



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 92 OF 2010**

**CHRISTOPHER WAFULA MAKOKHA** ..... **APPELLANT**

**VRS**

**REPUBLIC** ..... **RESPONDENT**

*(Appeal from the Conviction and Sentence by Principal Magistrate Hon. Susan Shitubi*

*in*

*Bungoma CM Court CR. C. NO.1065 of 2004)*

**JUDGMENT**

1. Christopher Makokha, the Appellant herein, was on 21<sup>st</sup> April, 2004 charged together with five (5) others with various Counts. The Counts that touched on the Appellant were four (4) in number which were the following:-

- a) Count 1- Conspiracy to commit a felony contrary to Section 393 of the Penal Code.
- b) Count 2 – Fraudulent accounting contrary to Section 330 (B) of the Penal Code.
- c) Count 3 – Stealing by Servant contrary to Section 281 of the Penal Code.
- d) Count 12 – Fraudulent false accounting contrary to Section 330 (b) of the Penal Code.

2. After trial, the Chief Magistrate’s Court, Bungoma (Hon. S. Shitubi S. P. M.), found the Appellant guilty and convicted him on all the charges. The Court sentenced the Appellant to 3 years imprisonment on each Count but the sentences were to run concurrently. Save for two who passed away during trial and their cases withdrawn under Section 87 (a), all the other co-accused were acquitted of all charges.

3. The Appellant has appealed to this Court against both the conviction and sentence. This being the first Appellate Court, the court is obliged to re-examine and evaluate the evidence tendered at the trial and come to its own findings and conclusions bearing in mind however, that the Court did not have the advantage of seeing the witnesses when they testified. **See Ekeno -vs- Republic [1972] EA.**

4. The prosecution's case in the lower Court was that, sometimes in October, 2003, the New Management of the Bungoma Teachers Co-operative Society (hereinafter “the Sacco”) who was the Complainant, detected anomalies in its finances. The Sacco ordered for an audit of its accounts by its external auditor, Jackson Wetosi (PW4) of Jackson Wetosi & Associates, Certified Accountants. His firm was to investigate a fraud that had occurred between 2<sup>nd</sup> January, 2002 and 31<sup>st</sup> December, 2002. In his evidence, PW4 told the Court that upon investigations, he discovered that several persons had defrauded the Sacco during that period as a result of which the Sacco lost monies amounting to Kshs.4,720,000/=. He produced his report as Pexh-3 whose

conclusions were, *inter alia*, that two cheques were issued and encashed by the Appellant for a sum of Kshs.200,000/= and Kshs.300,000/=: respectively. That according to the records held by the Sacco, the counterfoils showed that the said cheques had been issued to St. Monica Chakol Girls and Eregi Girls High Schools.

5. Sgt. Daniel Barasa PW9, was the Investigations Officer. He testified that he was given copies of various cheques including, Cheque No. 017332 for Kshs.200,000/= (Pexh. No.13) and Cheque No. 0182298 for Kshs.300,000/= (Pexh. No.1). The payee for the two cheques was Christopher Makokha, the Appellant. The cheques were for Bungoma Teachers Sacco. Pw9 went to the Sacco's offices and established that the counterfoils for the said cheques indicated the payee to be St. Monica Chakol Girls and Eregi Girls High Schools, respectively. That he went to the respective schools but confirmed from the school fees registers, Pexh. 17 and 18, that the said cheques were never paid to the said schools as fees. He produced the bank statements for the subject account (Pexh.13) which showed that the subject cheques had been paid.

6. Damaseno Wechuli Khamala (PW1), the Eregi Girls Secondary School Bursar and Anthony Victor Emase (PW2), the Accounts Clerk with St. Monica Chakol Girls High School told the Court that both their Schools did not receive cheques for Kshs.300,000/= and Kshs.200,000/=: respectively as school fees.

7. In his unsworn evidence, the Appellant denied the charges and told the Court that he was previously working as an Accounts Supervisor for the Sacco but his services had been terminated; that he was not a member of the Management Committee and the subject cheques written in his name had been properly authorized. He further told the Court that he had been suspended from his employment with the Sacco for other reasons other than the two cheques; that his immediate bosses, the Accountant and the Manager, had authorized the payment to him of the two cheques. In his defence, the Appellant called one witness Cleophas Simiyu who told the Court that he had worked with the Sacco between 1995 and 2005 when he left as a Registry Officer. He was in charge of personnel files and Members Loan applications. He recalled that two cheques of Kshs.200,000/= each were rightfully issued to the Appellant in respect of loans the latter took from the Sacco. That the loans were both applied for and the cheques rightly issued, signed and paid in the accounts section.

8. In his Petition of Appeal, the Appellant has listed 8 grounds. These can however, be summarized into (four) (4) broad grounds as argued by Mr. Murunga, the Learned Counsel for the Appellant. These are that:-

a) the trial court erred in convicting the Appellant of the offence of conspiracy to defraud without addressing itself to the constitutive elements thereby occasioning a miscarriage of justice;

b) the trial court erred in convicting the Appellant of the offence of fraudulent accounting which was duplex, had not been proved and the evidence did not show that the Appellant was the one who made the entries;

c) the trial court misdirected itself on the effect and weight to be given to opinions of handwriting experts, it failed to evaluate the entire evidence and that the judgment was against the weight of evidence; and

d) that the sentence meted out to the Appellant was harsh in the circumstances.

9. Mr. Murunga, Learned Counsel for the Appellant, argued ground 1, grounds 2, 3 and 4, grounds 5, 6, 7 and 8 of the Petition of Appeal separately. On ground 1, Counsel submitted that the trial court erred in convicting the Appellant yet there was no constitutive element for the charge of conspiracy. According to Counsel, the constitutive element of the charge of conspiracy is that there has to be an agreement by more than one person to commit the offence. That offence cannot exist without an agreement. He referred the court to the text of **Archibold:**

**Writing on Criminal Pleadings, Evidence and Practice, 1999 3<sup>rd</sup> Edn.** In support of that proposition and on **Mulama -vs- Republic [1975] KLR 24** in support of the proposition that an individual person cannot be found liable of conspiracy if the others are acquitted. On his part, Mr. Kamau, Learned State Counsel opposed the appeal and submitted that all the counts were proved against the Appellant and that there was conspiracy between the Appellant and the accountant who had not been charged.

10. The 1<sup>st</sup> Count in respect of which the Appellant was convicted of was that of conspiracy to commit a crime contrary to Section 393 of the Penal Code. That Section provides:-

***“393. Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”***

11. In **Archibold: Writing on Criminal Pleadings, Evidence and Practice (Supra)**, the learned writers observe at pages 2589 and 2590 that:-

***“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”***

12. From the foregoing, it is clear that the prosecution must prove the existence of an agreement between the accused and some other person to do the act complained of. In the present case, it was alleged that on diverse dates between 10<sup>th</sup> February, 2002 and 12<sup>th</sup> November, 2002 at Bungoma Township, the Appellant, jointly with his other five (5) co-accused conspired to commit a felony namely theft of Kshs.3,220,000/= from Bungoma Teachers Cooperative Society. At the trial, although it was proved that meetings took place, no minutes of the same was produced. But most important, it was never alleged at all that, the Appellant attended any of such meetings. I do not think the element of agreement involving the Appellant and his co-accused as alleged was ever proved. In any event, as rightly submitted by Mr. Murunga, once the court acquitted the other co-accused of the charge of conspiracy as in the Case of **Mulama -vs- Republic (supra)**, the Appellant should have likewise been acquitted.

13. Mr. Kamau submitted that the conspiracy was between the Appellant and the accountant. I do not think that is the case. Firstly, the charge sheet was quite clear as to the people the Appellant is alleged to have conspired with and secondly, it was never proved at the trial that there was any agreement between the Appellant and the said accountant to steal from the Sacco the alleged sum of Kshs.3,220,000/=. Accordingly, ground 1 of the Petition of Appeal succeeds.

14. Grounds 2, 3 and 4 attacked the court's conviction of the Appellant for the charges of fraudulent accounting. It was contended by the Appellant that the charge was duplex, that the charge was not proved and that the evidence tendered did not directly point at the Applicant as the maker of the entries complained of. Mr. Murunga submitted that the Appellant was neither the author of the cheques in question nor a signatory to the account. On his part however, Mr. Kamau submitted that whenever money was withdrawn, it was supposed to have been indicated in the cash book called treasury book; that as the Accounts Supervisor, the Appellant was one of those who made the entries to balance the accounts. That under Section 330 ( c) of the Penal Code, omitting any material particular from an accounting document is an offence and that the

Appellant was guilty of the offence for failing to indicate the withdrawals in the treasury book Pexh.10.

15. In Count Nos. II and XII, the Appellant was charged with the offence of fraudulent false accounting contrary to Section 330 (B) of the Penal code. It was alleged that on 10<sup>th</sup> March, 2002 and 10<sup>th</sup> February, 2002 at the Sacco, the Appellant with three (3) others, with intent to defraud, made or were privy to making false entries to cheque book leaf Nos.018298 and 017332 belonging to the Sacco purporting to show that the sums of Kshs.300,000/= and Kshs.200,000/= had been paid to Eregi Girls High School and St. Monica Chakol Girls High School, respectively.

16. PW4, the auditor who audited the accounts of the Sacco, told the court that the Appellant was the Accounts Supervisor whose duties included checking and verifying that the entries in the counterfoils and the cheques tallied; that it is the Appellant who wrote the two cheques. PW6, Emmanuel Kenga, an Assistant Commissioner of Police told the Court that he was a Document Examiner of more than 20 years. That he had compared the handwriting on the counterfoils and the subject cheques and he had concluded that the same were written by the Appellant. He produced his report as Pexh.19. After considering the Appellant's defence, the court found that as the Accounts Supervisor in the department that held and drew accounting books, the Appellant had the opportunity and had conspired with others not before court and did steal the money. The court proceeded to convict the accused for the offence.

17. This court finds that the trial court did not specifically evaluate the Appellant's defence and the prosecution's evidence on these counts before convicting the Appellant. However, as already stated, there was evidence on record by PW 4 and PW6, which was not challenged, that the entries in both the counterfoils for and the Cheque Nos. 018298 and 017332 for Kshs.300,000/= and Kshs.200,000/=-, respectively were not only written by the Appellant but that the entries in the counterfoils were misleading as to the actual beneficiary of the funds paid on those Cheques. When put to his defence, the Appellant did not specifically deny that he is the one who made the entries in both the counterfoils and the subject Cheques. He only stated that the cheques drawn in his name were properly authorized.

18. Accordingly, with such evidence, I find no fault with the trial court's conviction of the Appellant on Counts II and XII. Grounds 2, 3 and 4 of the Appeal are hereby dismissed.

19. As regards count III of stealing by servant contrary to Section 281 of the Penal Code, it was alleged that on 12<sup>th</sup> April, 2002 at Cooperative Bank, Bungoma Branch, the Appellant jointly with his co-accuseds as servants of the Sacco stole Kshs.300,000/= belonging to the said Sacco. Mr. Murunga submitted that it was not shown that the Appellant wrongly received the amounts complained of. That the Cheques were duly approved by the Central Management Committee to whose meetings the Appellant was not party.

20. Counsel further submitted that the Appellant had indicated in his defence that the funds were a loan which he had applied for and was duly approved. That he had since repaid the said monies in two instalments of Kshs. 300,000/ and Kshs. 200,000/-; that the Appellant's personal file was not investigated to confirm or disprove this fact. In his response, Mr. Kamau submitted that, the beneficiary of the funds was the Appellant; that Pexh.3, the Audit Report had found that the Appellant's Loan Account with the Sacco did not show these amounts. That the Appellant knew that he was not entitled to the amounts he was receiving.

21. From the record, PW4 told the court that his investigations revealed that the Appellant had not applied for any loan. He testified that according to the records kept by the complainant, Cheque No.018298 for Kshs.300,000/= was supposed to have been paid to Eregi Girls High School. However, those funds ended in the Appellant's account. This Courts view is that, that fact having been established, it was for the Appellant to show that he received the said sum of Kshs.300,000/= for a lawful purpose. He suggested that the money was a loan but failed to

produce any evidence in support of that allegation. His own witness, Cleophas Simiyu, told the Court that the loans that the Appellant had applied for and paid were two for Kshs.200,000/= each. In this regard, I am not satisfied that the Appellant had succeeded in explaining that he had received the said sum of Kshs.300,000/= for any lawful purpose other than stealing. To my mind therefore, Count III had been proved by the prosecution.

22. As regards Grounds 5, 6 and 7, the Appellant complained that the trial Court had misdirected itself on the effect and weight to be given to handwriting experts, that the court failed to subject the entire evidence to exhaustive scrutiny and that the judgment was against the weight of evidence. Counsels did not submit on these grounds. I have on my part considered the record in its totality, I am satisfied that the evidence of the handwriting examiner was corroborated by the evidence of PW1, PW2 and PW4 Further, there was sufficient evidence to find a conviction on Counts II, III and XII. Grounds 5, 6 and 7 are dismissed.

23. As regards Ground 8, the Appellant complained that the sentences of three (3) years meted out on him on each of these counts was excessive. I have seen Sections 281 and 330 of the Penal Code. The maximum sentence provided for on conviction is seven (7) years each. The Appellant was only sentenced to three (3) years imprisonment on each Count and the sentences were to run concurrently. In my view, considering the circumstances under which the offences were committed and the mitigation given by the Appellant, the sentences of three (3) years on each Count were not harsh.

24. Accordingly, I quash the conviction of the Appellant and set aside the sentence on Count 1. However, the Appellant's appeal and sentence on Counts II, III and XII is hereby dismissed. The trial Court's judgment on those Counts is hereby upheld. Since the Appellant had served part of the sentence, he shall complete the balance.

**Dated and delivered at Bungoma this 12<sup>th</sup> day of May, 2014.**

**A. MABEYA**

**JUDGE**