



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.338 OF 2011

(An Appeal arising out of the conviction and sentence of S. MUKETI – SPM

delivered on 16th June 2009 in Nairobi CMC. CR. Case No.280 of 2007)

JESSIE NJERI KAIYAKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Jessie Njeri Kaiyaki was charged with eight (8) counts of **forgery** contrary to **Section 349** of the **Penal Code**. The particulars of the offence were that on various dates between 11th April 2006 and 7th July 2006 at Ukulima SACCO Society Limited in Nairobi, the Appellant, jointly with others not before court and with the intent to defraud, forged certain Co-operative Bank of Kenya cheques Nos.234734 of Kshs.480,000/- purporting it to be genuine and payable to Meshack Ombasa Obare, No.252750 of Kshs.375,000/- purporting it to be genuine and payable to Henry Mose Maraga, No.252952 of Kshs.480,000/- purporting it to be genuine and payable to Antony Nyamwaro Kibagendi, No.252670 of Kshs.466,000/- purporting it to be genuine and payable to Lucy Wairimu Kamau, No.251099 of Kshs.290,600/- purporting it to be genuine and payable to Joshua Macharia Murage, No.253192 of Kshs.430,000/- purporting it to be genuine and payable to Christine Nyabera, No.253461 of Kshs.180,000/- purporting it to be genuine and payable to Lucy Wairimu Kamau and No.0001362 for Kshs.290,000/- purporting it to be genuine and payable to Mary Wanjira Macharia. The Appellant was further charged with **stealing** contrary to **Section 275** of the **Penal Code**. The particulars of the offence were that on diverse dates between the month of April and July 2016 at Ukulima SACCO Limited in Nairobi, the Appellant, jointly with others not before court stole Kshs.2,976,000/- the property of Co-operative Bank of Kenya. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charges. After full trial, she was convicted of seven (7) counts of forgery. She was however acquitted of one (1) count of forgery and the other counts of theft. In each of the convicted charges, she was ordered to pay a fine of Kshs.80,000/- or in default serve twelve (12) months imprisonment. She paid the fine. The Appellant was aggrieved by her conviction and sentence. She filed an appeal to this to this court.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She was aggrieved that she had been convicted against the weight of evidence. The prosecution had not established its case to the required standard of proof. She faulted the trial magistrate for filling in the gaps in the prosecution's case so as to achieve the objective of convicting the Appellant. The Appellant took issue with the manner in which the sentence against her was passed. She was of the view that the sentence was harsh and excessive in the circumstances and did not take into account the Appellant's mitigation especially the fact that she was a first offender and was of ill health. In the premises therefore, she urged the court to allow the appeal, quash the conviction and set aside the sentences that were imposed upon her.

During the hearing of the appeal, this court heard oral submission made by Mr. Kiboi for the Appellant and Ms. Aluda for the State. Mr. Kiboi submitted that the prosecution did not establish the seven (7) counts that the Appellant was convicted to the required standard of proof. He explained that there was discrepancy between the particulars of the charge and the actual evidence that was adduced in court. For instance, he pointed out that in the 1st Count, the amount in the charge differed from the evidence that was adduced. This discrepancy was not explained. In respect of the 3rd Count, evidence was adduced to the effect that the Appellant did not write or sign the cheque. In respect of the 4th Count, the evidence adduced in respect of the cheque number differed from the particulars in the charge sheet. The amount in the charge sheet also differed from the evidence that was adduced. In respect of the 5th Count, it was not indicated whether the cheque was issued by the Appellant. The witness who testified in court confirmed that the cheque was still in the custody of the Co-operative Society. In respect of the 6th Count, he submitted that the number of the cheque differed from the particulars in the charge sheet.

Learned counsel for the Appellant submitted that the trial court did not take into consideration the evidence of PW5 and PW6 which was to the effect that no one saw the Appellant write the cheques. In summing up the verdict of the trial court, the Appellant was of the view that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. She accused the trial court of filling up

gaps in the prosecution's case. No evidence was led by the prosecution to support the conclusion reached by the trial court that the Appellant was the one who had written the cheques. There was no evidence to support the conclusion that parallel cheques had been produced. There was no evidence to support the contention by the prosecution that the cheque books were in the Appellant's possession. At no point during the entire evidence was it explained how the Appellant could have written cheques and encashed the same without going through the entire system. In the premises therefore, the Appellant urged the court to allow the appeal.

Ms. Aluda for the State opposed the appeal. She submitted that the prosecution established the charges that the Appellant was convicted of to the required standard of proof. Evidence was led which proved that the Appellant was a cheque writer for the society, she was in possession of the cheque books and was therefore able to access them. The Appellant drew parallel cheques to the original ones that were in the society's possession. The cheques that she drew had similar numbers to the original cheques. The bank effected payments on the basis of the said cheques and therefore suffered loss. The money that was lost was never recovered. The Appellant was convicted on the basis of the evidence of the document examiner and not her fellow workers. The document examiner traced the handwriting on the cheques to the Appellant as the author of the amounts and figures in cheques. She reiterated that the prosecution was able to prove that the Appellant prepared parallel cheques, forged the same and presented the same for payment. She urged the court to discount the Appellant's defence which did not in any way dent the strong case that was presented against her by the prosecution. She submitted that the prosecution proved its case to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the seven counts of forgery contrary to **Section 349** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

In the present appeal, the prosecution adduced evidence which established that the Appellant was an employee of Ukulima SACCO. Her duties were essentially to write cheques on instructions of her supervisors. She wrote cheques that were intended to be paid to members who applied for loans and had their loans approved. From the testimony of PW5 Jacob Odhiambo and PW6 Festus Gegogo, the Appellant's co-workers, the cheque books were kept by their superiors. They were only given the cheque books when they were required to write the cheques. From the evidence adduced by PW1 Henry Chale Ngakay, the General Manager and PW3 Daniel Ndambuki, the Deputy General Manager of the SACCO, the cheque books were usually kept by the Appellant's superiors. They were given to the Appellant and his co-workers when they were required to write the cheques. After the cheques were written, they were handed over to either PW1 or PW2 so that they could be signed by the designated signatories.

From the evidence adduced, it was evident that none of the genuine cheque books of the SACCO were interfered with. What happened was that parallel cheque books were printed with the same numbers with the cheque books that had been issued to the SACCO. From the evidence adduced by the prosecution witnesses, it was clear that the SACCO lost up to 18 million shillings through cheque fraud. Some of the cheques were the subject matter of charges that were brought against the Appellant. After the discovery of the forgery, the SACCO put in place measures to curb the forgery. The measures included cancelling the cheque books that were in their possession and requesting for new cheque books. They also agreed with the bank that no cheque would be cashed without a duly approved schedule by the SACCO being presented to the bank.

None of the witnesses from the SACCO connected the Appellant to the forgery. The only evidence that linked the Appellant to the forgery was that of PW2 ACP Emmanuel Kenga, the document examiner. According to his testimony, the cheques that are the subject matter of the charges that were brought against the Appellant were written by the Appellant. PW2 examined other cheques that were also subject of the forgery and reached the conclusion that the same had not been written by the Appellant. It was instructive to note that other than allegedly writing the cheques, it was not claimed that the Appellant had signed the cheques. The official signatories of the cheques including PW1, PW3 and PW4 Andrew Ayao, the then Treasurer of the SACCO denied that they signed the cheques in question. In fact evidence was led which established that their respective signatures in the cheques were forged. Other than writing the cheques in question (if that indeed was the case), no evidence was led by the prosecution to establish who actually signed the cheques.

This court agrees with the Appellant when she states that there were gaps in the prosecution's case which necessarily dented the strength of the prosecution's case. One of the gaps was the beneficiaries of the cheques which were forged. From the charge sheet, the beneficiaries of the cheques were Meshack Ombasa Obare, Henry Mose Maraga, Antony Nyamwaro Kibagendi, Lucy Wairimu Kamau (twice), Joshua Macharia Murage, Christine Nyabera, and Mary Wanjira Macharia. The particulars of these beneficiaries were available to the investigators. They could not have cashed the cheques without presenting their identity cards to their respective banks. It was apparent that the police did not investigate these beneficiaries of the fraud. There was no evidence which was adduced by the prosecution to link these beneficiaries to the Appellant. This court is of the considered view that this was a critical aspect of the prosecution's case which was either ignored or was not investigated. Be it as it may, it weakened the prosecution's case to the extent that the prosecution was not able to establish to the required standard of proof beyond any reasonable doubt that the Appellant benefitted from the forgery.

As stated earlier in this judgment, it was evident that the only evidence that the prosecution relied on to secure the conviction of the Appellant is that of the document examiner. There is no other evidence, other than the evidence of opportunity which was adduced by the Appellant's co-workers and her superiors. Even this corroborative evidence was problematic because it was clear from the evidence adduced that the Appellant was not the only one who wrote the cheques at the time. PW5 and PW6 were the other employees of the SACCO who were authorized to write cheques. From the conclusion reached by the trial magistrate, it was apparent that she treated the evidence of the document examiner as the truth without considering whether other evidence supported the conclusion that he reached.

In Gari & 2 Others v Republic [1990] eKLR, Khamoni J held that the opinion of an expert on handwriting can only state that he believes or does not believe that a particular writing was written by a particular person or that the two writings are so similar as to be indistinguishable. A magistrate is entitled to accept or reject the opinion of the handwriting expert. On re-evaluation of document examiner's evidence, this court holds that that evidence alone, in the absence of other corroborative evidence, cannot support the conclusion reached by the trial magistrate to the effect that the Appellant was guilty as charged of the seven (7) counts of forgery.

Another gap in the prosecution's case came from the evidence adduced by the prosecution witnesses which was to the effect that the forgery was achieved by the use of parallel cheque books which duplicated the cheque books that had been issued by the Co-operative Bank of Kenya Ltd to the SACCO. It was clear from the evidence that a Co-operative Bank of Kenya official must have been involved in the scheme to defraud the SACCO. The forged cheques that were presented for payment by the bank had similar numbers to cheques that were in the SACCO's possession. The genuine cheques had not been issued. No evidence was adduced by the prosecution to connect the Appellant to the printing and issuance of the parallel cheque books.

This court is of the view that the case was not exhaustively investigated to establish the actual culprits in the fraud. For instance, *who forged the signatures of the official signatories of the bank accounts maintained by the SACCO?* No evidence was placed before the court record to illuminate to the court who forged these signatures. Evidence was adduced to the effect that at least three official signatories were required to enable funds to be withdrawn from the SACCO's account. Even if this court were to reach a finding that it is the Appellant who wrote the cheques in question, it would not have been possible for the cheques to be encashed without the official signatories appending their signatures on the cheques. This court therefore holds that the evidence adduced by the prosecution did not established the threshold that would enable this court find the Appellant guilty as charged in the seven (7) counts of forgery that were brought against her.

In the premises therefore, this court finds merit with the Appellant's appeal. The appeal is allowed. Her conviction on the seven (7) counts of forgery is quashed. She is acquitted of the charges. The sentences that were imposed upon her are set aside. The fine of Kshs.560,000/- that the Appellant paid to secure her release is ordered refunded to her. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MAY 2019

L. KIMARU

JUDGE