



REPUBLIC OF KENYA



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**Nambwaya v Republic (Criminal Appeal E017 of 2021)
[2023] KEHC 21024 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E017 OF 2021
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

SYLVESTER WASHIALI NAMBWAYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from judgment of Hon. TA Odera, Chief Magistrate, CM,
in Mumias CMCCRC No. 1206 of 2019, of 22nd March 2021)*

JUDGMENT

1. The appellant, Sylvester Washiali Nambwaya, had been charged before the primary court, on 7 counts: 1 of stealing by servant, 3 of forgery and 3 of uttering forged documents. The allegations were that he had stolen from his employer, St Mary's Girls High School, the School, through cheques that he had forged purporting them to have been signed by the Principal of the School, which he uttered to the bank, and withdrew Kshs 500,000.00 on 3 occasions. He denied the charges, on August 29, 2019, and a trial ensued, where 6 witnesses testified.
2. PW1, Dickson Katam Barasa, was one of the members of the Board of Management of the School, the Board, and a signatory to the accounts of the School. He stated that he had been presented with 3 cheques on December 20, 2017, by the appellant, which he signed. He was later shown the 3 cheques by the police, and confirmed that they were the 3 cheques he had signed earlier. He testified that they bore his signature and that of the Principal. The Principal told him that her signature had been forged. He said that a bank statement on the School account showed that the 3 cheques were presented to the bank, and the moneys in the cheques withdrawn. He said that when the appellant brought him the cheques to sign, he did not note anything unusual.
3. PW2, Rosemary Khadema Kwendo, was the Principal of the School at the material time. She stated that the appellant was arrested at the bank on January 3, 2018, as he was encashing 4 cheques. She



explained that the Board had sat on December 30, 2017, and had noted from bank statements of the School account that some Kshs 1,500,000.00 had been withdrawn from the School account. That amount had not been authorized for withdrawal and expenditure. She retrieved the cheques leaves, from the bank, and noted that the signatures in them, purported to be hers had not been signed by her. She said that a counter book of the cheque was maintained, for any payments that she had approved. She stated that there was no entry of the 3 cheques in the counter book. The Board sat on December 30, 2017, and commissioned an account for the 2017 accounts, and suspended the appellant. She took over the duties of the appellant. She prepared several cheques to raise funds for the running of the School in 2018, and when she gave the cheques to PW1 for signature, he told her he had just signed 4 cheques presented to him by the appellant. She called the bank, and was informed that the appellant was at the bank and had presented 4 cheques for Kshs 2,300,000.00. She dashed to the bank, together with the Chair of the Parent Teachers Association, the PTA, Mr Humphreys Luradi, and was shown 4 cheques, which bore signatures purported to be hers. The matter was reported to the police. She stated that the 4 cheques were not subject to the instant case. She said that she provided specimen signatures for forensics. She stated that she was surprised that PW1 and the other signatory signed the cheques, as they were familiar with her signature. She also expressed surprise that the bank also paid, given that it had specimens of her signature. She said that the subject cheques were not supported by payment vouchers, and there were no daily returns on how the expenditure of the moneys withdrawn.

4. PW3, Caroline Tambasi, was a teller at the bank. She testified that the appellant had presented the 3 cheques at the bank, and she signed to authorize their use. She stated that the payments on the cheques were made by other tellers. PW4, Acleus Okumu Kwena, was the Chair of the PTA and a member of the Board at the material time. He said that the appellant called him on December 20, 2017, to sign cheques. He brought the cheques to him and he signed. He said he did not doubt the signatures on them, purported to be that of PW2, and he only doubted them after the appellant was arrested. No xxxx Senior Superintendent of Police John Muinde, PW5, was a document examiner. He was presented with the 3 cheques, to examine the signatures on them, purported to be of PW1, PW2 and PW4, against specimens provided. After examination and comparison, he opined that the signatures of PW2 were forged, but those of PW1 and PW4 were not. PW6, No xxxx Inspector of Police Kevin Muriuki, was the investigating officer.
5. The appellant was found to have a case to answer, as the prosecution had established a prima facie case, and he was put on his defence, in a ruling delivered on February 28, 2020.
6. The appellant made a sworn statement. He testified that he was a bursar at the School up to December 10, 2017, when his services were verbally terminated. He was summoned by the police, who accused him of forgery. He testified that the 3 cheques were payable to the School, there was nothing to indicate that the money withdrawn was paid to him, as he did not sign at the back of the cheque, nor indicate his identity card number. He stated that the handwriting on the cheques was not his, and there was nothing to show that he had anything to do with them. He stated that no withdrawal slips were presented in court. He testified that the Board commissioned an audit, which was done after he had left the School. He stated that the report indicated that PW1 and PW4 should not have signed the cheques. He denied being at the bank on December 29, 2017, adding that he was dismissed on December 10, 2017. He further stated that he never gave out his handwriting for verification. He said that he never withdrew money without a withdrawal form, or without signing for the money, and there was no evidence that he ever signed for the money.
7. In its judgment, the trial court found the case had been proved beyond reasonable doubt, that the appellant had stolen from the School, having forged cheques that he uttered to bank officials.



8. The appellant was aggrieved, and filed 2 appeals, being Kakamega HCCRA Nos E017 and E032 of 2021. The 2 were consolidated by an order made herein on December 7, 2022. The grounds in Kakamega HCCRA No. E017 of 2021 revolves around the trial court relying solely on the report of the document examiner, the evidence of the document examiner not being conclusive, not giving the appellant benefit of the doubt, and the key ingredients of the offences were not proved. The grounds in Kakamega HCCRA No E032 of 2021 are that the evidence was not adequate to found basis for a conviction, the sentence was harsh, the document examiner did not establish who signed the documents, the trial court did not record the exact evidence tendered by the witnesses, there was no evidence that the money was transacted, and his constitutional rights were violated. An amended petition of appeal was filed herein on November 10, 2022, of even date. It is averred, in it, that the trial court treated the evidence and submissions superficially, the judgment was not supported by the evidence tendered, there was no evidence to support the conviction for forgery, the document examiner did not testify that he had been given specimens of the signatures of the appellant, all the charges were not proved to the required standard, the trial court misapprehended the evidence, among others.
9. Directions were given on June 27, 2022, for disposal of the appeal, by way of written submissions. The appellant filed written submissions, on November 17, 2022, dated November 10, 2022. He submitted largely on the ingredients of the 3 offences that he was accused of committing. The submissions are supported by ample caselaw. The respondent did not file written submissions.
10. I will assess whether the 7 accounts were proved. The count of stealing is dependent on the other counts, of forgery and uttering a forged document, which allegedly facilitated the theft. For that reason, I shall start by considering whether the counts of forgery and uttering of a forged document were proved.
11. Let me start with forgery. It is an offence defined under section 345, and created under sections 349, both of the *Penal Code*. Sections 350, 351 and 352 of the Penal Code create the offence of forgery with respect to specific documents, and forgery of cheques is dealt with in section 350. See *Daniel Lopeyok v Republic [2022] eKLR* (Waweru, J). The elements of the offence are the making of a false document, or material alteration of a genuine document by making false signatures or filing blanks in a document in such a way as to make it look genuine, the document has to look genuine to mislead, the document has to be of some legal significance, and there ought to be an intent to defraud. See *Caroline Wanjiku Ngugi v Republic [2015] eKLR* (Mativo, J).
12. Forgery, in the instant case, was charged under counts II, IV and VI, with respect to the making of 3 counter cheques, allegedly by the appellant, which he then uttered for the purpose of withdrawing funds from the bank. The charges are premised on section 350(1) of the Penal Code. The appellant was accused of having forged the 3 counter cheques, which he then used to steal from his employer. However, from the material presented, no evidence emerged, which points to him making the cheques from scratch or altering them in any way. No evidence was led to show that he drew the said cheques. The evidence tendered by the document examiner, PW5, did not point to him at all, for his specimen handwriting was not given to PW5, PW5 did not handle his handwriting, and the report PW5 presented in court had nothing to do with the maker of the handwriting in the 3 counter cheques. The trial court had no evidence that the appellant wrote the 3 cheques. Of course, as bursar, it was part of his role and mandate to write cheques for the School, and if he did write the 3 cheques, nothing would or should turn on that, for the critical thing was whether he made the contested signatures alleged to be by PW2. As his handwriting was not subjected to forensics by PW5, there was no opinion on who might have forged the signature of PW2 on the 3 cheques, and no evidence was led by anyone, which pointed towards or even suggested that the appellant had anything to do with the forged signature of PW2. There was, therefore, no basis for finding and holding that he forged them, without any evidence



that he wrote them. The forgery charge was founded on mere suspicion, which was not adequate to found a conviction.

13. On the uttering counts, the offence is established, where it is proved that the forged document was presented to the person intended to be deceived. Were the 3 cheques forged? Yes, they were. There was no evidence that the appellant forged them, but there was evidence that the signature of PW2 on them was false. That made them false documents, created through forgery. The 3 could, therefore, be found on a basis for an uttering charge. Were they uttered? There was evidence of withdrawal of 3 batches of Kshs 500,000.00, based on those 3 false cheques. For the said withdrawals to happen there must have been an utterance. PW3 testified that the 3 were presented for payment to cashiers at the bank, and were passed to her for authorization and approval. She initialed her signature on the 3 cheques, to authorize the cashiers to act on them, and the bank statement placed on record proved that the withdrawals were made. Was it the appellant who uttered the 3 cheques? PW3 testified that it was him who presented the cheques for payment. She had served him previously. The bank statement placed on record indicates that the withdrawals were by the appellant. The appellant was properly convicted on the uttering charges, in counts III, V and VII.
14. On the stealing charge in count I, it is alleged that he stole money that came into his possession on account of his employment. The issues here are whether any money was stolen, whether it was taken by the appellant, and whether it came to him on account of his employment with the School. The bank statement establishes that money was withdrawn from the account of the School, in 3 batches of Kshs 500,000.00. PW2 testified that the School did not authorize the withdrawals, the money did not come to the School and was not used for the purposes of the School. The person who was established to have withdrawn the money, according to the bank statement, was the appellant. PW3 placed him at the bank, with the cheques, each for Kshs 500,000.00, which she authorized. The cheques were meant for the School. The moneys were withdrawn from the account of the School. The signatures on the 3 cheques, both the contested and the uncontested, were of individuals associated with the School, who were at one time or other authorized signatories to the School account. The appellant was the School bursar. He handled the finances of the School, including the moneys in the bank accounts. He submits that the alleged loss happened after he had left employment of the School. The material on record indicates that the 3 cheques were encashed on December 29, 2017, and that the appellant was suspended from work on December 30, 2017. He was, therefore, an employee of the School when the withdrawals happened.
15. In view of what I have discussed so far, it is my finding and holding that the appellant herein was properly convicted on counts I, III, V and VII, but the convictions founded on counts II, IV and VI were not safe. Consequently, I find no merit in the appeal herein, with regard to counts I, III, V and VII, I hereby dismiss the same, and affirm the convictions handed out with respect to them. I, however, allow the appeal with regard to counts II, IV and VI, and I accordingly quash the convictions on those counts, and set aside the sentences imposed with regard to them.
16. On the sentences imposed, the appellant avers that they are harsh and excessive. I disagree. The appellant, as bursar of the School, was entrusted with funds earmarked for the management and running of the affairs of a school, for the benefit of students. He abused that trust, and appropriated to himself moneys that were meant to advance the education of the girls in the School. Theft by a trustee is deplorable, particularly when considered that the moneys stolen were for the benefit of children. The penalties imposed were on the lenient side, but I shall not interfere with them.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023



W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Mulama, instructed by Samba Odeck & Mulama, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

