



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.1257 OF 2002**  
**(From Original Conviction and Sentence in Criminal Case  
No.1471 of 1995 of the Chief Magistrate's Court at Nairobi)**

**BERNARD CHUI KIRORI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

The appellant herein filed an appeal against sentence and conviction in Criminal case No.1471/95 (Chief Magistrate's Nairobi). His appeal was argued by Mr. Nyachoti who relied on grounds of appeal filed on 4/12/2002. The appellant was sentenced to 2 years imprisonment on ten counts and to 4 years on one count (i.e. count ten). All the sentences were ordered to run concurrently. The offences for which he was sentenced to two years imprisonment were fraudulent false accounting by clerk contrary to section 330 (4) of the penal code which runs from count one to count eleven except for count nine which is a charge of stealing by clerk contrary to section 281 of the penal code. Counts twelve and count thirteen are also charges of stealing by clerk contrary to section 281 of the penal code.

It is against this conviction that the appellant filed this appeal. I have noted the various grounds of appeal which Mr. Nyachoti relied on in arguing this appeal. According to the memorandum of appeal the learned trial magistrate erred in convicting without considering evidence in support of each charge. Mr. Nyachoti argued that there was no direct evidence adduced in support of each charge. He has argued that the trial magistrate ought to have referred to specific exhibits and relied on specific testimonies in arriving at his findings. The evidence relied by the trial magistrate was circumstantial in nature and not specific. The evidence was based on the fact that the appellant had an opportunity to steal but not an actual fact. As there were seventy clerks in the department where the appellant worked each of whom had such opportunity; Mr. Nyachoti has argued that any of them could have corrupted this offence; yet they were not charged.

In ground number two Mr. Nyachoti has argued that it is wrong to convict on charges relating to fraudulent false accounting contrary to S.330 of the Penal Code without relying on the evidence of a document examiner. The relevant prime ones Ex.6 and 7 should have been given to the document examiner to examine the questioned signatures and writings on them and other documents since the principal witness (P.W.2) Mrs. Rebecca Lihani did not understand the appellant's handwriting and signatures. It is prejudice to rely on the evidence of P.W.2 to the effect that she was familiar with the appellant's handwriting and signatures without this aspect being corroborated by the independent evidence of the document examiner. I agree with the observation of the court of appeal on the case of **Pius Chorongo Mbashu Vs. Republic Cr. Application No.154/2000.**

It was also argued that it was wrong for the investigating officer to have extracted a statement from the

appellant and for the same statement to have been used as a confession against the appellant. The case of Joseph Njaramba Karura Vs. Republic K.A Reports 1982/1988 page 165 was quoted. I argue with its holding too.

It was also submitted that this was unprocedurally handled because Mr. Indeche wrote the Judgement without him having heard and seen the demeanour of the prosecution witnesses. This is against the Principal of natural justice as Mr. Nyachoti argued. The state counsel agreed with Mr. Nyachoti's observation on this point. From my perusal of the proceeding it is clear this case was handled by various magistrates during its history. Mr. Muturi heard the evidence of P.W.1 on 19/3/96. On 21/5/96 Mrs. Kidula Ordered that the case be taken over by a new magistrate and to start denoul. The case was eventually started denoul by R.K. Mwangi magistrate on 18/5/1998 who eventually went on retirement. The case was thus transferred to court No.6 by Mr. Olao the Chief Magistrate. Mrs. Meoli who took over the case made another order dated 12/5/2000 that the case should start denoul. The case started denoul on 23/10/2000 once again before Mrs. Meoli. After a lengthy trial it is noted that Mrs. Meoli became indisposed and the chief magistrate ordered that the case be taken one over by a new magistrate. In allocating the case to a new magistrate Mr. Olao noted "The new trial court will decide on whether or not the trial will commence denovo" The case that landed before Mr. Indeche the magistrate who wrote this judgement on 26/3/02.

I have closely perused the proceedings of Mr. Indeche who ordered that the proceeding be typed. It is noted that Mr. Indeche did proceed to take the statements of the appellant in defence without making reference to the provisions of S.200 of the Criminal Procedure Code in his record. He even went ahead to write a judgement from uising The proceedings recorded by Mrs. Meoli without noting this fact on record. The provisions of S.200 of the Criminal Procedure Code are very clear on what the succeeding magistrate is required to do on taking over the case. Under S.200 (1) (i) the appellant had a right to recall any of the witnesses who had earlier testified. This was the appellant's right and the appellant had the right to be informed of such rights by the trial magistrate.

Mr. Indeche did not comply with S.200 of the Criminal Procedure Code. The High Court has a right to order a retrial if it is of the opinion that the accused has been materially prejudiced.

I would have been willing to order retrial in this case but given the time taken to undertake this trial a retrial would not serve the interests of justice. It is noted the plea was taken on 28/6/95. The sentence was handed down on 22/10/02. The Court therefore took over seven years to conclude even then this case was handed by three different magistrates. If a retrial is ordered there is no gurantee that it will take a shorter period and that the prosecutions witnesses will be available to testify. It is for the above reason that it is my considered view that a retrial will not be ordered.

Taking everything into account including the submissions of Mr. Nyachoti on all the ten grounds of appeal which I agree with entirely, as well as the authorities quoted namely:- **Buhaya and others Vs. Uganda Cr. Appeal No.68/72 E.A.C.A 549, as well as Okoth Oketh Okale and others Vs. Rep. C.A. 555.** I am satisfied that the conviction of the appellant in this case was not based on safe and sound evidence. I have noted the fact that the learned state counsel does not support the conviction as well as retrial. I am in agreement with him as well as Mr. Nyachoti that this conviction cannot be upheld.

I therefore quash all the convictions in respect of counts one, two, three, four, five, six, seven, eight, nine, ten and count eleven. I set aside the sentence awarded to the appellant in respect of each count. The appellant will be set at liberty unless he is lawfully held.

Order accordingly.

**R.M. MUTITU**

**JUDGE**

**19/3/2003**

Delivered in the absence of Mr. Nyachoti for the appellant, the appellant and in the presence of Mr. Monda for the state.

**R.M. MUTITU**

**JUDGE**

**19/3/2003**