REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS

Criminal Appeal 475 of 2004

ISAAC NDISO MALINDA .....APPELLANT

- AND -

REPUBLIC ……..……...……RESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Mrs. C.W. Meoli dated 6th April, 2000 in Criminal Case No. 1251 of 1997 at the Nairobi Law Courts)

JUDGMENT

The appellant faced a charge in twelve counts: fraudulent false accounting contrary to s. 330 (b) of the Penal Code (Cap. 63 Laws of Kenya) – counts 1,3,5,7,9,11; stealing contrary to s. 275 of the Penal Code – counts 2,4,6,8,10,12.

It was the prosecution case that, during the material times, the appellant was employed as a clerk by Kenya Commercial Bank, at their Industrial Area branch. His duties were to be discharged within the Bills department; he was required to process foreign bills and issue banker's cheques and drafts. The issuing of cheques started with a customer completing a form (Form D47); and here the customer would give the particulars of the applicant, and the intended beneficiary of the banker's cheque. The required amount would be shown; and authority would be given to the bank to debit the applicant's account accordingly. The applicant would complete the form personally, in the presence of the appellant herein. The appellant would then raise credit-to-cheque, and stamp duty, and would have the documents approved by his superiors if the customer's account did not have sufficient cash to support the D47 application. Once approvals were given, the documents would be returned to the appellant to write the cheques in the beneficiary's name, and to credit the commission to the bank. He would record the cheque once signed; and the customer would collect the same and sign in acknowledgment. Stamp duty accrued from the cheque and other transactions would be added up at the end of the day. One bulk cheque representing the daily total duty payable to the Senior Collector of Stamp Duty would be written by the appellant, whose duty was to dispatch the cheque. Once the cheques were issued, supporting vouchers would be taken to the computer department for posting. These vouchers would then be stored in the bank archives.

It was alleged that the appellant had an account (No. 012010678006) at Standard Chartered Bank, Industrial Area Branch. On *16th July, 1993* and *10th August, 1993* his SCB account was credited with two banker's cheques, worth Kshs. 160,000/= and Kshs. 143,000/= respectively. On *19th August, 1993* the appellant presented a withdrawal voucher to PW13, a teller at the said SCB, Industrial Area. The teller

became suspicious, since she personally knew the appellant. Upon checking the account-opening documents used by the appellant at SCB, PW13 noted that the appellant had described himself as a businessman, and not as an employee of KCB, Industrial Area branch; and the teller passed the information to her superior (PW1). PW1 conducted further checks with different branches of KCB; and it was then noticed that two cheques, tallying with the two deposits aforesaid, were in the course of being paid out to one *C.N. Mutisya*, who was said to be the appellant's wife; and the proper payee should have been the Senior Collector of Stamp Duty. Closer checking revealed other vouchers which were to support payments to the Senior Collector of Stamp Duty – but payments had been re-directed to private individuals. Related documents found in different places, including other banks, all documents which enabled quick withdrawals of funds to be made by certain individuals, were submitted to a document-examiner for comparison of handwritings and specimen signatures; and on that basis the learned Magistrate put the appellant herein to his defence.

The learned Magistrate found a practised *modus operandi* of fraud, on the part of the appellant herein, in respect of all the twelve counts of the charge. In the last part of the judgment, the trial Court held:

"*I do find that the said two cheques were not issued to a bona fide payee, as this was income meant for the Senior Collector of Stamp Duty. At the same time the two were based on fabricated D47 forms. The letter were false, and used to account for the revenue collected by the accused on the respective days, i.e. 29th June, 1992 and 11th August, 1992. I totally accept the prosecution evidence in this regard and dismiss the accused's denial as a sham. That defence in the light of the evidence tendered by the prosecution cannot stand …… I am quite satisfied that the prosecution has proved the 3rd and 4th as well as the 7th and 8th counts against the accused beyond any reasonable doubt. The end result therefore, is that the accused has been found guilty and convicted on all the counts facing him……*"

After taking the appellant's statement in mitigation, the Court took into account the fact that he had now lost his job, and sentenced him as follows:

(i) Count 1: fine of Kshs. 5000/= (or 8-month jail term in default;

(ii) Count 2: fine of Kshs. 5000/= (or 8-month jail term in default);

(iii) Count 3: fine of Kshs. 5000/= (or 8-month jail term in default);

(iv) Count 4: fine of Kshs. 5000/= (or 8-month jail term in default);

(v) Count 5: fine of Kshs. 5000/= (or 8-month jail term in default);

(vi) Count 6: fine of Kshs. 5000/= (or 8-month jail term in default);

(vii) Count 7: fine of Kshs. 5000/= (or 8-month jail term in default);

(viii) Count 8: fine of Kshs. 5000/= (or 8-month jail term in default);

(ix) Count 9: fine of Kshs. 5000/= (or 8-month jail term in default);

(x) Count 10: fine of Kshs. 5000/= (or 8-month jail term in default);

(xi) Count 11: fine of Kshs. 5000/= (or 8-month jail term in default);

(xii) Count 12: fine of Kshs. 5000/= (or 8-month jail term in default);

The appellant, in his grounds of appeal, contended as follows: that there had been no evidence to support the conviction; that his defence had not been given due consideration; that the learned Magistrate had shown bias against him; that all the evidence adduced against him was fabricated; that much of the

evidence was false; that a lot of the evidence adduced had no relevance to the charges; that when PW3 gave evidence, he had been denied legal representation; that the prosecution case had been laid in bad faith; that the learned Magistrate should not have overruled the application for the recall of a certain witness (PW3); that the trial court had shifted the burden of proof on to the appellant; that no proper accounts had been produced in Court to support the case against him; that the sentence was manifestly excessive.

Learned counsel *Mr. Nyabena*, who argued the appellant's case contended that no evidence had been adduced in support of the findings of the trial Court, and that it had not been shown that the appellant had drawn any benefits from the funds that came into his accounts and which are the basis of the several counts of the charge.

Mr. Nyabena submitted that during testimony by PW3, the appellants request for time to secure counsel had been denied – and yet the appellant had a right to counsel; and in this regard he relied on the persuasive authority of *Olima & Another v. Republic* [1991] KLR 539 *(Porter & Mbaluto, JJ)*, in which it was held that:

"*Every accused has the undoubted right to be defended by counsel. If an accused is deprived of that right through no fault of his own and through no fault of his counsel and a conviction follows, the conviction will be quashed on appeal."*

Counsel also urged that the appellant while in custody, had been "intimidated" and "assaulted by the Investigating Officer", to cause him to record "incriminating evidence"; and that the trial Court had ignored the evidence of torture.

Counsel urged that the trial Court had declined the appellant's request to call a witness, instead ordering trial to proceed. It was also contended that the burden of proof had been shifted, from its proper *locus*, the prosecution, to the accused.

Learned State Counsel *Mrs. Obuo* contested the appeal, and urged that proof of all the counts of the charge had been accomplished beyond any reasonable doubt; counsel noted that a long list of witnesses, PW2,3,5,6,7,8,9 and 10 had given evidence that it was the appellant's duty at KCB to prepare Form D47, the very instrument that had served as the vehicle of the fraud that features in this case. PW12 had given corroborative evidence, that he had not applied for the said Form D47; and he had not collected a cheque generated through the said form. It was the testimony of the document examiner that the writings on the said Form D47 were the writings of the appellant herein. The client (PW12) had no funds in his accounts, and did not ask for Form D47; but the form was filled in to generate a cheque in the name of a *Mr. David Mutua*, a person unknown to KCB. In these circumstances, counsel urged, only the appellant herein could explain who *David Mutua* was, and it was not proper he should claim that the prosecution should have called *David Mutua* as a witness. This was not shifting the burden of proof, counsel urged, as it was a situation captured by s. 111(1) of the Evidence Act (Cap. 80, Laws of Kenya) (dealing with burdens that fall on the accused sometimes). Section 111(1) of the Evidence Act thus provides:

"*When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.…..*"

Learned counsel contested the contention made for the appellant, that the conviction of the appellant was based on mere suspicion, and she submitted that the evidence on record, and which led to the conviction of the appellant, was direct evidence.

On the contention that the appellant had been denied his right to counsel during the examination of PW3, learned respondent's counsel urged that the correct facts were not being placed before the Court; counsel for the appellant was present when PW3 testified; and it is this very counsel who asked for PW3 to be stood down at 3.00p.m. on that occasion; then on the following day, this counsel absented himself

from Court – notwithstanding that all hearing dates had been given in Court, and in advance; consequently all opportunity was available to the appellant, for arranging his representation. Moreover, the record shows that the appellant *had* cross-examined PW3 at length, when the appellant's counsel had not attended Court, on 2nd April, 1999.

On checking the record, I find that on 1st April, 1999, just before 4.00p.m. one counsel for the appellant said in Court: "I ask that the witness be stood down, so that *Mr. Mwilu* [appellant's other counsel] can question her. He is [now] in Court No. 5." To this request, the learned Magistrate thus directed:

"*Mr. Mwilu* was here yesterday; we adjourned the case [at his convenience]. It is [now] 4.00p.m. I intend to complete the evidence of [PW3]. Counsel [*Mr. Mbui*] to [cross-examine]."

Even as the learned Magistrate gave those directions, *Mr. Mbui* had already walked out of the Court, and it is on record. It is clear the appellant was not uninformed of the operating arrangements of both his counsel; for he then proceeded to conduct a lengthy cross-examination of PW3 himself (covering nearly four pages of typescript).

Learned counsel ***Mrs. Obuo*** submitted that even if it were to be held that on 1st April, 1999 the accused did not have the benefit of counsel when PW3 was cross-examined, there would still remain in place overwhelming evidence adduced in proof of the twelve counts of the charge.

On the contention that the appellant had been intimidated and tortured by the Investigating Officer, *Mrs. Obuo* urged that this was merely an afterthought, in the appeal scheme. For the Investigating Officer (PW14) had given his testimony, but there had been no cross-examination on the question of intimidation or torture. The claim of torture, counsel urged, could also not be supported by the doctor-witness(DW1) of the appellant; for DW1 had said he examined the appellant on *13th September, 1993*; but it was on *6th June, 1997* that the appellant was arraigned in Court – so there is no relation between the appellant's condition as at the two dates.

Upon viewing the record in this rather complex case, I have come to the conclusion that the learned Magistrate had a clear view of the twists and turns in the evidence; and she rightly arrived at the conclusion that the appellant, in abuse of the trust reposed in him by the bank, had used his experience to design stratagems for the making of false documents, and for the fraudulent funnelling of money out of the bank's vaults, and into the hands of persons only known to himself. I am in agreement with the trial Court that overwhelming proof had been adduced by the many prosecution witnesses, showing the appellant to be a culprit in respect of all the twelve counts of the charge.

My review of the appellant's contentions challenging his conviction, and of the responses of learned respondent's counsel, indicates to me that those contentions carry no substance: intimidation and torture did not feature in the handling of the appellant during his trial; the burden of proof was not shifted from the prosecution to the accused; the trial Magistrate had made orders that were in all respects proper, regarding the cross-examination of PW3.

In short, I find no merit in this appeal; I dismiss it; I uphold conviction on all the counts of the charge; I affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 22nd day of January, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Nyabena

For the Respondent: Mrs. Obuo