



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 67 of 2007

SAMUEL OBIERO OMBEWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original decision in Criminal Case No.3076 of 2003 of the Senior Resident Magistrate's Court at Nairobi – Mrs. Ngugi SRM)

J U D G M E N T

MAURICE OKELO KABURU alias **SAMUEL OBIERO OMBEWA**, the appellant, was charged before the subordinate court with 6 counts. Count 1 was for stealing contrary to section 275 of the Penal Code. The particulars of charge were that on or about 17th July 2003 at International Organization for Migration in Nairobi within Nairobi area, stole one Standard Chartered Bank of Kenya Limited cheque leaf number 204208 valued at Kshs.500/= the property International Organization of Migration. He was charged with an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of charge were that on 17th July 2003 at International Organization for Migration in Nairobi within Nairobi Area, otherwise than in the course of stealing, dishonestly received or retained one Standard Chartered Bank of Kenya Limited cheque leaf serial number 204208, knowing or having reason to believe it to have been stolen or unlawfully obtained.

Count 2 was for stealing contrary to section 275 of the Penal Code. The particulars of offence were that on 17th July 2003 at International Organization for Migration in Nairobi within Nairobi Area, stole one Standard Chartered Bank of Kenya Limited cheque leaf number 204201 valued at Kshs.500/= the property of International Organization for Migration. He was also charged with an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of charge were that on or about 17th July 2003, at International Organization for Migration in Nairobi within Nairobi Area, otherwise than in the cause of stealing, dishonestly received or retained one Standard Chartered Bank of Kenya Limited cheque leaf serial number 204201, knowing or having reasons to believe it to have been stolen or unlawfully obtained.

Count 3 was for uttering a false document contrary to section 353 of the Penal Code. The particulars of offence were that on 28th July 2003, at Chase Bank, Wabera Street Branch in Nairobi within Nairobi Area, with intent to defraud, knowingly and fraudulently uttered a certain Standard Chartered Bank of Kenya Limited cheque number 204208 to Jackline Muchangi, a teller at the said M/s Chase Bank purporting it to be a genuine and valid cheque from International Organization for Migration.

Count 4 was for uttering a false document contrary to section 353 of the Penal Code. The particulars of the charge were that on 28th July, 2003 at Chase Bank, Wabera Street Branch in Nairobi within Nairobi

Area with intent to defraud, knowingly and fraudulently uttered a certain Standard Chartered Bank of Kenya Limited cheque number 204201 to Jackline Muchangi, a teller at the said M/s Chase Bank, purporting it to be a genuine and valid cheque from International Organization for Migration.

Count 5, on the other hand, was for stealing contrary to section 275 of the Penal Code. The particulars of charge were that on 1st August 2003 at Chase Bank, Wabera Branch in Nairobi within Nairobi Area, stole Kshs.26,000/= the property of International Organization for Migration. Count 6 is also for stealing contrary to section 275 of the Penal Code. The particulars were that on 4th August 2003 at Chase Bank, Wabera Branch in Nairobi within Nairobi Area, stole Kshs.855,000 the property of International Organization for Migration.

After a full trial, the appellant was convicted on counts 3, 4, 5 and 6. He was sentenced to a fine of Kshs.20,000/= in respect of count 3; a fine of Kshs.20,000/= in respect of count 4; a fine of Ksh.50,000/= in respect of count 5; and a fine of Kshs.100,000/= in respect of count 6.

Being dissatisfied with the decision of the learned magistrate, the appellant has appealed to this court both against the convictions and the sentences, initially in person, but later through his counsel Memusi, Michemi & Associates Advocates.

At the hearing of the appeal, Mr. Memusi for the appellant submitted that there was no evidence that the appellant uttered false documents. In fact, from the evidence of PW1, PW4 and PW8, the cheques were genuine. Secondly, counsel contended the appellant was a totally different person from **SAMUEL OBIERO OMBEWA**. Counsel submitted that the magistrate erred in not finding that the identification parade had irregularities and flaws. Firstly, one **SCHOFIELD** who claimed to have identified the appellant never testified in court. Secondly, the identification parade was conducted after media advertisement. Therefore the identification of the appellant had no probative value. Counsel sought to rely on the case of **GABRIEL NJOROGE –VS- REPUBLIC (1982-88)1 KAR 1134.**

Counsel also submitted that there were several discrepancies in the evidence. Firstly, the dates given in the charge sheet were different from those testified to by PW3. Also, counsel submitted that, the magistrate failed to make any reference to the appellant's defence. Counsel emphasized that the appellant was searched and found with nothing connecting him to the offences. Counsel submitted that the magistrate erred in relying and convicting the appellant merely on the evidence of the document examiner, who merely gave an opinion. Counsel contended that crucial witnesses, that is **SCHOFIELD OTIENO, PATRICK WAKISI** and **IP ABUOGI** were not called to testify. Also the magistrate failed to address the evidence of PW9, who stated that the information from documents differed from the particulars of the appellant.

Counsel also submitted that the sentence was harsh and excessive. Counsel sought to rely on the case of **R –VS- NYAGA – Nbi HCCr. Case No. 40 of 2007.**

Lastly, counsel submitted that the language used in court was not indicated.

The learned State Counsel, Mrs. Kagiri, opposed the appeal and supported both the conviction and sentences. Counsel submitted that as the appellant was represented, the issue of the language used in court should not arise. Counsel also argued that there was no evidence to establish that the appellant was detained for longer than was permitted by law before he was arraigned in court.

On identification, counsel submitted that the identification parade was properly conducted and that PW4 and PW8 had seen the appellant before in the bank depositing and withdrawing money from the said Chase bank. On vital witnesses, the State Counsel submitted that the prosecution called all necessary relevant witnesses to testify. On differences of dates, the counsel submitted that it was not fatal to the conviction, as that variance was curable under section 382 of the Criminal Procedure Code. On the evidence of the document examiner, it was counsel's submission that the document examiner gave his expert opinion, which was correctly relied upon by the magistrate. Lastly, counsel submitted that the

sentences were neither harsh nor excessive.

I have evaluated the evidence on record as is required of me in a first appeal. The appellant was convicted of uttering a false document (count 3); uttering a false document (count 4); stealing (count 5); and stealing (count 6).

In count 3 and 4, he was alleged to have uttered Standard Chartered Bank Cheques purporting them to be genuine and valid cheques from the International Organization for Migration. There is no evidence that the said two cheques numbers 204208 and cheque number 204201 were not genuine or valid. These were the same cheques with regard to counts 1 and the alternative charge, as well as count 2 and the alternative charge, for which the appellant was acquitted. All the evidence on record showed that the said two cheques were genuine cheques from International Organization for Migration. They were banked with Chase Bank and were cleared. The evidence appears to be that the said two cheques got into the wrong hands, and were banked in a dubious account at Chase Bank. That was not evidence that the two cheques were not valid or genuine. They were properly signed and issued by International Organization for Migration. Therefore the appellant should not have convicted of count 3 and 4. I will acquit him on those two counts.

The convictions on counts 5 and count 6 were for stealing contrary to section 275 of the Penal Code. Count 5 was for stealing of Kshs.26,000/= on 1/8/2003, while count 6 was for stealing Kshs. 855,000/= on 4th August 2003. Both thefts occurred by withdrawing money from Chase Bank Wabera Branch from the account of International Organization for Migration. The evidence on record is that the account was in the name of International Organization for Migration. However, that organization disowned the account, which appeared to have been opened by a sole director. That director did not come to complain. There is no complainant from the owner of the account at Chase Bank Wabera Street. Therefore, technically the offences of theft contrary to section 275 of the Penal Code could not be established, as there is no complainant who claimed that the appellant stole from that account.

In addition to the above, the learned magistrate did not appear to have considered the defence case. The appellant stated that he had left his copies of documents including a copy of identification with the Chase Bank Branch, when he had applied to open an account and was given conditions which he could not fulfill. Also the handwriting for the documents opening the particular account in question was not taken to the handwriting examiner for comparison, as was stated in the evidence of the Investigating Officer **PW8 CPL PATRICK KISILU**. It is also in evidence that the photograph on the application for opening the account was not that of the appellant. The photograph that was published in the papers was obtained from the Registration of Persons Bureau, not the bank. Clearly, there were certain gaps in the evidence which required to be explained. The document examiner claimed that the handwriting in the documents for withdrawal of the money was like that of the known handwriting of the appellant. However, not much explanation was given about the similarity of handwriting. In my view, in the circumstances of this case there should have been details adduced in evidence, on how the comparison was made, what methods were used and what expertise was applied by the document/handwriting examiner to arrive at the conclusion of similarity of handwriting. That was not done, thus leaving on record only general statements. Probably, the appellant should have been charged with other offences, not the offences on which he was charged and convicted.

In criminal cases, the burden is on the prosecution to prove an accused guilty beyond any reasonable doubt – see *MUIRURI –vs- R.* (1983) KLR 2005. Having evaluated all the evidence on record, I am of the view that the prosecution failed to prove the guilt of the appellant on the charges that he was convicted of beyond reasonable doubt. I will allow the appeal. I do not find it necessary to address the issue of sentence, because having allowed the appeal on conviction, I will set aside the sentence.

Consequently, and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. If the appellant is in custody, I order that he be released, unless otherwise lawfully held. If he paid the fines, I order that the same be refunded to him.

Dated and delivered at Nairobi this 29th April 2008.

George Dulu

Judge

In the presence of ?

Appellant

Mr. Memusi for appellant

Mrs. Kagiri for State

Mwangi – court clerk