



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), SICHALE & KANTAL, JJ.A)

NAIROBI CRIMINAL APPEAL 121 OF 2018

BETWEEN

GEORGE ANUNDA NYAMWEYAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Nairobi (Ochieng, J) dated 21st November, 2011

IN

HC. CRA NO. 536 OF 2009)

JUDGMENT OF THE COURT

George Anunda Nyamweya (George) (the appellant herein) was charged with six (6) counts as follows:

In count I, he was charged with forgery contrary to section 349 of the Penal Code, the particulars being that on **30th November, 2004** at Standard Chartered Bank, Moi Avenue Branch in Nairobi within Nairobi area jointly with others not before court he forged a certain bank draft No. 753641 for Kshs 2.7 million purporting that the said bank draft had been repurchased by **Muhamed Sheikh Abdullahih**.

In count II, he was charged together with **Onuang'a Maragia (Onuang'a)** with stealing contrary to section 275 of the Penal Code. In the particulars it was stated that on **8th December, 2004** in Nairobi within the Nairobi area jointly with others not before court they stole cash Kshs 159,000, the property of Standard Chartered Bank.

In count III, the appellant and **Onuang'a** were charged with stealing contrary to section 275 of the Penal Code, the particulars being that, on **10th December, 2004** in Nairobi within the Nairobi area jointly with others not before court, they stole cash Kshs 850,000, the property of Standard Chartered Bank.

In count IV, the two (the appellant and Onuang'a) were charged with stealing contrary to section 275 of the Penal Code wherein it was alleged in the particulars that on **16th December, 2004** in Nairobi within the Nairobi area jointly with others not before court, they stole cash Kshs 1,500,000, the property of Standard Chartered Bank.

In count five (V), the appellant and **Onuang'a** were charged with the offence of stealing contrary to section 275 of the Penal Code, the particulars being that on **24th December, 2004** in Nairobi within Nairobi area jointly with others not before court stole cash Kshs 190,000, the property of Standard Chartered Bank.

In count VI, the appellant was charged with the offence of destroying evidence contrary to section 116 as read with section 36 of the Penal Code, the particulars being that on or before **26th July, 2005** at Standard Chartered Bank, Kimathi Street Branch in Nairobi within Nairobi area, knowing that the account opening documents for account Number 01020-129583-00 in the names of **Ibanchore Enterprises** were required in evidence in a Judicial proceedings willfully removed the said documents with intent to prevent them from being used in evidence.

The appellant denied all the charges leveled against him. In a trial conducted by **Honourable Mutoka**, the then Senior Principal Magistrate (SPM), Nairobi, the appellant was found guilty of counts 1, 2, 3, 4, & 5 and sentenced as follows:

- (i) In count I, he was sentenced to pay a fine of Kshs 30,000 in default, to serve nine (9) months imprisonment,
- (ii) In count II, he was sentenced to pay a fine of Kshs 10,000 in default, to serve four (4) months imprisonment,
- (iii) In count III, he was sentenced to pay a fine of Kshs 40,000 in default, to serve nine (9) months imprisonment,
- (iv) In count IV, he was sentenced to pay a fine of Kshs 20,000 in default, to serve six (6) months imprisonment, and
- (v) In count five (V), he was sentenced to pay a fine of Kshs 20,000 in default to serve four (4) months imprisonment.

The custodial sentences were to run consecutively. **Onuongá**, the appellant's co-accused was however acquitted of all the charges against him.

The appellant was aggrieved by the trial court's conviction and sentence and appealed to the High Court. In a Judgment delivered on **21st November, 2011, Ochieng, J** made the following findings:

“I find that that line of defence is nothing more than an afterthought, intended to create a gap between the appellant and the complainant. I also find that the appellant caused the issuance of cheques payable to Ibanchore Investments Limited account without the requisite authority of the complainant. By doing so he forged the signature of P.W.10. Thereafter, the appellant worked with his co-accused to withdraw the money from the account of Ibanchore. Of course Ibanchore Investments Limited had no reason to complain about the said withdrawals because the money was never theirs in the first place. The account was simply a conduit used by the appellant and his co-accused to withdraw money that legitimately belonged to the bank. By taking the said sums of money, the appellant was guilty of stealing. As regards the alleged offence of destroying evidence, the prosecution did not lead any evidence. Consequently, the appellant ought to have been acquitted in count 6. I do now find that the appellant was not guilty of destroying evidence; and I accordingly acquit him.

However, I do find that his conviction on counts 1 to 5 (inclusive) were sound. I therefore uphold the said convictions, together with the sentences.

In the event, the appeal is dismissed”

Still aggrieved with those findings by the Judge, the appellant has appealed to this Court. In a Memorandum of Appeal dated **17th June, 2014**, the appellant listed four (4) grounds of appeal that can be paraphrased as follows:

- (i) The 1st appellate court erred in law in finding that the evidence adduced in the lower court proved all the charges against him beyond any reasonable doubt,
- (ii) The 1st appellate court misdirected itself by ignoring the defence advanced by the appellant in the trial court,
- (iii) The judge in the 1st appellate court erred in law by failing to analyze in sufficient detail the submissions put on behalf of the appellant, and finally, that
- (iv) The judge in the 1st appellate court erred in failing to find that the trial court misinterpreted the evidence before it thereby occasioning a miscarriage of justice to the appellant.

On **13th November, 2019**, the appeal came up for plenary hearing before us. **Mr. Kanyangi**, learned counsel for the appellant whilst appreciating that in a second appeal, our mandate is confined to points of law and not facts submitted that there was no evidence that a Bank draft of Kshs 2.7 million was forged and if at all it was forged, then it was not forged by the appellant. Secondly, counsel pointed that it was not clear who the complainant was, was it **Christopher Muimita Ole Tanpeni?** or **Trans-Amazon Logistics Limited?** or **Mohammed Sheikh Abdullahi?** or **Standard Chartered Bank?** or **Ibanchore Enterprises**. Finally, it was his contention that the appellant was merely discharging his duties, which usually came at the tail end of banking transactions.

In opposition to the appeal, **Mr. Gitonga**, the learned Senior Public Prosecution Counsel pointed out that the Memorandum of Appeal and the submissions made before us by the appellant's counsel were bereft of points of law. Secondly, he was of the view that there was an exhaustive analysis of the facts by the two courts below, hence the conviction was properly founded.

We have considered the record, the rival oral submissions and the law.

This is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code we are mandated to consider only matters of law. In **Kados vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)** this Court delivered itself thus on this issue:

“...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”

In **David Njoroge Mcharia vs. Republic [2011] eKLR** it was stated that under Section 361 of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also Chemagong vs. Republic [1984] KLR 213).”

However, in order to determine whether the trial court and the 1st appellate court failed to analyze and re-analyze the evidence as provided in law, it is important to review the totality of the evidence.

The evidence tendered in the trial court was that on **30th November, 2004**, the appellant, an employee at Standard Chartered Bank gave **Elizabeth Mwangi** (P.W.1), a fellow employee a banker’s cheque No. **791940** dated **25th August, 2004** for Kshs 2.7 million drawn in favour of Customs & Excise Long-room, Mombasa.

The said cheque was purchased in Mombasa but had been brought for re- purchase. P.W.1 and the appellant signed the cheque to authorize the re- purchase. P.W.1 alleged that the appellant had explained to her that he had interviewed the customer and on that strength, P.W.1 and the appellant signed a new bankers’ cheque which was drawn in favour of the National Bank of Kenya. It was P.W.1’s testimony that the appellant explained to her that later, the “customer” returned that cheque claiming that he wanted to have several cheques issued; that after the appellant informed her that he had verified the instructions from the customer, she counter-signed three (3) cheques for Kshs 359,000, 759,000 and 1,552,999 respectively.

According to **Richard Thiani Mubea** (P.W.2), another Standard Chartered Bank employee, the appellant gave him written instructions from a customer who wanted to have a banker’s cheque for Kshs 2.7 million re-purchased but payment be made in cash. He stated that the written instructions required the bank to issue 3 cheques. It was P.W.2’s testimony that he drew the said three (3) cheques which were collected by the appellant from him. P.W.2 stated that it was the appellant who paid Kshs 2,550.00 as commission for the re-purchasing of the bankers cheque.

Boniface Mumea (P.W.3) was a teller at Standard Chartered Bank. He paid to the appellant a sum of Kshs 190,000 against a cheque drawn by Ibanchore Enterprises in favour of **Onuong’a Maragia**. P.W.3 stated that it was the appellant who had authorized the cheque for payment and had told him that the payee was in his office.

Christopher Muimita Ole Tandeni, (P.W.4) was the proprietor of Trans Amazon Logistics Limited, Mombasa, a company dealing with clearing and forwarding. It was P.W.4’s testimony that in its business dealings, the company paid Customs and Excise Duty by Bankers Cheque and that in the course of one business transaction, the company needed to pay Kshs 2.7 million to the Customs & Excise. He purchased the said cheque in Mombasa. P.W.4 alleged that he travelled to the Customs Offices Nairobi to get a letter to enable him make the payments but was told that the letter would be ready in two (2) weeks’ time. It was P.W.4’s further testimony that because he was due to travel to Rwanda, he left the bankers cheque with his friend, the appellant with instructions to deposit the payment back into the company account or into the account of **Mohamed Sheikh Abdullahi**, (P.W.10); that when P.W.4 returned into the country, he checked the company’s account but found that the appellant had not deposited the money therein; that when he enquired from the appellant why he had not deposited the money into the company account, the appellant told him that he had misplaced the cheque; that P.W.4 allowed the appellant one week to look for the cheque but it was never recovered and that instead, the appellant stopped picking his phone calls; that when P.W.4 travelled to Nairobi to talk to the appellant, he found that the appellant had proceeded on leave and, finally, that the appellant continued to ignore P.W.4’s phone calls until P.W.4 decided to report the matter to the police. He stated further that he did not know who gave the appellant the instructions for the re-purchase of the banker’s cheque as his written instructions to the appellant were for the cheque to be re-banked.

Winnie Otieno, (P.W.5) was a teller based at Moi Avenue Branch of the Standard Chartered Bank. She received a post-dated cheque for Kshs 359,000 in favour of Ibanchore Enterprises Ltd, which transaction was authorized by the appellant. According to her, there was nothing unusual about the transaction.

Joseph Gitau, (P.W.5) (should have been P.W.6) was also a teller at Standard Chartered Bank, Moi Avenue. On **10th February, 2004**, he received instructions from the appellant authorizing payment to **Onuong’a Maragia**.

P.W.5 stated that the cheque for Kshs 850,000 was crossed but the appellant signed it so that it could be encashed. It was P.W.5’s testimony that he handed over the cash to the appellant who had informed him that the customer was waiting in his (the appellant’s) office. He himself did not meet the customer.

According to **Angela Mutinda** (P.W.6), (this should have been P.W.7), another employee of Standard Chartered Bank, she was asked by the appellant to encash a cheque for Kshs 159,000 in favour of **Onuong’a Maragia**, which cheque was signed by the appellant authorizing the said payment. P.W.6 proceeded to make the said payment to the appellant who told her he was to collect the money on behalf of the customer (**Onuong’a Maragia**). She stated that it was normal for the appellant to seek cash payments on behalf of customers.

According to **Lucy Wangari Murimi**, (P.W.7), (should have been P.W.8), another teller at Standard Chartered Bank, Moi Avenue, on **16th December, 2004**, the appellant gave her a cheque for Kshs 1.5 million drawn in favour of **Onuong’a Maragia**, which cheque had been signed by the appellant authorizing payment of the said amount. P.W. 7 then took the cash to the appellant’s office where the “customer” (**Onuong’a Maragia**) was waiting; that the customer signed at the back of the cheque, acknowledging receipt of the money.

As for **Emmanuel Kenga** (P.W.8) (should have been P.W.9), a document examiner, he examined and verified that the appellant had signed at the back of all the five (5) cheques in question.

Anwan Ahmed Abeid, (P.W.9) (should have been P.W. 10), a Manager at Standard Chartered Bank, Harambee Avenue, Mombasa testified

that **Mohamed Sheikh Abdullahi** (P.W.10), purchased a bankers' cheque for Kshs 2.7 million payable to Customs & Excise Department; that he (P.W.9) signed the bankers' cheque together with one other bank manager; that P.W.10 later returned to him (P.W.9) to enquire whether the cheque for Kshs 2.7 million had been credited back to his (P.W.10's) account; that it was then discovered that the said money had not been credited to P.W.10's account.

Peter Kobuthi (P.W.11), a Security Officer attached to the Banking Fraud Investigations Department, Central Bank of Kenya investigated the matter and found that P.W.4 had instructed the appellant to refund the proceeds of the bankers' cheque to either Trans-Amazon Logistics Limited or to P.W. 10's accounts but the appellant did not do so; that the said banker's cheque was instead re-purchased by the bank which issued three (3) separate cheques thereafter, payable to Ibanchore Enterprises Limited's account and that the proceeds of the bankers' cheques were thereafter withdrawn from the account of Ibanchore Enterprises Limited through cheques drawn in favour of the appellant's co-accused, **Onuong'a Maragia**.

When the appellant was put on his defence, he gave an unsworn statement of defence confirming that he authorized the **encashment/payment** of the cheques in question. He however denied being the initiator of the said payments as he handled the said transactions only at the tail end of the banking transactions and in the ordinary course of his duties.

It is clear from the above evidence that the appellant used his position as a bank employee of the Standard Chartered Bank to steal various amounts of money. He would counter-sign the cheques and ask his colleagues at the bank to encash the cheques under the pretext that the "customer" was in his office.

There was no "such customer" save for his co-accused (**Onuong'a**) who although was charged together with the appellant was later acquitted.

The 1st appellate court re-analyzed the evidence and found as follows:

"Having re-evaluated the evidence on record, I note that the applicant did not deny having signed the cheques in question. In effect, he confirmed the findings by the Document Examiner, that he signed the said documents.

The appellant's co-accused testified that the proceeds from all the cheques drawn on the account of Ibanchore Enterprises Limited, were taken by the appellant.

Nowhere did the appellant deny receiving the proceeds of the cheques drawn on the said account.

The evidence from PW.5 and P.W.6 shows that the appellant personally collected Kshs 1,009,000/= from them. He did so allegedly on behalf of the customer, who was at his offices. However, the appellant did not testify that he handed over the money to the alleged customer. He remained mum in that regard.

Meanwhile, P.W.7 delivered Kshs 1,500,000/- in cash, to the appellant's office. At the said office, the customer signed the back of the cheque, to acknowledge receipt of that sum".

He also found that:

"...the appellant caused the issuance of cheques payable to Ibanchore Investments Limited account without the requisite authority of the complainant. By doing so, he forged the signature of P.W.10.

Thereafter, the appellant worked with his co-accused to withdraw the money from the account of Ibanchore. Of course Ibanchore Investments Limited had no reason to complain about the said withdrawals because the money was never theirs in the first place".

It is also clear that the appellant sought to challenge the concurrent findings of facts which the trial and the 1st appellate court analyzed and re-analyzed and both came to the conclusion that the appellant was guilty of the charges. Our conclusion upon review of the totality of the evidence is that the appellant's conviction was properly founded as all the charges and the particulars of the charges were proved beyond any reasonable doubt.

Having come to the above conclusion, we find no merit in this appeal. It is hereby dismissed.

It is so ordered.

Dated and delivered at Nairobi this 29th Day of January, 2020.

W. OUKO (PCA)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR