



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), OUKO & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 57 OF 2009

BETWEEN

ISAAC NDISO MALINDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya*

*at Nairobi (Ojwang', J.) dated 22<sup>nd</sup> January, 2009*

*in*

*H. C. Cr. A. No. 475 of 2009)*

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JUDGMENT OF THE COURT

1. *Isaac Malinda*, hereinafter referred to as the **appellant**, was faced with twelve (12) charges: six counts of the charge of fraudulent false accounting by clerk contrary to **section 330 (b)** of the Penal Code, a further six counts of the offence of stealing contrary to **section 275** of the Penal Code. He was convicted on all the twelve counts and sentenced to a fine of Kshs.5,000/= on each count, in default of which he would serve eight months imprisonment on each count.
2. He was aggrieved with this conviction and sentence and preferred a first appeal to the High Court of Kenya at Nairobi. In his first appeal, the appellant took issue with the findings of the trial magistrate, and in particular that the trial court erred in finding that the charges were proved to the required standard yet there was no evidence to justify the charge; that the trial magistrate failed to give due consideration to the matter before her; that the trial magistrate was biased against him; that he was denied legal representation; and that the sentences passed on him were manifestly excessive under the circumstances.
3. That appeal was heard and determined by Ojwang, J. (as he then was) who, after appreciating the duty of the trial court to re-evaluate the evidence tendered before the trial court, dismissed the appeal in the following terms:

*“Upon viewing the record in this rather complex case, I have come to the conclusion that the learned Magistrate had a clear view of the twists and turns in the evidence; and she rightly arrived at the conclusion that the appellant, in abuse of the trust reposed in*

***him by the bank, had used his experience to design stratagems for the making of false documents, and for the fraudulent funneling of the money out of the banks vaults, and into the hands of persons only known to himself. I am in agreement with the trial court that overwhelming proof had been adduced by the many prosecution witnesses, showing the appellant to be a culprit in respect of all counts of the charge.... In short, I find no merit in this appeal, I dismiss it; I uphold the conviction on all the counts of the charge; I affirm sentence as imposed by the trial court.”***

4. The appellant was aggrieved by the dismissal of that first appeal, and he therefore has preferred this second appeal. Relying on his memorandum of appeal lodged in this Court on the 14<sup>th</sup> January, 2014, the appellant, arguing on his own behalf, raised seven grounds of appeal which he argued together. Miss Oundo, learned Assistant Deputy Prosecution Counsel, opposed the appeal on behalf of the State.
5. This is a second appeal, and we remind ourselves of our duty of loyalty to the concurrent findings of the courts below us. In the words of this Court in ***Adan Muraguri Mungara Vs Republic [2010] eKLR (Criminal Appeal No. 347 of 2007)***:

***“As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”***

6. By way of brief background, we shall set out the facts as accepted by the trial court and the first appellate court: the appellant, at all material times was employed as a clerk at the Kenya Commercial Bank, Industrial Area Branch. He was posted at the bills department, where his duties included the processing of foreign bills, and the issuing of bankers cheques and bank drafts. Sometime between 1992 and 1993, it was noticed that some money had been credited to the appellant’s Standard Chartered Bank account. A teller at the said Standard Chartered Bank was suspicious of the deposits made into the account, and she informed her superior, who instigated an investigation into the account. During the course of the investigations, it was discovered that some payments had been made to the appellant’s wife, yet they ought to have been paid to the collector of stamp duty. Further investigations were done, and it was revealed that several payments had been done to private individuals, and the basis of these payments were fraudulent letters, all authored by the appellant.
7. The appellant’s first attack on the first appellate court’s decision was the failure to re-evaluate and re-analyse the evidence given before the trial court. He argued that had either of the courts below analysed the evidence tendered, they would have found that the evidence tendered did not show a connection between him and the beneficiaries of the cheques. He further argued that he was prejudiced because there were certain documents that were not produced that would have helped his case. In particular, the appellant argued that the re-evaluation was incorrect as the evidence of PW2 showed a number of discrepancies, and that there was no stamp duty lost.
8. In response, Miss Oundo argued that the re-evaluation of the High Court was proper, and that the first appellate court came to the correct conclusion which is that it was the appellant who was responsible for issuing the bank drafts and bank cheques. She argued further that the stamp duty under the individual accounts showed a benefit to the appellant, and that the handwriting evidence showed that it was the appellant who wrote the cheques. Miss Oundo urged us that these facts had been accepted by the two courts below us, and that there was nothing that would warrant our interference.
9. As we have stated in the earlier part of this judgment, this is a second appeal, and we are therefore constrained to deal with matters of law only. We have carefully considered the record of appeal, and we agree with the respondent’s counsel that there is nothing to warrant our interference with the concurrent findings of fact. We are satisfied that the appellant did act in abuse of the office that he held in order to commit fraud and divert money that he was to collect for his own benefit. We find that the first appellate court did appreciate its duty to re-evaluate the evidence on record, and did so; and cannot be faulted.

10. The appellant's other main challenge is that he was tortured while in custody, and that his constitutional rights were infringed. He argued that he was never given sufficient representation, and that the imposition of counsel on him by the trial court was wrong. This challenge arises out of the events that transpired during the time when the third prosecution witness, Milcah Gacheri Mwarania (PW3) testified. During this time, the appellant's advocate Mr. Mubui, asked that PW3 be stood down to enable Mr. Muli, for whom he was holding brief, to cross examine PW3. The Court refused this request, and noted that Mr. Muli had left the court room. However, the appellant was given a chance to cross-examine PW3, and the record bears out this cross examination in over three typed pages. This was an issue brought before the first appellate court, and the learned judge was of the view that the trial magistrate had acted properly in her orders regarding the cross-examination of PW3. We are of a similar mind. There was no prejudice occasioned to the appellant because he had mounted a lengthy cross-examination of his own. This ground of appeal is without merit, and accordingly, it too fails.
11. We find no merit in the assertion that the appellant was tortured. Like the first appellate court, we note that when it came to the cross-examination of the police officer who investigated this matter, there was no allegation of torture made. This challenge on his convictions fails as well.
12. The upshot of our findings is that this appeal is devoid of merit. We therefore decline the appellant's invitation and dismiss this appeal.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of June, 2014**

**P. KIHARA KARIUKI (PCA)**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**