



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 45 OF 2018

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

AND

DANIEL ORINA ONSOMU.....RESPONDENT

(Being an appeal from the original Conviction and Sentence of Hon. E. A. Obina dated 26th April 2018 at the Magistrate Court in Kisii in Criminal Case No. 1345 of 2010)

JUDGMENT

1. This is an appeal by the Director of Public Prosecutions following the acquittal of the respondent, **DANIEL ORINA ONSOMU** under **section 215** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. Before the trial court, the respondent ("the accused") faced the following charges:

COUNT 1: STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE.

On 24th March, 2010 at Moromba Farmers Co-operative Society Limited within Nyamira County, he stole one Co-operative Bank Cheque Book serial numbers 000301 to serial number 000400 valued at Kshs. 500/= the property of Co-operative Bank of Kenya issued to Moromba Farmers Co-operative Society.

COUNT 2: FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE.

On 24th day of March at Moromba Farmers Co-operative Society Limited within Nyamira County, jointly with others not before court, he forged a certain document namely Co-operation Bank of Kenya Cheque No. 000390 of Kshs. 196,000/= in respect of ROBERT N. ONCHANG'A purporting to be true and valid cheque issued by Moromba Farmers Co-operative Society Limited.

COUNT 3: FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE.

On 26th April at Moromba Farmers Co-operative Society Limited within Nyamira County, jointly with others not before court, he forged a certain document namely Co-operation Bank of Kenya Cheque No. 000392 of Kshs. 400,000/= in respect of CLEMENT M. NYANGENA purporting to be true and valid cheque issued by Moromba Farmers Co-operative Society Limited.

COUNT 4: FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE.

On 27th day of April at Moromba Farmers Co-operative Society Limited within Nyamira County, jointly with others not before court, he forged a certain document namely Co-operation Bank of Kenya Cheque No. 000399 of Kshs. 485,960/= in respect of ROBERT NYAMWEYA ONCHANG'A purporting to be true and valid cheque issued by Moromba Farmers Co-operative Society Limited.

COUNT 5: FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE.

On 28th day of April at Moromba Farmers Co-operative Society Limited within Nyamira County, jointly with others not before court, he forged a certain document namely Co-operation Bank of Kenya Cheque No. 000398 of Kshs. 375,000/= in respect of ROBERT N. ONCHANG'A purporting to be true and valid cheque issued by Moromba Farmers Co-operative Society Limited.

COUNT 6: UTTERING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 375(b) OF THE PENAL CODE.

On 22nd day of April at the Co-operative Bank of Kenya Parliament Road Nairobi within Nairobi County, with intent to defraud he knowingly uttered a certain document namely Co-operation Bank of Kenya cheque leaf serial number 000390 of Kshs. 196,000/= in respect of ROBERT N. ONCHONG'A purporting to be true and valid cheque issued by Moromba Farmers Co-operative Society Limited which was made without lawful authority.

COUNT 7: UTTERING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 375(b) OF THE PENAL CODE.

On 3rd day of May at National Bank of Kenya Limited Hospital Branch within Nairobi County, with intent to defraud, he knowingly uttered a certain document namely Co-operation Bank of Kenya cheque leaf serial number 000392 of Kshs. 400,000/= in respect of CLEMENT M. NYANGENA purporting to be true and valid cheque issued by Moromba Farmers Co-operative Society Limited which was made without lawful authority.

COUNT 8: UTTERING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 375(b) OF THE PENAL CODE.

On 29th day of April at the Co-operative Bank of Kenya Limited Nairobi Business Centre Ngong Road within Nairobi County, with intent to defraud knowingly uttered a certain document namely Co-operation Bank of Kenya cheque leaf serial number 000399 of Kshs. 485,960/= in respect of ROBERT NYAMWEYA ONCHONG'A purporting to be true and valid cheque issued by Moromba Farmers Co-operative Society Limited which was made without lawful authority.

COUNT 9: UTTERING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 375(b) OF THE PENAL CODE.

On 29th day of April at the Co-operative Bank of Kenya Limited Moi Avenue Branch within Nairobi County, with intent to defraud, he knowingly uttered a certain document namely Co-operation Bank of Kenya cheque leaf serial number 000398 of Kshs. 375,000/= in respect of ROBERT N. ONCHONG'A purporting to be true and valid cheque issued by Moromba Farmers Co-operative Society Limited which was made without lawful authority.

2. The appellant has appealed to this court on the grounds set out in the petition of appeal dated 5th July 2018 as follows:

1. *The learned trial magistrate failed to take into account the evidence produced as a whole but wholly concentrated on the defense evidence totally disregarding that of the prosecution.*
2. *The trial magistrate failed to take into account that expert evidence connected the respondent with some of the offences charged.*
3. *The trial magistrate wrongly evaluated the evidence in acquitting the respondent.*

3. Before I deal with the arguments raised by the parties, I must recall the general principle that governs this court's exercise of the appellate jurisdiction. As this is the first appellate court, it is my duty to re-examine and evaluate the evidence tendered at the trial and come to my own findings and conclusions bearing in mind that I did not have the advantage of seeing the witnesses when they testified (*see Okeno v Republic [1972] EA 32.*) In dealing with this task, I shall outline the evidence before the trial court.

4. The accused was the Secretary Manager of Moromba Farmers Co-operative Society ("the Society"). The Chairman of the Society, Clement Mouko Nyagena (PW 1), testified that on 3rd May 2014 he received a call from the Co-operative Bank ('the Bank') and was shown the following cheques and deposit slips:

- No. 399 drawn on 27th April 2010 in favour of Robert Nyamweya Onchonga for Kshs. 485,960/- with a deposit slip showing that he had deposited the cheque on 29th April 2014 at the Cooperative Bank Parliament Branch.
- No. 398 drawn in favour of Robert Nyamweya Onchonga for Kshs 375,000/- and a deposit voucher shown it was deposited at Co-operative Bank Parliament Branch without that the depositor indicated.
- A photocopy of a cheque no. 390 for Kshs. 196,000/- dated 24th March 2010 in favour of Robert Nyamweya Onchonga ("Robert").

5. PW 1 was informed that the drawee had already withdrawn Kshs. 196,000/-. He denied that he authorised or signed the cheques or knew Robert. PW 1 later met the members of the executive committee and the accused. The accused informed him that the cheque book and the vouchers were lost but that he had not reported the loss to the police. They proceeded and reported the loss at Nyamira Police Station but were later referred to Kisii Police Station where investigations started.

6. PW 1 further testified that on 5th May 2010, the District Cooperative Officer called to inform him that a cheque in his name was banked in his account at the National Bank of Kenya. He requisitioned the cheque deposit voucher which showed that he signed the deposit voucher dated 3rd May 2010. He confirmed that neither the cheque nor deposit slip was signed by him. He also stated that it lacked the 5th signature. The Society cheque no. 392 dated 26th April 2010 was drawn in his favour for Kshs. 400,000/-. PW 1 told court that the accused had been transferred from the Society on 22nd April 2010 but was to handover 5th May 2010. Before he handed over, the accused attended and recorded the minutes of the meeting on 29th April 2010.

7. The Society's Honorary Secretary, Peter Mayaka Onsongo (PW 2), the Vice-chairperson, Bosire Nyamongo (PW 3) and the Treasurer, Wilson Nyamumbo Mageto (PW 4) all testified that they attended the meeting of 3rd May 2010. The accused told them he could not find the vouchers and cheque book and when he went home, he did not find them. They all testified that when they went to the police station and cheques nos. 392, 398 and 399 were shown to them. They all denied that they signed or authorised the cheques as required by their procedures.
8. Charles Nyainga (PW 5) testified that he was employed by Gusii Coffee Farmers' Cooperative Society Limited ('Union'). He testified that when a cooperative, in this case the Society, draws a cheque it is brought to the Union and after it has been signed by the Chairman, Vice chairman, Treasurer and Honorary Secretary. It is taken to the accountant for approval and the General Manager for authorization, both the accountant and the general manager sign the cheque. On 3rd May 2010, he went to Co-operative Bank for official duties and was informed that cheque no. 390 from the Society had been cashed in Nairobi for an amount of Kshs 196,000/=. He told court that the cheque did not have the General Manager's signature and the signature appended thereon was not his. He stated that he knew the accused as the Secretary Manager of the Society.
9. Eric Aretha (PW 7) from the National Bank of Kenya, Kisii branch confirmed that on 3rd May 2010, the Society's cheque no. 392 for Kshs 400,000/- was deposited into PW 1's account in National Bank, Hospital Branch, Nairobi. The cheque was to mature after three clear days but it was stopped. The Customer Relations Officer for the Cooperative Bank, Kisii branch, Ochieng Thomas Anyumba (PW 8), testified two cheques issued to Robert were presented at Cooperative Bank Nairobi Business Center and Cooperative Bank Moi Avenue respectively. As he was required to confirm cheques over Kshs. 200,000/-, PW 8 called PW 1 who informed him that the Society had not issued the cheques. PW 8 instructed the branches not to honour the cheques, however there cheque no. 390 for Kshs 190,000/- was honoured.
10. The Investigating Officer, PC John Kinyua (PW 9) recalled that on 7th May 2010, the Society officials, PW 1, PW 2, PW 3, PW 4 and the accused, came to the DCI Kisii officers to report that a cheque book and voucher had been stolen. He recorded their statements in which the officials denied that they had authorised and signed the cheques while PW 1 denied that he signed the deposit voucher. After collecting cheques nos. 398 and 399 that had been issued to Robert, cheque no. 392 issued to PW 1 and the accompanying deposit slips, sample signatures from PW 1, PW 2, PW 4, PW 5 and the accused and the Society's documents prepared by the accused including account summaries, funding proposals, agenda for meeting and minutes, he prepared an exhibit memo for the handwriting expert to compare the signatures of the cheques and determine the authorship of thereof.
11. The Document Examiner, Chief Inspector Alex Mwangela (PW 6) explained that he trained as a document examiner in Ribat University, Sudan and had worked with CID Forensic Laboratory since 2007. He testified that on 2nd January 2011 he received the following exhibits for examination accompanying the exhibit memo; Cheques nos. 392,398, 399, a copy of cheque no. 390, three deposit slips. He received the accused's specimen handwriting and the specimen handwriting for PW 1, PW 2, PW 3 and PW 4 and PW 5. PW 6 explained that he examined the handwriting on the cheques and deposit slips and compared it that of the accused, PW 1, PW 2, PW 3, PW 4 and PW 5 by examining the same through specialized machines for image enhancement and magnification. By using the machines for better visibility and inspection of minute individual characteristics for absolute characteristics he made his findings in a report dated 2nd March 2011. He concluded that the handwriting on cheque no. 399 and the two deposit slips for cheque 399 for Kshs. 485,960/- in favour of Robert and cheque 392 for Kshs. 400,000 made in favour of PW 1 was made by the same author of the specimen handwriting given by the accused and the known handwriting of the accused shown in the Society's documents. He also concluded that the cheques and deposits slips were not signed by the Society's officials.
12. When placed on his defence, the accused denied the charges. He testified that he was in custody of the cheque books but that PW 1 and the treasurer had access to his office. He denied forging any document and told court he did not benefit from the forgeries. He testified that the cheques that went through were for the amount of Kshs 196,000/- to Robert Nyamweya Onchogo and Kshs 400,000/- to PW 1, however the amount to PW 1 was refunded. He also testified that the sample documents submitted were not his handwriting as he usually signed all documents he authors.
13. After hearing the evidence, the trial magistrate concluded that the prosecution had not established its case. He accepted that the accused was the custodian of the cheque book but held that the accused could not have stolen it. As regards Counts 2, 3, 4 and 5, the trial magistrate held that the accused's handwriting was on the cheques but the particulars of the offence did not disclose the date on the cheques. He held that, "*The accused is supposed to know the full particulars of the charges (sic) him in order to prepare for his defence. Failure to disclose the date was fatal on the 2nd, 3rd, 4th and 5th counts. I find the accused not guilty.*" As regards the 6th, 7th, 8th and 9th counts, the trial magistrate found as fact that none of the witnesses testified that the accused presented the cheques to the bank.
14. At the hearing counsel for both parties made brief oral submissions. In support of the appeal, counsel for the appellant reiterated the grounds of appeal set out in the petition of appeal and urged that the prosecution proved all the elements of the offences for the which the respondent was charged.
15. Counsel for the respondent submitted that the prosecution did not prove its case beyond reasonable doubt. He supported the judgment of the trial magistrate and submitted that PW 1, PW 2, PW 3 and PW 4 signed the cheques and that PW 1 actually received the proceeds of the cheque in his account thereby casting considerable doubt on the prosecution case. He pointed out that the respondent was not the only one in custody of the cheque book hence he could not be convicted of the offences.
16. Turning to my own consideration of the evidence, I am alive to the fact that the appellant's case against the accused was based on circumstantial evidence as no one saw the respondent steal the cheque book, forge the cheques and deposit slips and then utter them. The law concerning circumstantial evidence has been stated by the Court of Appeal in several cases in including **Nduruya v Republic [2008] KLR 135** and **Sawe v Republic [2003] KLR 364** where it was held that before convicting an accused on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt.
17. I find that following facts are not in dispute. First, that the accused was the Secretary Manager was the custodian of the cheque book and vouchers as he ran the day to day affairs of the Society. The accused agreed in cross-examination that he was the custodian of the cheque

book. Second, PW 1, PW 2, PW 3, PW 4, PW 5 and the accused admitted that signatories of the Society's cheques were the Chairman, Secretary, Treasurer and the Accountant and General Manager of the Union. While the PW 1, PW 2, PW 3, PW 4 and PW 5 denied that they signed cheques nos. 390, 392, 398 and 399 and the deposit slips.

18. The gist of the offence of stealing is that the accused stole the Society's Cooperative Bank of Kenya cheque book serial nos. 000301 to 000400. The cheque book was in the accused's custody when it went missing and a forged cheque was found to have been written in his handwriting. The accused suggested that the Chairman (PW 1) and Treasurer (PW 3) had access to his office and that they could have stolen the cheque book. In my view this evidence, is to be viewed against PW 6's testimony that the accused's handwriting was on one of the cheques. The possibility that PW 1 and PW 3 stole the cheques is excluded by the fact that the accused's handwriting was found on a cheque from a cheque book which he claimed had been lost and two deposit slips.

19. Counsel for the accused, in cross-examination of PW 1, suggested that it was likely that cheque book and other documents were not handed over to the accused when he took over from his predecessor in January 2010. This point was rebutted by the testimony of PW 1, PW 2, PW 3 and PW 4 who stated that when the accused came to the meeting on the morning of 3rd May 2010, he alleged that the cheque book was lost and this was what was reported to the police. He did not allude to the fact that the cheque books were never handed over to him.

20. The issue of stealing is intricately connected to the issue of forgery. In order to establish the case of forgery, the prosecution relied on the expert evidence of PW 6. In considering the evidence before the court, I am alive to the fact that the evidence of a handwriting expert is a matter of opinion. Although the court may rely on such an opinion, it is not necessarily bound by that opinion. In **Samuel Tela Akute v Republic NRB HCCRA No. 844 of 2004[2006]eKLR**, the court considered the position of a handwriting expert and stated as follows:

The evidence of an expert is a mere opinion which is not binding on the trial Court. The Court has to make its own independent evaluation and finding, the opinion of the expert notwithstanding. The Court has to examine the documents itself and come up to the conclusion with such assistance as can be furnished by the experts in the field, whether a particular writing is to be assigned to a particular person. In the instant case there is no evidence that such an exercise was undertaken by the trial Magistrates. There is no indication whatsoever that the Learned trial Magistrate did on his own examine the signatures and arrived at the conclusion that they were similar.

21. It is clear from the judgment that the trial magistrate did not analyse the testimony of PW 6 vis-à-vis the documentation produced by him and come to the conclusion that the accused forged the cheques and deposit slips. PW 6 explained credentials as an expert and nothing in this appeal turns on that. He also explained how he carried out the comparison of the handwriting using the sample signatures and handwriting provided by the accused, PW 1, PW 2, PW 3, PW 4 and PW 5.

22. In his defence, the accused stated that his handwriting sample was taken for examination by PW 6 but he did not present the specimen to the court. I have considered the exhibits which were presented in court and none of them was contested at the hearing or in cross-examination. The accused further contended PW 6 only examined the accused handwriting and not the signatures. His counsel also submitted that signatures are important since they are the ones that made the payment possible and further the handwriting used for comparison is not the one he made while in police custody.

23. In his report, PW 6 compared the specimen signatures provided by the accused and his own handwriting contained in the Society's documents. He concluded that the respondent's handwriting was found on cheque 399, the deposit slip banking cheque No. 399 for the Kshs. 485,960/- in Robert's account and the deposit slip banking cheque no. 392 in PW 1's account. PW 6 explained that since the signatures were forged, it was not necessary to compare them but the handwriting was important as it had special features from which he concluded that the handwriting on the cheque and deposit slips was made by the accused. I have also looked at the handwriting on cheque no. 399 and the two deposit slips and the sample signature and handwriting of the accused and they bear some similarity hence I accept the findings of PW 6.

24. Although the trial magistrate found that the accused's handwriting was on the cheques, he rejected the charges for the want of particulars. I reject the finding by the trial magistrate that the particulars of the offence were insufficient in that they did not disclose the date. The charges I have set out at the opening paragraph of this judgment show the particulars of the cheques that were forged. The only error I can detect is the failure to state the year after setting out the date and month.

25. The manner of framing charges is provided for under **section 134** of the **Criminal Procedure Code** which states -

134 Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged.

26. Each count sets out the particulars of the cheques, the date, the number, the drawer and drawee leaving no doubt the case the prosecution intended to prove. In addition, the tenor of the evidence was clear as to when the incidents took place and the accused through his counsel was able to not only to cross-examine the witnesses but also proffer a defence. The error, if any, was not fatal and did not cause any prejudice to the accused and is curable under **section 382** of the **Criminal Procedure Code**.

27. Since the cheque book was exclusively within the accused's custody and the forged cheque and deposit slips were found to contain his handwriting, the accused had a duty to explain what could have happened to the cheque book. **Section 111** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** provides that any person accused of an offence has the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to the operation of the law creating the offence with which the person is charged and the burden of proving any fact especially within the knowledge of such person is upon him. The burden is evidential only and is discharged if the court is satisfied, on the balance of probabilities, by evidence tendered by the prosecution or in cross examination. Where the facts are peculiarly within the accused's knowledge, under **section 111(1)** of the **Evidence Act** a rebuttable presumption arises that he knows the circumstances under which the theft took place.

28. In light of the facts presented by the prosecution, the respondent had the evidential burden to show that he did not steal the cheque book and or forge the cheque and deposit slips. He suggested that PW 1, PW 3 or anyone else could have stolen the cheques but this is disproved by the fact that one of the stolen cheques was proved to have been forged with his handwriting. Likewise, any suggestion that the cheque book got lost is disproved by the fact of forgery. If he did not have the cheque book, he would not have forged the cheque.

29. The respondent also contended that he was could not have stolen the cheque book as he was not a beneficiary of the cheques. The answer to the question is to be found in the definition of stealing under **section 268** of the **Penal Code** which states in part as follows:

268(1) A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:-

(a) intent to permanently deprive the general or special owner of the thing of it.

.....

30. Under **section 268(2)(a)** aforesaid, it did not matter that a third party was a beneficiary or that the respondent did not benefit from the proceeds of the cheques. What the prosecution was to prove was the fraudulent intent. In this case, the respondent, being the person in custody of the cheque book, and having forged the cheque in favour of a third party demonstrated the intent to permanently deprive Society of the cheque book. Having re-evaluated the evidence, I therefore find and hold that Counts 1 and 4 were proved. Counts 2, 3, and 5 were not proved.

31. Counts 6, 7, 8 and 9 are in relation to the offence of uttering a document without authority. **Section 357(a)** of the **Penal Code** provides as follows:

357. Any person who, with intent to defraud-

(a)

(b) knowingly utters any document or electronic record or writing so made, signed or executed by another person.

Under section 4 of the Penal Code, ““utter” means and includes using and dealing with and attempting to use or deal with and attempting to induce any person to use, deal with, or act upon the thing in question.”

32. The thrust of the prosecution is that the accused presented the forged cheques to the respective banks for clearance. In this case, PW 6 established that only the deposit slip for cheque no. 399 Kshs. 485,000/- and cheque No. 392 for Kshs. 400,000/- were presented using deposit slips bearing the accused's handwriting. In the circumstances, I find Counts 7 and 8 proved while Counts 6 and 9 were not proved.

33. In conclusion and having considered the evidence, I find that all circumstances point to the accused exclusively as the person who was in custody of the cheque book, forged one cheque and proceeded to deposit two cheques. He only, could explain what relationship he had with the said Robert and his claim that he was being framed could not surmount the proof of the prosecution evidence.

34. I allow the appeal and having found that the prosecution proved Counts 1, 4, 7 and 8 and I hereby convict him. I acquit him on Counts 2, 3, 5, 6 and 9.

DATED and DELIVERED at KISII this 8th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the appellant.

Mr Nyangwencha, Advocate, instructed by the respondent.