Bank and that the Appellant had on 14th June, 2010 approached her for authorization to pay Ksh.2.5million but on checking the system, she realized that a similar amount had been withdrawn previously which prompted her to verify from their Gikomba Branch where their customer held an account. He submitted that PW3 Simon Nyoro is the customer from whose account the money was withdrawn. The customer denied having signed any of the withdrawal slips dated 4th June,

2010, 9th June, 2010 and 14th June, 2010. He submitted that the said customer wrote a complaint to the bank for loss of Kshs.5,850,000/= which the bank credited into his bank account after a week. Counsel for the respondent submitted that PW4, Francis Owino, a Security Manager at the bank testified that on 15th June, 2010 he received a report of complaint that had been lodged by PW3 over the fraudulent withdrawal transactions from his bank account and thereafter conducted internal investigations. PW5, Emmanuel Alunda from Cooperative Bank testified that he received a request from PW4 to investigate the Appellant's bank account. Counsel submitted that PW6, a Document Examiner confirmed that all the four withdrawal slips were a forgery. PW7, an investigating officer from BFID conducted extensive investigations before arraigning the Appellant in court to face the charges he was convicted for. Counsel submitted that from the analysis of the evidence it is palpable that the Appellant was indeed an employee of Family Bank. He submitted that it is not in dispute that a sum amounting to Ksh.5,700,000/= was fraudulently withdrawn from PW3's account by using forged withdrawal slips and that all the withdrawal slips were acted on by the Appellant after seeking approvals from his superiors on the amounts above his limits. Counsel testified that the prosecution ably placed the Appellant at the scene of the forgery.

On the charge of stealing by servant contrary to Section 281 of the Penal Code, counsel submitted that the evidence that was led did not support the charge nor the particulars of the offence. He submitted that the learned trial magistrate misinterpreted the law because the evidence tendered showed that the money which was stolen was drawn from PW3's account hence it was not the property of Family Bank. In conclusion, he submitted that the respondent partly conceded to the appeal in regard to the conviction and sentence on the charge of stealing by servant for lack of evidence in its support. He supported the conviction and sentence on all accounts of forgery contrary to Section 349 of the Penal Code.

Having considered the submissions by both parties, it is now upon this court to re-evaluate the evidence and come up with an independent conclusion. See the case of **OKENO VS REPUBLIC (1972) EA, 32.**

According to the evidence on record, **PW1**, Virginia Wairumu Thuo, the Branch Manager, Family Bank at Four Ways Tower Branch testified that on 4/06/10 the Appellant went to her office with details of a customer being, the customer's identity card and particulars of the customer's account number who intended to withdraw Ksh.2.5 million. The customer held an account with the Gikomba Branch. According to her, the customer had been transferring money so she questioned why he wanted a cash withdrawal. The Appellant told her that the customer wanted to pay his clients on cash basis. PW1 then authorized the Appellant to debit the customer's account with Ksh.2.5 million. She signed the withdrawal debit receipt for the said transaction. The Appellant went back to her on 7/6/10 and explained to her that the same customer made a requisition for withdrawal of Ksh.3 million. She then asked that the client be referred to her. However, since there was insufficiency in funds, she called the Kenyatta Avenue Branch. She testified that she met with the client who seemed to be uneasy. On 15/6/2010 she was informed by PW2 that there was a query from the manager at Gikomba Branch about the transaction of 4/6/10 because the customer appeared at the Gikomba Branch and denied having withdrawn any money on 4/6/10. She testified that the money was withdrawn from a Business Account No. 43441178 in the names Sinclair Investments Limited held at Gikomba Branch operated by Mr. Nyoro. She testified that the cashier had a duty to identify the person who was being paid and that she had instructed the Appellant to identify the client positively.

In cross examination, she mentioned that the names on the identity card were similar to the names in the bank's system and that PW3 was the signatory to the account. She averred that the system screen showed PW3's photo to be corresponding with the photo on the Identity Card. She also stated that she was not well known to the customer.

PW2, Purity Njeri Ndungu a supervisor at Family Bank testified that on 14/6/10 the Appellant went to her seeking authorization of Ksh.2.5million and claimed to have paid a similar amount before to the customer. She checked the system and confirmed that the transaction had been approved by PW1. PW2 went ahead and approved the transaction and signed the print out since the manager was absent that day. The customer was paid. The account belonged to Sinclair Investments held at Gikomba Branch. She testified that the teller had the duty to identify the customer and that he or she only sought authorization for the amounts. She testified that on the following day the manager at Gikomba Branch told her that he

disputed the withdrawal which had been made at the Four Ways Branch. She then realized that it was a fraudulent withdrawal. She called her manager and made a report and the security department took up the matter.

PW3, Simon Nyoro Ngugi testified that he wanted to send money abroad so he went to Family Bank and requested for the balance on his account which is in the names Sinclair Investments. He realized that the balance was not as he expected. He enquired about a withdrawal of Ksh. 2.5million which had been made on 4/6/10. He testified that Ksh.80,000/= had been withdrawn on 5/6/10. He denied the withdrawal slips of Ksh.2.5 million and Ksh.200,000 withdrawn on 11/6/10 and Ksh.2.5million withdrawn on 14/6/10. He wrote a letter to the branch manager complaining of having lost Ksh.5,850,000/=. He was refunded the money within a week and a half.

PW4, Francis Ochieng Owino, the security manager at Family Bank Four Ways Towers Branch testified that on 15/6/10, he received a report from John Kimani, the manager of Family Bank, Gikomba branch that a customer known as Simon Nyoro Ngugi who was operating an A/C No. 441178 in the names of Sinclair Investments had complained that between 4th and 14th June 2010, a total of Ksh. 5,880,000/= was withdrawn from his account by unknown persons. He testified that he retrieved withdrawal vouchers and established that Ksh. 5,400,000/= had been paid out by the Appellant from Sinclair Investments at the Four Ways Retail Branch. He identified the several withdrawal vouchers dates and figures as were given by PW3. He testified that the voucher had a user number of AGN and that it was the Appellant who paid the customer. PW3 went to his office where he also called the Appellant who denied having paid the money to PW3. PW4 reported the matter to CID Central Bank and the Appellant was arrested for further investigations and later charged.

The evidence of **PW5**, Emmanuel Adunda, a security supervisor at Cooperative Bank related to the information of the Appellant's account held at the said bank. He testified that he was not told why the Appellant's account was being investigated. He testified that he did not know the Appellant.

In his evidence, **PW6**, a police officer Jacob Oduor from CID headquarters whose role was to analyze security documents including cheques, title deeds, identity cards, passports and certificates formed an opinion that the signatures on the bank withdrawal slips were forged and did not belong to the account holder.

PW7, Corporal Jasped Keddy of BFIU investigated the case. He proceeded to Family Bank Four Ways Branch where he interviewed PW1, PW2 and PW4. They informed him that the Appellant had made a total of four withdrawals of Ksh.2.5million on 4/6/10, another Ksh.2.5 million on 14/6/10, Ksh.200,000/= on 9/6/10 and another Ksh.200,000/= on 11/6/2010. Another withdrawal was made on 29/5/10 in which Ksh.300,000/= was debited to the account of Benard Mwangi Kiguru without his consent. He confirmed that the payments were done at the till operated by the Appellant.

In cross examination, he stated that he had enquired about the Appellant's personal account at Cooperative Bank and found that there had been a deposit of Ksh.100,000/= on 11/6/10 and a further deposit of Ksh.600,000/= on 15/6/10. He told the court that the said statement was not stamped by Cooperative Bank. He also told the court that he was not able to verify the source of the money in the Appellant's account.

The Appellant gave a sworn statement of defence in which he stated that he was an intern at Family Bank. He stated that his duties as spelt out in his terms of employment involved receiving cash, paying cash withdrawals, receiving cheque deposits, handling Western Unions or cash swift transactions, supporting front office staff, undertaking calls and ensuring entries are done on time. He stated that any amount above his limit which was Ksh.200,000/= had to be authorized by the supervisor or manager before he paid it out. He stated that the Ksh. 2.5million withdrawn on 4/6/10 was authorized by PW1 as her signature appeared on the slip. He stated that the Ksh.2.5 million withdrawn on 14/6/10 was authorized by PW2 as her signature appeared on the slip. He stated that in the first instance, PW1 had a look at the documents, opened the account and gave him a go ahead to pay the customer. In the second instance, he sent the customer to the supervisor who made enquiries and thereafter authorized the payment. In regard

to count IV, the Appellant stated that he paid the Ksh.200,000/= because it was within his authorized limit. He stated that the second transaction was authorized from the mother branch and the account had an authorized agent in the name of Simon Ngugi Nyoro who was not called to testify.

It is now the duty of this court to re-evaluate the evidence and arrive at its own conclusions. **SEE OKENO VS REPUBLIC [1972] EA, 336.**

In the first count, the Appellant was charged with stealing by servant contrary to Section 281 of the Penal Code. In counts III, IV, V and VI, he was charged with forgery contrary to Section 349 of the Penal Code. The particulars indicated that the Appellant had forged withdrawal slips purporting them to be good and valid, issued by Family Bank, and purportedly signed by PW3. In looking at the evidence of PW1, it is indicated that she authorized the withdrawal Ksh.2.5 million on 4/6/10. On 7/6/10 the Appellant referred the same customer to PW1. This time round, the customer wanted to withdraw Ksh.3million. PW1 had the opportunity to liaise with the said customer and told him to try getting the money from Kenyatta Avenue Branch since their branch did not have sufficient funds. PW1 said in her testimony that **“we did not have sufficient funds to pay the 3 million. I called Kenyatta avenue branch. When I met the client, he was uneasy. I explained to him, he thanked me and left.”**

In cross examination, PW1 stated that the Appellant brought the customer’s Identity Card and account number details to her. She said that they matched the description in the system of the account in the names of Sinclair Investments Limited and that PW3 was trading as Sinclair Investments Limited. What is not clear is whether the customer who was brought to her by the Appellant to withdraw a further Ksh.3million and who she directed to a different branch due to lack of funds was the same customer whose particulars she had verified in the system for withdrawal of Ksh.2.5million.

Another Ksh. 2.5 million was alleged to have been withdrawn on 14/6/10. This time the authorization was done by the PW2, the Appellant’s supervisor. She mentioned in her evidence that she authorized the withdrawal since PW1 was not around at the time. She testified that the account of the customer who was paid was in the names of Sinclair Investments. In cross examination, she confirmed that the signature on the screen, which I understand to be the bank’s system was similar to that of the customer. She mentioned that she asked the customer if he could opt for other methods of payment. This clearly showed that PW2 also had the opportunity to talk to this customer.

Without going any further, it is my view that the Appellant only did what he was instructed to do by his superiors. Neither PW1 nor PW2 denied that they authorized the withdrawals. They however did not mention anything about the withdrawals made on the 11th and 9th of June, 2010. PW4, the security manager at Family Bank Four Ways Towers Branch mentioned that the Appellant told him that he could have paid the wrong person by the names Samuel Njoro Ngugi. That aside, it is clear that the Appellant would not have paid the large amounts without the approval of PW1 and PW2. They confirmed the details in the system matched those given on hard copies by the Appellant. It was therefore ridiculous to conclude that the Appellant could either have deliberately paid the wrong person or stolen the money. Even if he were to be held culpable, the same ought to have applied to both PW1 and PW2.

At this point it is important to consider that PW3 and PW4 confirmed that the account had an agent by the name Simon Njoro Thuo. This was a person well known to the PW3. The failure to have him testify so as to shed light on whether he may have withdrawn the money of the complainant is not excusable. It raises eyebrows how and why the complainant mentioned to PW4 of a person by that name who may have been a suspect. This suspect was only causally pursued.

Let me emphasize that the Appellant could only be found culpable if it was proved that he had written and signed the withdrawal slips. That was not the case as the document examiner’s report only indicated that the signature did not belong to the account holder. More importantly, PW1 and 2 exonerated the Appellant as they had an interaction with the customer who presented himself to withdraw the money. In that case, the charges against the Appellant were a non-starter. He was charged as a sacrificial lamb. I have every reason to vindicate him. In this respect, I am moved to give him a benefit of doubt. This appeal succeeds. The conviction is quashed and the sentences are set aside. The Appellant is set free

unless otherwise lawfully held.

DATED and DELIVERED at NAIROBI this 19th Day of October, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Njiru for the Appellant.*
2. *Mr. Muriithi for the Respondent*