



**REPUBLIC OF KENYA**

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

**CRIMINA APPEAL NO. 680 OF 2003**

**FROM ORIGINAL CONVICTION AND SENTNECE IN CRIMINAL CASE NO.  
1932 OF THE CHIEF MAGISTRATE’S COURT AT NAIROBI**

**JOHN MBURU MUIRURI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, **JOHN MBURU MUIRURI** was convicted on 3 counts of **MAKING A DOCUMENT WITHOUT AUTHORITY** contrary to section 357(a) of the Penal Code; **UTTERING A FALSE DOCUMENT** contrary to section 353 of the Penal Code; and **STEALING BY DIRECTOR** contrary to section 282 of the Penal Code. He was then sentenced to imprisonment for 4 years on each of the counts, although the learned trial magistrate did order the sentences to run concurrently.

At the hearing of this appeal, the learned State Counsel, Mrs Toigat, notified the court that the respondent was not contesting the appeal. In her view, the learned State Counsel, felt that the evidence adduced by the prosecution actually disproved the offence with which the appellant had been charged.

PW1, Othiniel Kinja Ndirangu testified that he joined the appellant as well as one Francis Wanjohi Ndirangu, in a business partnership. The business was registered on 15th May 2000. Subsequently, the partnership got an order from the Ministry of Education, for the supply of “**heavy duty photocopiers.**” The value of the contract was Kshs 1,999,800/=. According to PW1, he and the appellant did not have sufficient liquidity, and therefore borrowed money from Francis Wanjohi Ndirangu, who was their partner.

The loan from Francis Wanjohi Ndirangu was documented in an Agreement drawn by M/S Nyawira Gitonga & Co., Advocates.

The appellant was then sent to Dubai to buy the machines which were supplied to the Ministry, after which an invoice was raised.

The Ministry paid the money to the appellant, but he did not credit the funds to the partnership. But later, PW1 also confirmed that the goods were in the appellant’s name. PW1 was not sure about the quality of machines purchased, or their purchase price, or even the manner in which the purchase price was financed. However, he was sure that Mr. Wanjohi loaned to the business, Kshs 480,000/=

First, as the money in issue was loaned to the company, I cannot understand why the appellant could be charged with stealing it. Secondly, the sum lent was Kshs 480.000/=:, therefore, it is not clear why the money allegedly stolen was Kshs 1,999,800/=:, as stated in count 3. Thirdly, as the money was said to

have been used to buy heavy duty photocopiers, which were supplied to the Ministry of Education, it cannot also be true that the same sum of money was stolen by the appellant.

As regards Count 2, PW2, James Kamau Gathuna, testified that the Business Name Certificate No. 336200 was genuine. The certificate is in the name of Ngethu Marketing and Supplies, which was registered on 28th May 2001.

Once PW2, who was an Executive Officer at the Companies Registry, confirmed that the certificate in issue Was genuine, the appellant ought not to have been convicted for making or uttering a false document.

PW3, Francis Wanjohi Nganga testified that he was invited by PW1, for a contribution for a business which PW1 had been asked to join, by the appellant. He said that he was approached for a loan, and was also invited to join the other two, as a partner.

PW3 had an Agreement drawn up by lawyers, and then he lent the money to the business. In cross – examination, PW3 emphasized that he did not lend money to the appellant. He said that he had only given a loan to the business.

According to PW3, the photocopiers were each costing shs 600,000/=. But he (PW3) only produced Kshs 480,000/= He testified that the appellant had told him that each photocopier was costing Shs 600,000/=. But he (PW3) only produced Kshs 480,000/= He testified that the appellant had told him that Shs 480,000/- would be sufficient to buy the machines, but after that he was not aware of what transpired. But he did see the machine, as it was being supplied.

Again, this court must reiterate that if the machine was bought and supplied to the Ministry, a fact which PW3 was aware of, it cannot also be true that the money was stolen. It would appear that the loan was put to good use.

After the machines were supplied, how was the money from the Ministry of Education to be dealt with? That does not come through from the prosecution evidence. Could it be that the appellant was only expected to repay the loan of Kshs 480,000/= to PW3? That is a possibility, although we cannot be sure of it.

In the light of the foregoing facts and reasons, I find that the prosecution did not prove the charges against the appellant to the standard required under our criminal law jurisprudence.

Therefore, it would be unsafe to sustain conviction. Accordingly, I do now quash conviction, set aside the sentence and direct that the appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 10th day of December 2004

**FRED A. OCHIENG**

**AG. JUDGE**

Delivered in the presence of

Miss Gateru for State

Appellant in persons present

Mr. Odero Court Clerk