



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Criminal Appeal 77 of 2006**

**(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 318 OF 2005)**

**KALUME NGALA KALUME.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant, Kalume Ngala Kalume, was charged and convicted on:

- (i) Count 1 with stealing by servant contrary to section 281 of the Penal Code:

The particulars of that offence are that on diverse dates between 1<sup>st</sup> January 2002 and 28<sup>th</sup> February 2005 at Mtwapa Creek Service Station (Caltex) in Mtwapa Township of Kilifi District within Coast Province, being the Manager of Mtwapa Creek Service Station (Caltex) stole from the said Mtwapa Creek Service Station (Caltex) Kshs. 5,761,200 which came into his possession by virtue of his employment.

- (ii) Count 2 with forgery contrary to section 349 of the Penal Code

The particulars of the offence are on the 18<sup>th</sup> day of October 2004, at Mtwapa Creek Service station (Caltex) in Mtwapa town of Kilifi district within Coast Province, with intent to defraud altered a carbon copy of a bank pay-in-slip dated 18<sup>th</sup> October 2004, to read Ksh.177,000 purporting it to be the correct amount of money he deposited in account No. 214720137 of Mtwapa Creek Service Station (Caltex) at Kenya Commercial Bank Mtwapa Branch.

- (iii) Count 3 with forgery contrary to section 349 of the Penal Code.

The particulars of the offence are that on the 17<sup>th</sup> day November 2004, at Mtwapa Creek Service station (Caltex) in Mtwapa town in Kilifi district within Coast Province, with intent to defraud altered a carbon copy of a bank pay-in-slip dated 17<sup>th</sup> November 2004, to read Kshs.175,566 purporting it to be the correct amount of money he deposited in account No.214720137 of Mtwapa Creek Service station (Caltex) at Kenya Commercial Bank Mtwapa Branch.

- (iv) Count 4 with forgery contrary to section 349 of the Penal Code.

The particulars of the offence are that on the 20<sup>th</sup> day of November 2004, at Mtwapa Creek Service station (Caltex) in Mtwapa town of Kilifi district within Coast Province with intent to defraud altered a carbon copy of a bank pay-in-slip dated 20<sup>th</sup> November 2004 to read Kshs. 215,835 purporting it to be the correct amount of money he deposited in account No. 214720137 of Mtwapa creek services station (Caltex) at Kenya Commercial Bank Mtwapa Branch.

(v) Count 5 with forgery contrary to section 349 of the Penal Code.

The particulars of the offence are that on the 4<sup>th</sup> day of December 2004, at Mtwapa Creek Service Station (Caltex) in Mtwapa town in Kilifi district within Coast Province, with intent to defraud altered a carbon copy of a bank pay-in-slip dated 4<sup>th</sup> December 2004, to read Ksh.187,833 to be the correct amount of money he deposited in account No. 21470137 of Mtwapa Creek Service Station (Caltex) at Kenya Commercial Bank Mtwapa Branch.

(vi) Count 6 with the offence of forgery contrary to section 349 of the Penal Code.

The particulars of the offence are that on the 7<sup>th</sup> day of December 2004, at Mtwapa Creek Service station (Caltex) in Mtwapa town of Kilifi district within Coast Province, with intent to defraud altered a carbon copy of a bank pay-in-slip dated 7<sup>th</sup> December 2004, to read Kshs. 179,687 purporting it to be the correct amount of money he deposited in account No.214720137 of Mtwapa Creek Service Station (Caltex) at Kenya Commercial Bank Mtwapa Branch.

(vii) Count 7 with the offence of forgery contrary to section 349 of the Penal Code.

The particulars of the offence are that on the 18<sup>th</sup> day of December 2004, at Mtwapa Creek Service Station (Caltex) in Mtwapa town of Kilifi district within Coast Province with intent to defraud altered a carbon copy of a bank pay-in-slip dated 18<sup>th</sup> December 2004, to read Kshs. 176,243 purporting it to be the correct amount of money he deposited in account No. 214720137 of Mtwapa Creek Service Station (Caltex) at Kenya Commercial Bank Mtwapa Branch.

(viii) Count 8 with the offence of forgery contrary to section 349 of the Penal Code

The particulars of the offence are that on the 4<sup>th</sup> January 2005, at Mtwapa Creek Service Station (Caltex) in Mtwapa town in Kilifi district within Coast Province, with intent to defraud altered a carbon copy of a bank pay-in-slip dated 4<sup>th</sup> January 2005 to read Kshs. 279,326 purporting it to be the correct amount of money he deposited in account No. 214720137 of Mtwapa Creek Service Station (caltex) at Kenya Commercial Bank Mtwapa Branch.

(ix) Count 9 with the offence of forgery contrary to section 349 of the Penal Code

The particulars are that: on the 5<sup>th</sup> day of January 2005, at Mtwapa Creek Service Station (Caltex) in Mtwapa town of Kilifi district within Coast Province, with intent to defraud altered a carbon copy of a bank pay-in-slip dated 5<sup>th</sup> January 2005, to read Kshs. 180,653 purporting it to be the correct amount of money he deposited in account No. 214720137 of Mtwapa Creek Service Station (Caltex) at Kenya Commercial Bank Mtwapa Branch.

(ix) Count 10 with the offence of forgery contrary to section 349 of the Penal Code.

The particulars are that on the 13<sup>th</sup> day of January 2005, at Mtwapa Creek Service Station (Caltex) in Mtwapa town of Kilifi district within Coast Province, with intent to defraud altered a carbon copy of bank pay-in-slip dated 13<sup>th</sup> January 2005 to read Ksh. 143,393 purporting it to be the correct amount of money he deposited in account No. 214720137 of Mtwapa Creek Service Station (Caltex) at Kenya Commercial Bank Mtwapa Branch.

(x) Count 11 with the offence of forgery contrary to section 349 of the Penal Code

The particulars of the offence are that on the the 20<sup>th</sup> January 2005, at Mtwapa Creek Service Station (caltex) in Mtwapa town in Kilifi district within Coast Province, with intent to defraud altered a carbon copy of a bank pay-in- slip dated 20<sup>th</sup> January 2005 to read Kshs. 114,777 purporting it to be the correct amount of money he deposited in account No. 214720137 of Kenya Commercial Bank Mtwapa Branch.

(xi) Count 12 with the offence of forgery contrary to section 349 of the Penal Code

The particulars of the offence are that on 5<sup>th</sup> February 2005 at Mtwapa Creek Service Station Caltex in Mtwapa town in Kilifi district within Coast Province with intent to defraud altered a carbon copy of a bank paying slip dated 5<sup>th</sup> February 2005 to read 186,136 purporting to be the correct amount of money he deposited in account No. 214720137 of Mtwapa Creek Service Station Caltex at Kenya Commercial Bank Mtwapa Branch.

He was sentenced to serve four (4) years imprisonment. He has appealed to this court against the conviction and listed six (6) grounds of appeal.

Foud Faraj Awadh (PW1), proprietor of Caltex Petrol Station at Mtwapa Creek checked his books of accounts on 16<sup>th</sup> February 2002 and discovered a shortfall of Sh. 350,000/=. He looked at several entries, to wit.

i) entry of 5.2.2005 at page 71 shows Sh.186,136

The deposit receipt/slip shows similar amount. The statement shows that Kshs.136,136 was deposited. The sum of Ksh. 50,000 was missing.

ii) Entry of 20<sup>th</sup> January 2005 at page 30. The deposit receipt/slip shows Kshs.114, 777/20 while the cash slip banked shows Shs. 128,777. The sum of Ksh.14000/20 was missing.

iii) entry on 13<sup>th</sup> January, 2005. Cash deposit was Ksh. 143,393. The receipt book shows Kshs. 43,393 only was deposited. Kshs. 100,000 was missing.

iv) entry on 4<sup>th</sup> January 2005. Cash deposit was Ksh.279,326. The actual deposit was Ksh.150,653. The sum of Ksh.128,673 was missing.

v) Entry of 5<sup>th</sup> January 2005. Cash deposit was Ksh.180,653. The actual banking was Ksh. 150,653. The sum of Ksh. 30,000 was missing.

The appellant conceded the short-fall as enumerated herein-above. He under took to make good the loss after selling his parcel of land. Subsequently he failed to report on duty for a week. The complainant reported the matter to the police culminating into the arrest, charging and prosecution of the appellant.

In cross-examination *PW1* was categorical that the

appellant was the only person doing the banking but there was no specific time for banking.

*Antony Ben Owuor (PW2)* is an accountant since 1984. He was commissioned by the complainant to audit their books for December 2004 to January 2005. The complainant gave him the systems for operation. He discovered anomalies. He prepared monthly report for money received and money banked.

He detected 11 instances of the anomalies, to wit.

i) On 7<sup>th</sup> December 2004 receipt book shows Ksh.179,687 while the bank statement shows

Ksh.79,687. The sum of Ksh. 100,000 was missing.

ii) On 18<sup>th</sup> December 2004 receipt shows Ksh. 177,000 while the statement shows only Ksh.77,000. The sum of Ksh.100,000 was missing.

iii) On 17<sup>th</sup> November 2004 receipt shows Kshs. 175,566 while the statement shows Ksh. 55,566. The sum of Ksh.120,000 was missing.

iv) On 20<sup>th</sup> November 2004 receipt book shows Ksh.215,835/50 while the bank statement shows, Ksh.165,835/50. The sum of Ksh. 50,000 was missing.

v) On 4<sup>th</sup> December 2004 receipt book shows Ksh. 187,833 was banked. While the statements shows Sh. 164,833. The sum of Ksh. 23,000 missing.

vi) On 7<sup>th</sup> December 2005 receipt shows Ksh. 179,68 was banked while the statement shows Ksh. 79,687. The sum of Ksh.100,000 was missing.

vii) On 18<sup>th</sup> December 2004 the bank slip/receipt shows Ksh. 176,243 while the statement shows Kshs. 121,243. The sum of Kshs. 55,000 missing.

viii) On 5<sup>th</sup> January 2005 bank slip shows Kshs. 143,392 while the statement shows Ksh.114,777. The sum of Ksh.30,000 was missing.

ix) On 13<sup>th</sup> January, 2005 bank slip shows Ksh.143,393 while the statement shows Ksh.43,393. The sum of Ksh.100,000 was missing.

x) On 20<sup>th</sup> January 2005 bank slip shows sh.128,767 while the statement shows Ksh. 114,777. The sum of Ksh. 13,980 was missing.

xi) On 5<sup>th</sup> February 2005 bank slip shows Sh. 186,136.50 while the statement shows Sh136,136/50. The sum of Ksh.50,000 was missing.

He prepared a report which disclose that from January 2002 to February 2005, excluding January 2003 to June 2003, a total of Ksh.5,761,100 was not banked. This includes Ksh.650,000 constituted by alterations on the bank slips. Confronted by the figures, the appellant could not offer any explanation. He maintained that his report was accurate and in accordance with the accounting practice.

*Phoebe Mvoi Mwasombe (PW3)* an employee of KCB Ltd. Mtwapa Branch, at all material times, recalled that the appellant used to do banking for and on behalf of Mtwapa Creek Manager. She dealt with the transactions in-question. On request by the prosecution she checked the originals and duplicates retained by the customer and confirmed there were anomalies. The bank received the money and the original banking slip while the customer retained the duplicate. The bank also issued bank statement which she also looked at in relation to the questionable transactions. She produced six (6) bank paying-in-slips and five(5) statements in respect of which the amount in figures and the amount in words differed. She confirmed that the appellant used to write the banking slips in her presence. That she was acquainted with the appellant's signature and handwriting.

*Emmanuel Kenga (PW4)* a document examiner of 14 years experience received questionable handwritings and signatures from P.C. Mbavu. He examined the same and formed the opinion that the writings and the signatures in the 27 questionable documents were by the same hand - the appellant's.

*No.63614 P.C. Duncan Makeya (PW5)* of CID Office Mtwapa was sent by P.C. Minda to get original documents touching and concerning this case from the bank. The audit by the complainant and the report emanating therefrom were equally given to the prosecution. Specimen signatures and handwriting of the

appellant were taken and sent for analysis. A report was received which was admitted in evidence.

At the close of the prosecution's case the learned trial magistrate put the accused on his defence. The accused made sworn statement.

According to him, his duties involved training staff. The director (complainant) was the one doing the banking. He was not involved with money. He was paying salaries from the sales. That several people collected the money as there was no full time accountant. He conceded having asked for 3 days leave to attend personal issues at home. When he returned he was arrested. He had been made a Manager in 2004 and during his tenure in office did not see any missing pages in summary register. He was surprised to find a book with missing pages. He was depositing the money with Mtwapa KCB Ltd. Different cashiers took the deposits. Sometimes the Manager took the deposits. He denied stealing the money.

On the evidence, it is common ground that, the accused was employed by the complainant and rose through the ranks to the position of Manager in the year 2004. The complainant entrusted him, inter-alia, with the banking of the money from daily sales. *Phoebe Mvoi Mwasombe (PW3)* confirmed that the appellant was the only person doing banking on behalf of the complainant. The bank received the money together with the original banking slip while the customer retained the duplicate. The bank also issued bank statements which she also examined in relation to the questionable transactions. She also produced six (6) bank paying-in-slips and five (5) statements in which the amount in figures and the amount in words were at variance. She confirmed that the appellant used to write the banking slips in her presence and that she was acquainted with the handwriting and signature of the appellant.

In my judgment, based on the evidence, the accused had the exclusive control of the finances and the banking during the period the questionable transactions were made.

*Emmanuel Kenga (PW4)*, a document examiner of 14 years standing examined the questionable documents relating to banking and formed the opinion that the writings and the signatures on the 27 questionable documents were by the same hand-the appellant.

Confronted by *Faud Faraj Awadh (PW1)* the appellant accepted the loss and undertaking to make good the shortfall which he acknowledged at Ksh. 350,000. Then for three (3) consecutive days he failed to show up for unexplained reasons. Faraj reported the matter to the police culminating into the arrest of the appellant.

Having compared the nine (9) originals pay-in-slips with the cash book and relying on the evidence of *PW2* and *PW4*, it is clear to me that a sum of Kshs. 581,000 was never banked by the appellant who had the exclusive duty of supervising and banking the daily receipts. The original receipts did not tally with the cash book. In an attempt to conceal the anomalies the duplicates were altered. By failing to bank the various amounts to the tune of Ksh.581,000 the appellant has thus fraudulently without any claim or colour of right converted the same to his own use. That, in law, amounts to theft.

Against that backdrop, I am prepared to uphold the appellant's conviction. He had the opportunity, the means and the motive and did steal the same. I find no merit in his appeal which I order dismissed.

DATED and delivered at Malindi this 25<sup>th</sup> day July of 2007.

N.R.O.OMBIJA

JUDGE