



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 82 OF 2017

JANE GATUYA MUGWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. S. Muchungi RM

delivered on 14th July 2017 in Nairobi CM CR. Case No. 1187 of 2011)

JUDGMENT

The Appellant, Jane Gatuya Mucheru was charged with a raft of offences under the **Penal Code**. The charges arose from the Appellant's alleged misconduct and breach of trust while at her place of employment. The thrust of the prosecution's case was that on diverse dates between 1st January 2011 and 2nd September 2011, the Appellant stole twenty-seven (27) cheque leaves listed in the charge sheet some of which she used to withdraw the sums of Kshs.579,400/-, Euro 500, USD 2,850 and Sterling Pounds 1460. The Appellant's employer was Don Bosco Boys Youth Educational Services. The charges range from theft by servant contrary to **Section 281** to **forgery** contrary to **Section 349**. The Appellant was further charged with two counts of **uttering false documents** contrary to **Section 353** and also charged with two counts of **stealing** contrary **Section 275**. She was finally charged with **handling stolen property** contrary to **Section 323**. In total, the Appellant was charged with seven (7) counts. The Appellant pleaded not guilty to the charges. After full trial, the trial magistrate convicted the Appellant of five (5) of the counts. In respect of the first count, she was sentenced to serve three (3) months imprisonment. In respect of the remaining four counts, she was sentenced to serve two (2) years imprisonment on each count. The sentences were ordered to run concurrently. When the Appellant appealed to this court, pending the hearing of the appeal, she was released on bail.

In her petition for appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She was aggrieved that she had been convicted on the basis of evidence that did not establish her guilt to the required standard of proof. She faulted the trial magistrate for failing to exhaustively analyze the prosecution's evidence, which in her view, was full of contradictory and inconsistent evidence that did not directly point to her as the person who stole the cheques in question and encashed them. She took issue with the fact that the trial court had shifted the burden of proof and failed to appreciate the fact that what she was being accused of constituted part of her duties as an employee of the organization and that some of the payment made to her were due to her. She was aggrieved that her cogent defence was not taken into consideration before the trial court reached the verdict that she was guilty as charged. She faulted the trial magistrate for ignoring the evidence that she had adduced in her defence which was to the effect that some of the cheques were paid to third parties who were not called to testify in the case nor were they similarly charged. She accused the trial court of ignoring the evidence which was to the effect that she was never at any time in custody of the cheque books and therefore she could not have had the opportunity to steal them. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed on her.

During the hearing of the appeal, parties filed their respective written submissions. This court also heard oral submissions from Mr. Rono for the Appellant and Ms. Kimaru for the State. Mr. Rono was of the view that the circumstantial evidence adduced by the prosecution did not meet the required legal threshold. He asserted that the trial court in convicting the Appellant made inferences and assumptions not founded on evidence. He averred that the missing funds were paid out to third parties and not the Appellant. He submitted that the prosecution failed to establish any connection between the Appellant and the stated third parties. He stated that anyone could have accessed the cheque book from the drawer where it was kept. He pointed out that the alleged stolen funds amounting to Ksh.600,000/- as particularized in the charge sheet was inconsistent with the amount of stolen funds brought out in the evidence on record. He was of the opinion that the custodial sentence of two (2) years meted by the trial court was harsh and excessive in the circumstances. He urged this court to review the sentence and give an option of payment of a fine since the Appellant was a first offender and a mother of two children.

Ms. Kimaru for the State opposed the appeal. She averred that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the Appellant was in-charge of keeping vouchers and accounting documents. She also wrote cheques. She stated that PW6 testified that she knew the Appellant as a banking agent of Don Bosco. Learned State Counsel asserted that most of the cheques were cashed in favour of the Appellant and Emmanuel Rescue Centre. She averred that a cheque book with missing cheque leaflets was recovered by police officers from the Appellant's residence. The Appellant was not able to explain where the missing cheques were. With regard to the Appellant's sentence, Learned State Counsel left the same to the discretion of the court. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Father Sebastian Kolady, was the Director of Don Bosco Youth Educational Services. He stated that the institution held four bank accounts at Standard Chartered Bank and two accounts at Commercial Bank of Africa. The signatories to the said bank accounts were Fr. John, Fr. Sanjay, Fr. George, Fr. Hurbert and PW1. Only two signatures were required to carry a transaction at the bank. If the priests were travelling, one of the priests would sign blank cheques so that if funds were required, the remaining priest could append the second signature. PW1 stated that on 20th August 2011, he got a call from Standard Chartered Bank informing him that dubious cheques from the organization had been presented to them. He instructed them to hold the cheques. He went to the bank on 1st September 2011 to follow up on the same. He discovered that several cheques not authorized by him had been presented to the said bank by the Appellant who was the institution's secretary. He cross-checked the cheques with his cheque book and discovered that several cheque leaflets had been plucked from the cheque book. The cheques had been plucked together with the counterfoils.

PW1 told the court that the cheque books were kept in the Administrator's office. They were kept in a drawer which was not locked. The cheques were ordinarily filled by himself, the administrator or sometimes the secretary. He immediately hired a private investigator and reported the matter to the police at Karen Police Station. He testified that the forged cheques were written out to the Appellant, Emmanuel Rescue Centre and Kentron Ltd. He said that he did not know the proprietors of any of the two companies. Most of the cheques had been paid out. PW1 produced in evidence the forged cheques. He also produced before court, bank statements for the institution's bank accounts held in Standard Chartered Bank and Commercial Bank of Africa for year 2011.

PW2, Fr. Sanjey Kizha Kinedath, was the Assistant Director in charge of planning. He was one of the organization's signatories. He stated that sometime in July 2011, PW1 asked him to sign a blank cheque. PW2 was set to travel to India the following month in August 2011. PW1 asked him to sign the cheque before he left since it required two signatories. The cheque was Serial No.9006478. Sometime in September 2011, PW1 called him and informed him that the blank cheque he signed had been stolen. PW3, Joyce Otwere, was a teller at Standard Chartered Bank, Karen Branch. On 15th February 2011, 28th February 2011 and 2nd March 2011, a customer presented to her three separate cheques Nos.901426, 900614 and 900618 respectively for amounts Ksh.55,000/-, Ksh.35,000/- and Ksh.44,000/-. The three cheques were drawn from three different bank accounts held by Don Bosco and were all payable to the Appellant. The cheques were processed. PW3 stated that she could not recall the customer who presented the cheques to her.

PW4, Benson Waithaka, was a teller at Commercial Bank of Africa, Galleria Branch. He stated that on 22nd July 2011, a customer came to the bank and presented a cheque for 830 pounds payable to Emmanuel Rescue Center by Don Bosco. After verifying that the cheque was okay, he forwarded the cheque to his supervisor who authorized payment of the same. The cheque was paid out. They were later informed that the cheque was not genuine. He stated that he could not remember the customer who presented the cheque to him. PW5, Caroline Kariuki was a teller at Standard Chartered Bank. On 28th April 2011, the Appellant came to the bank and presented to her a cheque for Ksh.47,000/- drawn from an account held by Don Bosco. The cheque was payable to the Appellant. She received the same and forwarded it to her superior for authorization. PW6 testified that she knew the Appellant as an agent of Don Bosco and had served her at the Karen Branch on several occasions. She stated that the Appellant also held a bank account at the said bank.

PW6 Linda Amukoa, was a teller at CBA Bank, Galleria Branch. On 22nd July 2011, a customer presented a cheque Serial No.42 for USD 1020 (PEX.31) payable to Emmanuel Rescue Center. She verified that all the details were in order. The cheque was paid out. She stated that she could not remember the customer who presented the cheque to her. PW7 Roseline Musa was a teller at CBA. On 25th July 2011, she received a cheque (PEX.13) from one of her colleagues. The cheque was for USD 1020 payable to Emmanuel Rescue Centre. After verifying that all the details of the cheque were in order, she processed the same. PW8 Ann Nyokabi was a cash officer at CBA Upper Hill Branch. On 25th January 2011, one of the tellers PW7 forwarded to her a cheque No.5 (PEX.13) for authorization for payment. After confirming that everything was in order, she authorized the same for payment. She stated that she did not know who deposited the cheque since the same was forwarded to her by a teller.

PW9 Michira Ndege was a document examiner based at the CID Headquarters Nairobi. He stated that on 20th December 2011, he received several exhibits from the investigating officer namely; cheques marked A1-A19, specimen handwriting of the Appellant marked B1-B8, known handwriting of the Appellant marked C1-C2, known signature of the Appellant marked D1-D2, specimen signature of PW1 marked E1-E6, and known signature of PW1 marked F1-F4. He was instructed to ascertain whether the signatures on the cheques alleged to belong to PW1 were authored by PW1. He was also required to ascertain whether the handwriting on the cheques matched the Appellant's handwriting. After his analysis, he formed the opinion that the handwriting on the cheques matched the specimen & known handwriting of the Appellant. He stated that the signatures on the cheques alleged to belong to PW1 were not authored by PW1. He produced a report of the same into evidence.

PW10, Thalma Mkama, was a cash officer at CBA. On 22nd July 2011, she received two cheques from one of the tellers for authorization. The cheques were payable to Emmanuel Rescue Centre by Don Bosco. They were for amounts \$1020 and 800 pounds. She authorized the same to be paid. PW11 Willy Tanui was the Head of Financial Crime and Risk Department at Standard Chartered Bank. On 28th October 2011, he was instructed by the police to avail all documents pertaining to four accounts belonging to Don Bosco Youth Educational Centre held at the Karen Branch. The said bank accounts were Don Bosco Youth Account No.9302092980900, Don Bosco Communication Account No.0102096735100, Don Bosco East Africa Account No.8702096785200 and Don Bosco Yes Account No.0102092980900. He was also asked to forward account documents for Account No.0100318309600

belonging to the Appellant.

PW12 P.C Simon Kakai attached at Karen Police Station was the arresting officer. He stated that a private investigator (PW13) came to the station on 2nd September 2011. He was on duty together with P.C. Kirui. PW13 made a report regarding an employee of Don Bosco Education Centre who was suspected to have stolen some money from the institution. He requested them to accompany him to the institution where they arrested the Appellant. They later handed over the Appellant to officers from the CID who carried out investigations. PW13 Daniel Muthuri was a private investigator. PW1 called him on 1st September 2011 and instructed him to investigate allegations of fraud involving one of their employees (the Appellant). He accompanied PW1 to the bank and they retrieved the organization's bank statements for the period in question. He reported the matter on behalf of the institution to Karen Police Station. The Appellant was arrested the following day.

The investigating officer in the present case was PW14, CPL Stephen Njagi based at the Criminal Investigation Department in Langata. He was assigned the case by the DCIO Langata on 2nd September 2011. He proceeded to Karen Police Station where the Appellant was being held. He was accompanied by PC Omondi. The police officers at the said station handed over the Appellant. The Appellant was alleged to have stolen several cheques and illegally cashed the same at Standard Chartered Bank and Commercial Bank of Africa. They went to the Appellant's house in Ngong and conducted a search. They recovered several documents including personal cards belonging to the Appellant, one Standard Chartered Bank cheque book with ten missing leaflets, a pamphlet for Emmanuel Rescue Centre, a blank cheque No.901622 drawn by Don Bosco Account No.0102092980900 as well as three cheque deposit slips dated 28th August 2011.

They later took the Appellant to Langata Police Station. He visited Standard Chartered Bank and Commercial Bank of Africa where he recovered certified copies of the cheques in question as well as bank statements for the accounts belonging to Don Bosco and the Appellant for the period January 2011 to September 2011. He also obtained known and specimen signatures of PW1 and the Appellant as well as known handwriting of the Appellant and forwarded the same to a document examiner (PW9) together with the alleged forged cheques. The report from PW9 indicated that the Appellant was the one who filled the cheques and forged PW1's signature. The Appellant was not able to explain why a blank cheque belonging to Don Bosco was recovered from her house. After concluding his investigations, he proceeded to charge the Appellant with the present offence.

The Appellant was put on her defence. She stated that she was employed by Don Bosco Youth Education Services in 2004 as a Receptionist. She later became a Secretary in 2005. Her duties included preparing payroll for staff, making out cheques, depositing cash and cheques at the bank, petty cash withdrawal and preparing financial statements. Cashing out cheques was also part of her duties at the institution. She reported to the Administrator, Fr. John Marcinaik. When she received an invoice, she would make out a cheque for the same and forward the cheque to the Administrator. The cheque required two signatories. The cheques were usually signed by PW1 and Fr. John since they were the only priests residing within the institution. She stated that at times, Fr. John would make out a cheque in her name as a token of appreciation for taking up extra duties. She testified that her salary was also paid via cheque. It was her testimony that all the cheques written out to her that were produced in evidence by the prosecution were either for payment of her salary or remuneration for taking up extra duties at work. She admitted that she drew the cheques since that was part of her normal duties. The said cheques were signed by the required signatories. She denied stealing any cheques from the institution.

The Appellant stated that PW1 used to sign blank cheques and leave them in a drawer at the administrator's office. In case she needed to make any payments, she would fill out the blank cheque and take the same to Fr. John to append the second signature. She denied the prosecution's assertion that she forged PW1's signature. She testified that when Fr. John was transferred, PW1 took over his duties as an Administrator on an interim basis. She explained to PW1 that she needed to get paid for carrying extra duties at the institution. PW1 told her that she had to engage in sexual relations with him for him to pay her the extra remuneration. She declined his advances. PW1 started issuing threats that he would fire her. She reported the incident to Fr. Hubert who was in-charge of the institution's branch based in town. He however did not offer any solution. Three days later, she was arrested by the police. The complainant also filed a civil suit against her for recovery of alleged stolen funds.

On cross-examination, the Appellant stated that she knew of Emmanuel Rescue Centre since Don Bosco was involved with the Rescue Centre. She stated that they were not paid by Don Bosco. She maintained that she had the mandate to draw cheques for payments by the institution. She testified that extra duties included firing and hiring of employees. She said that Fr. John used to pay her extra remuneration once or twice a month as a token of appreciation. She would get upwards of Ksh.35,000/- as a token of appreciation from Fr. John. Her salary was in year 2011 about Ksh.27,000/-.

This being a first appeal, this Court is mandated to re-evaluate afresh the evidence presented before the trial court. The Court of Appeal in the case of Gabriel Kamau Njoroge –vs- Republic [1987] eKLR stated this on the duty of the 1st Appellate court:

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”

In the present appeal, the issue for determination is whether the prosecution established the Appellant's guilt on the charges preferred against her to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. The Appellant was charged in count 1 with the offence of **theft by servant contrary to Section 281 of the Penal Code**. She was alleged to have stolen several cheques from her employer, Don Bosco Youth Educational Services, based in Karen.

It was not disputed that the Appellant was an employee of said institution. She was first employed as a receptionist and later became a secretary. She admitted to these facts in her testimony. The Appellant stated that her duties included **preparing payroll for staff, making out cheques, depositing cash and cheques at the bank, petty cash withdrawal and preparation of financial statements**. From the

evidence on record, the prosecution established that the cheques as particularized in the charge sheet were indeed stolen. PW1, who was one of the institution's signatories, and whose signature appeared on the stolen cheques, denied signing the same. His evidence was corroborated by the evidence of Forensic Document Examiner (PW9). The cheques were therefore not issued by the complainant.

In addition, the cheques in question had been plucked from the cheque book, together with the counterfoil in a deliberate effort to conceal the theft. The trial court, in convicting the Appellant, relied on circumstantial evidence. The test to be met with regard to circumstantial evidence was laid out in the case Sawe vs Republic [2003] eKLR, where the Court of Appeal stated thus:-

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on.”

The evidence by the forensic document examiner established that the Appellant filled out the cheques in question. The Appellant in her defence admitted to writing out the said cheques. She told the court that drawing cheques was part of her normal duties. This court also notes that most of the cheques were in the Appellant's name. The said cheques also reflected in her Standard Chartered Bank account statement (**PEX31**) where the same had been processed. It is trite that a court can rely on circumstantial evidence to find a conviction as was held in R v. Taylor, Weaver & Donovan [1928] 21 Criminal Appeal CA 20, to wit:

“Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.”

In the present appeal, the Appellant had the opportunity to commit the offence. She had access to the cheque books since it was part of her duty to write out the cheques, and not any other employee.

The prosecution established that she indeed made out the said cheques. She did so without the complainant's authority since the complainant's signature was forged. Funds cashed out from the said cheques were paid out to the Appellant. In addition, the fact that the cheques had been plucked out together with the counterfoils points to the fact that the guilty party was trying to conceal the theft. If indeed the Appellant wrote out the said cheques in the normal course of business, she would have retained the counterfoils in the cheque book. The prosecution was able to prove that the cheques in question were filled out by the Appellant. It therefore follows that she is the one who illegally plucked out the cheques without the authority of the complainant. This court is of the view that no other logical explanation can be derived from the evidence on record, taken into totality, other than the fact that the Appellant stole the cheques as particularized in the charge sheet, and cashed out the same in her favour. Her conviction in count 1 is upheld.

The Appellant in count 2 was alleged to have forged the signature appearing on the cheques as particularized on the charge sheet. **Forgery** is defined under **Section 345** of the **Penal Code** as *“making a false document with intent to defraud or to deceive”*. The onus is on the prosecution to prove that the document is forged, that the accused person forged the said document and that the accused person forged the document with intent to defraud or deceive.

In the present appeal, PW1 was one of the institution's signatories. He was alleged to have signed the said cheques. He however denied signing the same. The prosecution availed a Government Document Examiner (PW9) to adduce evidence. PW9 testified that he examined the signatures on the cheques and compared the same to PW1's specimen and known signature provided to him. *After his analysis, he came to the conclusion that PW1 did not sign the said cheques. The prosecution was therefore able to prove that the cheques were a forgery.* It is the prosecution's case that the Appellant forged the said cheques in a bid to steal funds from her employer. The Appellant on her part denied forging PW1's signature. She stated that she filled out the cheques but did not forge PW1's signature on the said cheques.

On re-evaluation of the evidence adduced before the trial court, it was clear to this court that the Appellant was the beneficiary of most of the forged cheques. As stated earlier in this judgment, the Appellant filled out the cheques as was her duty. She was required to ensure that two designated signatories signed the cheque before presenting the same to the bank. One of the signatory's signatures (PW1) was however forged. The cheques which were produced in evidence were written out to the Appellant. The same were cashed in as was reflected in her bank account statements produced in evidence. It therefore follows that the Appellant forged the said signature and cashed in the cheques in her favour. Her defence, which was a mere denial, did not dent the otherwise strong and cogent prosecution's evidence against her. This court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant caused the said cheques to be forged so that she could cash them in her favour. The Appellant's appeal against conviction in count 2 therefore lacks merit and is hereby dismissed.

The Appellant was further charged in count 5 and 6 with the offence of **stealing** contrary to **Section 275** of the **Penal Code**. The Appellant was alleged to have stolen Ksh.579,400/-, 500 Euros, and USD830 from the complainant's bank accounts held in Standard Chartered Bank, and GBP 1460 and USD 2,040 from the complainant's bank account held in Commercial Bank of Africa, as particularized in the charged sheet. As was held earlier in this judgment, the prosecution did establish that the Appellant stole the relevant cheques with regard to the stated stolen funds. She also forged PW1's signature on the cheques. The stated cheques led to debit of the above amounts of money from various bank accounts held by the complainant. Apart from the 500 Euros, USD830, GBP 1460 and USD 2040 which were paid out to third parties, the alleged stolen funds were credited to the Appellant's bank account as reflected in her bank account statement produced in evidence.

The Appellant in her defence stated that she received the funds from Fr. John as a token of appreciation for taking up extra duties at the institution. This court is of the opinion that her defence was not believable since the cheques were forged and not genuine. The amounts she alleged were tokens of appreciation were also way above her monthly salary. It therefore follows that the complainant forged the said cheques in a bid to steal funds from her employer. Even though the 500 euros, USD830, GBP 1460 and USD 2040 were paid to third parties, the prosecution established that the Appellant stole the relevant cheques, filled out the same and caused PW1's signature to be forged. She therefore debited the funds from the institution's bank accounts and paid out the same to third parties without the complainant's authority.

The Appellant's defence was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. This court is of the view that the prosecution established the elements of the offence of **stealing** contrary to 275 of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

The Appellant was charged in count 7 with the offence of **having suspected stolen property** contrary to **Section 323** of the **Penal Code**. The Appellant was alleged to have been found in possession of one blank cheque No.901622 which was suspected to have been stolen. PW1 in his testimony listed down the various cheque leaves that were missing from the institution's cheque book. Cheque No.901622 in question was among the cheque leaves listed as missing from a cheque book for the Don Bosco Yes Series Account No.0102092980900 held at Standard Chartered Bank that was produced before court. The blank cheque leaf was recovered from the Appellant's house when she was arrested. The Appellant in her defence admitted that the blank cheque leaf was recovered from her house by the police. Upon re-examination, she explained that the same was not abnormal since she dealt with cheques in her normal daily duties at the institution. This court notes that from the evidence on record, the cheque books were kept at the Administrator's office. The Appellant admitted as much in her defence. The presence of the blank cheque leaf in her house was therefore irregular. In addition, the cheque leaf's counterfoil had also been plucked out of the cheque book, in a bid to conceal the missing cheque leaf. This court is of the opinion that the Appellant's explanation of why the cheque leaf was recovered from her house was displaced by evidence on record. Her conviction in count 7 is hereby upheld.

In the premises therefore, this court finds no merit with the appeal lodged by the Appellant with respect to the counts that she was convicted of. Her appeal against conviction is hereby dismissed. The funds stolen from the institution were not recovered. However, before the court can sentence the Appellant, it will direct that a probation report be prepared so as to determine whether the Appellant is suitable to serve a non-custodial sentence. Upon receipt of the probation report, the court will impose an appropriate sentence. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE