



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Appeal 213 of 2007**

*(From Original Conviction and Sentence in Criminal Case No.1376 of 2005 of the Chief Magistrate's Court at Mombasa: **R. Makungu – R.M.**)*

**MICHAEL M. NGATIA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant herein **MICHAEL NGATIA** has filed this appeal contesting his conviction and sentence by the Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant had been charged with four others before the lower court on four counts as follows

**COUNT NO. 1**

***“STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE***

***On or about the 13<sup>th</sup> April 2005 at the Ministry of Labour and Human Resources Development offices within Nairobi area of the Nairobi Province jointly with others not before court stole one cheque leaf No. 072251 valued at Kshs.20/- the property of the Government of Kenya”***

**COUNT NO. VI**

***“STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE***

***On or about the 11<sup>th</sup> April 2005 at the Ministry of Labour and Human Resource Development offices within Nairobi area of Nairobi Province jointly with others not before court, stole one cheque leaf No. 072249 valued at Kshs.20/- the property of the Kenya Government”***

**COUNT NO. VIII**

***“ATTEMPTED STEALING CONTRARY TO SECTION 275 AS READ WITH SECTION 389 OF THE PENAL CODE***

***On the 15<sup>th</sup> day of April 2005 at Post Bank – Savanni Branch within Mombasa District of the Coast Province attempted to steal Kshs.500,200/- the property of the Government of Kenya”***

**COUNT NO. X**

***FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE***

*On or about the 13<sup>th</sup> day of April 2005 at unknown place within the Republic of Kenya jointly with others not before court with intent to defraud forged a certain cheque leaf No. 072249 purporting it to be a genuine and valid order for payment of Kshs.1,719,500/- upon Central Bank of Kenya on account of the Ministry of Labour and Human Resources Development”*

The Appellant entered a plea of ‘**not guilty**’ to all the four counts which he faced. His trial commenced on 9<sup>th</sup> March 2006. The prosecution led by **INSPECTOR NCHORO** called a total of thirteen (13) witnesses in support of their case. The prosecution case revolved around two cheques serial No. 072249 in the amount of Kshs.1,719,500/- and a second cheque serial No 072251 in the amount of Kshs.1,819,060. Both cheques were supposedly drawn on the account of the Ministry of Finance, Pensions Department and were ostensibly for payment of pensions due to various pensioners. As it later transpired the two cheques were not genuine and had been forged from a cheque book No. 072001 – 072300 which had been stolen from the Ministry. The stolen cheque serial numbers were circulated to all the Kenya Post Office Savings Bank branches countrywide from which pensions are ordinarily paid out. The stolen cheque serial number 072249 in the amount of Kshs.1,719,500/- was presented to the Savani House Branch in Mombasa on 11<sup>th</sup> April 2005 for payment. Two beneficiaries were indicated on that cheque one of whom was the Appellant ‘**Michael M. Ngatia**’, who had only three days earlier on 8<sup>th</sup> April 2005 opened his account at the Savani Branch of Postbank in Mombasa. This therefore was a carefully executed but elaborate racket by several people to fleece the Government of Kenya of large amounts of money by falsely presenting themselves as pensioners at the various branches of Postbank to receive the funds from the stolen cheques. The Branch Manager of the Savani House Branch upon realizing that one of the fraudulent cheques had been presented for credit to accounts held at his branch called in the police who immediately swung into action and laid a trap to apprehend those who would

come to withdraw the proceeds of the stolen cheques. The Appellant was arrested on 15<sup>th</sup> April 2005 at the nearby Glory Guest House. He was taken to the police station and upon completion of police investigations he was duly charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He opted to give a sworn defence by which he denied all the charges he faced. On 20<sup>th</sup> November 2007 the learned trial magistrate delivered her judgement by which she acquitted the Appellant in Count No. 1, and 6 of stealing as well as on Count No. 10 of Forgery. The trial magistrate did however convict the Appellant on Count No. 8 of Attempted Theft and after listening to his mitigation sentenced him to serve two (2) years imprisonment. The Appellant being dissatisfied with both this conviction and sentence filed the present appeal.

Being a court of first appeal I am mindful of my obligation to re-examine and re-evaluate all the evidence adduced before the lower court and to draw my own conclusions thereto – see **OKENO –VS- REPUBLIC [1972] E.A.L.R. 32.**

The fact that the cheques in question were stolen from the Ministry of Labour is not in any doubt. **PW5 JEREMIAH TOMNO**, an officer from Central Bank testified that on 7<sup>th</sup> November 2003 they issued 25 cheque books bearing serial numbers 071001 to 073400 were issued to the Ministry of Labour and Human Resource Management. Later on 27<sup>th</sup> February 2004 Central Bank received a letter from the same Ministry informing them that their cash office had been broken into and the cheque book bearing cheques serial numbers 072201 to 072300 was stolen. **PW5** acted to immediately stop payment of all cheques falling within those series. The cheque serial No. 072251 **Pexb4** which was presented to Postbank Savani Branch Mombasa fell within that series and therefore was clearly one of the stolen cheques.

The fact that the cheque No. 072251 had been forged is also not in any doubt. **PW6 PETER KAHARA NJOROGE** an employee of the Ministry of Finance Pensions Department, who told the court that it was his duty to authorize payment vouchers and to sign cheques, did look at the stolen cheque **Pexb4**. He denies that the authorizing signature thereon is his. He further noted other anomalies on the cheque such as that it did not bear the '*CFS Pension number 051*' and the account

number indicated for the drawer of the cheque was indicated as '**010103015**' whereas the correct account number for the Pensions Department was '**010103051**'. **PW6** also noted that the stamp on the cheque was not the genuine stamp of the Pensions Department. Likewise **PW7 EDITH KARINGA KENATTE** is an accountant with the Ministry of Finance and is one of the signatories of their cheques. She too denied that the cheque S/No. 072251 bore her signature and she states categorically that, that cheque did not originate from the Pensions Department. Where both the official signatories to the cheque have denied signing the cheque, this coupled with the numerous anomalies noted and shown to the lower court by **PW6**, is more than sufficient proof that this cheque had been forged and was not a genuine document.

The Appellant was the purported beneficiary of some of the proceeds of this cheque. **PW3 HELLEN CHEPKORIR SANG**, a clerk at Post Bank, Savani House Branch testified that on 8<sup>th</sup> April 2005 she opened an account in her branch for the Appellant. He presented his original Identity Card No. 0761118 as a form of identification. **PW11 CATHERINE MURA** who works with the National Registration Bureau confirms that their records indicate that the identity card No. 0761118 was issued to **MICHAEL MACHARIA NGARIA**, who is the Appellant. On his part the Appellant readily concedes being the owner of that identity card and he also readily admits having opened an account at Postbank Savani House on 8<sup>th</sup> April 2005. **PW1 JOSEPH KASIU**, the Branch Manager at Savani House confirms that the account No. KMOMBSA004327X was opened in the name of the Appellant. He further tells court that the stolen forged cheque serial No. 072251 was presented to their bank by courier for payment. The sum of Kshs.560,200/- was to be credited into the Appellant's account. So far the prosecution have built a strong case. It is clear that the proceeds of the stolen cheque were to be deposited into the account of the Appellant and therefore would benefit him alone.

In his defence the Appellant denies all knowledge of the cheque and denies having been in any way involved in this scam. He insists that he only opened his account for business purposes and totally denies that he was expecting the sum of Kshs.560,200/- to be paid into his account. **PW1** told the court that on 15<sup>th</sup> April 2005 he received information that the beneficiaries of the stolen

funds were in the bank waiting to withdraw the money so he called in the police **PW12 SERGEANT JOACHIM IRERI** is the officer attached to the Banking Fraud Unit who responded the call. He went to the Savani House Branch when called by **PW1** and found a suspect apprehended there. That suspect was **not** the Appellant. It was a man called **BERNARD OTIENO NYASENGA**. It was this Bernard who led **PW12** to where the other suspects including the Appellant were. **PW12** arrested the Appellant at Glory Guest House and arrested him. There is no evidence that the Appellant was ever in the banking hall and no evidence that he was found in possession of a withdrawal slip. Indeed **PW13 SERGEANT ALI IBRAHIM** under cross-examination by the Appellant states at page 86 line 5

*“there is nothing pertaining to Post Bank which was recovered from you”*

The evidence against the Appellant is purely circumstantial. In order for circumstantial evidence to suffice to support a conviction it must point at the accused and the accused only as the perpetrator of the offence in question. This is not the case here. There is no direct evidence linking the Appellant to either the theft of the cheque or the forgery of the same. Indeed the learned trial magistrate acquitted him of both these charges. At page 86 line 5 **PW13** the investigating officer explains why he decided to charge the Appellant of Attempted Theft

*“At the time the cheque was deposited, that was already an attempt. The cheque was sent via Securicor. An attempt is trying”.*

With respect I do not agree with this reasoning. It is common knowledge that banking practices allow a cheque to be deposited by any person. This cheque was delivered to the bank by Courier. There is no evidence that it was the Appellant who delivered the cheque to the courier for onward transmission to the bank. Indeed there is no evidence of who delivered the cheque to the courier. What is the *‘actus reus’* committed by the Appellant? The mere attempt by someone to deposit funds into his account cannot suffice. There is no evidence that the Appellant had filled out a withdrawal slip preparing to withdraw these stolen funds. No link is shown to exist between the Appellant

and the person who deposited the funds into his account. The mere fact that he was found sitting at a nearby café is not a crime. The Appellant was identified by the man Bernard Otieno, who was a co-accused. Evidence of a co-accused on its own cannot form the basis of a conviction. I find that the prosecution failed to show or prove the '*actus reus*' or the act of an attempt to steal. In my view the evidence adduced was not sufficient to support this charge and the learned trial magistrate erred in relying on this evidence as the basis for a conviction. I therefore quash the Appellant's conviction on Count No. 8 of Attempted Theft. The subsequent 2 year sentence is also set aside. This appeal succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered at Mombasa this 6<sup>th</sup> day of September 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-

Appellant in person

Mr. Ondari for State

**M. ODERO**  
**JUDGE**  
**6/09/2010**