REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 950 of 2003

(From Original Conviction and Sentence in Criminal Case No.1248 of 2001 of the Chief Magistrate's Court at Nairobi – M. Mlanga (Mrs) - SRM).

DANIEL MOTUGI MOKUA……..……..……..……..APPELLANT

VERSUS

REPUBLIC……..……...….RESPONDENT

J U D G M E NT

The Appellant, **DANIEL MOTUGI MOKUA STEPHEN** and another were initially charged with four counts in the Chief Magistrate's Court at Nairobi. In the first count, they were jointly charged with stealing contrary to Section 275 of the Penal Code. The item allegedly stolen by the two was a bankers cheque in the sum of KShs.446,300/- payable to Daystar University. In the alternative they were jointly charged with handling the same contrary to Section 322 of the Penal code. The two were further charged with Forgery contrary to Section 349 of the Penal code. The particulars being that the two forged the said cheque and had it deposited in the appellant's account. The third count which faced the appellant and his co-accused was that of uttering a false document contrary to Section 353 of the Penal Code. It was alleged that the said subject cheque was uttered to Peter Muthee Kimotho (P.W. 3) and employee of Barclays Bank of Kenya Limited, Haile Selassie Avenue branch.

Following a full trial the Appellant stood convicted on 2 counts; that of handing stolen goods and uttering a false document. He was then sentenced to serve 7 and 3 years imprisonment respectively on each count. The Appellant was aggrieved by both the conviction and sentence and hence lodged this appeal.

The Appellant in his petition of appeal aised three grounds:

1. That the learned trial magistrate erred in law and fact by convicting the Appellant on the alternative count of handling stolen goods without considering that the explanation given was plausible.

2. That the learned trial magistrate erred in law in not considering his defence and not finding that the Appellants conduct was consistent without innocence.

3. That the trial magistrate erred in law and fact in convicting the Appellant for uttering a fake document when there was no conclusive evidence.

In support of the aforesaid rounds opposed the appeal. Counsel submitted that there is evidence of P.W. 4 that the Appellant presented to him a cheque with a deposit slip.

The brief facts of the case are that a cheque to the order of Daystar University was sent from London. The cheque never reached the University. Somehow it found its way into the hands of the Appellant and the co-accused. The Appellant attempted to en-cash the cheque at Barclays Bank of Kenya Limited, Haile Selassie Avenue branch on 11/6/01. The Appellant had an account with said bank. The Appellant presented the said cheque to P.W. 4 who passed it over to P.W. 4 who was her supervisor for further instructions regarding payment as the amount on the cheque was beyond her limit regarding payment. It was the evidence of P.W. 4 that he had known the Appellant since 1999 he opened the account. The said cheque was apparently for payment of tuition fees for a foreign student at the said University from an overseas benefactor. The evidence of the document examiner was to the effect that he formed an opinion that the bank deposit voucher exhibit 12, was written and signed by the Appellant. In his defence, the Appellant did not deny receipt of the cheque. However he stated that it was the coaccused who requested him to en-cash the cheque for him in his account as the coaccused did not have an account. The Appellant obliged and sometimes later the coaccused brought the cheque written in the Appellant's name and together proceeded to the Appellant's account aforesaid to en-cash it. It was in the process of having the cheque en-cashed that the anomaly that led to the Appellant and co-accused being arrested and charged was detected. It was his case therefore that his involvement in the matter was merely to assist a friend and therefore did not commit the offences with which he was charged.

P.W. 4 then passed the two documents to P.W. 3, her Supervisor. P.W. 3 in turn requested the drawee bank to confirm who the payee of the cheque was. The drawee bank sent a fax indicating that the payee was Daystar University. That the cheque the Appellant had presented had been altered to read his name as the payee. Counsel further submitted that it had been established through the evidence of P.W. 6 that the account into which the cheque had been presented belonged to the Appellant who was the sole signatory. Counsel further submitted that the document examiner (P.W. 8) in his evidence confirmed that the contents of the cheque had been altered but could not tell by whom. In those circumstances, it was the learned state counsel's submission that the conviction for the offence of handling was safe.

Regarding the offence of uttering counsel submitted that it was the evidence of P.W. 4 that it was the Appellant who tendered the cheque and the deposit slip to her. She the Appellant as a customer. Regarding sentence, counsel submitted that the sentence imposed was legal and even lenient and ought not therefore to be discussed.

In his reply, the Appellant reiterated that he was requested by his co-accused to cash the cheque for him. He took the cheque to his bank to assist a colleague.

I have carefully re-evaluated the evidence adduced before the lower court bearing in mind that I did not see or hear the witnesses and have given due allowance. **(See Okeno – Vs- Republic (1972) E.A 32)** From the evidence it is common ground that the Appellant was in possession of the cheque and that he presented it to P.W.4 for encashment. The Appellant in his defence and indeed in his submissions says as much. www.kenyalaw.org Daniel Motugi Mokua v Republic [2006] eKLR 5 His only explanation being that he was given the cheque by the co-accused to en-cash it for him since he did not have an account. In his defence, the Appellant's co-accused elected to keep quiet. So that at the end of the day the court was only left with the word of the Appellant. There was no other evidence to back up the Appellant's story. This placed the trial magistrate in a dilemma. No wonder she found herself stating;

"……2nd accused on his defnce elect to keep quiet leaving everything to the court to decide. He is the one who could have clarified to this court where a cheque No. DT 461910 for Kshs.446,200/- originated from. It is difficult to tell whether both accused stole the said cheque or the said cheque stolen by 2nd accused who forged it by deleting the original payee Daystar University and inserting the 1st accused's name as the

payee……"

In my view the learned trial magistrate seriously misdirected herself in law from the above extract. It would seem that she attempted to shift the burden of proof to the coaccused.

The co-accused had no duty to prove his innocence or explain the original of the cheque. The duty is cash upon the prosecution at all times to prove its case beyond reasonable doubt. In the instant case, the prosecution was expected to prove that the Appellant stole the cheque in question, handled it and indeed uttered it to the P.W. 4. Did the prosecution discharge this obligation with regard to the Appellant? Thre is no doubt at all that the cheque the subject matter of the charges was stolen. There is ample evidence on record in this regard. There is also ample evidence that the Appellant handled the subject cheque.

P.W. 4 testified the Appellant presented a cheque to be deposited in his account. P.W. 7 also testified on the issue in the following terms.

> **"……I interrogated both accused in the genuinity of the said cheque and 1st accused told me that he had been given the said cheque by the 2nd accused….."**

Regarding the 2nd accused the witness stated

> **"…..2nd accused told me that he had been given the said cheque by somebody else but since he had no account he requested the 1st accused to have the cheque payable under his account……"**

In his own defence, the Appellant also clearly states

> **"……on 06/06/01 when a friend by the names Ombasa Nyaata Jason came to my office at 10.43a.m. and requested me to assist him en-cash a cheque because he did not have a bank account I have him my names in order for the cheque to be prepared in my name…….On 16/6/01 he telephoned me and we met at Gill House…..went to the bank. He gave the cheque. I wrote the paying in slip and I handed over the cheque to the cashier…"**

It is clear from the aforesaid prices of evidence that the Appellant did handle the cheque. Was his handling of the cheque innocent as he wants us to believe?

In the case of **John Kamundia Gitau & another –vs- Republic, CR. App. No. 28 of 1997 (unreported)** it was held that

> **"where an accused person is charged with receiving stolen property, his guilty is not established if the explanation given is reasonable and might possibly be true, even if the court is not convinced that it is in fact true……."**

The Appellant explained that he came by the cheque through the co-accused. This fact is buttressed by the evidence of P.W. 7. In my view that explanation without any other evidence to the contrary remains unchallenged particularly their being no direct or other evidence as to the circumstances under which the cheque was stolen. I think that the explanation offered by the Appellant was reasonable and could possibly be true. Had the learned trial magistrate taken into account that aspect of the matter, she would probably have not convicted the Appellant of the charge. It is also worth noting that when the Appellant was summoned by the bank Manager and asked about the source of the cheque, the Appellant took a long the co-accused and introduced him to the bank manager as the person who could give rational answers concerning the origin of the cheque. In my view the conduct of the Appellant was inconsistent with guilt. Otherwise it would be foolhardy for a person knowing that he had uttered a cheque to a bank in suspicious circumstances when summoned by the bank manager of the same bank to innocently present himself. What I have stated applies with equal force on the 1st issue of uttering. In my view it was innocent.

The trial magistrate relied heavily on the evidence of the document examiner to convict the Appellant. However, in my view the evidence of the document examiner did not point to the guilt of the Appellant beyond reasonable doubt. This is in view of the fact that, there lingered doubts as to who between the Appellant and the co-accused actually forged the cheque. There was no evidence tendered by the prosecution to show that any specimen of the co-accused writing was taken to the handwriting expert to determine who could have altered the said cheque. It was incumbent upon the prosecutions to take both the handwriting of the Appellant and co-accused to the document examiner. The omission by the prosecution was fatal. The Appellant did not deny the fact that he is the one who wrote the details in the paying in slip and signed the same. This is what the document examiner found as fact. Had the document concluded that the alterations on the cheque were effected by the Appellant, different consideration would have arisen.

The Appellant's complaint that his defence ewas not given due consideration is not without merit. No mention at all is made by the learned trial magistrate with regard to the detailed defence advanced by the Appellant. In my view the Appellant gave an account that with consistent with his innocence both in cross-examination of witnesses and in his defence. There was no evidence at all to link the Appellant with the altering of the said cheque. The Defence was plausible and created a reasonable doubt that ought to have been resolved in favour of the Appellant. Indeed the said defence did even receive support from the prosecution evidence.

In conclusion, I hold the view that the conviction of the Appellant was based on weak and sketchy evidence which cannot be allowed to stand. In the end then, I allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set free forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 23rd day of January, 2006

M.S.A. MAKHANDIA

JUDGE