



REPUBLIC OF KENYA
MILIMANI LAW COURTS
HIGH COURT CRIMINAL DIVISION
CRIMINAL APPEAL NO E 262 OF 2023
(CMCRCASE E969 OF 2021)

**GEOFFREY KARIUKI_
MUTHUI.....APPELLANT**

VERSUS

**REPUBLIC.....
RESPONDENT**

JUDGMENT

TRIAL COURT PROCEEDINGS

CHARGE SHEET/INFORMATION

COUNT 1

1. The Accused Geoffrey Kariuki Muthui was/is charged with forgery c/s 345 as read with 349 of the Penal Code.

The particulars of offence are that on or before 18th April 2019 at an unknown place within the Republic of Kenya with intent to defraud , forged a certain

document ; namely NIC Bank Cheque Number 000028 in the name of Alfabet Ventures purporting it to be a genuine cheque drawn and signed by Alfabet Ventures.

COUNT 2

2. The Accused Geoffrey Kariuki Muthui was/is charged with stealing c/s 275 of the Penal Code. The particulars of offence are that on or before 18th April 2019 at Equity Bank Dagoretti Corner Branch in Nairobi County, he stole Ksh 774,200/- the property of Equity Bank.

ALTERNATIVE TO COUNT 2

3. The Accused Geoffrey Kariuki Muthui was/is charged with alternative count to Count 2 handling stolen property c/s 322(1) as read with Section 322(2) of the Penal Code. The particulars of offence are that on or before 18th April 2019 at Equity Bank Dagoretti Corner Branch in Nairobi County, otherwise than in the course of stealing , he dishonestly received Ksh 774,200/- through Account Number 1690277834269 Account in the name of Savannah Geo Plumbers Ltd knowing or having reasons to believe it to be stolen money.

TRIAL COURT EVIDENCE

4. PW1 Bett Kipngeno Joshua in 2013 had company called Alphanet Ventures produced registration Certificate. He opened Account 1005820192 at NIC Bank at Embakasi Branch and produced Account Opening Documents.
5. PW1 was issued with a 50-page cheque book series number 1-50 0000001-000050 on 10/7/2018. Around March 2019, he lost the cheque- book at a car wash. The NIC bank called to approve payment of a cheque and he declined and vide email 10/4/2019 stopped payment of the presented cheque and all cheques in the lost cheque book. He produced the E-mail as exhibit in Court.
6. PW1 reported the matter to Kericho Police Station OB 30 of 4/4/2019. He was informed by the Bank the presented cheque was No 000028 and banked through Equity Bank.
7. PW1 came to Nairobi and at Police Station was shown the cheque he recorded his statement and his handwriting and signature samples were taken.
8. PW2 Phillip Chabari of Equity Bank testified that Savannah Geo Plumbers Ltd Account Opening Documents he presented in Court indicated Geoffrey Kariuki Muthui of ID 0813488 opened Account Number 1690277834269 and other

documents included the Certificate of Incorporation of the said Company and the PIN Certificate of Geoffrey Kariuki Muthui and PIN for Savannah Geo Plumbers Ltd.

9. PW2 stated that on 18/4/2019 a cheque that read Payee Savannah Geo Plumbers Ltd for Ksh 774,200/- from Alphanet Ventures dated 18/4/2019 from NIC Bank and was received from NIC Bank and processed all conditions were checked; the cheque was received during Easter holiday and the system captured the clearance of the cheque. The cheque was taken to NIC who paid the amount and the Payee accessed the funds Ksh 774,200/- over the Counter.

10. Later that afternoon, the cheque was indicated as unpaid and the Payee's Account was debited the amount. PW2 produced the Statement of Account w.e.f 31/1/2019-16/5/2019 (PEXH 14) of the Payee Company in Court and the Notice from NIC Bank via Email of 16/5/2019 (PEXH16)

11. PW2 said that they called the customer on what goods were supplied or services rendered to warrant payment, he said he supplied 17 Davis Petrol engines pumps and 5 diesel engine and it was through online advertisement website. They

saw advertisement created in Facebook and it was Davis & Shirtliff and Payee was their customer or stockist.

PW2 identified Payee Director on behalf of the Company or Business name from the ID card and in Court.

12. PW3 Joe Kevin Mugo Maina from National Registration Bureau confirmed receipt of letter dated 7/10/2019 (PEXH 17) requesting for Identification Report of ID 0813488. PW3 prepared Report and vide letter dated 14/11/2019 found the ID card belonged to one Geoffrey Kariuki Muthui, photo, fingerprints and signature of the named person and home particulars all detailed in the letter of 14/11/2019 (PWEXH 18) & Report (PWEXH 19) & accompanied with Certificate prescribed under Section 65 of Evidence Act. (PWEXH 20)

13. PW4 Felix Naftali Mutevya from the Business Registration Bureau confirmed receipt of letter from Central Banking Fraud Unit on registration details of Savannah Geo Plumbers Ltd; letter dated 11/10/2019 (PWEXH 21) and upon checking records replied vide letter of 21/10/2019 (PWEXH 22) the Savannah Geo Plumbers Ltd was registered on 9/10/2018 under PVT-27UKXDB. As at

21/10/2018 the Director was Geoffrey Kariuki Muthui of P.O Box 57790-0200 registered office LR Kalanduni 042, the Director with 1000 shares. He presented the Report/Letter.

14. PW5 C.I Mariam Kemunto Document Examiner from DCI HQ confirmed qualification and experience. On 20/9/2021 she received exhibits with a Exhibit Memo form From Cpl Kamau. The exhibits for examination were Cheque for NIC Bank (A1); Specimen signatures of PW1(B1-B2); Specimen Handwritings of PW1 (B3-B4); Account Opening Documents at NIC of PW1 (C1) Equity Bank Account Opening Documents of Accused Person (C2) and specimen handwritings of the Accused person. PW5 subjected the signature and handwriting specimens to the Video spectrum machine. PW5 considered the following;

15. Design and Spacing writing strokes baseline allotment and genuine resemblance of characters; Initial terminal strokes if the signatures flow if the pen and character formation was similar; PW5 found the connection in the handwriting in the specimen and the handwriting of the Accused person.

16. PW6 CPL Naftali Kamau of Banking Fraud Investigation Unit (BFID) stated that on 4/6/2019 a matter was reported to their Unit by Security Officer Equity Bank vide letter dated 4/6/2019 (PWEXH 27). A Cheque fraudulently drawn from NIC Acc No 1005820193 in the name of Aplhanet Ventures. He sought through Court Order No 3292/2019 Misc App (DExh 28) documents related to the matter. He obtained statements from witnesses, obtained Account Opening documents from banks.

17. In the course of investigations, he confirmed Ksh 774,200/- was paid to Account of Savannah Geo plumber Ltd on 23/4/2019, the account opened by Geoffrey Kariuki Muthui. PW1 Bett Kipngeno; Director of Alphanet Ventures and he alleged he did not draw Cheque 000028 and the signature on the cheque was not his and the cheque was lost in March 2019. PW1 reported the loss of cheque book to Kericho Police Station and to NIC Bank Westlands Branch. He submitted the collected documents and specimen handwritings and signatures to the Document Examiner (PW5) He arrested the Accused person in CBD and charged him with the offences.

DEFENSE CASE

18. The Accused person Geoffrey Kariuki Muthui gave sworn statement and stated that he was/is CEO of Savannah Geo Plumbers Ltd duly registered. On 17/4/2019 his Marketing Manager informed him that people contacted them on internet and they were interested in buying their products and sought quotations that were provided. They asked for water pumps and petrol and diesel engines and the quotation issued totaling Ksh 774,200/- He told his team to ask people to transfer funds to Equity Bank Account.
19. On 18/4/2019, he received the funds in Account No 1690277834269 Equity Bank Dagoretti Branch. He asked the bank if the cheque had cleared and he could use the money which he did shortly thereafter. On 23/4/2019, the Delivery Note produced as (DEXH2).The goods were released by Davis & Shirtliff at Industrial Area Branch who were their official suppliers and they were their stockists. He produced letter dated 29/11/2022 (DEXH 3) and receipt of goods supplied to Charles Gitango on 23/4/2019 for Ksh 774,200/-.

20. He admitted that the amount deposited in his account, he withdrew Ksh 773,000/- from the account through a cheque which he took to clear Micro Finance business called Daraja and produced Cash deposit (DEXH 5)

On 25/4/2019, he paid Ksh 641,269 to Davis & Shirtliff for supply of pumps through bundle of Transfer Form (DEXH 6) and Fax Invoice (DEXH 7)

21. In July 2019, he received Statement of Account that indicated his Account through the Company was debited with Ksh 774,200/- the funds he withdrew from the Account. He wrote various letters to Manager of the Bank where the Account was (DEXH 8) and later received response on 8/11/2019 which referred to fraudulent cheque deposited in his company's account.

22. His Advocates on record wrote to the Bank on 14/11/2019 and there was no response. He tried to get a loan from Daraja Micro-Finance and he was informed that he was listed under CRB as having outstanding loan of Ksh 815,346.05/- He denied forging the cheque and Charles Gitongo was allegedly representing the Company by Celim

Commercial Agencies. He saw the said cheque at the Police station after he was arrested.

23. DW2 Emmanuel Kenga, Forensic Document Examiner for over 30 years and formerly attached to CID HQ was extensively trained and worked as such and retired as Commissioner of Police.

24. He was presented documents A1-A4; B1-B3; C1-C2 & D1 and upon examination through microscope and enlarging glasses for style, alignment, pen movement, lift, speed, stroke and free flow of ink and found as follows;

- Cheque for NIC Bank (A1);
- Specimen signatures of PW1(B1-B2);
- Specimen Handwritings of PW1 (B3-B4);
- Account Opening Documents at NIC of PW1 (C1) Equity Bank
- Account Opening Documents of Accused Person (C2) and specimen handwritings of the Accused person.

25. He found no similarity between C1-C2 & D1; A4 & C1- D1 no agreement in handwriting & signatures,

A3 & D1 known signatures were similar and originated from same hand. A4 and B1& B2 found

no agreement. A2 & B3 & B1 & B2 were by the same author.

26. DW3 Tabitha Wangechi Digital Marketer, the Appellant was her Employer in Savannah Geo Plumbers. On 17/4/2019 she ran online advertisement she got a call from Charles Gitango and he wanted water pump. She sent quotation as per his request (DEXH4) for Ksh 774,200/- and he was to make payment through cheque and it was during Easter and he made payment on 23/4/2019, She sent to the Supplier Davis & Shirtliff to one Maurice Ochieng and issued Delivery Note of 23/4/2019 and stated that Maurice Ochieng collected goods for the Supplier.

APPELLANT'S WRITTEN SUBMISSIONS

27. The Court of Appeal in **Joseph Mukuha Kimani v Republic (Criminal Appeal No. 76 of 83) [1984] eKLR** held that to prove forgery, the prosecution must prove that:

A)The document was false; in the sense that, it was forged.

B)The accused knew it was forged

C) The utterer intended to defraud.

In this case it is alleged that the Appellant with intent to defraud, forged a certain document namely NIC

bank cheque No. 000028 in the name of Alfabet Ventures purporting it to be a genuine cheque drawn and signed by Alfabet Ventures. However, in view of the above analysis, the prosecution did not substantiate the allegations of forgery, for the following reasons:

- i. The account opening forms in respect of Alfabet Ventures NIC Bank **PExb 2** and Forensics examiner's report-**PExb 23** confirms that the cheque produced as **PExb 5** was neither signed by the complainant, PW1, Bett Kipngeno Joshua nor the Appellant herein.
- ii. The **PW1**, confirmed that as at the material time of the alleged acts of forgery, ALFANET Venture NIC Bank did not have sufficient funds in its bank accounts.
- iii. The Complainant, PW1, produced an e-mail dated 10/04/2019, marked as **PExb 3**, which e-mail confirms that the complainant had made a formal notification to NIC Bank that his cheque book had been lost or stolen and hence the NIC Bank was to stop the said cheques in the said series.

28. In addition, the forensic report tendered created lots of doubt which ought to be resolved in favor of the Appellant. For instance;

- i. The document examiner went beyond his scope of duty when he arrived at the conclusion that

the handwriting on the Equity Bank Account Opening Forms belonging to the Appellant and the handwriting on the cheque in question as compared with the specimen handwriting of the Appellant, were made by the same author, the Appellant herein.

29. In the case of **Stephen Kinini Wang'odu versus The Ark Limited [2016] eKLR** the judge drew out four tests to be applied by a court when considering admission and acting on expert evidence as follows:

'...in my view it's correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the experts reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert,

whatever the field of expertise, is worthless unless founded upon a substratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence. “An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based...”

30. The Court of Appeal in the case of **Joan Chebichii Sawe-V-Republic Crim.App. No. 2 of 2002** had this say about suspicion in a criminal case:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira

vs Republic (Criminal Appeal No. 17 of 1998(unreported) suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.

31. In the case of **Mwangi & Another v Republic [2004] 2KLR 32** the Court of Appeal held thus:

'In a case relying on a circumstances evidence, each link in the chain must be so closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of events proved in incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.'

ANALYSIS & DETERMINATION

32. The Court considered the evidence on Trial Court record and written submissions by Appellant.

33. This Court being the 1st Appeal Court, its duty is as set out in the case of **Okeno vs. Republic [1972] EA 32** as follows:-

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first

appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

34. In criminal case the burden of proof solely rests with the Prosecution. In the celebrated case of **H.L(E)Woolmington vs. DPP [1935] A.C 462 pp. 481**, 35. The standard of proof is proof beyond reasonable doubt. **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372**

36. The Petition of Appeal filed on 13/9/2023 raised 10 grounds and sought the conviction and sentence be set aside and the fine be refunded to the Appellant. The gist of the Appeal is based on Petition of Appeal filed on 13/9/2023 and condensed as follows;

a) The Trial Court passed judgment convicted the Appellant when the Prosecution did not discharge the required burden of proof; the evidence tendered was insufficient failed to call crucial witness, failed to rule the evidence adduced by Prosecution was contradictory, misleading, inconsistent and unreliable evidence.

b) The Trial Court erred in holding and finding that the Document Examiner's holding that there was semblance in the handwritings and signatures of documents presented for examination without detailed explanation of the examination and outcome.

c) The Trial Court erred in disregarding the evidence of the Appellant's Expert, finding against evidence tendered by the Appellant and submissions filed.

d) The Trial Court erred and meted out grave and excessive sentence.

The appellant sought conviction and sentence set aside and judgment to be quashed.

37. The burden and standard of proof is on the Prosecution but where the Defense through the Accused person has knowledge of certain facts, then

it is upon him/her to adduce such evidence and prove the said facts.

The Evidence act succinctly provides as follows;

107. Burden of proof

- (1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
- (2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person***

111. Burden on accused in certain cases

- (1) *When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.***

39. Jabane - v- Olenja[1986] KLR 664, The Court held thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with

them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.....

40. The main contention of the appeal is mainly that the Trial Court made finding that the cheque in question was deposited in Appellant's Account and the Prosecution tendered evidence that the Appellant with intent to defraud, forged a certain document namely NIC bank cheque No. 000028 in the name of Alfabet Ventures purporting it to be a genuine cheque drawn and signed by Alfabet Ventures. The Appellant submitted he did not forge the impugned cheque.

41. The Defense took issue with testimony and expert evidence adduced by PW 5 Document Examiner, who found after comparing disputed handwriting in A1 cheque No. 000028; with Account Opening Documents C2 known handwritings and signatures of the Appellant & D1- D3 Specimen handwritings of the Appellant. PW5 subjected these writings to a machine for better visibility-video-spectrum and witnessed the following; design and spacing, writing strokes and baseline allotment and found genuine resemblance of the characters.

42. The Appellant through his Defense presented evidence of DW2 Document Examiner, he examined the questioned handwriting and signature into specimen C1-C2 and D1 respectively and he did not find any similarity to indicate they were from a common author. He confirmed A4 and B1-B2 were not in agreement in the writings. He compared A2 B3 B1 & B2 and they were made by the same author as there were similarities. He used microscope and enlarging glasses for good observation and found style, alignment, pen movement, lift, speed, stroke and free flow of ink and made his findings.

43. The Appellant was charged with Count 1 of forgery which is the making of a false document with intent to defraud or to deceive. The evidence on record is that PW1 the owner of cheque-book with 50 leaves lost the same at a Carwash and reported to Police. Thereafter, one of the cheque leaves No. 000028 from PW1's Company Alfabet Ventures was deposited in the Appellant's Account 16902777834269 Equity Bank in the name of Savannah Geo Plumbers Ltd and confirmed by PW4 to be registered in Appellant's name and PW3

confirmed identification details of Appellant as per his ID 0813488.

44. The only contentious issue is whose expert Report is conclusive on the forgery of the impugned cheque,

In the absence from the Trial Court file of the documents marked and produced as exhibits during Trial and more specifically the Expert Reports produced in Trial Court by PW5 & DW2 respectively, this Court whose legal duty as 1st Appellate Court is to re-evaluate the evidence on record and come to its own conclusion;. In this exercise, the Court is left handicapped and impeded to determine the issue of the expert reports one way or the other.

45. The value of expert evidence is technically persuasive and only considered together with the other available evidence and the circumstances of the case.

In **Shah and Another vs Shah and Others [2003] 1 EA 290:-**

'The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of

an expert if it finds good reasons for not doing so.”

In **Parvin Singh Dhalay vs Republic [1997] eKLR; [1995-1998] 1 EA 29**, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”

46. The court cannot competently consider the impugned judgment on expert evidence in a bid to see if the same is sufficiently comprehensive and coherent with respect to the documents that were produced and the analysis of the same such that each Document Examiner was presented with examined and made findings in reports filed in Court and for this Court to reach an informed and therefore just and fair determination of this appeal. Therefore on which report is/was correct and/or reliable with regard to circumstances cannot be conclusively determined in the absence of exhibits and reports. This court did not see documentary evidence and hear the evidence of experts in the absence of material presented during

trial on appeal this court upholds finding of Trial Court as it can only rely on Trial Court's evidence and finding.

47. The 2nd ground by Appellant was that the Trial Court failed to consider the Defense evidence and submissions which this Court hereby undertakes to do;

DW1 stated in his testimony that the Marketing Manager informed him of customers who sought to purchase goods through Internet. The quotation of Ksh 774200/- was made and sent to customer and he asked that the customer banks funds first through his Account 16902777834269 Equity Bank Dagoretti Corner Branch. Later he went to bank and was informed that the funds were credited to his Account and he withdrew funds.

48. He produced Delivery Note that confirmed diesel and petrol pumps were delivered to one Charles Githongo on 23/4/2019 for Ksh 774,200/- The goods were sourced from Davis & Shirtliff who are their official suppliers. He withdrew funds and paid Daraja Micro-Finance Bank. Later he was informed that a cheque was deposited that was fraudulent and he was to repay the funds.

49. DW3 the Digital Marketer who stated that she was running online advertisement and she received a call

from Charles Gitango for water pump and she issued quotation of Ksh 774,200/-.He paid on 17/4/2019 via cheque as he wanted the goods urgently and she sent for Supplier Davis & Shirtliff through one Maurice Ochieng and issued Delivery Note dated 23/4/2019 and the Registration number of the vehicle was shown in the Delivery Note and she signed the documents to confirm delivery.

50. This Court finds the evidence by Prosecution and Defense unclear in one aspect; the questioned cheque No. 000028 which was one of leaves in the cheque book belonging to PW1 and reported it was stolen at a Carwash on 10/4/2018 This cheque was presented and/or banked in the Appellant's Account. How was the cheque brought to Equity Bank and by whom? Was it over the Counter and/or presented to the bank, if anyone brought the cheque, physically, logically forms were filled in and presented with the cheque and the CCTV was on as in all bank halls. This is the anomaly and the

contradiction in terms; PW 3 of Equity Bank presented Account Opening Documents of the Appellant and testified that the cheque was received from NIC and was received by Equity Bank it was processed and the

cheque went to NIC and it was paid into the Appellant's Company Account.

51. DW3 on the other hand dealt with the customer online and it was one Charles Gitango who called the Company and talked to her said the goods sought were urgently required and opted to pay by cheque and it was deposited and paid by 17/4/2019. So where was this cheque presented first NIC Bank PW1's Bank that issued him cheque-book that was stolen or Equity Bank the Appellant's bank? If so, by whom NIC and/or at Equity. If the goods were required urgently the customer would have paid by cash/online Banking/Mpesa.

52. Secondly, Charles Gitongo the said customer who approached Appellant's Company online and called on phone, as stated by DW3, surely DW3 had phone number why did she not report the matter to Police once investigations commenced on funds withdrawn from Appellant's Account if she is the one who was in contact with Charles Gitongo? Does Charles Gitonga exist?

53. Thirdly, if as alleged goods namely petrol and diesel pumps were sold to Charles Gitongo who

deposited the impugned cheque and had goods delivered to him through Delivery Note as stated by DW3; it was through Maurice Ochieng. Surely if at all they could trace the one who received the goods they could have reported to Law Enforcement.

Once the Bank raised a query that the cheque was fraudulent, DW1 & DW3 made no effort to return goods sold and delivered by one Maurice Ochieng (who was not called or reported) and whose delivering motor vehicle Registration Number was noted in the Delivery Note and/or trace Charles Gitongo who paid for the goods through the fraudulent cheque nor did they trace the registered motor vehicle in the Delivery Note sought, in short, the Appellant & DW3 should have retraced the transaction of sale of goods back wards and with the Police to get to the root of the fraudulent cheque. A Delivery Note by and of itself did not confirm sale and delivery of the goods to the alleged buyer.

55. Fourthly, it is strange that DW1 on receipt of funds in his Account he withdrew the said funds and instead of paying the Official Supplier Davis & Shirtliff where he had release of goods he paid into Daraja Micro-Finance. No evidence of the payment for goods obtained from Davis & Shirtliff **was presented during trial and no**

evidence of business relationship with Davis & Shirtliff .

Section III of the Evidence Act provides that where the Accused has facts/evidence within his knowledge the whole burden of proof shifts to him

Section III Evidence Act, the Appellant ought to prove facts within his knowledge any evidence of Supplier and Stockist relationship established.

56. These anomalies, in the Defense Case against the evidence on record that PW1 lost his cheque-book 50 leaves 0000001-000050 it was stolen at a Carwash on 10/7/2018 and 1 leaf mysteriously finds its way to Appellant's Account on sale of goods that are allegedly delivered to unknown customer Charles Gitongo (only name existence not established even from phone number) and goods delivered by one Maurice Ochieng (again not traced) does not cast doubt on Prosecution case. For all intent and purpose these may be just names in the absence of any other detail availed to Law Enforcement or Trial Court.

57. With regard to the fact the matter was civil and not criminal the Court relies on **Article 157 (10 & (11) of the Constitution**, we cannot direct the ODPP on who when or where to charge.

The Criminal Procedure Code provides;

193A. Concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

58. On the issue of the Prosecution not calling crucial witnesses, although the Defense did not name the witnesses not called during trial and later in the Appeal **Section 143 of the Evidence Act provides;**

‘No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact’.

see Samuel Kagiri Njuguna v Republic [2016] eKLR

All that the prosecution is required to do is to call such a number of witnesses as it thinks is sufficient to prove its case.

59. The Appellant raised issue with contradiction and inconsistencies of evidence during Trial but the specific evidence that was contradicting and inconsistent was not zeroed in for the Court to consider.

In the case of **Richard Munene -vs- Republic 2018 eKLR** with regard to contradiction or inconsistency in the evidence of the prosecution witness and the Court stated that;

“.....Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

The trial court correctly found the cheque No 00028 was stolen as per evidence of PW1 and the Trial Court record evidence PW2 & DW3 and PW5 & PW6 confirmed through investigations the cheque was used to pay for goods and processed through the Appellant's Account through his Company. The evidence adduced by Defense did not cast doubt on Prosecution case due

to anomalies highlighted that remained unresolved and unexplained.

DISPOSITION

The Appeal is dismissed

Trial Court judgment upheld

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN
COURT CRIMINAL DIVISION NAIROBI ON
23/3/2026**

**M.W. MUIGAI
JUDGE**