

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 90 of 2005

DAVID WAINAINA MUBEA APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of

R.N. Muriuki – Senior Resident Magistrate in the Resident Magistrate’s Criminal Case No. 522 of 2003 at KANGEMA)

JUDGMENT

The appellant was charged with various counts in the lower court. He was charged with stealing by clerk contrary to section 281 of the penal code. He is also charged with altering the crossing on cheques contrary to section 356 (a) of the penal code. Finally he was charged with making documents without authority contrary to section 357(a) of the penal code. The appellant was employed as an accounts clerk of the complainant. After hearing of the case the learned magistrate convicted him as charged. He has brought this appeal against his conviction and sentence. The documents that were used at the trial were numerous relating to cheques that allegedly were altered by adding figures to argument the amount to be withdrawn. It is alleged that the appellant was the person who altered those cheques and the document to support the cheques. As the first appellant court there is a responsibility to reevaluate the evidence of the lower court and also consider the question of law and fact relating to the charge. I have gone through the many exhibits relied upon by the prosecution and I have found that amongst the documents there is no counterfoil of those cheques. It should be noted that the appellant was not the authorized signatory to the cheques. It is therefore vital for this court to reevaluate the evidence to consider those counterfoils and confirm that that amount reflected thereon did not tally with the cheques that were draw. Inquiries have been made by this court to the lower court with a view to having those counterfoils produced and to date they have not. Bearing that in mind I find that the doubt this court entertains whether indeed the alterations on the cheques did not marry with the counterfoil must be exercised in favour of the appellant. On that basis alone this appeal will be allowed and the appellant’s conviction at the lower court is hereby quashed and the sentenced is hereby set aside. The appellant shall be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 24th day of September 2008.

MARY KASANGO

JUDGE