



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL APPEAL NO. 19 OF 2020**

**EDMOND KIPNGETICH MUTAI.....1<sup>ST</sup> APPELLANT**

**EDWARD WILLIAM OCHOLA.....2<sup>ND</sup> APPELLANT**

**BENARD KIPKURUI MUTAI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Conviction and Sentence of Hon. S. K. Mokuu (CM)*

*delivered on 17/2/2020 in Kericho CMCC No.98 of 2019 delivered on 20/12/2019)*

**JUDGMENT**

1. The three Appellants were charged with the following counts;

- i) Conspiracy to defraud contrary to section 317 of the penal code.
- ii) Stealing by servant contrary to section 281 of the penal code.
- iii) Stealing contrary to section 275 of the penal code.

2. The particulars of the 1<sup>st</sup> charge were that on divers dates between 5/3/2009 and 24/3/2011 at Kericho Township in Kericho District within Rift valley province, the three Appellants EDWARD WILLIAM OCHOLA (2<sup>nd</sup> Appellant), BERNARD KIPKURUI MUTAI (3<sup>rd</sup> Appellant) and EDMOND KIPNGETICH MUTAI (1<sup>st</sup> Appellant) jointly with others not before court conspired to defraud Ndege Chai Saving and Credit Cooperative Society by opening personal accounts and falsely pretending that they belonged to or were genuine customers at the said Ndege Chai Savings and Credit Society Kericho and that the said accounts were able to be operated by genuine customers.

3. The 2<sup>nd</sup> Appellant and 3<sup>rd</sup> Appellant were jointly charged with stealing on count II and the particulars were that on count II and the particulars were that on diverse dates between 5/3/2009 and 24/3/2011 at Ndege Chai Savings and Credit Cooperative Society Limited in Kericho District within the Rift Valley province the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants being servants to Ndege Chair & Savings and Credit Society Limited stole a total of Kshs. 6,054,394.06 from the said Ndege Chai Savings and Credit Cooperative Society Limited Kericho.

4. The 1<sup>st</sup> and the 2<sup>nd</sup> Appellants were also charged on the 3<sup>rd</sup> count with stealing contrary to section 275 of the penal code and the particulars were that on diverse dates between 1/12/2010 and 22/12/2010 at Ndege Chai Savings and Credit Cooperative Society jointly stole Kshs. 1,278,605.94 the property of Ndege Chair Savings and Credit Cooperative Society Limited.

5. The 3<sup>rd</sup> Appellant was also charged on the 4<sup>th</sup> count with stealing by servant and the particulars thereof are that on diverse dates between 15/1/2010 and 9/4/2010 the 3<sup>rd</sup> Appellant being a servant of Ndege Chai Savings and Credit Cooperative Society stole a total of 1,084,205 from the said Ndege Chai Savings and

Credit Cooperative Society.

6. A brief summary of the prosecution evidence was that between 5/3/2009 and 24/3/2011, Ndege Chai Savings and Credit Cooperative Society lost Kshs.7,333,000. EDWARD WILLIAM OCHOLA was an accounts assistant and BERNARD KIPKURUI MUTAI was in charge of tellers while EDMOND KIPNGETICH MUTAI's account was used in stealing money from the complainant.

7. The 1<sup>st</sup> Accused person EDWARD WILLIAM OCHOLA had posted various amounts to various accounts and some documents in relation to the Accounts were recovered from the house of the 1<sup>st</sup> Accused person including an ATM card in the name of IRENE OCHOLLA.

8. There was evidence that the 1<sup>st</sup> Accused person EDWARD WILLIAM OCHOLLA who is the 2<sup>nd</sup> Appellant had posted money into the following accounts;

(i) The Account of Irene Ocholla Kshs.5,415,000

(ii) The Account of Edward Mutai Kshs.1,232,000

(iii) The Account of Cheruiyot Kirui Kshs.606,000

(iv) The Account of Philip Kirui Kshs.80,000

9. There was also evidence that the 2<sup>nd</sup> Accused person; BENARD KIPKURUI MUTAI (the 3<sup>rd</sup> Appellant) who was a teller with the complainant was involved in the transactions. He converted the account for AGNES BUNEI (PW7) and made it to appear as belonging to IRENE OCHOLLA and the 1<sup>st</sup> Accused, EDWARD OCHOLLA (2<sup>nd</sup> Appellant) made posted various amounts into the said account. There was evidence that the 2<sup>nd</sup> accused (3<sup>rd</sup> Appellant) authorized the release of money from IRENE OCHOLLA's account on five occasions and this was confirmed by PW13 who produced a report to that effect.

10. The 3<sup>rd</sup> Accused person EDMOND KIPNGETICH (1<sup>st</sup> Appellant) was the holder of A/c No.514061181 into which the 1<sup>st</sup> Accused EDWARD WILLIAM OCHOLLA (2<sup>nd</sup> Appellant) made deposits. The 3<sup>rd</sup> Accused (1<sup>st</sup> Appellant) made withdrawals through ATM. PW5 who issued the ATM card said he gave the same to the 3<sup>rd</sup> Accused (1<sup>st</sup> Appellant).

11. There was also evidence that some cheques which had been paid by JAMES FINLAYS were honoured and respective beneficiaries were paid and later the same amounts were posted or allocated to a different account and the posting were done by the 1<sup>st</sup> Accused (2<sup>nd</sup> Appellant) and withdrawn by the 3<sup>rd</sup> Accused (1<sup>st</sup> Appellant).

12. The three Appellants in their statements of defence denied being involved in the transactions. The 1<sup>st</sup> and 2<sup>nd</sup> Accused persons (2<sup>nd</sup>& 3<sup>rd</sup> Appellants) denied knowledge of the 3<sup>rd</sup> Accused (1<sup>st</sup> Appellant).

13. The trial court found that the three Appellants conspired to defraud the complainant by opening account irregularly without following laid down procedures. There is evidence that the 1<sup>st</sup>& 2<sup>nd</sup> Accused persons (2<sup>nd</sup>& 3<sup>rd</sup> Appellants) posted various amounts into the aid accounts and the same were withdrawn by the 3<sup>rd</sup> Accused (1<sup>st</sup> Appellant) and the 1<sup>st</sup> Accused (2<sup>nd</sup> Appellant) using an ATM card the 1<sup>st</sup> Accused person (2<sup>nd</sup> Appellant) had in his possession in the name of IRENE OCHOLLA.

14. The father of IRENE ATIENO testified as PW6 and said his daughter was arrested on 14/7/2011. He said the 1<sup>st</sup> Accused (2<sup>nd</sup> Appellant) intended to marry her but the marriage did not work out.

15. The trial court found that the evidence against the Appellants was systematic and consistent. There was evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons (2<sup>nd</sup> and 3<sup>rd</sup> Appellants) while working for the complainant manipulated the system to access funds and created fictitious accounts and opened an account for the 3<sup>rd</sup> Accused (1<sup>st</sup> Appellant) which they used to defraud the complainant.

16. The trial court found the three Appellants guilty as charged and convicted them and sentenced all of them to 3 years imprisonment on count 1. The 1<sup>st</sup> and 2<sup>nd</sup> accused were sentenced to 5 years imprisonment each on count II and the 1<sup>st</sup> and 3<sup>rd</sup> Accused were sentenced to 2 years imprisonment each on count III. The 2<sup>nd</sup> Accused was sentenced to 5 years on count IV. The sentences were to run concurrently.

17. The Appellants are aggrieved by the convictions and sentences and they have appealed to this court on the following combined grounds of appeal;

(i) THAT the prosecution did not prove the charges against the Appellants to the required standard.

(ii) THAT the Appellants were not accorded a fair trial in that they were not supplied with the documents the prosecution relied on in violation of Article 50 of the constitution of Kenya 2010 and against the rules of National Justice.

(iii) THAT the sentences meted on the Appellants were harsh and excessive in view of the mitigating circumstances and sentencing options available in law.

(iv) THAT the trial court did not take into account the defence evidence and neither did he consider the mitigation and pre sentence reports.

(v) The charges were defective and duplicitous.

18. The parties filed written submissions in this appeal which I have duly considered. In summary the Appellants submitted as follows;

(i) The 1<sup>st</sup> Appellant submitted that he was charged as 3<sup>rd</sup> Accused with two counts (Count 1 and Count 2) and he was sentenced to 3 years imprisonment and 2 years imprisonment on count III without an option of a fine.

(ii) The 1<sup>st</sup> Appellant (3<sup>rd</sup> Accused person submitted that PW1 the operations manager of the complainant did not know him and he had never seen him at the Bank and he did not say who collected the ATM card for him.

(iii) The 1<sup>st</sup> Appellant also submitted that PW5 said he issued

him with the ATM card but he could not physically identify him.

(iv) The 1<sup>st</sup> Appellant also submitted that from the documentary evidence adduced, the ATM card and ATM pin cards were issued on different days and the signature for collection of the same were different.

(v) The 1<sup>st</sup> Appellant submitted that the evidence on record did not prove the two charges he was charged with to the required standard.

19. The 2<sup>nd</sup> Appellant (1<sup>st</sup> Accused person) was convicted with all the charges and sentenced to 5 years imprisonment. He submitted in writing as follows;

(i) THAT the trial court based its findings on circumstantial evidence which was weak and unreliable and further that the trial court did not take cognizance of the surrounding circumstances.

(ii) The 2<sup>nd</sup> Appellant submitted that PW2 the IT Technician testified that he learnt that the system was manipulated with intent to defraud the complainant but he failed to illustrate whether the assignment of the username and password were machine generated thus autonomous and devoid of human manipulation.

(iii) The 2<sup>nd</sup> Appellant further submitted that the testimony offered by the expert witness was not conclusive to warrant a conviction and further that PW2 cast aspersions before the trial court in testifying that the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons (the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants) were working in the same office without establishing a nexus between them and the crime in question.

(iv) The 2<sup>nd</sup> Appellant submitted that the trial court infringed Articles 27 (1), (5) and 31 of the constitution when PW8 testified that she was called into the office of the operations manager on 2/4.2011 regarding a transaction she posted on 6/10/2011 and she was categorical that it emerged that it was the 2<sup>nd</sup> Appellant who had posted the same and the trial court erroneously admitted this to the detriment of the 2<sup>nd</sup> Appellant and relied on it to convict the 2<sup>nd</sup> Appellant.

(v) It was further submitted on behalf of the 2<sup>nd</sup> appellant that the trial court convicted the 2<sup>nd</sup> Appellant on uncorroborated, unreliable and doubtful evidence for instance PW9, the Finance Manager confirmed that JAMES FINLAY did not lose any monies whereas PW1 said JAMES FINLAY lost money.

(vi) It was further submitted on behalf of the 2<sup>nd</sup> Appellant that PW10, the Internal Auditor stated in his testimony that some transactions were done while the 2<sup>nd</sup> Appellant was on leave and his password and username were used to make the postings while he was away on leave and yet the systems operator (PW 14) was did not say whether it was possible for one to remotely access their work credentials

while away on leave.

(vii) It was submitted that the evidence of PW9 was contradictory to that of PW1, the Operations and Human Resource manager who stated that when an employee goes on leave his user account was blocked and could not be used while PW10, the Finance Manager said being on leave could not preclude one from accessing the Bank and transacting.

(viii) The 2<sup>nd</sup> Appellant submitted that the trial court shifted the burden of prove to him and used evidence adduced in his defence to convict him and further that the offence of conspiracy to defraud must of necessity be committed by two or more persons acting in concert to execute a common intention and yet there was no evidence that the three Appellants conspired to defraud the society.

(ix) It was further submitted that IRENE OTIENO ODONGO was not called to testify and yet the 2<sup>nd</sup> Appellant was convicted on the basis of a statement made by the said IRENE OTIENO ODONGO.

20. The 3<sup>rd</sup> Appellant (2<sup>nd</sup> Accused person) also submitted as follows;

(i) THAT the trial court convicted him on a charge whose particulars were totally defective and further that the charges were duplicitous in nature hence deflection was passed by the trial court.

(ii) The 3<sup>rd</sup> Appellant also submitted that his mitigation and Pre-sentence Report were not taken into consideration and that the sentence meted upon him was excessively harsh.

(iii) The 3<sup>rd</sup> Appellant submitted that he was charged with two similar charges of stealing by servant in counts II and IV and further that the particulars were the same and dates overlapped and this amounted to duplicity and hence he was punished twice with the same offence.

(iv) The 3<sup>rd</sup> Appellant submitted that the sentences meted were harsh and excessive and highly prejudicial and they occasioned him injustice.

(v) It was submitted that count I, the 3<sup>rd</sup> Appellant was sentenced to 3 years imprisonment, which is the maximum period provided for under the penal code and on counts II and IV he was sentenced to 5 years imprisonment and yet the penal code provides for 7 years and further that the object of sentence is to reform the 3<sup>rd</sup> Appellant.

(vi) It was also submitted that the 3<sup>rd</sup> Appellant was employed in September 2008 and in March 2009 he assumed the position of chief cashier and further that his functions were to reconcile tellers cash account, replenish cash to tellers, balance tellers at the end of each day and to take money to the bank and bank cheques.

(vii) The 3<sup>rd</sup> Appellant (2<sup>nd</sup> Accused person) submitted that his work did not entail opening accounts for customers and yet the person who was responsible for the same never recorded a statement.

(viii) The 3<sup>rd</sup> Appellant submitted that the other accounts under question were as follows;

- Philip Kibyegon Kirui

- Victor Chepkwony

- Wesley Tonui

- Benjamin Too and

- Chepkorir Langat

And yet none of them was investigated or charged in court despite that they were prime suspect.

(ix) The 3<sup>rd</sup> Appellant submitted that no witness from JAMES FINLAY was called to confirm that they did not loose money or that they had contractors who were paid by the cheques numbers stated or amounts stated.

21. The complainant also filed written submissions and states as follows;

(i) THAT the prosecution adduced watertight evidence that on diverse dates between 5<sup>th</sup> March 2009 and 24<sup>th</sup> March 2011 the 1<sup>st</sup> Appellant jointly with others not before court conspired to defraud the complainant by opening personal accounts falsely pretending that they belong to or were customers of the complainant and that the said accounts were then able to be operated by genuine customers.

(ii) It was further submitted that in order to prove an offence of

conspiracy to defraud the elements to be proved are the existence of an agreement and the intention to defraud and further that the agreement may either be express or implied from the circumstance of the case.

(iii) The complainant submitted that it was in the evidence of PW5 that the 1<sup>st</sup> Appellant collected his ATM card on 18/11/2011 upon presenting his ID card.

(iv) Further that PW 13 (The Document Examiner) confirmed that the signature on the ATM card collection Register resembled that of the 1<sup>st</sup> Appellant.

(v) There was evidence that the 2<sup>nd</sup> Appellant would initiate the withdrawals while the 3<sup>rd</sup> Appellant would authorize the same and the 1<sup>st</sup> Appellant would withdraw the funds. The withdrawals were done using PW7's account details and 2<sup>nd</sup> Appellant had swapped the account with the name Irene Ocholla whose ATM card was with him.

(vi) The complainant also submitted through his counsel that the 1<sup>st</sup> Appellant was the holder of A/c No.514061181 which was used by both the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants to cash money fraudulently transferred from complainants overdrawn accounts.

22. With respect to the 2<sup>nd</sup> Appellant, the complainant submitted that the prosecution proved the charges of conspiracy to defraud c/s 317 of

the P. C, Stealing by servant c/s 281 of the P. C and Stealing C/s 275 of the P.C to the required stand and further submitted as follows;

- (i) THAT the 2<sup>nd</sup> Appellant (1<sup>st</sup> accused person) was the master mind of the whole transaction and further that he was employed by the complainant as an accounts assistant.
- (ii) The complainant submitted that the 2<sup>nd</sup> Appellant created fictitious accounts with the 3<sup>rd</sup> Appellant (2<sup>nd</sup> Accused person) and the 2<sup>nd</sup> Appellant would initiate a money transfer and approve it and the 1<sup>st</sup> Appellant (3<sup>rd</sup> Accused) would cash using his ATM card.
- (iii) It was also submitted that the 2<sup>nd</sup> Appellant (1<sup>st</sup> Accused) stole the funds while employed by the complainant.
- (iv) Further that the rights of the 2<sup>nd</sup> Appellant were not violated as the police obtained a court order to search his accounts.

23. The complainant submitted that the 3<sup>rd</sup> Appellant (2<sup>nd</sup> Accused person) was convicted with counts I, II and IV and further that there was no duplicity of charges as the 3<sup>rd</sup> Appellant while working as a teller with the complainant opened two accounts No.051048354 where in withdrawals of Kshs.186,000 and Kshs.275,000 were made on 15/1/2010 and 9/4/2010 respectively. It was further submitted as follows;

- (i) THAT the 3<sup>rd</sup> Appellant was charged on count II with stealing Kshs.155,000, Kshs.290,000 and Kshs.175,000 on 15/1/2010, 6/2/2010 and 9/4/2010 respectively.
- (ii) Further, that although the charges were similar, they were conducted on different dates and charges were in compliance with section 135 (1) and (2) of the Criminal Procedure Code.
- (iii) The complainant also submitted that the said issue is an afterthought as it was not raised during the trial.
- (iv) The complainant referred to the case of PAUL KATANA NJUGUNA V REPUBLIC [2016]eKLR where the issue of duplicity of charges was discussed in details.

24. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion bearing in mind that the trial court had an opportunity see the witnesses.

25. The issues for determination in this appeal are as follows;

- (i) Whether the prosecution proved the charges against the Appellants to the required standard.
- (ii) Whether the rights of the Appellants were violated during the trial.
- (iii) Whether sentences meted were excessive.

26. On the issues as whether the charges against the Accused persons were proved to the required standard I find that the prosecution called a total of seventeen (17) witnesses and produced documentary evidence in support of their case.

27. There is evidence that the three Appellants had a design which they jointly implemented to defraud the complainant of funds. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were employees of the complainant while the 1<sup>st</sup> Appellant whose account was used to withdraw the funds worked with concert with the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.

28. It was the combination of the efforts of the three Appellants that made the complainant loose the funds totaling to over Kshs.7,000,000.

29. The standard of prove in criminal cases is beyond reasonable doubt and I find that the prosecution evidence discharged the said standard on all the counts the Appellants were convicted.

30. On the issue as to whether the rights of the Appellants were violated during the trial, it was submitted an account of the Appellants that the documents relied on were not supplied to the Defence. However, I find that the Appellants were represented at the trial and there is an indication that the issue was raised before the trial court and the same was redressed.

31. The 2<sup>nd</sup> Appellant also submitted that Article 27 (1), (5) and 31 of the Constitution was violated in that PW8 gave evidence that was prejudicial to him. I find that the 2<sup>nd</sup> Appellant has not demonstrated how this evidence was prejudicial to him since he had an opportunity to cross-examine the said witness (PW8) and even call evidence to counter her testimony.

32. On the issue that the sentences meted were excessive and also that the mitigation and pre-sentence reports were not taken into account, I find that the sentences are lawful and further, the trial court noted that upon perusal of the pre-sentence reports, the Appellants though remorseful were not willing to demonstrate on how to compensate the complainant.

33. In **KNN -VS- REPUBLIC [2020] eKLR** Odunga J. stated that:-

***"I must however state that the probation report being a report which is not subjected to cross-examination in order to determine***

*its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court..." he further stated that:- " To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so."*

34. The trial court noted that the amounts were huge and deterrent sentences were inevitable.

35. In **SHADRACK KIPKOECH KOGO -VS- REPUBLIC CRIMINAL APPEAL NO. 253 OF 2003** the Court of Appeal held that:-

*"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that the wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle and must be interfered with..."*

36. Similarly, in **BERNARD KIMANI GACHERU -VS- REPUBLIC [2002] eKLR** the Court of Appeal stated that:

*"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already states is shown to exist."*

37. In a nutshell, I find that the convictions herein are secure and the sentences lawful.

38. I dismiss the appeal and uphold the convictions and sentences.

**Delivered, dated and signed at Kericho this 9<sup>th</sup> day of July 2021.**

**A. N. ONGERI**

**JUDGE**