REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 544 OF 1999

KAMAU JOHN KINYANJUI ……...……. APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

(Consolidated with Criminal Revision No 13 of 1999)

(From Original Conviction and Sentence in Criminal Case No 2247 of 1996

of the Chief Magistrates Court at Nairobi) – UP Kidula (Mrs)-CM)

JUDGMENT

The appellant, Kamau John Kinyanjui, was charged with twenty three counts of stealing by agent contrary to section 283 (c) of the Penal Code. The particulars of the said charges were that on diverse dates between the 7th and 28th of June 1996, he stole various sums of money ranging from Kshs 520,000/- to Kshs 2,450,000/- which he had received on behalf of various administrators of the estates of deceased persons who died in an accident which occurred on the 1st December 1994. The appellant pleaded not guilty to all the counts. After a full trial, he was on 24.05.99 convicted on eighteen of the twenty three counts. He was however acquitted in five counts. He was sentenced to pay a fine of Kshs 50,000/- on each of the counts that he was convicted of, in default he was to serve twelve months imprisonment on each count. He paid the fine of Kshs 800,000/-. He was further ordered to make restitution to the Attorney General on the balance of the amount which he had received but not yet paid out to the said beneficiaries within fourteen days from the date of the delivery of the judgment. The appellant was aggrieved by the said conviction. On 07.06.99 he filed an application seeking to invoke the revisionary powers of this Court to enhance the sentence imposed upon the appellant. The High Court exercising its powers under section 362 of the Criminal Procedure Code, called for the lower court record of proceedings in order to satisfy itself as to the sufficiency, correctness and adequacy of the sentence passed by the learned trial magistrate and to take corrective measures if satisfied that such action was warranted. On 02.06.99 the High Court issued notice under section 364 (2) of the Criminal Procedure Code to the appellant, Kamau John Kinyanjui to show cause why the sentence passed on him should not be enhanced. Both the appellant and the respondent were served with the notice. Subsequently both the appeal filed by the appellant and the reference to this Court by the respondent (the Attorney General) were consolidated and heard as one during the hearing of the appeal. For a variety of reasons which need not occupy us here, the appellant's appeal against conviction and the State's application for enhancement of sentence could not be heard until 19.05.04.

In his amended petition of appeal, the appellant has raised a total of thirty seven grounds of appeal

faulting the trial magistrate for convicting him. The said grounds of appeal made by the appellant were summarized by his counsel to be as follows: -

-Whether the decision to arrest and subsequently arraign the appellant in Court was made in good faith;

-Whether there were any complaints made to the police concerning the conduct of the appellant;

-Whether the Attorney General's office could be held to be the complainant in the criminal case facing the appellant;

-Whether there were any demands or request for accounts made by the complainants before the appellant was arrested;

-Whether the witnesses who testified in Court were the administrators for the deceased persons' estate and; whether they had capacity to receive the money deposited by the appellant;

-Whether the Ministry of Home Affairs which was the paying Ministry made any complaint to the police;

-Whether the appellant ought to have been tried in a criminal case in a matter which was essentially civil in nature;

-Whether theft was proved as against the appellant;

-Whether the charges brought against the appellant afforded him a fair chance of defending himself;

-Whether the trial court addressed itself to the statutes governing the advocate-client relationship and further;

- Whether the trial court appreciated the practice in personal injury claims;

-and finally whether the trial court properly addressed itself to the issues raised in the criminal case without being clouded by the professional conduct of the appellant.

At the hearing of this appeal, the appellant was represented by Mr Ng'ang'a Thiongo advocate while the State was represented by the Director of Public Prosecution – Mr Philip Murgor assisted by Mr Ogeti. The appeal was argued before us for two days and after the conclusion of the submissions judgment was reserved for consideration by the Court. Before we can address the grounds of appeal raised by the appellant, it will be imperative for the facts of this case to be set out, albeit briefly.

On the 1st of December 1994 prisons officers who were travelling in a prisons lorry registration No GK N970 from Kamiti Prisons to Nairobi were involved in an accident near Ruaraka, Nairobi. Several prison officers were fatally injured in the said accident. Soon thereafter, the appellant, who is an advocate of the High Court, solicited instructions from the relatives of the deceased persons. He had an agent called Wanjohi. The said agent represented the appellant to the families of the deceased prison officers as having the authority of the Government to act on their behalf to secure their compensation as a result of the fatal road accident. Some of the members of the deceased persons' families were given the appellant's business cards. The said agent managed to persuade some of the deceased families. But some did not accept to give instructions to the appellant.

Upon receiving the said instructions, the appellant commenced negotiations with the Attorney General's office with a view of settling the matter out of Court. The appellant had filed some suits in Court claiming compensation for both the families of the deceased persons who had specifically instructed him and also for those families who had not instructed him. In the latter case, the appellant acted without instructions from the deceased persons' families. The appellant acting in his professional capacity as an advocate, filed several applications in Court on behalf of the deceased persons' next of kin and was able to obtain limited grant of letters of administration which enabled him to file suit on behalf of the said estates of

deceased persons. In some cases, he did not obtain letters of administration. After filing the said suits in Court, the appellant commenced out of Court negotiations with the office of the Attorney General, with a view of settling the claims of the deceased persons out of Court. In particular, the appellant negotiated with one DM Kinyanjui, a State Counsel at the State Law Office. The said negotiations involved the Ministry of Home Affairs. From the evidence adduced in Court it appears that the senior legal officers at the Attorney General's office including the Deputy Chief Litigation Counsel were not aware of the negotiations that were being undertaken as between the appellant and the said DM Kinyanju. No approvals of the settlements to be made were obtained from the said senior officials at the Attorney General's chambers.

The appellant presented proposals on behalf of the deceased persons' families. DM Kinyanjui a State Counsel at the Attorney General's office accepted the proposal. The said DM Kinyanjui presented the said proposal to the Ministry of Home Affairs for settlement. The first cheque of Kshs 52,170,800/- was paid to the appellant. The second cheque of Kshs 23,439,300/- was stopped when it was discovered by the senior officials at the Attorney General's office that the said payments were made without authority. An attempt was made to stop the cheque of Kshs 52,170,800/- paid to the appellant but the police were unsuccessful. The appellant moved the said amount from his clients account to another unknown account. The appellant made some payment to some of the family members of the deceased persons. The said payments were a tiny portion of the amount received by the appellant on their behalf.

When the police were informed by the Attorney General's office, they swung into action. They recorded the appellant's statement. They recorded the statements of the family members of the deceased persons whom the appellant had received compensation on behalf of. After the conclusion of the investigations, the appellant was charged in Court for the offences of stealing by an agent contrary to section 238 (c) of the Penal Code. The statement recorded by the police from the appellant was admitted in evidence, as the appellant did not object to the same. When put on his defence, the appellant testified that he had acted *bona fide* as an advocate of the High Court. It was his case that he had instructed Wanjohi, a freelance agent, to secure the said clients for him. The appellant testified that after obtaining instructions, he duly filed suits and later negotiated out of Court settlements on behalf of the said claimants. On receiving the said cheque for Kshs. 52,170,800/, he proceeded to give what he termed as partial disbursements to the families of the deceased persons. It was his evidence that the said Kshs. 52,170,800/ comprised the amounts to be paid to the families of the deceased persons as compensation, his disbursements and also his legal fees. It was his evidence that he was arrested and arraigned in Court before he could pay all the amount that was due to the families of the deceased persons less his disbursements and legal fees. The appellant produced a fixed deposit receipt of Kshs 23,000,000/ in the name of KJ Kinyanjui & Company Advocates to prove that he still had the money at the time of trial. The appellant testified that he was always willing to disburse the said amount to the deceased person's families but could not disburse the same as the said next of kin of the deceased persons had not obtained letters of administration to give them authority to receive the said compensation from the appellant. As stated earlier at the beginning of this judgment, the trial magistrate was not impressed by the defence put forward by the appellant. He convicted and sentenced him.

In urging the appeal filed by the appellant, Mr Ng'ang'a Thiong'o argued that the trial magistrate erred in convicting the appellant on the evidence adduced by the prosecution. Counsel for the appellant argued that the charges facing the appellant were defective. He argued that for the charge of theft by an agent to be proved under section 283 (c) of the Penal Code, it must be proved that the property was received on account of another person. It was his argument that such a person must be a human being or a corporate person. In the instant case, he argued that the particulars of the charge in each of the offences read "Estate Administrator." It was his submission that the term estate administrator was unknown in law. It was not a legal person. The complainants named in the charge sheet had not obtained the letters of administration to administer the deceased persons' estates. It was his submission that the said persons, having not obtained the letters of administration could not complain to the police on behalf of the deceased persons' estates. It was further his argument that in the absence of proper complainants, the charge against the appellant would not stand. He further argued that since there were no complainants, the appellant should not have been found guilty.

The appellant further submitted the charge against the appellant was bad in law for overloading. It was his argument that the appellant ought to have been charged with at most twelve counts. By charging the appellant with twenty three counts, the appellant was embarrassed in the presentation of his defence. The appellant relied on the Court of Appeal decision in *Trouistik Union International & Another –versus- Mrs Jane Mbiyu & Another* Civil Appeal No 145 of 1990 (Nairobi unreported) to support his argument that persons without letters of administration lacked capacity to sue in civil cases. Under the same principles, he urged this court to find that the complainants did not have capacity to institute criminal proceedings against the appellant. The appellant relied on the decision of *Peter Ochieng –versus- Republic* (1982-88) 1 KAR 832 in support of his argument that the appellant ought to have been charged with no more than twelve counts. The appellant further argued that no complaint was made to the police; rather it was the Attorney General's office which instigated the police to look for the complainants to come and testify in court against the appellant. The appellant argued that his prosecution seems to have been informed by the fact that the counsels at the State Law Office, particularly Valerie Onyango and Muthoni Kimani felt that the amount paid in settlement was inflated. It was his submission that the fact that the settlement appeared inflated should not form the basis for instituting a criminal case against him.

The appellant further argued that it was wrong for the State to charge him with the offence of the theft by agent, yet it was admitted in evidence that part of the amount paid constituted the appellant's legal fees, disbursements and interest payable. The appellant further submitted that the appellant being an advocate, any relationship that he enters in this capacity as an advocate with his clients, forms a special type of relationship. It was his argument that the advocate-client relationship was a special type of relationship. He submitted that an advocate had a lien over the amount he receives on behalf of a client until his fees are paid. He argued that there is legal machinery for a client who is dissatisfied to invoke the jurisdiction of the Court to recover the amount claimed from an advocate. In the instant case, he argued if the complainants were dissatisfied, they ought to have filed proper suits under the provisions of the Civil Procedure Act to recover the amount claimed from the appellant. The appellant could not therefore be charged with the offence of stealing by an agent, neither could he be charged with the offence of obtaining under false pretences under the provisions of section 313 of the Penal Code. The appellant submitted that he had kept the money awaiting the deceased persons' next of kin to obtain letters of administration. The appellant admitted that he deliberately removed the money from the known clients account to the unknown account so as to frustrate the police from freezing the said account. The appellant further argued that the fact that he may have transferred the amount from a clients account to a personal account should be viewed in the context of a professional misconduct and not as a criminal offence.

The appellant argued that the prosecution had not proved the charges against the appellant beyond reasonable doubt. It was his view that this burden of proof was not discharged. He argued that the offence of theft by agent was not proved as against him. The appellant referred this Court to several authorities in support of his arguments. We shall refer to them later in this judgment. The appellant argued that were this Court to consider all the evidence adduced in totality, it would find that the appellant was not guilty of the offences of which he was convicted.

On the issue of the enhancement of sentence proposed by the State, the appellant argued that since he did not appeal against sentence but conviction only, the State cannot raise the issue of enhancement. It was the appellant's submission that if the State was dissatisfied with the sentence imposed by the trial magistrate, it ought to have cross-appealed. The appellant submitted that the State could not purport to have this Court to enhance the sentence by invoking the revisionary jurisdiction of this Court. The appellant referred this Court to various decisions of the courts to support his arguments. The appellant argued that the trial magistrate hade properly exercised her discretion in sentencing the appellant to pay a fine and further in ordering for forfeiture. The appellant urged the Court not to sentence him to a custodial sentence five years after the non-custodial sentence was imposed by the trial Court. It was his submission that such a sentence would not serve any useful purpose. The appellant further argued that the concept of enhancement of sentence was unknown in criminal jurisprudence.

In response to the appellant's submission, Mr Murgor, the Director of Public Prosecutions urged this Court to uphold the conviction of the appellant. He also urged this Court to invoke its revisionary powers and impose an appropriate custodial sentence on the appellant. Mr Murgor argued that it was common

ground that the appellant sought out the families of the deceased persons who were fatally injured in the accident that occurred on the 1st of December, 1994. The form the brief took was what is known in legal circles as "smbulance chasing." The appellant employed an agent, one Wanjohi. The Director of Public Prosecutions argued that the appellant did not require the relatives of the deceased persons to have letters of administration; he dealt with them as the next of kin of the deceased persons. He submitted that the appellant could not say on the one hand that he had instructions from the relatives of the deceased persons and on the other hand deny them the compensation received on their behalf by the appellant allegedly because they did not have letters of administration. It was his further submission that many of the claimants had obtained temporary letters of administration through the firm of the appellant. These limited grant of letters of administration were obtained for the purposes of filing suit and other purposes. Mr Murgor argued that the appellant was estopped from claiming that the next of kin of the deceased persons did not have letters of administration as he had made partial disbursements to some of the relatives of the deceased. It was further his submission that were the Court to uphold the appellant's argument in this regard, then fraudulent intention on the part of the appellant would by virtue of the same argument in fact have been proved. The state further argued that where such persons did not have legal capacity to receive the money, the appellant was legally bound to withhold all the money and account for it. It was further his submission that when the dispute arose, the appellant was legally bound to deposit the amount either in Court, or in an account which could be scrutinized and assessed by the Court. The Director of Public Prosecutions further argued that the appellant had obtained limited grant of letters of administration for the next of kin of the deceased persons. It was his argument that such persons were the administrators of the said deceased persons' estates and could therefore file a complaint with the police and institute criminal charges against the appellant. It was further his submission that the appellant had paid the said next of kin small amounts signifying that he recognized that they had capacity to receive the said compensation.

The State further was of the view that the ownership of the bulk of the amount received by the appellant was vested in the estates of the deceased persons and not the appellant. The State further submitted that there was an agency relationship created when the appellant acted or purported to act for the next of kin of the deceased persons. This agency could be a direct formal agency or it could be implied. It was implied agency where the appellant received money that did not belong to him and withheld it.

The State submitted that the estate of the deceased persons were thus the proper complainants in this case.

The State further argued that the applicant was properly charged with the offence of stealing by an agent under the provisions of section 283 (c) of the Penal Code.

It was the State's view that even though the appellant was charged with more than twelve counts, there was no embarrassment or prejudice occasioned to the appellant. He was able to ably defend himself during the trial. The Director of Public Prosecutions argued that the dates which appeared on the charge sheet were specific. It was during the said period that the appellant received the money and undertook a series of transactions that led to his being charged with the offence of stealing by agent. The State referred the Court to the provisions of section 137 (f) of the Criminal Procedure Code. It was the State's view that the time and the date were sufficiently clear for the appellant to appreciate the charges facing him.

The State was further of the view that the administrators of the deceased persons were the proper complainants in the criminal case facing the appellant.

Mr Murgor argued that the offence of theft was proved by the prosecution. It was his argument that the evidence in this case showed that there was an intention on the part of the appellant to permanently deprive the legal owners of the money. It was his argument that if it was proved that the appellant had used the money but had intentions of later repaying the said amount, the charge of theft was proved. The State argued that the fact that the appellant had moved the money from the client's account at Barclays

Bank of Kenya, Haile Sellasie Avenue, to an unknown destination proved that the appellant indeed stole from the beneficiaries of the said compensation which the appellant had received on their behalf. The State further argued that in the past five years since the appellant was convicted by the trial court, he has

made no effort to pay the estates of the deceased persons. This proved the fact that the appellant intended to permanently deprive what the owners of the said amount received in compensation. It was the State's submission that it was not enough for the appellant to say that the money existed and he had the capacity to pay; the appellant ought to have paid the said amount to the rightful owners.

The State further argued that the prosecution was alive to the number of counts that the appellant had been charged with. Mr Murgor distinguished the decision of *Ochieng' –versus- Republic* (1982-1988) I KAR 832. He argued that in the said case, the accused person had been charged with forty four different counts spanning a period of over six months involving twelve separate transactions. In the present case, all the offences that the appellant was charged with occurred at the same time and were interrelated.

It was his submission that the decision of the Court in the said case was advisory and not prohibitory. The test that the Court should apply in order to find if a charge sheet is overloaded is whether the said charge sheet caused confusion and embarrassment to the defence. It was his further submission that there was no possibility of confusion and embarrassment to the appellant occurring in this case.

The State submitted that the fact that a set of facts may amount to professional misconduct or result in a civil case being filed, does not mean that it would bar criminal proceedings from being instituted against such a person if it is proved that a criminal offence has been committed.

It was the State's submission that the appellant's conduct in this case amounted to theft as there was sufficient evidence to sustain a conviction.

It was further the state's submission that complaints were not made to the police because most of the next of kin of the deceased persons were not aware of the amount that was due to them as compensation from the Government. The State further submitted that once the said next of kin became aware of the theft committed, they willingly wrote their statements with the police and came to testify in Court. The State further argued that after the trial court had heard the evidence adduced by the said prosecution witnesses, the trial court was convinced that the case against the appellant had been proved and duly convicted the appellant.

The State further admitted that the appellant had aggravated the offence by obtaining instructions from the next of kin of the deceased persons by false pretences or improperly. It was the State's submission that evidence had been adduced in Court that the appellant and his agent Wanjohi had duped the next of kin of the deceased persons by stating that the appellant had the mandate of the Attorney General to pursue the compensation claim of the deceased persons' estate. The said next of kin were given an impression that it was only the appellant who had authority to get compensation on their behalf and no one else.

On the issue of whether the appellant ought to have been convicted of the offence of theft by agent or obtaining by false pretences, the State submitted that this Court had powers under the provisions of section 345 (3) of the Criminal Procedure Code to evaluate the evidence and substitute an appropriate charge. It was the state's submission that the charge of theft by agent was cognate with the offence of obtaining by false pretences. It was further the state's submission that where it was proved that an agency relationship did not exist, this Court could substitute the charges of theft with that of obtaining by false pretences. The State urged this Court to dismiss the appeal filed by the appellant on conviction.

On the issue of sentence, it was the state's submission that the sentence imposed on the appellant was too lenient to the extent that it caused a miscarriage of justice. It was the state's submission that with the kind of offence that the appellant was convicted, the most appropriate sentence was a custodial sentence. It was the state's submission that if the appellant had made restitution as ordered by the trial court, then the State would not have necessarily insisted on the appellant's sentence being enhanced.

The State further submitted that to-date the appellant had not made restitution and was still in illegal possession of the said amount. The appellant had enriched himself at the expense of the next of kin of the deceased persons who had been fatally injured in the road accident. It was the State's submission that

where restitution was not made by the appellant, it would be against public policy for the appellant not to be sentenced appropriately by this Court. The State submitted that the time that it has taken from the date that the appellant was convicted by the trial magistrate to the date that the appeal was heard was inconsequential. What was important for the Court to do was to see that justice be seen to be done to all the affected parties. The Director of Public Prosecutions urged this Court to impose an appropriate sentence in this case.

The High Court as the first appellate court in criminal cases is mandated to look at the evidence adduced before the trial magistrate afresh, reevaluate and re-examine the same and reach its own independent conclusion whether or not to uphold the conviction of the appellant. In reaching its decision, the High Court has to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore could not be expected to make any findings as to the demenour of the said witnesses. [See *Gabriel Kamau Njoroge –versus-Republic* (1982-88) 1 KAR 1134]. The High Court is also mandated to consider the grounds of appeal put forward by the appellant in reaching its judgment. (See *Pandya –versus- Republic* [1957] EA 33, *Okeno –versus- Republic*

[1972] EA 32 and *Njoroge –versus- Republic* [1987] KLR 19). In the instant case, the facts of the case are not in dispute. The appellant, an advocate of the High Court of Kenya, solicited instructions from the next of kin of the deceased persons who were fatally injured in a road traffic accident which occurred on 1st December 1994. All the affected persons were prison officers. They were employed by the Ministry of Home Affairs.

The appellant employed an agent called Wanjohi. He gave him his business cards. Wanjohi traversed the country. He was able to obtain instructions from some of the next of kin of the deceased persons. In other cases he was unsuccessful. In the cases that he obtained the instructions, he made the said next of kin believe that the appellant had exclusive authority from the Attorney General to negotiate compensation on behalf of the families of the deceased persons, the appellant obtained limited grant of letters of administration for the purposes of filing suit for compensation on behalf of the families of the deceased persons. He also filed the said suits. He served the summons to enter appearance upon the Attorney General. The appellant then entered into negotiations with the Attorney General's office with a view of settling the claim out of Court.

In the said negotiations, he included the estates of deceased persons who had not given him any instructions. An official of the Ministry of Home Affairs was involved. The appellant dealt in particular with one DM Kinyanjui, a state counsel at the Attorney-General's chambers. Evidence was adduced that the appellant and the said DM Kinyanjui were one time colleagues at the State Law Office. The appellant prepared his proposals as to settlement and delivered the same to his contact, DM Kinyanjui, the state counsel at the State Law Office. The said state counsel then communicated with the Ministry of Home Affairs where approval was given for the out of Court settlement proposals made by the appellant. Evidence was adduced before the trial court that the senior officials at the State Law Office were not aware of the said out of Court negotiations conducted between the appellant and the said DM Kinyanjui, state counsel. It appears that the said negotiations were being conducted without authority of the Attorney General and also clandestinely. The Ministry of Home Affairs acting on instructions of the said DM Kinyanjui, state counsel drew two cheques in settlement of the claims filed by the appellant on behalf of the estates of the deceased persons. The two cheques were for the sum of Kshs 52,170,800/- and Ksh 23,439,300/-. The first cheque was encashed by the appellant. The second cheque was stopped by the Attorney General's office.

The State Law Office had discovered the clandestine negotiations that had been undertaken between the appellant and the said DM Kinyanjui, state counsel. The State Law Office then made efforts to retrieve the sum of Kshs 52,170,800/- paid to the appellant. The police were involved. Investigations commenced. It was discovered that the appellant had paid some of the next of kin miniscule amounts in proportion to the amounts received as compensation on behalf of the deceased persons' estates. The appellant called the payment of these small amounts partial disbursements. Some of the deceased persons' estates were not paid any sum at all. The police in the course of their investigations sought to freeze the appellant's accounts. The appellant, to frustrate the said efforts by the police, moved the said amount to accounts

which could not be accessed by the police.

The appellant removed the said sum from his clients account and transferred it to his personal account in another bank. Meanwhile, DM Kinyanjui, the state counsel involved in the out of Court negotiations with the appellant on behalf of the Government disappeared. To date, the said DM Kinyanjui has not been traced. Wanjohi, the agent of the appellant has also not been traced. After the conclusion of their investigation, the police made a decision to charge the appellant with the twenty three counts of stealing by an agent under the provisions of section 283 (c) of the Penal Code. The prosecution called a total of thirty three witnesses. After evaluating the said evidence, the trial magistrate found the appellant guilty in all counts save for five counts of which he was acquitted.

Now, the issues for determination by this Court of Appeal is whether or not the prosecution's case against the appellant was proved beyond reasonable doubt. The other issue raised by the appellant and which we shall address in our judgment is whether the advocate-client relationship that was said to exist as between the appellant and the next of kin of the deceased persons preclude the State from bringing criminal charges against the appellant. A further issue for determination of this Court is whether the proceedings against the appellant before the trial court disclosed professional misconduct which could not lead to criminal liability. The final issue for determination is whether this Court can interfere with the sentence imposed by the trial magistrate and sentence the appellant to an enhanced custodial sentence.

We have re-evaluated the evidence adduced before the trail magistrate. We have also considered the rival arguments made before us by counsel for the appellant and the Director of Public Prosecutions. Our reassessment of the evidence adduced by both the prosecution and the defence shows a common trend. The appellant together with DM Kinyanjui (state counsel) put in place a scheme where they were to obtain money from the Ministry of Home Affairs in the guise that the appellant was acting on behalf of the next of kin of the deceased persons who were fatally inured in the accident that took place on 1st December 1994. It helped that all the deceased persons were prisons officers. The appellant then instructed his agent, a Mr Wanjohi to solicit instructions from some of the next of kin of the deceased persons.

It did not matter that some of the said next of kin, when approached, were reluctant to instruct the appellant. Some of the relatives of the said deceased persons gave instructions to the appellant. Some did not. The story that the said Mr Wanjohi gave to the relatives of the deceased persons is that the appellant had been given authority by the Attorney General to negotiate compensation on behalf of the said relatives of the deceased persons.

From the onset the appellant's intentions are manifest. It did not matter that the appellant was engaged in unprofessional conduct in the first place by soliciting for clients, contrary to the advocates professional ethics. After obtaining some of the said instructions, the appellant proceeded and obtained limited grant of letters of administration to enable him file suits against the Government. The appellant then entered into what appeared to be negotiations with the State Law Office. In reality, the appellant did not negotiate with the State Law Office. He "negotiated" with DM Kinyanjui an official whom the appellant had previously worked with at the State Law Office. He presented proposals on an out of Court settlement. The said proposals were accepted on their face value. DM Kinyanjui did not therefore negotiate a settlement with the appellant. He endorsed the appellant's proposals.

The said purported negotiations took place without the knowledge of the senior legal officers at the State Law Office. DM Kinyanjui's immediate superior, the Principal Litigation Counsel, Muthoni Kimani was not aware of the negotiations that were going on between the appellant and the said DM Kinyanjui. Neither was Valerie Onyango, the Deputy Chief Litigation Counsel, aware. The said DM Kinyanjui (state counsel) communicated directly the proposals made by the appellant to the Ministry of Home Affairs. The Ministry of Home Affairs paid the cheques to the appellant. It is instructive to note that there was no evidence that correspondence was exchanged as between the appellant, the Attorney General's office and the Ministry of Home Affairs indicating that there were ongoing negotiations as between the appellant and the said offices concerning the issues related to out of Court negotiations leading to settlement.

From our re-evaluation of the evidence on record, it is clearly evident that DM Kinyanjui was a vital cog in the scheme hatched by the appellant to get money from the Ministry of Home Affairs in the guise that the appellant was pursuing compensation on behalf of the families of the deceased persons. The appellant had no intention of paying the said amount to the deceased persons' families. That the appellant had the intention to convert the said amount without reference to the beneficiaries of the deceased persons' estate is without doubt. For instance, the appellant received the sum of Kshs 2,337,500/- on behalf of the estate of Charles Moit Muya. He paid the said deceased's wife PW 2 Jane Akiro Etot Kshs 420,000/- only. The appellant received the sum of Kshs 2,337,500/- on behalf of the Estate of John Lalampaa. The appellant paid PW 3 Ledo Lalampaa the son of the deceased the sum of Kshs 217,000/- only. The appellant was paid the sum of Kshs 1,787,500/- on behalf of the estate of Amos Sande. He paid the sum of Ksh 250,000/- only to PW 4 Samson Sichangi the father of the deceased. The appellant received the sum of Kshs 2,450,000/- on behalf of the Estate of Christopher Limo Kipyegon. He paid PW 8 Jackson Kipgeyo Chemuli the deceased's father the sum of Kshs 270,000/- only. The appellant received the sum of Kshs 2,450,000/ - on behalf of the estate of Frederick Isaac Egadwa. He paid PW9 Benjamin Egadwa, the father of the deceased the sum of Kshs 275,000/- only.

As earlier stated in this judgment, the appellant put in place a scheme whereby he would purport to act on behalf of the estates of the deceased persons but in reality he never ever intended that the estates of the deceased persons were ever to benefit from the compensation paid. It is the finding of this Court that the appellant did abuse his professional capacity to dupe ignorant and in some instances illiterate relatives of the deceased persons into providing him with a vehicle for achieving his aim of fraudulently obtaining money from the Ministry of Home Affairs. DM Kinyanjui's part in the whole fraudulent scheme was critical. It was no surprise that the said DM Kinyanjui went underground after the appellant was arrested and later arraigned in Court to face the charges that he was later convicted of by the trial court.

The appellant's defence has always been consistent. He does not deny receiving the said amount from the Ministry of Home Affairs. The appellant's evidence and submission before this Court is that he was acting as an advocate. The complainants in this case fall into two broad categories: those who instructed the appellant to pursue compensation claims arising from the accident and those who did not instruct the appellant. Regarding the first category, we are of the considered view that there was a direct agency relationship between the appellant and them. With regard to the second category, the evidence establishes implied agency relationship between the appellant and them. The relationship that existed between him and the said relatives of the deceased persons was an advocate-client relationship. It was the appellant's submission that there were procedures and rules in place in the event that a client was dissatisfied with the amount that he had been paid by an advocate, after receiving the same on his behalf. It was his submission that such a client could tax the advocateclient bill of costs or alternatively invoke the summary jurisdiction of the High Court under the provisions of the Civil Procedure Act and Rules made thereunder to compel the advocate to pay up the returned amount.

It is our considered view that the appellant's defence has no merit. The appellant can not seek to hide behind legal rules where it is clearly proved that he was engaged in a criminal enterprise. The appellant in this case did not act as an advocate. He used the fact that he is an advocate as a cloak to put in place a scheme to defraud the estates of the deceased persons of what was rightly due to them. To further support our finding that the appellant had intention from the word go to defraud the beneficiaries of the deceased persons' estates, the appellant introduced a concept known in legal practice called partial disbursement. It was the appellant's argument that the miniscule amount he paid to the deceased persons' relatives were partial disbursements. It was the appellants case that he intended later to pay the said relatives the balance of what was due to them after deducting his legal fees, interest and disbursements. This submission made by the appellant is disapproved by the evidence adduced by the prosecution. For instance, PW 5 Kipkiget Kenduiywo testified that he was only paid Kshs 225,000/- by the appellant and told that was all that he would get as compensation for his son's death. PW 9 Benjamin Egadwa was paid Kshs 275,000/- by the appellant as compensation for his son's death. He was told that that was the final amount. It is our considered view that the deceased persons' relatives were just but pawns in a scheme hatched by the appellant to obtain money from the Ministry of Home Affairs purportedly on their behalf and then steal it from them. We do find that the charge of theft by agent was proved by the prosecution.

We could now address the authorities that the appellant relied on in support of his appeal. The appellant referred this Court to the decision by the Court of Appeal in *Trouistik Union International & Another –versus- Mrs Jane Mbiyu & Another* Civil Appeal No 145 of 1990. It was his submission that all the complainants had not obtained grant of letters of administration. They could not legally therefore lodge a complaint with the police. It was the appellant's submission that the lack of letters of administration incapacitated the complainants from lodging complaints. He urged the Court to find that there having been no competent complainants, the charges against him could not be proved. In response, the State submitted that some of the said complainants had obtained limited grant of letters of administration which were obtained by the appellant himself. The State further submitted that even if the said complainants had not obtained letters of administration, it would not be a bar to their raising a complaint if their names were used to obtain money on their behalf, the sum of which was ultimately not paid to them. The State referred the Court to the provisions of section 137 (c) (ii) of the Criminal Procedure Code which allowed the prosecution to bring a charge in the name of a body which is capable of owning property. On our re-evaluation of the rival submissions, we do find that the complainants in this case had capacity to lodge complaints against the appellant. Section 137 (c) (ii) of the Criminal Procedure Code states: -

"Where the property is vested in more than one person, and the owners of the property are referred to in a charge or information, it shall be sufficient to describe the property as owned by one of those persons by name with the others, and, if the persons owning the property are a body of persons with a collective name, such as a joint stock company or 'inhabitants', 'trustees',

'Commissioners', or 'Club' or other similar name, it shall be sufficient to use the collective name without naming any individual".

In the instant case, the charge sheet states that the appellant stole from the estate administrators of the deceased persons. Under the Law of Succession Act, an estate administrator is defined in section 3 (i) as meaning a person who has been granted letters of administration under the said Act. Administration of estate is understood to mean the administration of the property of a deceased person. The complainants in this case were persons who were entitled to administer the estate of deceased persons. They were the deceased persons' next of kin. Evidence was adduced by the appellant himself that he had obtained limited grant of letters of administration to enable him to file suits on behalf of the said estates of the deceased persons.

The appellant cannot now turn around and state that the said complainants did not have capacity to lodge a criminal case against him. If the said complainants had capacity to sue in civil cases, in the same manner they had capacity to lodge criminal complaints against the appellant. We further find that even if the said complainants had not obtained letters of administration, they would still have capacity to lodge a criminal complaint under the provisions of section 137 (c) (ii) of the Criminal Procedure Code. The fact that the letters of administration have not been obtained for the estate of a deceased person does not mean that the property that is vested in such deceased person cannot be protected by the law, more so, against criminal actions of individuals.

We were further referred to the case of *Peter Ochieng' –versus- Republic*

(1982-1988) I KAR 832.In the said case, Hancox JA stated at page 836;

"It is undesirable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a Court to put the prosecution to its election at the inception of a trial as to the counts upon which it wishes to proceed. Usually, though not invariably, no more than twelve counts should be laid in one charge sheet. The others can be withdrawn under section 87 (a) of the Criminal Procedure Code, which will entitle the prosecution to bring them again if necessary."

At page 837;

"Moreover the possibility of embarrassment and prejudice to the defence cannot be excluded when there are numerous counts because of the danger of the assumption that because the accused faced so many

charges, there must be some substance in some of them."

The appellant in this case was charged with twenty three counts. In actual fact he was charged with twenty two counts as there was no 19th count.

The appellant has submitted that he was prejudiced by this fact. He submitted that by the charge against him being overloaded, he was prevented and prejudiced in his defence. We have looked at the charge sheet. The appellant was in essence charged with one charge of stealing by agent. The twenty two counts were separate instances in the same series of transaction that particularized the offences committed by the appellant to the specific estates of the deceased persons.

In our considered view, a charge is said to be overloaded when multifarious counts are brought against an accused person involving different aspects of criminal law. When such an accused person is so charged, he would be prejudiced in presenting his defence. The test to be applied to arrive at a conclusion that a charge is overloaded is whether or not the counts brought against the accused prejudices or embarrasses him in the presentation of his defence. In the instant case, there was no proof that the fact that the appellant was charged with twenty two counts he was prejudiced in his defence. The trial magistrate was not confused in her appreciation of the evidence adduced by the prosecution. Indeed she proceeded to acquit the appellant in some counts where no evidence was adduced. The total sum received by the appellant and from which he made small payments and withheld the balance was paid to him in one lumpsum cheque. The appellant in his defence was alive to what was expected of him. He presented a robust defence. He was not at all embarrassed by the number of counts that he was facing in the charge sheet. It is, therefore our finding that the appellant was not at all prejudiced by the twenty two counts that were brought against him.

The appellant also referred us to the provisions of the Advocate Act and the Advocates (Accounts) Rules to support his contention that an advocate client relationship is a special type of agency which has specific rules that govern it. He also referred to the provisions of Civil Procedure Act and particularly order LII of the Civil Procedure Rules. After perusing the said sections of law referred to us, we do find that the fact that there is a different and civil procedure given by the law to remedy a situation does not mean that where investigations have been undertaken and a criminal offence disclosed, the person found to have also contravened the criminal law cannot be charged with a criminal offence. In the instant case, it is our finding that the advocate-client relationship does not preclude the State from instituting criminal charges where it has been established that a criminal offence was committed. We, therefore, find the submissions by the appellant to have no merit. The appellant cannot hide behind rules to escape criminal liability when the same has been proved. The appellant manifested his disregard for the said rules by transferring the funds from the clients' account to his personal account. He converted the clients' fund to his own use in utter disregard of the self same rules that he seeks to invoke in his aid.

After re-evaluating the evidence adduced by the prosecution before the trial court, and after hearing the submissions made on this appeal, we find that the prosecution did prove its case beyond any reasonable doubt. We find that the appeal filed by the appellant against conviction has no merit.

We wondered what could have motivated the appellant to appeal against conviction only. Did the appellant file the appeal to forestall compliance with the order of the trial magistrate that he makes restitution to the Attorney-General of the sums that were in his possession? Whatever the reason may be, the situation on the ground as at the time of the appeal is that the appellant made no restitution and offered no satisfactory explanation for the failure.

The appellant's appeal against his conviction under counts nos 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22 and 23 is hereby dismissed and the said convictions by the trial magistrate are hereby upheld. On the issue of sentence, the appellant submitted that in the absence of a cross appeal filed by the State, this Court has no jurisdiction to enhance the sentence imposed by the trial magistrate's court. It was his view that since he did not appeal on the sentence, this Court cannot make any findings as to the sentence. On his part, the Director of Public Prosecutions submitted that immediately the sentence was pronounced the State wrote to the High

Court seeking to invoke its revisionary jurisdiction to impose an appropriate sentence. It was further his submission that the sentence meted out by the trial court upon the appellant was one instance when a miscarriage of justice was occasioned. It was further his submission that the sentence imposed was informed by the fact that the trial court expected the appellant to make restitution of the amount that he had received once the sentence was imposed. The Director of Public Prosecutions submitted that the appellant did not make restitution after the imposition of the said sentence. Neither has the appellant made any restitution to-date. It was the State's submission that if the appellant had made restitution, then the State may not have insisted that the Court impose an appropriate and enhanced sentence. It was further the State's submission that the most appropriate sentence to be imposed was a custodial sentence.

On his part, the appellant through his counsel, argued that to sentence him to a custodial sentence five years after the conviction by the trial magistrate would not be fair in the circumstances. It was his view that the trial magistrate had considered all the circumstances appertaining to this case before imposing the said sentence which in her opinion was just and fair.

We have re-evaluated the rival arguments of the appellant and the State.

The section granting powers to the High Court on appeal in criminal cases is section 354 of the Criminal Procedure Code.

Section 354 (3) Criminal Procedure Code states that:

"The Court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may –

(a) In an appeal from a conviction –

(i)Reverse the finding and sentence, acquit or discharge the accused, or order him to be tried by a Court of competent jurisdiction,

(ii) Alter the finding, maintaining the sentence or with or without altering the finding, reduce or increase the sentence; or

(iii) With or without a reduction or increase and with or without altering the finding alter the nature of the sentence."

The above section of the Criminal Procedure Code clearly grants this

Court jurisdiction to impose an appropriate sentence on appeal, including enhancing the sentence imposed by the trial magistrate. In the instant case, the appellant set up a scheme whereby he intended to defraud the families of the deceased persons. It is clear from the evidence on record that from the onset, the appellant had no intention whatsoever of paying the estate of the deceased persons the amount that each estate was to receive in compensation arising out of the accident that occurred on the 1st of December 1994. It was the appellant's intention from the outset to convert the said amount. He intended to steal the same. The appellant seems to have adopted an attitude that because most of the members of the deceased persons' estates were either ignorant or illiterate, he would pay them a small fraction of the total sum received then convert the remainder to his use. The appellant abused his professional calling as an advocate to fleece the poor relatives of the prison officers who died in a road accident. The deceased persons' families not only lost their beloved ones but insult was added to their loss by the appellant stealing from them what was due to them as compensation. He never gave any regard to the feelings of the families of the deceased persons more so considering the fact that they had lost their beloved ones. The appellant was given an opportunity by the trial court to make restitution to the families of the deceased persons. He did not take the opportunity. Instead he filed an appeal, in our view, to have a justification in continuing to retain the funds. To-date the appellant has not made restitution. The appellant's action was callous in the extreme. It was also insensitive.

In assessing all the above facts and putting into consideration the appellant's conduct after his conviction by the trial court, it is the finding of this Court that the most appropriate sentence to be imposed upon the appellant is a custodial sentence. For the trial court to sentence the appellant to pay a fine of Kshs 800,000/- after convicting him of stealing Kshs 52,170,800/- smacks of rewarding the appellant for the theft committed. The said sentence imposed was manifestly inadequate and inappropriate.

We, therefore, substitute the said sentence with a sentence commensurate with the gravity of the offence.

We make the following orders on sentence: -

(a) The fine of Kshs 50,000/- under each of the counts on which the appellant was convicted is hereby upheld and retained but the default sentence of 12 months imprisonment on each such count is hereby set aside.

(b) The appellant is in addition to the fine as stated above hereby sentenced to 4 (four) years imprisonment on each of the counts of which he was convicted, the said sentences to run concurrently.

It is so ordered.

Dated and delivered at Nairobi this 24th day of September, 2004

P.B. KUBO

……..

JUDGE

L.K. KIMARU

……

Ag JUDGE