REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 1214 OF 1988

BETWEEN

GITAU & ANOTHER.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

June 14 , 1989, the following Judgment of the Court was delivered.

The two appellants were convicted in the court below on a series of charges relating to some cheques which were stolen, and then forged. The charges break down into Counts 1 to 4 which are theft counts of 4 various cheques from the Nairobi City Commission, and Counts 5 to 10 which are forgery charges relating to cheques for those amounts and another cheque. The appellants are jointly convicted in respect of those cheques, which concern Kenya Railways Corporation as the drawer of the cheques.

Counts 11 to 14 are theft charges relating to cheques and sums of money allegedly stolen from Kenya Medical Research Institute. In respect of which the 1st appellant was convicted with another who has not appealed.

The story told by the prosecution witnesses is a very unusual one. Taking Counts 1 to 10 first, so far as one can tell from the record what happened was that Kenya Railways drew cheques for various charges to Nairobi City Commission. Somehow or another these cheques disappeared after they had been delivered to the Commission and before they were paid into the Bank. It does not appear that these cheques ever surfaced again but it does appear that somehow or another some cheques which represented the same amounts were paid to the credit of an account of Impex Enterprises at Kenya Commercial Bank Kipande House Branch.

It seems from the record that, contrary to what the learned trial Magistrate said, the cheques which were paid into this account were not the same cheques which had been delivered to NCC, but substitute cheques upon which the same cheque number, the same amount appeared, but which bore a different payee, Impex Enterprises, and forged signatures of the authorised signatories, according to the Document Examiner.

Now the reason the 1st appellant was connected with these cheques is that the learned trial Magistrate found that he was the operator of the Account of Impex Enterprises concerned. The prosecution rather confused the issue as to that account by calling evidence of a search at the Company’s Registry of a

Company called Impex Enterprises Ltd. The directors turned out to be 2 Asians who appear to have no connection with this case, and that is not surprising as Impex Enterprises was expressed to be a sole proprietorship, not a Limited Company.

The sole proprietor of Impex Enterprises was said to be one Alex Ndirangu Gitau, the last name being the only one in common with the 1st appellant.

In fact the prosecution did make investigations into the identity of the person who had opened the account. No one was able to identify him, and the only available evidence was that of the Document Examiner who looked at the account opening documents and said that the specimen signature card and the sole proprietorship letter with which the account was opened were written in the same hand as specimen signatures written by the 1st appellant.

What is odd, we notice, is that the Police did not ask the Document Examiner to check the paying in slips with which these forged cheques were paid in, and the cheques withdrawing amounts from the Impex Enterprises account and so there was no report or opinion on these documents. The learned trial Magistrate was aware of this shortcoming, and filled in the gap by making his own observation without assistance on these signatures and hand writing. He had no doubt that they were made by the 1st appellant.

With the greatest of respect we think that this was most unwise, for two reasons. It is in the nature of forgery to make the forged signature look as alike to the original as possible, and we doubt that either our training, or the training of the learned trial Magistrate is sufficient in such matters to come to such a definite conclusion.

And second the learned trial Magistrate came to this evidential conclusion in the judgment without having given any notice to the parties that he was going to do so, or affording any opportunity to the parties to do anything about it. At the conclusion of the evidence the parties were entitled to assume that the prosecution made no issue of this, and so it was unnecessary to call evidence about it. The learned trial Magistrate was wrong to fill up a gap upon which the prosecution were reluctant to lead evidence.

And so the connection of the appellant with the account which benefited from the cheques came down to the evidence of the Document Examiner who said that the account opening documents had been written in the same hand as specimens taken from the appellant.

Now it is interesting to note from the record that the Document Examiner was not challenged at all. None of the parties, and the 1st appellant as well, not to say vociferously represented, had any questions to ask the Document Examiner at all. Complaint was raised in submissions that the Document Examiner did not refer to the points which he relied upon to show why he thought that the writing was in the same hand.

As to expert evidence in general, the authority for receiving the opinions of expert arises from S 48 (1) of the Evidence Act. The section says that it is the opinion of the expert which is admissible. S 53 also provides that the grounds for the opinion are also admissible. SS 50 to 53 describe the witnesses who can be considered experts, and able to give their opinion on a number of subjects “when the court has to form an opinion” on that subject.

The section is an exception to the general rule that oral evidence must be direct (S63).

In cases where an opinion is to be formed by the court as to handwriting, and where a handwriting expert is called, the question arises as to what the expert can say, and what evidence is necessary to be presented for the court to be able to form the necessary opinion.

In *Hassan Salum v Rep* [1964] EA 126, it was said by Spry J in the High Court of what was then Tanganyika, relying on English authorities, that the most an expert on handwriting can say, on a positive comparison is that two writings are so similar as to be indistinguishable, and to comment on unusual features which made the similarity more remarkable.

As to the necessary evidence, that he should point out the particular features of similarity or dissimilarity between the forged signature on the compared, and the comparison, documents.

Spry J said that it was correct to say that the evidence of a handwriting expert was opinion only and the matter was one on which the court had to make a finding.

In *Onyango v Rep* [1969] EA 362 a two judge court in Nairobi (Mwendwa CJ and Farrell J) specifically considered *Salum's* case and disapproved it.

In that case Mr Thompson was said in submissions to have gone far beyond the proper province of a handwriting expert in expressing the opinion that the compared writings, were in the same hand. In *Onyango's* case it was pointed out that S 48 expressly allowed evidence to be given of opinion "as to identity or genuineness of handwriting".

As to the evidence necessary, it was said that an expert witness (and a hand writing expert should not be treated differently from any other expert) should come to court prepared to justify his opinion by argument and demonstration, but he need not necessarily be called upon to do so.

The magistrate in that case had before her the disputed writings and the specimens, and also the confident opinion of the expert that they were in the same hand. She was entitled to draw conclusions from what was before her.

In *Wainaina v Rep* [1978] KLR 11, the Court of Appeal accepted Spry J's interpretation of the proper role of an expert in *Salum's* case. The most an expert can say in an appropriate case is that he does not believe a particular writing was by a particular person or, positively, that the writings are so similar as to be undistinguishable.

In CA 15/86 *Asira v Rep*, the Court of appeal was faced with what it referred to as "a remarkable opinion" as to disguised handwriting. It was pointed out that there was no demonstration of what was disguised writing and what were the telltale charractristics of the appellant's handwriting.

The Court of Appeal said that it was difficult to say whether the lower courts had made findings of their own, and referred to *Wainaina v Rep*. It

said:

> "It is the duty of the court to satisfy itself after examination whether the expert's opinion can be accepted and cannot blindly accept such opinion. In these areas of conflict it is prudent to look for other evidence so that forgery can be excluded on the one hand, and mistaken identification excluded on the other".

The learned trial Magistrate relied completely on the opinion of the Document Examiner, and although he had the documents before him, he was not assisted or taken through the compared writings by the Document Examiner. There were no photomicrographs showing the basis upon which the Document Examiner came to his opinion.

We are of the opinion that the record and the judgment must show that the learned trial Magistrate satisfied himself of the accuracy of the expert upon whose opinion he relies. If the relevant material is before him and he applies his mind to the matter, and there is no crossexamination of the expert, we cannot see how objection can be taken.

The learned trial Magistrate did not rely completely on the opinion of the document examiner but applied his mind to the matter with the assistance of the Document Examiner, whose evidence was not challenged.

The learned trial Magistrate was entitled to come to the conclusion he did on this evidence and we on our

own assessment of the record would agree. We also find, even considering the denial of the 1st appellant that it was so, that it was the 1st appellant who opened the account of Impex Enterprises, and it becomes relevant in this matter that the 1st appellant denied that he was the same person as Alex Ndirangu Gitau, which he clearly was.

We are unable however to draw the same conclusions as did the learned trial Magistrate which came before the details of the Company Impex Enterprises Ltd for the reasons we have already set out.

The cheques referred to in the 1st 10 counts were taken from the Nairobi City Commission, and the learned trial Magistrate devoted some time in his judgment to examining whether there was sufficient evidence to show that the 1st appellant was involved in taking them, in the course of which he branded one of the prosecution witnesses as an accomplice, but was unable to make the finding that the 1st appellant was any more concerned with the taking of the cheques than to have ended up with them in an account which he operated, and unless by association, it was difficult to see how the learned trial Magistrate reached the conclusion that the 1st appellant should be convicted of the theft.

The problem he had was that, apart from matters considered below, all the evidence he had was to show that the 1st appellant ended up with the cheques in his account, and that the 1st appellant worked for Nairobi City Commission albeit in a different department to the one handling the cheques: this was why he thought that PW 19 must be an accomplice and should have been in the dock. There was no direct evidence as to theft, and the matter became one of circumstantial evidence.

The only matter to be added to what has been said above is that the 1st appellant made an inquiry statement in which he said that he had been approached by 2 men who were not before the court to obtain large cheques which they would be able to cash. He agreed that he had gone to open an account in the name of Impex Enterprises.

He then said that one Mungai who was in charge of Government Accounts brought him 6 cheques of a similar description to the cheques in question and he handed them over to the 2 men not before the court, who paid them in to the Impex Enterprise Account, from which withdrawals were later made and shared. This statement was repudiated, on the basis that it was obtained by the promise that if he made it he would be called as a witness and not charged.

The statement was taken on 20.8.85: the caution administered says that the officer concerned had reason to believe that the 1st appellant was connected with the offence, or had “reasonable information (sic)” that could assist him in his investigations.

In the certificate at the end the officer refers to the 1st Appellant as “the accused person” which he was not by then and it is a matter of guesswork as to when the officer taking the statement changed his mind, and decided that the 1st appellant should be charged: whenever it was, he should have then cautioned the 1st appellant and taken a warned and cautioned statement, but he did not do that. That leads us to the inference that this was a Freudian slip, and that it cannot be excluded that he represented to the 1st appellant that he would not be prosecuted if he made his enquiry statement, as the 1st appellant was saying in the trial within trial. There is at least something wrong, whichever view was to be taken, either a promise upon which the 1st Appellant relied, or a failure to caution, and in either case, where the prosecution case was such as to depend to a great extent upon the inquiry statement, we find it very difficult to support the finding of the learned trial Magistrate for reasons which he said he was going to give later, but never did, that the statement was to be admissible. To be fair to the learned trial Magistrate, he did not rely on this statement in his judgment.

He did rely on the warned and cautioned statement of the 3rd accused who is the 2nd appellant as against the 1st appellant. That statement was repudiated and also admitted after trial within trial. This was a warned and cautioned statement, and there seems to be no basis upon which to upset the decision to admit it.

In the statement the 2nd appellant casts the 1st appellant in the role of proof reader of cheques printed

through the offices of one John, a man from Meru. He casts himself in the role of messenger between the various people involved, including a man called James Waema who did the forgery of the signatures according to the 2nd appellant. He said that the 1st appellant told him he was able to cash the cheques through the Bank Account of Impex Enterprises. The 2nd appellant said that he had received shs 17,000 from withdrawal of funds from these cheques, and that he had passed on a similar amount to James Waema.

The evidence of a co-accused, cannot be used against the other accused if it is unsworn *Ozio v Rep* [1951] EA 36, cited in *Hasa v Rep* [1976] KLR 6. Indeed even if the evidence is sworn it must be regarded with extreme caution if it is to be used against the co-accused.

Nor can what the co-accused told the Police about another accused be used against that accused (CA 82/83). Where the confession is in a statement under caution, a statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may in a joint trial be "taken into consideration" against that co-accused. It is however not only accomplice evidence but evidence of the weakest kind and can only be used as lending assurance to other evidence against the co-accused (*Anyangu & Ors v Rep* [1968] EA 239).

The confession of a co-accused can only be used to corroborate or supplement evidence in exceptional cases where there is substantial evidence to which the confession may be added (*Gpa & Ors v Rep* (1954) 21 EACA 267 quoted with approval in CA 97/85).

The 2nd appellant put the 1st appellant in the position.

> (1) Of knowing that one cheque had been taken from the Nairobi City Commission and of having been involved in its abstraction.
>
> (2) Of having been involved in the various steps of the forgery of the cheques in question
>
> (3) Admitting to the 2nd Appellant that the cheques were to be paid into Impex Enterprises account.

On those points assurance can be lent to other evidence based upon the warned and cautioned statement of the 2nd appellant.

But what other evidence is there? Only the fact that the 1st appellant had a bank account into which the funds were paid, but not that he in fact operated that account in respect of these cheques, a matter which was simple to prove but which was not proved. Indeed the 1st appellant said that others withdrew from that account which indicates that yet further forgeries were committed in respect of that account.

Without the statement of the 1st appellant the prosecution have no evidence other than the statement of the 3rd appellant to which the statement can lend assurance.

The evidence is circumstantial as to the involvement of the 1st appellant, and it must then be such that the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation on any other hypothesis than that of his guilt (*R v Kipkering arap Koske* (1949) 16 EACA 136.

There is one other piece of evidence which might help the prosecution so far as the 1st appellant is concerned. There was PW 33 who is a business man in Nairobi who met the 2nd appellant who showed him 6 blank cheques and said that he was looking for someone who could forge them. 2 or 3 days later he met him again, and he was shown the cheques which were now forged and made out to Impex Enterprises.

This was useful evidence against the 2nd appellant. The witness continued to say that the 2nd appellant said that he had got the cheques from one Gitau, whom he was introduced to later by the 2nd appellant. But this evidence was hearsay, as against the 1st appellant as his connection with the cheques came from

what the 2nd appellant was said to have said about him to the witness in his absence.

We do not think on our own assessment of all the evidence that the 1st appellant should have been convicted of these counts numbers 1 to 10.

Turning now to the 2nd appellant our understanding of the case comes very much from the warned and cautioned statement which he made. We do not think that the learned trial Magistrate was necessarily right to assume that just because he was a printer, it was he who printed the cheques which were later forged by someone else.

But it is clear that he was right in the middle of the forgery side of this matter, as a joint offender and as an aider and abettor, and as an accessory before the fact, and benefited from it. He may therefore be charged as principal. It is unlikely that he was concerned with the theft of the cheques in Counts 1 to 4, so far as his statement went, and there is no other evidence to connect him with it, save the possession of the forged cheques about which PW 33 talks. The explanation clearly given is that he had those cheques for forgery purposes, and was not concerned with the theft of the cheque.

The statement under caution of the 2nd appellant is corroborated in material particular by the evidence of PW 33, and the fact that the forged cheques were paid into the account of Impex Enterprises as he said in his statement.

We think that his conviction on counts 1 to 4 was wrong, but we are satisfied on our own assessment of the record that he was properly convicted on counts 5 to 10.

Turning now to counts 11 to 14. What happened in these cases was that the cheques concerned were filled out in the name of Impex Enterprises according to the warned and cautioned statement of the 4th accused. The counterfoils were filled in as having been paid to Kenya Posts & Telecommunications.

The evidence of PW 11 & 12 corroborates the statement made by the 4th accused, who was properly convicted on admissible evidence.

The only basis upon which the 1st appellant was convicted was his inquiry statement, with which I have already dealt, the warned and cautioned statement of the 4th accused, and the fact of being the person who opened the Impex Enterprises Account.

Much the same applies to the warned and cautioned statement of the 4th accused as has been said above. It can only lend assurance to other evidence. The only available evidence against the 1st appellant is the fact that he was the person who opened the account into which the forged cheques were paid, and lied about that.

In no other way, on evidence which can be taken into consideration is he connected with these charges.

Once again we think that the available evidence is not sufficient to convict the 1st appellant.

Accordingly the appeal against conviction of the 1st appellant is allowed in respect of all counts for which he was convicted, convictions quashed and sentences set aside.

The appeal against conviction of the 2nd appellant in respect of counts 1 to 4 is allowed, convictions quashed and sentences set aside. As to counts 5 to 10 we consider the sentences to be lenient and we shall not interfere with them. Appeal against conviction and sentence on those counts is dismissed.

Dated and delivered at Nairobi this 14th day of June , 1989

PORTER **TANK**

JUDGE **JUDGE**