IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach &Muli JJ A)

CRIMINAL APPEAL NO 109 OF 1991

JOHN MUNYAO NZUKIE ……..…….... APPELLANT

VERSUS

REPUBLIC……....…RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Mr Justices Porter & Mbaluto) dated 15th October, 1991

in HC CR A No 398 of 1990)

JUDGMENT

John Munyao Nzukie (the appellant) was tried by the Chief Magistrate in Nairobi on an indictment containing 28 counts. The first 3 counts related to theft by servant, it being alleged that being a servant of the United Nations Development Programme in the office of the Resident Representative in Kenya, jointly with others not before the Court, stole certain sums of money from his employer. In counts 4 to 28, he was charged with forging some 25 cheques, with others not before the Court, purporting them to be valid and genuine payment to Maroden East Africa Ltd, Campus Stationers Ltd and Agricultural Appliances Ltd. He was found guilty and convicted on all counts except one count of forgery on which he was acquitted. On each of the theft charges, the appellant was sentenced to 7 years, and on each on the forgery counts he was sentenced to 3 years imprisonment. The sentences were ordered to run concurrently.

On appeal to the superior court against both conviction and sentence, the appellant's appeal was allowed on eleven counts of forgery but the appeal against conviction and sentence on the 3 theft counts and the remaining forgery counts was dismissed. Although the summary of the result contained in the penultimate paragraph of the judgment of the superior court makes no mention of counts 18 and 21, it is evident from the judgment that the appeal in relation to these counts was dismissed.

The appellant was employed by the United Nations Development Programme (UNDP) as an accounts clerk and his duties included preparation of cheques for payment of suppliers of items to various projects undertaken by UNDP in Kenya. It was alleged that the appellant obtained blank invoices from three fictitious suppliers namely, Maroden East Africa Ltd, Campus Stationers Ltd and Agricultural Appliances Ltd, which he used as a basis of request for payment by those companies. There is a concurrent finding by the trial court and the first appellate court that these 3 companies did not supply any items or goods to

UNDP and they were not, therefore, entitled to any payment. This finding is fully justified on the evidence.

Evidence was led explaining the procedure followed by UNDP in processing payment to *bona fide* suppliers. Every invoice was accompanied by a delivery note signed by the person receiving the goods on behalf of UNDP. These documents were then sent to the Finance Department where the appellant worked. UNDP maintained a card for each supplier which was kept in a cabinet in the section. In order to satisfy himself that payment was due to a supplier, the clerk handling the claim would check the original Local Purchase Order (LPO), the delivery note to prove delivery and the invoice showing the amount due to the supplier. On the basis of that, he would then prepare a disbursement voucher and enter the payment in the cash book. He would then prepare a cheque. All these documents – the LPO, delivery note, invoice, disbursement voucher and the cheque were then passed by the clerk to the supervisor who checked them to ascertain that they were in order. The supervisor then passed the bundle to a certifying officer who held the position of Assistant Resident Representative (Administration), who also checked the documents. If he found them to be in order, he would certify the disbursement voucher and append the first signature on the cheque. He then passed the bundle to the approving officer, the Resident Representative (or his deputy) who repeated the same exercise and if satisfied, certified the disbursement voucher and placed the second signature on the cheque and then initialed the supplier's card. The bundle excluding the cheque were sent to New York but copies were kept in the Nairobi office for 4 years.

The fraud came to light when one of the employees, John Senge (PW1), was trying to close the accounts for October, 1988. He discovered a payment to Maroden East Africa Ltd but he could not trace either the relevant disbursement voucher or supplier's card. Investigations revealed payments to Campus Stationers Ltd and Agricultural Appliances Ltd neither of which had a supplier's card. The relevant cheques were retrieved from the bank and the writing on some of these cheques was shown to be that of the appellant, which he did not dispute but admitted. The appellant admitted that he was the clerk who dealt with those cheques, but his case was that he did so in the ordinary course of business. This must mean, as the two Courts below found, that he handled all the relevant documents in accordance with the established procedure for processing payments to suppliers at UNDP.

The appellant was unrepresented before us and he argued his appeal in person. He is obviously a reasonably well – educated person and he made his submissions quite competently. He listed 20 grounds of appeal in his petition but basically his main complaints were:

> (1) That the statement under inquiry he made to S P Daniel Ndungu, which he retracted, did not amount to a confession and that the lower courts erred in relying on it;
>
> (2) That his conviction was based on uncorroborated evidence of accomplices;
>
> (3) That evidence of the handwriting expert was wrongly admitted; and

(4) That he was embarrassed and prejudiced by the overloading of the indictment.

The appellant made a detailed statement under inquiry (Ex 217) in which he explained how, in collaboration with persons from the three companies (Maroden East Africa Ltd, Agricultural Appliances Ltd and Campus Stationers Ltd), they set up a scheme to defraud UNDP. He explained how he prepared disbursement vouchers and collected one current cheque book for use in the scheme. He admitted that for all the payments made in respect of those companies, there were no goods supplied and that all those payments were false. He said that after getting his share of the money, he bought a house in Langata for Shs 450,000/-. He also bought a 20 – acre farm in Kibwezi and spent the rest of the money in domestic expenses and gambling at the Casino, Safari Park Hotel and Intercontinental Hotel. He also admitted preparing payment vouches for payment to these companies. Having read this statement ourselves, we are left in no doubt at all that it was a confession in which the appellant admitted and gave a full account of his own involvement in the fraudulent scheme. He retracted the confession but it was admitted in evidence after a trial within a trial. We can find no substance in the appellant's contention that the statement did not amount to a confession.

Since the confession had been retracted, the Chief Magistrate looked for corroboration which he found in the evidence of the handwriting expert and in the appellant's own conduct in absconding from the employment of UNDP after he had undertaken to assist in tracing the missing documents.

The second complaint by the appellant was that the Chief Magistrate convicted him on uncorroborated evidence of accomplices. The Chief Magistrate and the High Court judges correctly directed themselves that the witnesses from the three companies and some of the employees of UNDP, who were working with the appellant, were accomplices. If that is accepted to be the position, and on the evidence we do, the contention of the appellant must still fail for two reasons. First, the evidence of the accomplices is amply corroborated by the same evidence that we have already referred to in relation to the appellant's retracted confession. Secondly, apart from the accomplice evidence, there is abundant other evidence upon which the appellant's conviction could have been sustained. The Chief Magistrate correctly directed himself on the nature of this evidence and in looking for corroboration complied with the test laid down by Lord Reading LCJ in the famous case of *R v Baskerville* [1916] 2 KB 658 at page 667:

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that crime has been committed, but also that the prisoner committed it. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

The third complaint relates to the evidence of the handwriting expert. This evidence has been attacked on the ground that the expert witness did not include similarities and dissimilarities of the questioned handwriting. It is provided by section 48(1) of the Evidence Act (cap 80) that:

" 48. (1) When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions."

The legal position in Kenya as regards the evidence of a handwritten expert was settled by this Court in the case of *Wainaina v Republic* [1978] KLR 11, where it was held that whilst a handwriting expert may, in an appropriate case, say that he does not believe that a particular writing is by a particular person, the most he should ever say on the positive side is that two hand writings are so similar as to be indistinguishable. He might also comment on unusual features which make the similarity the more remarkable.

In *Cross on Evidence* (6th edition) at page 612 it is stated:

"Strictly speaking an expert in handwriting should not be asked to say definitely that a particular writing is to be assigned to a particular person. His function is to point out similarities between two specimens of handwriting or differences and leave the Court to draw their own conclusion."

The handwriting expert Mackenzie Mweu (PW 41) gave evidence about the documents he received, what he was requested to do and the result of his examination. In cross-examination he said the writings in dispute were good and undisguised and he freely admitted that he did not include similarities and dissimilarities in his report. Having read the evidence of Mweu, we are satisfied that it fell within the parameter enuciated in the authorities we have considered. It was up to the defence counsel to examine the handwriting expert on any aspect of this report and having not done that, it is not now open to the appellant to ask us to treat this as a deficiency in the report. In any case the expert was not dealing with disguised handwriting and the persons alleged to have signed the documents in question gave evidence and denied having done so. The conclusion arrived at by the trial court that those documents were forged

was therefore well founded.

The totality of the evidence establishes conclusively that if the appellant did not himself perpertrate the forgeries, he definitely had a hand in procuring the same. He wrote the false invoices in counts 4, 5, 6, 7, and 9 and prepared the cheques which he then caused to be forged. In counts 18 and 21, although there was an internal memorandum showing that payments were to be made to the National Museums and the Governmeent of Kenya, the appellant, instead made the cheques payable to Maroden East Africa Ltd. The cheques in counts 22 and 28 were also written by the appellant without any supporting documentation. When he was asked about this, he said he would look for them and then absconded. This evidence is sufficient to disprove the appellant's contention that he prepared these documents in the course of business.

Once the convictions on the forgery counts have been proved, conviction on the 3 counts of theft by servant automatically follows.

We would like to consider briefly the issue of overloading. The indictment in this case containing 28 counts was plainly overloaded and it in fact caused some degree of embarrassment to the appellant. The laying of this number of charges was a clear and deliberate disregard by the prosecution of the advice of this Court in the case of *Peter Ochieng v Republic* [1988] 1 KAR 832, that it is undersirable to charge an accused person with so many counts in one charge sheet. Had the appellant been unrepresented and had the matter been raised at the inception of the trial, we would have been inclined to allow this appeal on this ground alone. In the circumstances of this case, however, the overloading did not cause any injustice or prejudice to the appellant. The duty to ensure that an indictment is not overloaded rests squarely with the trial court which must put the prosecution to its election at the commencement of the trial.

The end result is that we find no merit in this appeal and order it to be dismissed.

Dated at Nairobi this 21st Day of May, 1993

J.E. GICHERU

…….

JUDGE OF APPEAL

R.O. KWACH

…….

JUDGE OF APPEAL

M.G. MULI

…….

JUDGE OF APPEAL