



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 177 OF 2016**

**BENJAMIN CHERUIYOT NGETICH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal arising out of the conviction and sentence of Hon. F. Munyi SRM delivered on 12<sup>th</sup> October 2016 in Nairobi CM Cr. Case No. 1596 of 2008)*

**JUDGMENT**

The Appellant, Benjamin Cheruiyot Ngetich was charged in Count I with the offence of **fraudulent false accounting** contrary to **Section 330(b)** of the **Penal Code**. The particulars of the offence were that on 4<sup>th</sup> October 2008 at I&M Bank Kenyatta Avenue Branch in Nairobi, being a servant of to the said I&M Bank made false entries into the computer system of the said I&M Bank purporting that Ksh.16,187,500/- was to be paid to Slope Park Limited Account No. 00800367631210 domiciled at I&M Bank Karen Branch.

The Appellant was charged in Count II with the offence of **stealing by servant** contrary to **Section 281** of the **Penal Code**. The particulars of the offence were that on 4<sup>th</sup> October 2008 at I&M Bank Kenyatta Branch in Nairobi, being a servant of the said I&M Bank, the Appellant, jointly with others not before court stole Ksh.16,187,500/- the property of the said I&M Bank which came into his possession by virtue of his employment.

The Appellant was charged in Count III with the offence of **obtaining goods by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 7<sup>th</sup> October 2008 at Mumias Sugar Company Depot at Industrial Area in Nairobi, with intent to defraud, the Appellant jointly obtained 1,900 bags of sugar valued at Ksh.4,987,500/- from Christine Cherotich, a Warehouse Manager of the said Mumias Sugar Company by falsely pretending that he had deposited Ksh.16,287,500/- at Slope Park Limited Account No. 00800367631210 domiciled at I&M Bank Karen Branch.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged in Count I and II. He was sentenced to serve three (3) years imprisonment in each count. The sentences were to run concurrently. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for failing to acknowledge that any other staff member could have accessed the Appellant's computer and made the entries since the work stations were open and accessible to all authorized staff. He took issue with the fact that the trial court failed to appreciate that two user accounts of staff members who had already left the bank were used in the transaction subject matter of the present appeal. He was aggrieved by his conviction stating that PW6 was the beneficiary of the stolen funds. He was of the opinion that the circumstantial evidence presented by the prosecution was not sufficient to sustain a conviction. He was aggrieved by the trial magistrate's inference of his guilt from the fact that he proceeded on leave after the offence was committed. He complained that the trial court failed to consider his defence in arriving at its decision. He was of the view that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt.

During the hearing of the appeal, both parties filed their respective written submissions. Mr. Langat for the Appellant urged this court to allow the Appellant's appeal. This court also heard oral submissions from Ms. Kimiri for the State. Ms. Kimiri conceded to the Appellant's appeal. She submitted that the prosecution failed to discharge their burden of proof to the required standard of proof beyond any reasonable doubt. She averred that the evidence of PW1 established that other staff members had access to the Appellant's computer. They could access the bank systems from any branch of the bank. A staff member only needed to have a username and password to enable him or her log in and access the system. The staff members knew the password. Learned State Counsel asserted that the prosecution failed to establish that the Appellant was the only person who had access to the system. She was of the view that reasonable doubt was raised as to whether the Appellant authorized the transaction. In the premises, she urged this court to allow the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Rupinder Jandu was an I.T Manager at I&M Bank. She was instructed to investigate fraudulent transfer of funds made to an account belonging to Slope Park Ltd. There were two credit entries made to the said account. One entry was for Ksh.9.9 million while the second was for Ksh.6.2 million. From her investigation, she discovered that the funds originated from a suspense account at the bank. The suspense account was typically used by the Funds Transfer Department to transfer funds to client accounts. Any funds that were to be transferred to a client account had to be first transferred to the suspense account before being deposited to the client's account. She discovered the funds had been transferred to the suspense account using the identity of a staff member who had already left the bank. The computer that was used to facilitate the transfer was the Appellant's computer. The funds were transferred to the suspense account, then to a traveller's cheque account, and then to an unearned income account and finally to an interest account. The Appellant's user ID had been used to verify one of the transactions. The money was withdrawn from Slope Park Ltd bank account by use of a banker's cheque dated 6<sup>th</sup> October 2008. The cheque was for Ksh.13,912,500/-. The payee was Mumias Sugar Company. The bank however managed to stop the cheque. On cross-examination, PW1 testified that any staff member could transfer funds to the suspense account. She admitted that she did not have any documentary evidence to show that the Appellant transferred the funds. She also stated that other user accounts belonging to senior management who were not based at Kenyatta Branch had been used to attempt to log into the banking system.

PW2, Patrick Mukundi was the Manager of Treasury Bank Office at I&M Bank. He was tasked with ensuring that all transactions at the bank were valid and authorized. On 7<sup>th</sup> October 2008, he discovered an unusual transfer of funds from an income account to a customer's account. He noted that the first transfer of Ksh.6.2 million was done on 4<sup>th</sup> October 2008. The second transfer of Ksh.9.9 million was done on 6<sup>th</sup> October 2008. The funds were first transferred to a suspense account and later to a customer account namely Slope Park Ltd. The transactions were authorized by Gordon, Opistus and the Appellant. PW2 discovered that user accounts namely Gordon and Opistus belonged to former staff members who had already left the bank. Their user accounts were still active. He reported the matter to his superior.

PW3, Christine Cherotich, worked at the Mumias Sugar Company warehouse located in Nairobi. Her duties included receiving sugar packages from the headquarters in Kakamega and dispatching the same to clients. On 6<sup>th</sup> October 2008, an employee from Slope Park Ltd presented to her a banker's cheque for Ksh.13,912,500/- dated 6<sup>th</sup> October 2008. The funds were for purchase of 5,300 bags of sugar. She issued a receipt No.28704 acknowledging receipt of the banker's cheque. On the same day, she issued 500 bags of sugar to the said employee. On 7<sup>th</sup> October 2008, she issued several consignments; one was for 500 bags of sugar, the second was for 200 bags, the third was for 200 bags and the last consignment was for 500 bags of sugar. Delivery notes were issued for all the consignments. The bags of sugar were transported in motor vehicles registration numbers KAW 882D, KAL 604Z and KAY 569A. PW3 took the banker's cheque to KCB Moi Avenue branch on 7<sup>th</sup> October 2008. The bank informed her that they could not honor the cheque due to suspected criminal activity. She was therefore not able to complete the order for 5,300 bags. She had however issued 1,900 bags of sugar. PW3 stated that the person who brought the cheque was known as Mungai.

PW4, Musa Mappinga was a cashier at I&M Bank Karen Branch. On 6<sup>th</sup> October 2008, one of the directors of Slope Park Ltd, George Wainaina (PW6), withdrew Ksh.500,000 over the counter from the Slope Park Ltd account. He was an authorized signatory of the account. He later made a request for a banker's cheque for Ksh.13,900,00/- for purchase of sugar from Mumias Sugar Company. PW4 issued PW6 with the banker's cheque. On 7<sup>th</sup> October 2008, PW6 withdrew a further Ksh.500,000/- from Slope Park Ltd account over the counter. Later that afternoon, he received a call from the head office informing him of fraudulent cash transactions involving Slope Park Ltd account.

PW6, George Wainaina Njogu was a director at Slope Park Ltd. The company was a distributor for Mumias Sugar Company. On 4<sup>th</sup> October 2008, his brother informed him that a client by the name Anthony Njoroge had deposited funds in the company account for purchase of sugar. He met with the said Anthony Njoroge. They agreed that PW6 would ensure supply of the sugar on 6<sup>th</sup> October 2008. PW6 proceeded to I&M Bank and bought a banker's cheque for Ksh.13 million payable to Mumias Sugar Company. He then prepared a Local Purchase Order and sent it to Mumias Sugar Company Depot in Industrial Area, Nairobi. He was later informed that the banker's cheque was not honoured. He called the branch manager at I&M Bank who informed him that funds were fraudulently transferred to the company account.

This case was investigated by PW5, IP David Seroney based at Kisii Central Police Station. He was previously stationed at the Banking Fraud Investigations Unit. On 7<sup>th</sup> October 2008 he received instructions to visit I & M Bank to investigate a banking fraud case. The bank officials informed him that the Appellant had fraudulently transferred Ksh.16,187,500/- to a customer account No. 0080036761210 belonging to Slope Park Ltd. He interrogated the Appellant as well as witnesses and recorded their statements. He confirmed that the Appellant authorized the transfer of the said funds. After the Appellant deposited the money in Slope Park Ltd bank account, one Anthony Njoroge Kamau (2<sup>nd</sup> accused person in the trial case) called PW6 and informed him that he wanted to purchase sugar from Mumias Sugar Company. PW6 was a director at Slope Park Ltd. Slope Park Ltd was an agent of Mumias Sugar Company. PW6 confirmed that Ksh.16,187,500/- had been deposited to Slope Park Ltd account. He proceeded to obtain a banker's cheque for Ksh.13,912,500/- in favour of Mumias Sugar Company. The said Anthony Njoroge collected the sugar from Mumias Sugar Company Depot in Nairobi. He proceeded to charge the Appellant with the present offences.

The Appellant was put on his defence. He gave a sworn statement. He stated that he worked at the Settlements Department at I&M Bank. He was the assistant to PW2 who was the manager. The department was involved in buying and selling foreign currency. The Appellant stated that he went on leave on the 7<sup>th</sup> October 2008. He however was recalled back to the office on the same day by his immediate supervisor, PW2. He was shown transactions that PW2 claimed originated from his computer. However, the transactions were not conducted using his username. He stated that his user name was Benjamin300. The transactions were done by usernames Opistas and Gordon who were no longer employees of the bank. The Appellant testified that the staff members could access any computer as well as log in using any employee account as long as they had the login password. He said all transactions had to be verified by senior personnel. He denied conducting or approving any transactions for transfer of funds to Slope Park Ltd account. He told the court that he was not a beneficiary of the said funds. He did not know any of the directors at Slope Park Ltd or Anthony Njoroge who purchased the sugar from Mumias sugar Company.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge vs- Republic (1987) eKLR** stated this on the duty of the 1<sup>st</sup> 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 him 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 submission made by the parties to this appeal. The Appellant was charged in Count I with the offence of **fraudulent false accounting** contrary to **Section 330(b)** of the **Penal Code**. The Appellant was alleged to have made false entries into the computer system of I&M Bank which facilitated transfer of Ksh.16,187,500/- to the account of Slope Park Ltd.

The evidence by PW1 was that two fraudulent entries were made for transfer of the funds; one entry was for Ksh.9.9 million and the other for Ksh.6.2 million. The two entries were made by user accounts belonging to Gordon and Opistus who were former employees of the said bank. This fact was corroborated by PW2. The transactions were carried out using the Appellant’s computer. However, any staff member could have accessed the Appellant’s computer and logged in using the said user accounts. PW1 told the court that any employee could post entries in the suspense account. No evidence was led by the prosecution to prove that the Appellant had access to the former employees’ usernames and passwords. PW1 actually stated that user accounts of employees whose employment at the bank was terminated were usually suspended. None of the prosecution witnesses were able to explain how the said user accounts belonging to the two former staff were still active or how they were activated.

PW1 also stated that the Appellant’s user account was used to transfer the funds from the traveller’s cheques account to the unearned income account. She however failed to avail any documentary evidence to prove the same. Such documentary evidence, which is typically in the bank’s possession, could have proved the Appellant’s involvement, if any, in the fraudulent transactions. None of the prosecution witnesses saw the Appellant posting the said entries. No direct evidence was adduced connecting the Appellant to the fraudulent transactions. The circumstantial evidence relied on by the trial court in convicting the Appellant was that his computer was used to post these transactions. The test to be met with regard to circumstantial evidence was laid out in the case of **Sawe vs Republic [2003] KLR 364**, 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.”***

In the present appeal, the Appellant was not the only employee who had access to the particular computer. Although the computer was assigned to the Appellant, any employee in the bank could use it provided he used his assigned password. The Appellant’s assigned password was **NOT** used.

In his defence statement, he stated that it was on open office and any employee could log into the computer using any username and password. The entries were made by user accounts belonging to former employees. None of the prosecution witnesses saw the Appellant posting the said entries. The circumstantial evidence was not sufficient to sustain the Appellant’s conviction. There were other co-existing circumstances which weakened the inference of the Appellant’s guilt in the present appeal. It was not ruled out by the prosecution that any other employee could have posted the transactions using the Appellant’s computer. In **Parvin Singh Dhalay v Republic [1997] eKLR**, the Court of Appeal stated as follows:

***“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”***

This court also notes that the Appellant was not the beneficiary of the funds in question. The funds were transferred to the account of Scope Park Ltd owned by PW6. PW4 told the court that PW6 withdrew the said funds from I & M Bank Karen Branch. PW6 did not deny withdrawing the said funds. PW6 in his testimony told the court that his brother informed him that Anthony Njoroge had deposited the said funds in the company account for the purchase of sugar. PW6 met and dealt with the said Anthony Njoroge and not the Appellant. On cross-examination, PW6 stated that he did not know the Appellant. He saw him in court for the first time. There was therefore no evidence linking the Appellant to the beneficiary of the funds who was PW6. The investigating officer (PW5) was unable to link the Appellant to the beneficiary of the funds or to the said Anthony Njoroge. The documentary evidence adduced by the prosecution did not link the Appellant to the purchase or delivery of sugar from Mumias Sugar Company.

Taking into consideration the totality of the evidence adduced, this court is unable, with certainty, to reach the conclusion that the conviction of the Appellant is beyond reproach. There are many holes in the prosecution’s case which cannot establish that the Appellant committed fraudulent false accounting as laid out in the particulars of the charge. The Appellant denied any involvement with the fraudulent transactions. His conviction in Count I is subsequently quashed.

The Appellant was charged in Count II with the offence of **stealing by servant** contrary to **Section 281** of the **Penal Code**. It is not disputed that the Appellant at all material times was an employee of I&M Bank. As discussed earlier in this judgment, the prosecution failed to prove that the Appellant was involved in or facilitated the fraudulent transfer of funds from the bank to the account belonging to Slope Park Ltd. The Appellant was not the beneficiary of the stolen funds. The prosecution failed to establish any nexus between the Appellant and the beneficiary of the stolen funds. The prosecution also failed to prove that the Appellant had the intention to deprive the said bank of the funds. His conviction in Count II was therefore unsafe. The prosecution, correctly in the view of this court conceded to the appeal.

In the premises, the appeal lodged by the Appellant has merit. It is hereby allowed. The conviction of the Appellant in both counts is quashed. The sentences are set aside. The Appellant is ordered set at liberty and released forthwith from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER 2019**

**L. KIMARU**

**JUDGE**