



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 229 OF 2011

GEORGE ODHIAMBO MAIGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1546 of 2009 in the Chief Magistrate's Court at Nairobi – G. W. Ngenye (Mrs.) (PM) on 28/07/2011)

JUDGMENT

1. **George Odhiambo Maigo** was tried on four counts as follows:

Count I: Stealing contrary to **Section 275** of the **Penal Code**.

In the alternative he was charged with handling stolen property contrary to **Section 322(2)** of the **Penal Code**.

Count II: Forgery contrary to **Section 349** of the **Penal Code**.

Count III: Uttering a false document with intent to defraud contrary to **Section 357(b)** of the **Penal Code** and

Count IV: An attempt to obtain by false pretences contrary to **Section 311** as read with **Section 389** of the **Penal Code**.

2. The brief facts in the counts for which he was convicted were as follows:

Count I: that on 27th January 2008, at Elementaita Pharmaceutical Limited in Naivasha within Rift Valley Province, he stole Barclays Bank of Kenya cheque leaf No. 105189 for Kshs. 50 the property of Elementaita Pharmaceutical Limited.

Count II: that between the 11th August 2009 at unknown place within Republic of Kenya, jointly with others not before court, with intent to defraud forged a certain Barclays Bank of

Kenya cheque leaf No. 105189 for Kshs. 16 million in favour of Kiptui Mbabu & Co. Advocates purporting it to be a genuine and valid Barclays Bank of Kenya Bankers cheque issued by Barclays Bank of Kenya Nakuru West Branch.

Count III: that on 14th August, 2009 at Ukulima Co-operative Savings and Credit Society Limited in Nairobi uttered the said bankers cheque number 105189 to Henry Echale Nakaya a general manager with the said Ukulima Co-operative Savings and Credit Society.

Count IV: that on 14th August, 2009 at Ukulima Co-operative Savings and Credit Society Limited in Nairobi jointly with others not before court with intent to defraud, attempted to obtain a parcel of land number LR 209/5001 (NO. 09/4991/10) by falsely pretending that a certain Barclays Bank Bankers cheque number 105189 for Kshs.16 million in favour of Kiptui Mbabu and Company Advocates was a good and valid Barclays Bank Bankers cheque issue by Barclays Bank Nakuru West Branch.

The Prosecution's Case

3. The prosecution's case was that on 19th June 2009 Ukulima Co-operative Savings and credit Society, (hereafter the SACCO), advertised land **LR No. 209/5001** for sale through the Daily Nation Newspaper. Leatherwise International Limited of which the appellant was a director was one of the fourteen (14) interested companies that bid in the sale. M/s Kiptui Mbaabu and Company Advocates were the appointed agents of the SACCO in the sale. A letter of offer was sent to Leatherwise International Limited and was received by the appellant.
4. One of the conditions of sale was that the purchaser had to make a 10% deposit. On 14th August 2009 the appellant presented a Bankers cheque No. 105189 from Barclays Bank to the General Manager of the SACCO in the presence of their advocate, Mr. Mbaabu for Kshs.16 million, being the deposit of 13% of the purchase price. The advocate for the vendor suspected the cheque to be fake and advised Mr. Nyakaya (**PW1**) not to bank it. She faxed a copy thereof to Barclays Bank West Branch in Nakuru and was informed the cheque was not genuine.
5. The matter was reported to Banking Fraud Investigation Unit (BFIU) who commenced investigations. A few days later the appellant called Mr. Nakaya to say that he would bring a cheque of Kshs.140 million. Police were alerted and when he visited the SACCO he was arrested and subsequently charged.

The Defence Case

6. The appellant denied committing the offences. Whereas he admitted that his company Leatherwise International Limited bid in the purchase of the said property he stated that the company failed to meet the conditions of sale. He denied that the cheque for Kshs.16 million was presented by him.

Grounds of Appeal

7. At the close of the trial he was convicted on the alternative to count 1 and was also convicted on **count II, III and IV**. He was sentence to 2 years' probation. The appellant being dissatisfied with the outcome of the case filed an appeal, advancing five grounds in which he stated the complainant Mr. Mbithi of Commercial Bank of Africa did not testify and that he and the said bank were non-existent. He also complained that Mr. Kisionei who delivered the cheque in question did not testify and was never his partner. The last ground was that the trial was unfair and unconstitutional.
8. Miss Nyauncho learned state counsel responding on behalf of the state submitted that the testimony of **PW3** and **PW5** had confirmed that the cheque was stolen from Elementaita

Pharmaceuticals. That the appellant was arrested when he showed up to inquire about the cheque and it was therefore not necessary to call Mr. Kisienei to testify.

Analysis

9. The court found that there was no evidence to connect the appellant with the offence of theft and gave him benefit of doubt in **count I**. In the alternative charge, the appellant denied that he ever delivered the subject cheque to the SACCO. It is true that the cheque was taken into the offices by one Mr. Kisienei. This was attested to by the evidence of **PW1** and **PW2** who were present when the cheque was delivered. The record however shows that it was their evidence that Mr. Kisienei handed the cheque over to the appellant who in turn gave it to **PW1**. It was also their testimony that the appellant instructed Mr. Kisienei as his business partner and that he had kept communicating with him to bring the cheque into the office.
10. The appellant presented the cheque as the down payment of 10% stipulated in the letter of offer produced as P. Exhibit 4. He intended both **PW1** and **PW2** to rely on it as a genuine cheque in payment for part of the purchase price. He instructed **PW1** and **PW2** to deposit the cheque in the bank, but **PW2** realised it was fake before it was so deposited. From the evidence it was the appellant who negotiated the sale with the SACCO on behalf of Leatherwise International. He also advised **PW1** and **PW2** that the company would initially make a down payment of Kshs.16 million.
11. **PW5** M/s. Selestine Otieno Lumumba also confirmed that she was acting for Leatherwise International Limited in the matter but parted ways with her client when it failed to make the 10% deposit of purchase price on time. She identified the appellant as one of the directors of the company she met during the negotiations.
12. There is no dispute that cheque No. 105189 produced in evidence as P Exhibit 6 which was the main subject of this case was a forgery. **PW3** Dr. Komen testified that his business, Elementaita Pharmaceuticals, lost cheques during the Post-Election Violence when the Pharmacy was broken into. He identified the cheque leaf in P. Exhibit 6 as belonging to their Account No.8103304.
13. **PW5**, an investigation manager with Barclays Bank confirmed that indeed P. Exhibit 6 had been tampered with. He confirmed that the account number shown therein belonged to Elementaita Pharmaceuticals and that the names of the account holder had been erased and replaced with the name "**Barclays Bank Limited**" so as to resemble a Banker's cheque. He produced before court the account signatory print out P. Exhibit 16(a), which showed the account signatories as Kenneth C. Komen (**PW3**), Korua Lolich Lokite Martin and Wilfer Kipkemoi Kiprop.
14. **PW5** corroborated the evidence of **PW3** to the effect that the latter had written a letter to the bank requesting that the cheques in the series of the cheque book that was stolen be stopped. P. Exhibit 16(b) was the said series running from numbers 000105101 to 000105280 and included Cheque No.105189. The signatories to the account did not write the cheque and I note that the appellant did not argue to the contrary of the foregoing facts. I therefore find that P. Exhibit 6 was a forged cheque, even without the evidence of the document examiner.
15. It is however not possible to state with any degree of certainty that the appellant was the author of the forgery, without the evidence of the Document Examiner. This I find was fatal to the prosecution's case in count No. II.
16. I examined the evidence of the defence in the context of all the foregoing evidence from the prosecution.
17. The defence did submit that the charges against the appellant should fail because the appellant did not fulfil conditions 8, 9 and 10 in the letter of offer. That being the purchaser he was required to sign an agreement of sale and pay 10% deposit within a specified period before the offer lapsed on

8th August 2009. That Mr. Kisionei was a director in a competitor company named Gentblank in the sale transaction and that he was the one who presented the cheque to **PW1**.

18.**PW1** and **PW2** were however, categorical that the said Mr. Kisionei gave the cheque to the appellant who in turn handed it to **PW1**. The appellant introduced him as a partner. The trial court found that that defence was an afterthought that could not hold. The trial court also found that **PW1** and **PW2** did not give contradictory evidence with regard to the date of the cheque as stated by the defence because **PW2** testified that the cheque was dated 11th August 2009 which was the reason for her suspicion that it was fake. It appeared to her to have been drawn on the date it was presented, that is 14th August 2009. **PW1** did confirm that it was dated 11th August 2009.

19.The appellant complained in his grounds of appeal that the complainant did not testify. I find that the witnesses who were called by the prosecution were the ones whom the prosecution deemed necessary to testify on behalf of the state. Although on the charge sheet, the complainant was indicated as Mr. Mbithi c/o Commercial Bank of Africa, he was not named as one of the complainants in the various counts. The fact that he did not testify was therefore not fatal to the prosecution case.

20.In sum I find that the trial court addressed itself properly to the facts and the law in reaching its findings in **counts I, III and IV**.

The appeal therefore **succeeds** in **count II** but is **dismissed** in **counts I, III and IV**.

SIGNED DATED and **DELIVERED** in open court this **3rd day** of July **2014**.

L. A. ACHODE

JUDGE