



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**CRIMINAL APPEAL 685 OF 2002**

**(From original conviction(s) and Sentence(s) in Criminal case No. 2377 of 2000 of the Senior Principal Magistrate's Court at Nairobi (Injene Indeché (Mr.) – SRM)**

**JAMINE OWALA MAGOWI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**JAMINE OWALA MAGOWI** was together with another charged with five counts of offences. In count 1 and 2 both were jointly charged with **STEALING** contrary to Section 275 of the Penal Code and in the alternative to each **HANDLING STOLEN PROPERTY** contrary to **Section 322(2)** of the **Penal Code**. In count II the Appellants co-accused was charged alone with **FORGERY** contrary to **Section 349** of the Penal Code. In count 4 both were jointly charged with stealing contrary to **Section 275** of the Penal Code. In count 5 the Appellant was charged alone with stealing contrary to **Section 275** of the **Penal Code**. After a full trial, the Appellant was found guilty and convicted in the main counts of stealing contrary to **Section 275** of the **Penal Code** in count 1 and 2. In count 1 the Appellant was alleged to have stolen a cheque leaf No. 419432 the property of express Kenya Limited jointly with others. In count 2 the Appellant with others was alleged to have stolen Cheque No. 419433. Both offences are alleged to have been committed on 30<sup>th</sup> October 1999.

The Appellant was sentenced to three years imprisonment on each count with sentences ordered to run concurrently. The Appellant was aggrieved by the conviction and sentence and therefore lodged this appeal.

The brief facts of the prosecution case was that on 10<sup>th</sup> December 1999, PW1 the Chief Accountant of Express Kenya Limited was doing reconciliation of the Company's accounts when he discovered two strange out payments. One was vide cheque No. 419432 exhibit 3 in the sum of Kshs.941,300/- and another vide cheque No. 419433 exhibit 4 in the sum of Kshs.964,280/-. He called for the chequebook exhibit 1(a). In the cheque PW2, a Senior Accountant at Express (K) discovered two cheques with counterfoils missing at the centre of the chequebook with cheque leaves on both ends intact. Later on the two missing cheques were retrieved cheque Exhibit 3 was received by City Bank Manager PW7, form co-op Bank. It was for 941,300/- payable to Kumbe Distributors. PW7 also received chief Exhibit 4 payable to the 1<sup>st</sup> accused in case Richard Otieno Onyango in sum of Kshs.864,280/-. Both cheques were cleared

and Express Kenya Account debited. PW8 a banker with KCB Muindi Mbingu Street said that on 2<sup>nd</sup> September 1998, the 1<sup>st</sup> accused in the case opened an account with them. on 3<sup>rd</sup> November 1999 he deposited exhibit 4 in the account and withdrew the amount in six withdrawals. PW8 a banker with Standard chartered bank, Industrial Area branch confirmed that the Appellant to open an account with them on 10<sup>th</sup> November 1999 with a cash deposit of Kshs.20,000/-. On 12<sup>th</sup> November 1999 he deposited Kshs.105,000/- PW9 a handwriting expert formed the opinion that the Appellant's co-accused wrote on the cheque exhibit 3. PW10, a finger print expert found the Appellants finger impression of the left thumb on the cheque exhibit 4. The Appellant's defence was that he worked as a messenger in Express (K) Ltd. and that he handled all work assigned to him. he alleged he had differences with the Chief Accountant, PW1 who caused his transfer from Accounts Department. He admitted buying various furniture household items, television and radio in November 1999. He said the money for the purchases came from his wife's business.

The Appellant raised 11 grounds of appeal in a petition of appeal filed on 2<sup>nd</sup> July 2002 on his behalf by **WACHAKANA & CO.** advocates. The Appellant however prosecuted the appeal himself. The grounds of appeal are as follows:

- “1. THAT, the learned magistrate erred in law when he failed to consider evidence of Ronald Munge, the source of the alleged forgery.***
- 2. THAT the learned magistrate erred in law and misdirected himself when he failed to consider that the cheque in question was brought by Mr. Ronald Munge, and there was no evidence to show that the accused person stole it.***
- 3. The learned magistrate erred in Law and misdirected himself in rely on a probability that even if the Accused never committed the forgery he was party to it without calling evidence.***
- 4. THAT, the conviction was against the weight of the evidence.***
- 5. THAT, the learned trial magistrate erred in law and misdirected himself in finding that the offence was proved to the standards required by law.***
- 6. THAT, the sentence was harsh and excessive as to occasion a failure of justice.***
- 7. THAT, the learned magistrate erred in law by failing to make a finding of fact that circumstantial evidence for forgery needed independent corroborated evidence to sustain a conviction.***
- 8. THAT, the learned trial magistrate erred in law in failing to rely on the statement by the accused that the prime suspect Mr. John Munge who was not called by the prosecution, did not have an account and had requested the Accused to allow for his account to facilitate a business transaction.***
- 9. THAT, the learned trial magistrate erred in law in failing to recognize that all the monies from the accused account were all given to Munge.***
- 10. The learned trial magistrate erred in law by shifting the burden of proof to the Appellant on all the counts.***
- 11. The learned trial magistrate erred in law by shifting on extraneous issues, which were not part of the court record.”***

The State was unrepresented in this appeal despite having been served with the same. The Appellant in his submissions challenged the conviction on the grounds that the learned trial magistrate erred to find that even if the Appellant was authorized to handle cheques, he could not handle signed ones. The Appellant submitted that the finger print expert could not say clearly, at which stage the Appellant's fingerprints came to be impressed on the cheque. That in the circumstances, PW10 could not assist the

court in determining whether the Appellant handled the cheque before or after it was stolen. The Appellant continued to say that PW4's evidence was clear that the Appellant moved documents from place to place and therefore the fact that the Appellant handled the cheque could have been in the course of his duty.

The Appellant continued to submit that both PW1 the Chief Accountant and PW2 the cashier admitted that the chequebook was kept in safe custody under lock and key and that the Appellant had no access to the same. The Appellant submitted that the two witnesses were the persons who held the keys to the safe and that both confined that the safe was not broken into.

I have carefully considered the appeal, re-analysed and re-evaluated the entire evidence adduced before the trial court being in mind that I neither saw nor heard any of the witnesses. See **OKENO vs. REPUBLIC 1972 EA 32.**

The Appellant's conviction was predicated on the finding that his left thumb print impression was found on the cheque exhibit 3, which is the subject matter of count 1. The learned trial magistrate concluded that the Appellant was guilty on the basis that even though the Appellant handled cheques in the course of his work, they did not include those plucked out from the centre of the chequebook before they were reached. The learned trial magistrate also found a connection between the theft of the cheque and its clearance by the bank and the opening of the Appellant's account and deposit of huge sums of money.

The evidence against the Appellant was circumstantial. The test for circumstantial evidence is clearly stated in **David Merita Gichuhi vs. Republic CA No. 138 of 2003** at page 6 where Court of Appeal held: -

***“Before a court can base a conviction exclusively on circumstantial evidence, it must be satisfied that the inculpatory facts irresistibly point at the accused and are incompatible with the innocence of the accused and incapable of any explanation upon any other hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”***

The issue is whether the circumstantial evidence against the Appellant irresistibly points to his guilt. The circumstantial evidence must be viewed in its totality, so that the Appellant was proved by the prosecution to have handled the cheque leaf exhibit 3. the date of handling is unknown. However considering the cheque leaf exhibit 3, together with exhibit 4 the very next cheque left to it, going by the serial numbers, (419432 and 419433 respectively) were plucked out of the centre pages of the cheque plucked out of the centre pages of the cheque book exhibit 1(a) as per evidence of PW3 the Senior Accountant, the handling must be considered to have been at the time the two cheque leaves were plucked out of the cheque book first before they were drawn and banked in the account of Kumbe Distributors and that of 1<sup>st</sup> accused in the case. That was not the only evidence and it was to be taken together with other circumstantial evidence which was the fact that on 3<sup>rd</sup> November 1999. PW5 an official at KCB received exhibit 4 written in favour of 1<sup>st</sup> accused in sum of Kshs.864,280/-. That cheque was cleared by Citi Bank on 4<sup>th</sup> November 1999. the 1<sup>st</sup> accused withdrew first amount of Kshs.65,000/- on 10<sup>th</sup> November 1999. that was the same day the Appellant opened his bank account at Standard Chartered Bank and deposited Kshs. 20,000/- as per evidence of PW8. Two days later he deposited Kshs.105,000/-. These sums were unexplained in the Appellant's defence. The Appellant also bought various household goods and electrical goods including television and radio, which he admitted in defence. The two TV and radio were exhibit 33 and 34 complete with receipts of purchase and permits exhibits 34, 35, 37 and 38. The evidence of PW12 who recovered all these documents and electricals was very clear that the goods were bought on 9<sup>th</sup> November 1999 and the other after that date. It is therefore quite clear in this evidence that the Appellant suddenly came by a large amount of money whose source he could not clearly explain.

The Appellant has complained that the court shifted the burden of proof against him. That is not correct. The evidence before court was clear that the Appellant came by large sums of money and went

on a shopping spree at the same time that the cheques were stolen and used to withdraw over 1 million from the Appellant's employer. The Appellant was rightly expected in law to explain how the came by those large sums of money. The requirement to offer an explanation is not shifting of burden as the Appellant submitted.

The Appellant submitted that various witnesses were not called to testify and others were not investigated. PW12, the investigating officer did a commendable job. The only person demonstrated to have failed to show up to give evidence was one **RUGU** implicated by the Appellant's co-accused as the one who deposited money in his account. T he failure to call him did not in my view destroy or weaken the inference of guilt that was held against the Appellant in view of the circumstantial evidence against him. The prosecution called sufficient evidence to prove the charges against the Appellant.

Having considered this appeal and all issues raised by the Appellant, I am satisfied that the learned trial magistrate came to the right conclusion. The prosecution proved its case against the Appellant in both counts of stealing the cheque leaves as charged in counts 1 and 2. the conviction entered was safe and should not be disturbed.

The upshot of the appeal is that it should fail. The appeal is therefore dismissed.

Dated at Nairobi this 1<sup>st</sup> day of November 2006.

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mr. Wachakana for the Appellant.

CC: Tabitha

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**LESIIT, J.**

**JUDGE**