



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 536 OF 2009

GEORGE ANUNDA NYAMWEYA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1660 of 2005 of the Chief Magistrate's Court at Nairobi by R.A. Mutoka (Mrs.) – Chief Magistrate)

JUDGMENT

The appellant, **GEORGE ANUNDA NYAMWEYA**, was convicted on one count of Forgery contrary to **section 349 of the Penal Code**; and also on four counts of Stealing **contrary to section 275 of the Penal Code**.

For the offence of forgery, he was sentenced to a fine of KShs.30,000/-, in default 9 months imprisonment.

For the offences of stealing, the appellant was fined a total of KShs.90,000/-, in default a total of 23 months imprisonment.

The appellant asserted that the offence of forgery was not proved at all, because the cheque in issue was made out by the officers at Standard Bank, Moi Avenue Branch, on the express instructions of the customer.

He also asserted that **PW 4** was not a credible witness at all. As far as the appellant is concerned, it was preposterous for **PW 4** to allege that he had left to the appellant, a cheque which the appellant was to bank for him. The reason given by **PW 4** for allegedly giving the cheque to the appellant was that **PW 4** was going abroad.

The appellant says that it was preposterous to suggest that the cheque could have been left to him, for banking, when he was a senior bank manager at one of the busiest bank branches in Africa.

This court was told that if the trial court had analysed the evidence properly, it would have concluded that it is **PW 4** who had stolen the cheque which **PW 10** had given to him, for purposes of the business that **PW 10** wanted to start.

The appellant explained that the cheque in issue was made at the request of **PW 4**, after the said **PW 4** had failed to bank the first cheque at the National Bank of Kenya. The failure to bank the first cheque was attributed to the fact that **PW 4** did not have a covering letter to justify the banking of the cheque at National Bank of Kenya.

It is the appellant's position that he had only carried out his duties, as a senior bank manager. He assisted customers.

He says that the transactions were initiated by tellers. He then signed the requisite documents, in the ordinary course of his work.

He did so in accordance with the rules of the bank, which require bank managers to assist any customer who was withdrawing large sums of money.

In this case, the trial court is said to have failed to spell out the issues for determination. The court is also said to have failed to properly analyse the evidence. As a consequence, the appellant submitted that the findings of the court did not correspond with the court's conclusion.

In any event, the trial court said nothing about count 6, in which the appellant and his co-accused were alleged to have destroyed evidence contrary to **section 116** as read with **section 36 of the Penal Code**.

The appellant submitted that the evidence produced by the prosecution was insufficient to prove the case against him. He emphasized that he did not forge anything or steal any money, as alleged.

This court was asked to find that any evidence which the appellant's co-accused adduced, and which purported to incriminate the appellant, should have been treated as accomplice evidence.

In any event, even with the said accomplice evidence, the appellant believes that the prosecution failed to prove the case against him beyond any reasonable doubt.

As far as he is concerned, there were very many serious doubts in the prosecution case, which should have been resolved in his favour.

In answer to the appeal, the respondent submitted that the conviction and sentence were sound.

It was pointed out that the transaction was initiated by the appellant, not the tellers. It is he who told **PW 1** that the customer wanted to have his cheque re-purchased, whereas the customer had said that he wanted to have the cheque banked.

The respondent also pointed out that it was the appellant who endorsed the various cheques.

Furthermore, the document examiner verified that it was the appellant who prepared the cheques in question, in collusion with his co-accused.

Therefore, the respondent submitted that the conviction was safe.

Being the first appellate court, I will re-evaluate all the evidence on record, and draw therefrom, my own conclusions. However, I will bear in mind the fact that, unlike the trial court, I did not have the opportunity to observe the witnesses as they testified.

PW 1, ELIZABETH MWANGI, worked at Standard Chartered bank, Head Office. On 30th November 2004, the appellant gave to **PW 1** a bankers cheque drawn in favour of Customs & Excise Longroom, Mombasa. The said cheque was purchased in Mombasa, but had been brought for re-purchase.

PW 1 and the appellant signed the cheque to authorize the re-purchase.

It was the evidence of **PW 1** that the appellant explained to her that he had interviewed the customer.

PW 1 and the appellant signed a new bankers cheque, which was drawn in favour of the National

Bank of Kenya.

However, the customer later returned that cheque too. The appellant told **PW 1** that the customer wanted to have several cheques issued.

When the appellant informed **PW 1** that he had verified the instructions from the customer, **PW 1** counter-signed the 3 cheques for the following sums;

- (a) *KShs.359,000/-;*
- (b) *KShs.759,000/-; and*
- (c) *KShs.1,552,999/-.*

During cross-examination, **PW 1** said that nothing unusual happened when the appellant authorized the drafts, as the appellant had the requisite authority to counter-sign all documents.

PW 2, RICHARD THIANI MUBEA, was a teller at Standard Chartered Bank, Moi Avenue Branch.

The appellant gave to **PW 2**, some written instructions from the customer who wanted to have a bankers cheque for KShs.2.7 million re-purchased.

The written instructions required the bank to issue 3 cheques.

PW 2 drew the said 3 cheques, which the appellant then collected from him.

PW 2 said that it is the appellant who paid KShs.2,550/-, cash, which was the commission for the repurchasing of the bankers cheque.

PW 3, BONIFACE MUMEA, a teller at Standard Chartered bank, Moi Avenue Branch, paid to the appellant KShs.190,000/-, against a cheque drawn in favour of Onuonga Maragia. The appellant authorized the cheque for payment, and told **PW 3** that the payee was in his office.

In cross-examination, **PW 3** said that senior managers had authority to collect money on behalf of customers.

PW 4, CHRISTOPHER MUIMITA OLE TANDENI, was the proprietor of Trans Amazon Logistics Limited, Mombasa. His company does Clearing and Forwarding.

In the course of their business, the company paid Customs and Excise Duty by Bankers Cheque. It is in the course of one business transaction that the company needed to pay KShs.2.7 million to the Customs & Excise.

PW 4 travelled to Nairobi, to the Customs Offices, to get a letter which would enable him make payment.

However, he was told that the letter would only be ready after 2 weeks.

As **PW 4** was due to travel to Rwanda, he left the bankers cheque with the appellant, who was a friend of his. The appellant was to deposit the payment back into the company account or into the account of **PW 10**.

When **PW 4** returned to the country, he checked the company account, but found that the appellant had not deposited the money therein. When **PW 4** asked the appellant why he had not deposited the money, the appellant told him that he had misplaced the cheque.

Although **PW 4** allowed the appellant about one week to look for the cheque, the same never

materialized. Instead, the appellant stopped picking-up **PW 4's** phone-calls.

PW 4 travelled to Nairobi again, to talk to the appellant. However, he found that the appellant had gone on leave.

As the appellant continued to ignore **PW 4's** calls, **PW 4** reported the matter to the police.

During cross-examination, **PW 4** said that he and **PW 10** were planning to start a business for Container Freight Services. **PW 4** therefore put together KShs.1.0million, whilst **PW 10** put together KShs.1.7million.

PW 4 said that he did not know who gave the appellant the instructions for the re-purchase of the bankers cheque. His instructions to the appellant, and which were in writing, were that the cheque be re-banked.

PW 5, WINNIE OTIENO, was a teller at Standard Chartered bank, Moi Avenue. She received and posted a cheque for KShs.359,000/-, which was in favour of Ibanchore Enterprises.

The transaction was authorized by the appellant. There was nothing unusual about the transaction.

PW 5, JOSEPH GITAU, was also a teller at Standard Chartered Bank, Moi Avenue.

On 10th February 2004, **PW 6** received instructions from the appellant, authorizing payment to Onuonga Maragia. The cheque for KShs.850,000/- was crossed. But the appellant signed it, so that it could be encashed.

PW 5 JOSEPH GITAU then handed over the cash to the appellant, who said that the customer was at his (the appellant's) office.

Joseph Gitaunever met the customer, Onuonga Maragia.

During cross-examination, Joseph Gitau explained that payment of sums in excess of KShs.400,000/- had to be authorized by a manager.

PW6, ANGELA MUTINDA, was told by the appellant to encash a cheque for KShs.159,000/-. The said cheque was in favour of Onuonga Maragia.

After the appellant signed the cheque, to authorize the bank to pay the proceeds thereof in cash, **PW 6** paid the money to the appellant.

According to **PW 6**, it was not unusual for the appellant to seek cash payments on behalf of customers.

PW 7, LUCY WANGARI MURIMI, was a teller at Standard Chartered Bank, Moi Avenue.

On 16th December 2004, the appellant gave to **PW 7** a cheque drawn in favour of Onuonga Maragia, for KShs.1.5million. The appellant had authorized the cheque for encashment.

PW 7 took the cash to the appellant's office, where the customer signed the back of the cheque, confirming receipt of the money.

PW 8, EMMANUEL KENGA, was a Document Examiner. He verified that the appellant had signed all the 5 cheques in question. His signatures were at the back of each of the said cheques.

PW 9 ANWAN AHMED ABEID, was the Manager of Standard Chartered Bank, Harambee Avenue, Mombasa.

He testified that **PW 10** did purchase a bankers' cheque for KShs.2.7million payable to Customs &

Excise Department. **PW 9** signed the bankers' cheque together with one other bank manager.

Later, **PW 10** returned to **PW 9**, inquiring if the cheque had been credited back to his (**PW 10's**) account. However, the said sum had not been credited back to **PW 10's** account.

PW 10, MOHAMED SHEIKH ABDULLAHI, prepared a bankers cheque for KShs.2.7 million, at the request of **PW 4**. The said cheque was then given to **PW 4**.

Later, **PW 4** told **PW 10** that he had not got the licence for which the cheque had been issued. **PW 4** informed **PW 10** that he would travel to Nairobi, to have the proceeds credited to **PW 10's** account. However, **PW 4** then told **PW 10** that the appellant had manipulated the whole thing, and taken the money.

During cross-examination **PW 10** said that **PW 4** did not contribute Kshs.1,000,000/- out of the total sum of KShs.2.7 million.

PW 11, PETER KOBUTHI, worked as a security officer attached to the Banking Fraud Investigations Department, Central Bank of Kenya.

He investigated the matters in issue. His investigations revealed that **PW 4** had left the appellant with instructions to refund the proceeds of a bankers' cheque. The proceeds were to have been refunded to either Trans Amazon Logistics Limited or to **PW 10**. However, the appellant failed to do so.

Instead, the bankers cheque was re-purchased by the bank, which thereafter issued 3 separate cheques payable to Ibanchore's account.

Thereafter, the proceeds were withdrawn from the account of Ibanchore Enterprises Limited, through cheques drawn in favour of the appellant's co-accused, Onuonga Maragia.

The said Maragia was a relative to the 2 directors of Ibanchore Enterprises Limited, who lived in the U.K. The said directors had given to Onuonga Maragia, authority to operate the account.

After the prosecution closed its case, and the appellant was put to his defence, he gave an unsworn defence.

He confirmed having authorized the encashment of the cheques in question. He did so in order to authorize payment. However, he emphasized that it is not he who initiated payment. If anything, he only came into the transactions at the end.

As far as he was concerned, everything that he did was done in the ordinary course of his duties. He did not even know any of the parties to the transactions until he met them in court.

Having re-evaluated the evidence on record, I note that the applicant did not deny having signed the cheques in question. In effect, he confirmed the findings by the Document Examiner, that he signed the said documents.

The appellant's co-accused testified that the proceeds from all the cheques drawn on the account of Ibanchore Enterprises Limited, were taken by the appellant.

Nowhere did the appellant deny receiving the proceeds of the cheques drawn on the said account.

The evidence from **PW 5** and **PW 6** shows that the appellant personally collected KShs.1,009,000/- from them. He did so allegedly on behalf of the customer, who was at his offices. However, the appellant did not testify that he handed over the money to the alleged customer. He remained mum in that regard.

Meanwhile, **PW 7** delivered KShs.1,500,000/- in cash, to the appellant's office. At the said office, the

customer signed the back of the cheque, to acknowledge receipt of that sum.

Consequently, when the appellant's co-accused said that even that sum was taken by the appellant, it became necessary for the court to give special consideration regarding how such evidence of an accomplice ought to have been treated.

The learned trial magistrate concluded that the explanation tendered by the appellant's co-accused was plausible.

In effect, the trial court gave consideration to the question regarding how the evidence of the accomplice ought to have been treated.

By dint of the provisions of **section 141 of the Evidence Act**;

“An accomplice shall be a competent witness against accused person: and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.”

In this case, therefore, the fact that the appellant was implicated by an accomplice is not reason, of itself, to upset the conviction.

Secondly, there is evidence from the tellers, corroborating the evidence of the said accomplice.

But there is also evidence that the accomplice signed the back of one cheque, to acknowledge that he received the proceeds therefrom. In those circumstances, had the appellant testified that the sum of KShs.1,500,000/- was actually received by his co-accused, it would have been difficult for the court to disbelieve him. At the very least, such evidence may have given rise to some doubt as to whether that sum was received by the appellant.

But, as I have already said, the appellant remained silent, save to say that what he did was done in the course of his duty.

PW 4 and **PW 10** expressly stated that the appellant was a friend to **PW 4**. The appellant did not raise questions about the said friendship when he was cross-examining **PW 4**. However, in his defence, he alleged that he had not known any of the parties until he met them in court.

I find that that line of defence is nothing more than an after thought, intended to create a gap between the appellant and the complainant.

I also find that the appellant caused the issuance of cheques payable to Ibanchore Investments Limited account without the requisite authority of the complainant. By doing so, he forged the signature of **PW 10**.

Thereafter, the appellant worked with his co-accused to withdraw the money from the account of Ibanchore. Of course Ibanchore Investments Limited had no reason to complain about the said withdrawals because the money was never theirs in the first place.

The account was simply a conduit used by the appellant and his co-accused to withdraw money that legitimately belonged to the bank. By taking the said sums of money, the appellant was guilty of stealing.

As regards the alleged offence of destroying evidence, the prosecution did not lead any evidence. Consequently, the appellant ought to have been acquitted in count 6.

I do now find that the appellant was not guilty of the offence of destroying evidence; and I accordingly acquit him.

However, I do find that his conviction on counts 1 to 5 (inclusive) were sound. I therefore uphold the said

convictions, together with the sentences.

In the event, the appeal is dismissed.

Dated, Signed and Delivered at Nairobi this 21st day of November, 2011.

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FRED A. OCHIENG

JUDGE