



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mbuvi v Republic (Criminal Appeal 134 of 2017)  
[2024] KEHC 3671 (KLR) (Crim) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3671 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL 134 OF 2017**

**GL NZIOKA, J  
MARCH 14, 2024**

**BETWEEN**

**JOHN MANZI MBUVI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision of; Hon. M. A. Opondo, Senior Resident Magistrate (SRM), dated, 11th September, 2017, delivered vide Criminal Case No. 416 of 2010, at the Chief Magistrate's Court at Milimani)*

**JUDGMENT**

1. The appellant was arraigned before the Chief Magistrate's Court at Milimani, Nairobi charged vide Criminal Case No. 416 of 2010 with five (5) offence of stealing by a person employed in the Public Service contrary to section 280 of the Penal Code, (Chapter 63) Laws of Kenya. The particulars of each count are per the charge sheet.
2. The prosecution case in brief is that, the appellant was employed in the Judiciary from February 2002 up to April 2010. He was working as an Accountant II, based at Nakuru Law Courts and his duties included, withdrawal of money from the bank on behalf of and for the Chief Magistrate Court.
3. The appellant's immediate supervisor (PW6), Salome Wanja Nderitu, Senior Accountant testified that in the month January 2010, while executing her normal duties, she discovered withdrawal of large sums of money made from the employer's account held at National Bank of Kenya Limited.
4. That she requested for the bank statements and discovered there were withdrawals made on; 7<sup>th</sup> January 2010, 25<sup>th</sup> January 2010, and 5<sup>th</sup> February 2010 in the sum of; Kshs. 395,000, Kshs. 450,000, and Kshs. 450,000 respectively.



5. That on 11<sup>th</sup> February 2010, she inquired from Timothy Onamu (PW12), the Chief Executive Officer, at Nakuru Law Courts, as to whether he authorized the large withdrawals but he denied authorizing the withdrawals.
6. That, she went to the bank and obtained more documents including; counter foils, deposit voucher movement, and copies of three cheques and discovered that the withdrawals were made by the appellant.
7. That the funds withdrawn could not be traced in the Chief Magistrate Court and/or established how it was utilised. Further the money was withdrawn when the appellant was on annual leave as per the approved leave application form.
8. That on 19<sup>th</sup> February 2010, the senior accountant informed Hon. Wilbroda Juma, the Chief Magistrate, who confirmed from the bank statements that the transactions took place but without her authority and neither were the monies received by her office. She reported the matter to the Registrar of the High Court and thereafter the matter was reported to the Police for investigation.
9. On 23<sup>rd</sup> February 2010, (PW18), Inspector Michael Kirwa Meli, attached to the Banking Fraud and Investigation Unit (BFIU) was assigned investigation of the case. He obtained the bank statements, retrieved the subject cheques and withdrawal slips after obtaining a search warrant from court.
10. That the cheques obtained were five cheques being; No(s); 7509, 7557, 7586, 7408 and 7210 signed by the appellant and payable to, “the Chief Magistrate of Nakuru (JM Mbuvi)”. He further recovered a payment voucher No 401514, and imprest warrant No(s); 970828 and 970829.
11. That on the 26<sup>th</sup> February 2010, Inspector Michael Kirwa Meli, in the company of Sargent Mwabonga, visited the appellant’s office and requested for the imprest warrant book, but he did not avail it, where upon a search in his office led to the recovery of the imprest warrant book of series B970801 – B970850.
12. The appellant’s specimen handwriting, known signatures and the cheques were examined by (PW17), Emmanuel Kenga, a document examiner to ascertain whether the cheques and vouchers were written and signed by the same person. He concluded as per his report that, the documents were made by the same author.
13. At the conclusion of the prosecution case, the appellant was placed on his defence.
14. He gave his defence vide a sworn statement and denied committing the offences levelled against him. He testified that he was a signatory to the Judiciary’s bank account and could withdraw amounts exceeding Kshs. 100,000.
15. That a cheque went through more than ten (10) stages before it was cleared for payment and required two signatures; one from the Judiciary and one from the District Treasury.
16. That the prosecution’s witnesses confirmed that all the five (5) the cheques passed through the approval and/or confirmation stages without anomaly and were all signed by the District accountants.
17. The appellant told the court that, he gave all the money he withdrew to the Senior Accountant, (PW6), who had a cash book where she acknowledged receipt. That, she kept all the accounting books including the imprest warrant under lock and key, and that he would only assist her in her absence.
18. He denied the evidence led that, the Senior Accountant went on leave arguing that there was no hand over report for the time in question. He further argued that the charges against him were framed and stated that he was not given an opportunity to give his version of events before he was charged. He



- questioned why none of the District Accountants who signed the cheques had been charged and were still in office.
19. He further stated that the Senior Accountant (PW6) was hiding two cheques in her office and its only when the Chief Magistrate insisted on their production that she brought up the allegations against him.
  20. He questioned why the Senior Accountant (PW6) was never investigated despite the fact that she received monthly bank statements.
  21. The appellant faulted the Investigating Officer for failing to produce the letters for the AIE requesting for money despite each requisition form having four (4) copies. That these documents would have finalized the case.
  22. Finally, the appellant argued that the police investigated his bank account but did not find any incriminating evidence against him and reiterated that being a public servant he never stole the amounts he was charged with.
  23. At the conclusion of the trial, the court in its judgment dated 11<sup>th</sup> September, 2017, held that the prosecution had proved the charges against the appellant beyond reasonable doubt and convicted him accordingly on all five charges. He was then sentenced to serve a two years' probationary sentence.
  24. However, the appellant being aggrieved by the decision of the trial court has appealed against it on the grounds as here below reproduced:
    - a. That, the Learned Trial Magistrate erred in law and fact by convicting the Appellant when the prosecution did not prove their case to the required standard thereby occasioning the Appellant a miscarriage of justice.
    - b. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant while the essential ingredients of the five counts had not been proved by the prosecution as required by the law.
    - c. That the Learned Trial Magistrate erred in law and in fact by holding that the appellant had retained the money he had withdrawn thus drawing an adverse inference against the Appellant in effect shifting the burden of proof to the appellant contrary to the law of evidence.
    - d. That the Learned Trial Magistrate erred in law and fact in failing to find that the prosecution failed to tender before the court the document that requisitioned for the payments, namely the letter, imprest warrants and the payment vouchers.
    - e. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant when the prosecution failed to produce the cashbooks and entry registers to show whether the money alleged to have been stolen was received or not by the in charge of accounts i.e. PW6.
    - f. That the Learned Magistrate erred in fact and law when she ignored the Appellant's evidence on the investigation that were done by the police on the bank accounts from which investigation found no incriminating evidence against the Appellant.
    - g. That the Learned trial Magistrate erred in and in fact by failing to consider the defence and submissions by the defence.
    - h. That the Learned Trial Magistrate erred in law and fact in failing to find that the prosecution had not proved their case beyond reasonable doubt and that doubt had been cast against the prosecution case which ought to have benefited the Appellant.



- i. That the learned trial Magistrate erred in law and fact in finding that the appellant fraudulently and without claim of right withdrawal money from the account held and maintained in the name of the judiciary at the national bank of Kenya, Nakuru branch access of which he had by virtue of his employment in the employment service.
  - j. That the land trial Magistrate erred in law and fact in failing to find that there could be no cheque generated or drawn to withdrawal judiciary funds unless the same was requisitioned by the AIE holder by way of voucher or imprest warrant.
  - k. That the Learned Trial Magistrate erred in law and fact by failing to hold other individuals countable apart from the Appellant like PW6, Salome who was not investigated yet the bank officials stated that each month they would print bank statement and also two of the cheques in question were hidden in her office until the chief magistrate insisted on their production.
  - l. That the Learned Trial Magistrate erred in law and fact by ignoring the fact that the appellant enquired the cheques on behalf of the chief Magistrate as in the letter produced by the prosecution "exhibit 39".
  - m. That the Learned Trial Magistrate erred in law and fact when she ignored the fact that the accused couldn't have cashed the cheques without them going through the right procedure and that in that case the appellant could not retain the money without being questioned its whereabouts as it had been withdrawn for a particular purpose.
  - n. That the Learned Trial Magistrate erred in law and in fact by basing her judgment on inconsistent, incredible and contradictory evidence of the prosecution witnesses particularly PW7 PW9, PW14 andPW18 in respect of No's and 0077586.
  - o. That the Learned Trial Magistrate erred in law and fact by convicting the appellant without clear, uncontroverted and admissible evidence presented to the court.
25. However, the respondent opposed the appeal vide grounds of opposition dated 28<sup>th</sup> April 2022, in which it is stated that:-
- a. The appeal is not arguable and has no chance of success since the evidence on record adduced by the prosecution during the trial was sufficient to support both the conviction and sentence.
  - b. The appellant was properly convicted and sentenced lawfully.
  - c. The orders sought on sentencing are discretionary and to that effect the appellant has failed to demonstrate that they are deserving of this court discretion.
26. The appeal was disposed of by way of written submissions. The appellant in submissions dated; 21<sup>st</sup> March 2022, argued that the appellant's arrest and arraignment was selective and that he was used as a scape goat.
27. That all persons involved in requisitioning, preparing, drawing and signing the cheques were never arrested and no explanation as to why offered.
28. Further, while the learned trial Magistrate noted the fact that he was charged with others not before the court, the court failed to note that, it was not possible for him to commit the offences, as his role was limited to signing the cheques and withdrawing the money as authorized and in the course of his duties and after all other stages had been verified.



29. That, he and PW9, Damaris Ikaria, the District Accountant informed the trial court of the process and procedures before any payment was done. Further, PW6, Salome Wanja Nderitu, told the court that it was not possible for an unauthorized person to sign an imprest warrant and/or payment voucher and take it to the District Accountant for payment. However, the trial court did not take into consideration the said process and procedures and only considered the last stage of the process
30. Furthermore, PW4, Hon. Wilbroda Juma, the Chief Magistrate, and PW12, Timothy Onamu, were the only authorized AIE holders who could sign the imprest warrant and/or payment voucher and neither of them alleged that he had forged their signature and/or uttered the documents.
31. That in addition both PW1, David Kipchirchir, and PW2, Enpra Odhiambo Oganda, cashiers at National Bank of Kenya, Nakuru Branch, testified that they confirmed the necessary documents from the District Treasury were correct and that he was a signatory to the Judiciary account No. 01XXXX00.
32. That, the trial Magistrate ignored his sworn defence which indicated that he withdrew the money in the normal course of his duty and proceeded to handed it PW6, Salome, who recorded the money received in the cash book.
33. He further faulted the learned trial Magistrate for shifting the burden of proof the case to him when she stated that he had failed to produce any evidence that he handed over the money to the Judiciary.
34. He relied on the case of William Kiprotich Cheruiyot vs Republic (2021) eKLR where the High Court at Narok cited with approval the case of; Woolmington v DPP [1935] A.C. 462 where Viscount Sankey L stated that, no matter the charge, the principle is that the prosecution must prove the guilt of the prisoner and no attempt to whittle it down can be entertained.
35. The appellant submitted that, the prosecution was in possession of the cash book and it was therefore its duty to produce the same. Furthermore, the trial court ignored his request to have the prosecution produce the cash book during his defence which would have exonerated him and therefore he was prejudiced.
36. The appellant further submitted that, the prosecution failed to produce and/or concealed vital documents being; the documents used to raise the cheques and signed by the AIE holders, which, documents PW9, Damaris, confirmed to have seen but were never produced.
37. Lastly, he conceded that he withdrew the money but reiterated that it was with authority and as a signatory of the Judiciary account. That, he was fully investigated including his bank accounts but was not found in possession of huge sums of money or purchased goods that would infer to having stolen the money in question.
38. That in light of the above, the conviction and sentence was erroneous and unlawful and should be set aside.
39. However, the respondent in their submissions dated; 30<sup>th</sup> April, 2022 cited section 280 of the Penal Code that provides for the offence of stealing by a person employed in the public service. That, the elements of the offence are; proof that the appellant was employed in public service, the thing stolen was government property, and it came into possession of the appellant by virtue of his employment.
40. That all the elements of the offence were proved beyond reasonable doubt in that the appellant was employed as a District Accountant by the Judiciary and appointed as a signatory to the account vide letter dated 30<sup>th</sup> July, 2008. Further, his colleagues positively identified him as an employee of the Judiciary and his employee's identity card produced as prosecution exhibit 20.



41. The respondent submitted that, the cheques in issue never emanated from the Judiciary cash office as PW4, Hon. Juma, told the court that she had not authorized any imprest.
42. That, PW6, Salome, one of the accountants and the whistle blower, confirmed that the payments had not been authorized. Furthermore, PW5, Monica Atieno Oluoch informed the court that, they were required to surrender the imprest warrant book but it was missing and was later found in the appellant's office.
43. The respondent argued that, the failure by the prosecution to charge others did not diminish the prosecution's case as he was linked to the amounts withdrawn as the payee of the cheques in question.
44. Further, the intention to defraud the Judiciary was planned and hatched by the appellant as he alone could explain the whereabouts of the imprest warrant book. Furthermore, the appellant never availed nor cross examined the witnesses he claimed to have handed over the money to.
45. The respondent urged the court to dismiss the appeal as it lacks merit arguing that the sentence took into account the appellant's mitigation and was appropriate and sufficient in the circumstances.
46. At the conclusion of the arguments on appeal, I have considered the evidence adduced in total and note that, the role of the first appellate court was well articulated in the case of; Okeno vs. Republic (1972) EA 32, that the appellate court re-evaluates the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
47. The court stated thus stated:
 

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses
48. In the instant matter, the appellant was charged with the offence of stealing by a person employed in the Public Service Contrary to section 280 of the Penal Code, (Chapter 63) Laws of Kenya that provides: -
 

If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years.
49. The ingredients of the subject offence were set out in the case of Hillum Macharia Kamau v Republic [1995] eKLR where the court stated:
 

“ Employment in the Public Service is any person employed by the Government of Kenya and the 'thing' or item stolen must belong to the Government of Kenya or come in possession of such Government employee by nature of such employee's employment.”
50. In considering the evidence adduced, the learned trial Magistrate analyzed the ingredients of the offence under section 280 of the Penal Code which the appellant was charged with and the case of Charles Maina Ngare -vs- Court Martial Appeal No. 1 of 2008 where the subject ingredients were discussed and



- held that the appellant was an employee of the Judiciary as supported by all documents produced and that his own statement in defence corroborated it and therefore a person employed in Public Service.
51. In that regard I find that, indeed there is no dispute that the appellant was an employee of Judiciary employed as Accountant II and based at Nakuru Law Court, thus in public service. He testified to the same and confirmed his employment status.
  52. The trial court considered the second ingredient as to whether the subject money that was withdrawn, is public funds and arrived at the finding that the money was withdrawn from the bank account of Judiciary, as such it is public funds. Again I find that there is no dispute that the funds in question is indeed public funds.
  53. The trial court further considered the definition of stealing under section 268(1) Penal Code and held that the appellant admitted signing the five (5) cheques and withdrawing the money and that he had no claim over the money.
  54. The trial court also held that no evidence was produced to prove that the appellant handed over money to any person in the Judiciary but merely alleged he handed over to immediate boss, which was an afterthought as it was not raised during cross-examination.
  55. I have considered the evidence in relation to the issue of whether the money was received and utilized by the Judiciary and I find that, the appellant's defence is simple and straight forward, that he withdrew the money in question and gave his immediate supervisor (PW6), Salome, Senior Accountant.
  56. However, it is noteworthy that, throughout cross-examination, the appellant never alluded to nor put it to (PW6) Salome that, he gave her the money he encashed. To the contrary, responding to the question put to her, she stated as follows  

“It is absolute wrong to say I called your client, let him avail phone records. It was not a skim between me, Mr. Onamu and the District accountant to sign imprest voucher and receive money on our behalf or that we forced him to do so. It has become apparent that anything is possible. This is not a fabrication. We have procedure for payment of government money. That is all”.
  57. Therefore, the questions put to the witness in cross-examination and her response thereto negates the defence advanced that the subject money was handed over to (PW6) Salome by the appellant.
  58. Further, it is in evidence that some of the supporting documents including: payment voucher(s) and imprest warrant could not be traced, a clear indication or supportive of the fact that this is a case of fraud and in any case, there is no evidence the funds were utilized for the purpose for which it was requisitioned.
  59. Furthermore, (PW6) Salome Wanja Nderitu testified that she went on leave on 21<sup>st</sup> December 2009 and resumed in the month of January 2010. Yet it is noteworthy that, the cheque for Kshs 450,000 was cashed on 7<sup>th</sup> October 2009, while the cheque for Kshs 370,000 was cashed on 26<sup>th</sup> November 2009. The other three cheques for Kshs 395,000 and Kshs 450,000 were cashed on 7<sup>th</sup> January 2010, 25<sup>th</sup> January 2010 and 5<sup>th</sup> February 2010, respectively.
  60. In cross-examination she stated she was aware the appellant was on leave between 1<sup>st</sup> December 2009 to 20<sup>th</sup> January 2010. At this point it suffices to note that, the appellant encashed the cheque for Kshs 395,000 on 7<sup>th</sup> January 2010, during his leave days. The question is: how and why? Was he recalled from leave? By who and why? Was there an emergency? He did not state so, yet Salome (PW6) denied recalling him.



61. PW6 further testified that the imprest book was found in the appellant's office the day he was arrested and that he should explain how he got it. Therefore, though no inventory was made when the items were recovered from appellant's office, Salome corroborates the Investigating Officer's evidence on recovery of the imprest book in the appellant's office.
62. In addition, (PW6) Salome discovered withdrawals on 11<sup>th</sup> February 2010, when she requested for bank statements. She testified that, the withdrawal of Kshs 395,000 and two others of Kshs 450,000 alarmed her.
63. That she noticed on the deposit voucher movement the entry of cheque No. 7509 posted on 6<sup>th</sup> January 2010 had no payee's name and no entry on deposit voucher for cheque No. 7586, thus stated, "I say those payments were not official and not authorized by my office"
64. The appellant argued that the court was informed of the procedure of raising the cheque for payment and the persons involved. That all procedures were followed and yet all people involved were not prosecuted.
65. However, I find that argument of whether the cheque was procedurally raised falls on the road by virtue of the fact that, the appellant has admitted cashing the subject cheques. Indeed his own defence is that the whole process was above board and that is why he was paid. As such, the issue shifts to where the money went.
66. The question is if the money was not received by the owner, was it stolen? Stealing as it were, is the unlawful retention of something without authority of the owner or permanent deprivation of the owner of the use therefore. That is the case herein.
67. The upshot is that, the defence as advanced did not displace the prosecution case, that, the appellant received the subject funds and did not remit it for public use.
68. I therefore find that, the trial court correctly arrived at the finding that the appellant committed the offences as charged and convicted him. I uphold the conviction on all five counts.
69. The appellant did not challenge the sentence, although I note that, the trial court passed the same without indicating whether it applied to all the five counts or one. The prosecution did not raise it at all. It was passed on 25<sup>th</sup> September 2017. It will not be in the interest of justice to remit the matter to the trial court, after seven years for re-sentencing.
70. I therefore invoke the supervisory jurisdiction of the court and order the sentence of two (2) years' probation be applicable on each count and run concurrently.
71. It is so ordered

**DATED, DELIVERED AND SIGNED THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

The appellant present virtually

Mr. Muia for the appellant

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant

